

EXECUTIVE SESSION

NOMINATION OF PRISCILLA OWEN
TO BE UNITED STATES CIRCUIT
JUDGE FOR THE FIFTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session. The clerk will report the pending business.

The legislative clerk read the nomination of Priscilla Richmond Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit.

The PRESIDING OFFICER. Under the previous order, there will now be 1 hour of debate divided in the usual form, prior to the vote on the nomination of Priscilla Owen to be circuit court judge for the Fifth Circuit.

The Senator from California.

Mrs. BOXER. Mr. President, I again thank my colleague for allowing me to move forward on this because of a commitment to a markup in the Commerce Committee.

I rise to express my deep concerns regarding the nomination of Priscilla Owen to the U.S. Fifth Circuit Court of Appeals. I have noted there is a lot of politics around this particular nomination, as there is around the Miguel Estrada nomination. I read the Republican Party is planning to run ads against those of us who vote against these nominees, saying we do not want to see diversity on the bench.

Let me say that is extraordinary because as someone who worked so hard to support qualified minorities and women, I have been praised by many in my State for doing just that. But I have to tell you, if you place on the bench a minority or a woman who has animosity toward the goals of minorities and women, you are dealing a great setback to both minorities and women. I will make that point when I have to.

But as for today, I point out I voted for well over 90 percent of the President's appointees up to this point in time, but I cannot support this nomination. This is why.

President Bush pledged to govern from the center. Those were his words. Yet this nominee is so far from the center that she is almost off, to the right. She is barely on that line at all. That differs from the mainstream values of my constituents and I believe of the majority of Americans.

In such important areas as reproductive rights, civil rights, consumer rights, and environmental protection, this nominee has legislated from the bench. She inserted her personal beliefs into the judicial process.

I have to say even members of her own party, and even Mr. Gonzales, who is White House counsel, has criticized her for that.

What is particularly troubling to me is that I believe in the advice and consent role of Senators in the nomination and the confirmation of judicial nominees of any President, be that President a Democrat or a Republican. As

we have heard many times from historians, the selection of judges and the confirmation of judges is a shared responsibility. So it is not a question of whether they are Clinton judges or Carter judges or Bush judges; they are America's judges. As such, there has to be a role for the Senate and for the executive.

This President knew very well that this particular nominee was well off the center. He knew very well there was deep objection to her. She was voted down once before. Yet he comes right back with this nomination.

I have made it a priority of mine in this Senate to stand up for the mainstream values of people of my State. So I cannot possibly support this nomination. I wish to outline a case that illustrates Priscilla Owen's callous attitude toward individuals who are fighting against large corporate interests and their well-paid legal defense teams.

A young man in Texas was paralyzed in a car accident. His injuries were made much worse because of a malfunctioning seatbelt, and his family took the automaker to court. The case made its way to the Texas Supreme Court on appeal.

Judge Owen waited 16 months before issuing a decision in that case, in that Ford Motor case. When she did, she essentially sent the case back and created a substantial roadblock for this paralyzed teenager to receive funds to pay for his medical care. There were 2 years of delay on a procedure issue that was never raised in the case but was raised by her, and this young man died. This young man died. His family couldn't afford around-the-clock monitoring of his ventilator. This is a truly tragic example of delayed justice.

I could go into detail about the fundamental right to choose in which Justice Owen set up a barrier to a young woman who was seeking to end her pregnancy. When she issued her opinion, it dealt with having to seek religious counseling, which was not part of the law. In that case, Judge Gonzales, who as you know is White House counsel to this President, said:

To create hurdles that simply are not to be found in the words of the statute would be an unconscionable act of judicial activism.

That is a quote from Mr. Gonzales regarding Judge Priscilla Owen, criticizing her for judicial activism.

I know the issues of judges are very touchy. Senator HATCH, when President Clinton was President, told me—he said it with a twinkle in his eye: Senator, don't send me judges that are outside the mainstream.

You know, I didn't. Senator HATCH helped me. He helped me get these wonderful people confirmed.

Now we have a circumstance where we are not getting our judges from the mainstream. We are getting some. I have supported 90 percent of these judges. But in this case—

Mr. HATCH. Will the Senator yield for a question?

Mrs. BOXER. I certainly will. I just want to finish my thought.

In this particular case, I think this is a nominee who is outside the mainstream and who was criticized for that by the President's White House counsel.

I am happy to yield to my friend.

Mr. HATCH. Is the Senator aware that there is an ample record that even Judge Gonzales admits he was not criticizing her as an activist, he was criticizing the court. She didn't write the opinion. That has been more than established. Yet we keep hearing Senators on the floor of the Senate and elsewhere saying Judge Gonzales directly criticized her. He didn't. I think the record is pretty clear on that.

Mrs. BOXER. I will have printed in the RECORD my understanding of what actually happened here.

In the case of the 2-year delay, I find that was unconscionable.

The point is this: I will support candidates who are from the mainstream. I want to do that. The chair of the Judiciary Committee has changed his attitude about who is going to get through this Senate. During the Clinton years, you had to have someone from the mainstream. During the Bush years, you can have people from the far right of the spectrum. My constituents do not think that is fair. We had a situation during the Clinton years that two Senators had to sign off on a judge before there would even be a hearing. Oh, no, now the committee has changed its mind. Suddenly, because they have a Republican in the White House, two Senators don't have to sign off and they are pushing forward with hearings.

It is wrong. It is not right. I would say regarding this particular nominee, you have very moderate Members of this Senate saying she is a judicial activist and any words to the contrary can be disproven by her record. I think this is someone who does not come from the center, does not come from the mainstream. I think this is a President who, in this case, has not sought the advice and consent, really, of the Senate. He is essentially saying we don't care that you Democrats—none of you—vote for her. I should not say none—maybe one. Certainly none on the committee. We are going to go right back and bring her back here.

This is a lifetime appointee. I think when we make these types of appointments, we have to make sure the person who is being nominated is not going to be an activist, make sure the person has demonstrated the types of qualities we want on the bench.

I don't think it is a quality you want on the bench when a woman waits 2 years before she renders a decision in a case of a paralyzed teenager whose parents didn't have the money to keep their teenager on a ventilator. And the record shows otherwise? I know what the record is. We have people combing that record. That is why you are going to see very many women in this Senate take this floor. I will repeat, when you put a woman on the bench who has a

record of not really helping women—I have seen it in this case, and I have seen it with other nominees who will be coming before us. I will take a second seat to no one in the advancement of women. Every time I have sought the support of bipartisan women's groups, I have gotten it because of that. Anyone who says Democratic women coming here speaking up against this nominee are not for women ought to study that record as well.

I think the Federal courts deserve better than this nominee. I think the American people deserve better than this nominee. I could go on and on about the record.

Let me briefly outline a case that illustrates Priscilla Owen's callous attitude towards individuals who are facing large corporate interests and their well-paid legal defense teams.

A young man in Texas was paralyzed in a car accident. His injuries were made much worse because of a malfunctioning seatbelt. His family took the automaker to court. The case made its way to the Texas Supreme Court on appeal. Justice Owen's unexplained 16-month delay in writing the court's opinion in the Ford Motor Company v. Miles case created a substantial roadblock for this paralyzed teenager to receive funds to pay for his medical care. Priscilla Owen was responsible for two of the five years of delay and finally issued a decision that was based on a procedural issue never raised in the case. All of her colleagues on the court believed she had improperly delayed the case.

The young man died approximately seven years after his accident because his family could no longer afford round-the-clock monitoring of his ventilator. To date, his family has not received any funds. This is truly a tragic example of delayed justice. This is an unprecedented attempt to manipulate the Senate's role in the confirmation process. The Judiciary Committee rejected this nominee last year.

The committee performed its constitutional rule and voted against Justice Owen. However, the White House renominated her to the same position. How could they not have gotten the message the first time?

This process makes a mockery out of the Senate's constitutional "advice and consent" role. The blatant disregard of the Senate's constitutional role is leading us into uncharted territory. Let me say this again that Justice Owen was rejected by the Senate Judiciary Committee—10-9 on September 5, 2002. The long list of concerns about her record that caused the majority of committee members to vote against her last year still exist.

I have made it a priority in my career to stand up for consumers and those who find themselves up against huge corporate interests. The people of California know all too well how difficult it is to take on powerful companies. The playing field is far from balanced.

In other areas, Justice Owen has consistently attempted to chip away at women's fundamental reproductive rights.

In the case of Doe I—2000—Justice Owen argued that a minor must meet a restrictive standard to establish that she is sufficiently well informed about her choice to have an abortion. Among other things, she would have to show that she had received counseling about the religious arguments surrounding abortion, despite the fact that the law in no way involves religious considerations.

The Texas statute states that a minor need not inform her parents before seeking an abortion if the court finds one of three things.

No. 1, that the minor is mature and sufficiently well informed to make a decision; or

No. 2, that parental notifications would not be in her best interest; or

No. 3, that notification may lead to physical, sexual, or emotional abuse.

That is all it says.

I have to go to a markup. But we can try to rewrite the facts all we want. We can rewrite and put another spin on it. We can say, oh, the criticism wasn't toward her, when in essence my belief is that was her point of view that was being espoused. But that is fine. I understand this is a fight. I am willing to take this fight. I was very proud to say that the people in my State want me to stand up in these situations because it goes to the heart of the role of the Senate and it goes to the heart of what kind of country we will have. It goes to the heart of what kind of judges we will have. Will they be compassionate? Will they be fair? Will they stand up for the rights of women? Will they stand up for the little guy against the big corporation? You have to look at this particular record. You are not going to find someone who doesn't.

I thank my colleague, Senator HATCH. I know he strongly disagrees with me. I think that is fine. But he is very kind to allow me to go first so I can go to my hearing for the reauthorization of the FAA.

Thank you very much. I yield the floor and reserve the remainder of the Democratic time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have listened to my distinguished colleague. I have to say that if there has been any attempt to rewrite the facts, it is by those who have spoken as my friend from California has.

First of all, they seem to think on that side that they advance women when they only advance women who agree with their particular position. They don't even realize that Priscilla Owen agrees with many of their positions as she does with other well-thought-out positions. They think the advancement of women depends only on if you have women who are going to be pro-abortion.

I might add that I don't know where Priscilla Owen is with regard to abor-

tion because she has not told me. She has not told the committee that, but she has said what has to be the hallmark of what judgeship nominees should say—that she will uphold *Roe v. Wade* as a court judge, which is all you can ask of anybody. Regardless of what her personal views are, she is going to uphold it. Yet we hear this argument that they are advancing women because they are keeping a woman who is unanimously well qualified by their gold standard—the American Bar Association, which is not a conservative organization by any stretch of the imagination—they are keeping her from serving this country. They continue to misquote Judge Gonzales as though he was directly attacking Priscilla Owen when he himself admits he was not—and other judges from that Supreme Court of the State of Texas say he was not.

Senator CORNYN, who served with her and was sitting beside her, said those criticisms weren't directed directly at her. That is distortion. It is unworthy of this body. But it is going on all the time.

On the tort case—I know the distinguished Senator from Texas is here, and I will yield to her as soon as she is ready—they bring up again the distortion that she held a case up until this young boy died. Let me make some important observations about the majority opinion Justice Owen wrote in *Ford Motor Company v. Miles* because I think there has been some serious confusion about the case and it is very apparent that the distinguished Senator from California is confused. This is the case involving a car accident victim named Willie Searcy who, tragically, passed away years after his accident but before the litigation was resolved. I have addressed this issue over and over. But it looks as if I must go through it again.

The accusation was once made that the victim passed away before the Texas Supreme Court ruled on his appeal. Justice Owen more than set the record straight last July. The victim passed away 3 years after the opinion was issued. Yet we hear this again on the floor.

When are the Democrats going to quit distorting President Bush's nominee's record?

I have to admit that I used to think this was—well, just interesting. But it has gone on and on. And after you show them the facts, they still distort it. I would have thought that issue moot because the opinion was issued 3 years before he died. But some interest groups continue to make this allegation in spite of the facts. I suspect that the New York Times just copies the letters in the editorials of *People for the American Way*. It is unbelievable.

The allegation was made that Justice Owen's opinion was improper based on the issue of venue; in other words, the question of whether plaintiff's lawyers filed the case in the county that didn't have jurisdiction over the dispute.

Some allege that this issue had not been raised by the parties in the lower courts. Again, Justice Owen set the record straight in no uncertain terms. The venue issue was properly considered in the Texas Supreme Court. The entire court agreed that it was appropriate for the court to resolve the venue issue.

Again, they are wrong, and they are distorting this case.

I don't think there is any reason for that type of distortion. We have explained it over and over. Justice Owen was more than clear. Yet they are smearing this judge who has the highest rating of the American Bar Association—unanimously well qualified. That doesn't happen very often.

It must also be emphasized that under Texas law the court was required to address the issue of venue. The court found that the case was filed in the wrong venue. It was required to reverse the verdict. It had no other option. The Texas statute governing this issue read:

On appeal from the trial on the merits, if venue was improper, it shall in no event be harmless error and shall be reversible error.

In other words, the court must reverse if improper venue is found.

In all honesty, to ensure there is no confusion about the problem with venue, let me say there was no question but that Dallas County was the proper place to bring the suit because the plaintiffs lived there, bought their truck there, and that is where the accident took place. Inexplicably, the lawyers filed in another county, Russ County—having absolutely no connection whatsoever to the plaintiffs or the accident. It looked like forum shopping—something that should not be permitted by the courts, under any circumstances, no matter how badly a person might have been injured.

If we read between the lines, we can see that the lawyers were forum shopping—looking for a favorable jury—something that should not be allowed by any court in this land, especially when it is clear cut that the venue was in Dallas County.

It must also be noted that the court's decision did not prevent the case from being filed in Dallas County or refiled.

I am a little tired of the smearing of these nominees. I am not saying intentional smearing, although it is reaching that point when you have to say over and over, when the justice explained herself and made it so abundantly clear, and we have made it over and over ourselves, and the record is so doggone clear. Why would we have, time after time, people coming out here saying they are advancing the cause of women by smearing this woman justice and keeping her from serving her country on the circuit court of appeals?

One last thing: The Senator also complained because she has objected to another nominee when we have the blue slip back from the other Senator from the State. There has never been a

rule, since Senator KENNEDY was the chairman of the committee and was the one who established the rule that I followed, that says a single Senator can stop a circuit court of appeals nominee of the President of the United States.

Senator KENNEDY's ruling, even with regard to district courts, was that the opinions of the Senators with regard to blue slips will have great weight, but they will not be dispositive, especially where there is no reason for the withholding of a blue slip. And in this case, there is basically no reasoning, and in this other case of Carolyn Kuhl.

So I want to set the record straight there. No President would agree to, and this Senate should not agree to, one solitary Senator, for political reasons, refusing to return a blue slip on a circuit court of appeals court nominee where that circuit court of appeals nominee, once on the court, will be representing the whole country, but, of course, all the States in that particular circuit.

I notice the distinguished Senator from Texas is in the Chamber, so I will yield—

Mrs. HUTCHISON. Up to 10 minutes.

Mr. HATCH. Up to 10 minutes to the distinguished Senator from Texas. I will continue my remarks afterwards.

The PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Thank you, Mr. President. And I thank the chairman for yielding time to me to talk about someone I know well, someone I have observed over the years, and who is one of the most outstanding people I have ever seen nominated for a Federal bench. She is a legal scholar. She has the temperament for a judge. And I think nothing shows her temperament better than her demeanor during the ordeal through which she has been put.

She has been held up since May 9, 2001. She has had two hearings—not one—in which she was grilled by members of the Judiciary Committee, and she came out spotlessly clean. And even Members who today are going to vote against her have said she is one of the most qualified legal scholars they have seen before their committee. In fact, I have to say, I think there are a number of Democrats who really think she should be confirmed, but they are being held back by the special interest groups and the pressures not to confirm this qualified woman.

Justice Priscilla Owen is an 8-year veteran of the Texas Supreme Court. She graduated cum laude from Baylor Law School. She earned the highest score on the Texas bar exam that year. She was a practicing lawyer before she was nominated for the supreme court. And she has been elected since her nomination and won over 80 percent of the vote of Texans and was endorsed by every newspaper in Texas.

She enjoys broad support. The American Bar Association, as the distinguished chairman mentioned, has voted her unanimously well qualified. The

Dallas Morning News called her record one of accomplishment and integrity.

The Houston Chronicle wrote: She has the proper balance of judicial experience, solid legal scholarship, and real world knowhow. This is exactly what we want in judges, people who have been in the real world, who have practiced law, who know what it is to be in a courtroom and see two sides of the issue. She also has the academic qualifications that you would want in a judge.

I cannot think of any better qualification. She has been supported across the board by people with whom she has served, both Democrat and Republican.

Let me read the words of former Texas Supreme Court Chief Justice John Hill, who also served our State as attorney general. He is a Democrat. He denounced the false accusations about Priscilla Owen's record by special interest groups. He said:

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. He said:

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

In addition, another judge with whom she served on the Texas Supreme Court, Raul Gonzales, gave her a sterling endorsement.

Two former State bar presidents who are women—there have not been but three or four women State bar presidents, one of whom is Harriet Miers, who supports Justice Owen; she is now counsel to President Bush—yesterday Colleen McHugh, a Republican, a former State bar president, and Lynne Liberato, a Democrat, a former State bar president, ringingly endorsed Justice Owen.

These are the people who have seen her in action, who have seen her opinions, who have worked before her court on both sides. They have won, they have lost, and they have given her the ringing endorsement.

I think there are two areas where the other side has distorted the facts. It has continually been quoted, Judge Gonzales' opinion dissenting from the opinion of Justice Owen—hers was the dissent; his was the majority—in which he said he thought she was being judicially active. But Judge Gonzales is the very person who recommended her to the President for the Fifth Circuit slot because he looked at the totality of her record, and he felt that she was the best qualified person for this nomination.

He held her in such high regard that he singled her out and took her from the supreme court to suggest that she should be on the Fifth Circuit because he knows that she follows the law as she sees it and does not allow her personal opinions to interfere, which is why I think she has been attacked by

the pro-abortion groups who misunderstand her opinions.

Texas has a parental notification statute on abortion. The law was passed in the year 2000. This is not parental consent; it is parental notification. So in the years since the law was passed, the supreme court has been called upon to look at the lower court opinions. Justice Owen has voted with the majority 11 times out of 14. And, in fact, out of those 14 cases that have come before the court, only 3 have reversed the lower court opinions.

I think the reason Justice Owen has so adhered to the lower court fact finding is for the very reason we want her on the bench; that is, that she believes the trier of fact is the court that should make the decisions on fact; and unless there is a reason to believe that lower court has misconstrued the intent of the legislature under the law, that court should not be reversed. Even if she believes that maybe the court made a mistake on the facts, she does not put herself in the place of the fact finders since she is not the one who heard the facts in person.

She is not a judicial activist. She is the opposite. In fact, her record shows that she has gone far beyond what most judges do not to put her personal opinions in place. I do not know what her views on abortion are. She has never told anyone what her views on abortion are because she does not ever intend to let her personal views skew an opinion on this very sensitive issue.

She also said, in defending her record on these issues, that she took the Supreme Court of the United States interpretation of the words that would define when a young woman under the age of consent would be able to make the decision on her own without notifying her parents. She took the U.S. Supreme Court, which is exactly what a judge should do.

So I think Justice Owen has been put into the political meat grinder in Washington, DC. Anyone in Texas you would ask—now, I am not saying that everyone in Texas would say she is their choice; I am not saying that because I have not talked to everyone in Texas about her in particular, but the vast majority of people who know her best, who have practiced before her court, who know the supreme court and what it takes to be a good judge, they have come up here, Democrats and Republicans—not just Democrats and Republicans, leading Democrats and Republicans, the former Democratic attorney general, the former Democratic supreme court chief justice, and another former Democratic justice on the supreme court—they have come forward to say she should be confirmed, that they support her, that she is the right kind of person for a judgeship.

I hope we will be able to meet the 60-vote standard the Democrats are now setting for many judges. That 60-vote standard is wrong. It is against the Constitution. She deserves a vote. She

should have the 51-vote standard as the Constitution intended. I hope the Democrats will give her that chance. She is the most qualified person for this position we could ever put forward. I know her personally. I know her integrity. I know what a wonderful human being she is. I have seen her demeanor as she has gone through this meat grinder.

I hope the Senate will give her the dignity she deserves and confirm her today.

Mr. HATCH. Madam President, how much time do I have?

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Utah has 11 minutes remaining.

Mr. HATCH. Let me continue then.

This body is in danger of blowing up. I just read a letter Senator SCHUMER sent to the President yesterday suggesting that we should take this authority from the President to nominate the judges and set up judicial nominating commissions in every State. There is no President in his right mind who would consider doing that. There is no reason a President should. To make a long story short, the Senate is broken. The process is broken. Senator SCHUMER admits it. He writes:

DEAR MR. PRESIDENT: Six months ago you described the judicial nomination confirmation process as "broken" and declared we have a "duty to repair it." I could not agree with you more.

The other side of this body understands this process is broken because they are filibustering now two of the President's nominees for the first time in history.

Both of these nominees, Miguel Estrada and Priscilla Owen, have unanimously well qualified ratings from the American Bar Association, which during the Clinton years the Democrats were saying was the gold standard. Once they have a qualified rating, which is a passable rating, they should be confirmed. These two not only have qualified, they have well qualified, and unanimously. Only a select few have achieved that rating. It is outrageous that we hear again and again, without a single pause, that a nominee rated unanimously well qualified for Federal judicial service is "out of the mainstream."

Those who have served with her on the Texas Supreme Court know that charge is false. Former Texas Supreme Court Justices John Hill, Jack Hightower, Raul Gonzalez, all Democrats, call Justice Owen unbiased and restrained in her decisionmaking, and they praise her impeccable integrity, character, and scholarship.

Senator CORNYN, whom we all respect, who served with Justice Owen on the Texas Supreme Court, has made it clear that the charge is false. Alberto Gonzales, who also served with Justice Owen, said the charge is false. Senator CORNYN and Judge Gonzales believe Justice Owen is a terrific judge. The two individuals who are repeatedly drafted as prosecution witnesses to dis-

credit Justice Owen as an activist judge, Judge Alberto Gonzales and Senator CORNYN, are actually two of her biggest supporters. All you can conclude is that they are smearing this very fine, unanimously well qualified woman in their comments and also through this filibuster. Nothing can change the fact that the two they use to criticize her are her biggest supporters. I fit in that category, too, as one of her biggest supporters.

No matter how hard they try, they cannot distort that. The unqualified endorsement of 15 past presidents of the Texas State Bar, Democrats and Republicans alike, also shows that the charge is false. Justice Owen is a well qualified, mainstream jurist. And to say that the bar association is wrong, all these Democrats down in Texas are wrong, shows the paucity of the argument.

Some criticize a few rulings made by Justice Owen in some parental notification cases which involve a minor girl seeking an abortion. This is really the basis of it because my colleagues on the other side are getting so enamored with abortion that that becomes the single litmus test on every judge. And they are so afraid that this woman judge might be pro-life, even though I don't know what she is and she didn't say what she believes, but she did say she would follow *Roe v. Wade* as settled law. I don't know what more you can have. And because she is unanimously well qualified for honor, integrity, impeccability, and so forth, we can take her word for it.

Texas happens to have a statute requiring that a minor notify one parent before she has an abortion. The statute allows the minor girl's parents to be involved in this very important decision. Our colleagues on the other side apparently don't think that is a good idea. It upholds the right of parents in the upbringing and care of their children, and the American people support the principle.

According to a January 2003 CNN/USA Today/Gallup poll, 73 percent of Americans favor requiring minor girls to obtain parental consent before obtaining an abortion. The Texas statute doesn't even go that far; it requires only notice. This broad support is also found in the individual States. Currently, 32 States across the country enforce laws requiring parental involvement in a minor girl's decision to obtain an abortion. Fully 18 States enforce parental consent laws, including Louisiana, Massachusetts, Michigan, North Carolina, North Dakota—where both parents must consent—Rhode Island, and Wisconsin. These are States represented in the Senate by both Republican and Democratic Senators, pro-life and pro-choice Senators. These are States inhabited by people of a variety of beliefs and positions.

Simply being pro-life or pro-choice does not make a person out of the mainstream. That is the only argument they have. How can you call

somebody who has a unanimously well qualified rating from the American Bar Association out of the mainstream? That is the height of absurdity, and it shows the ridiculousness of the argument being used against her.

Another 14 States have less stringent parental involvement laws requiring parental notification before a minor has an abortion, including the States of Arkansas, Delaware, Georgia, Iowa, Maryland, Minnesota, Texas, and West Virginia. New Hampshire, which is known as a pro-choice State because of widespread support for abortion rights among State citizens, is close to passing a parental notification law. Notably, the bill's main sponsor in New Hampshire openly supports abortion rights.

Even in States with no laws requiring parental involvement in a minor's abortion decision, popular support for such legislation runs high. In the State of Vermont, more than 70 percent of State citizens support requiring a minor to notify her parents before having an abortion. You would think anybody with a brain would want to do that. These are kids. The parents ought to be involved.

But by comparison, parental consent and notification laws are consistently opposed by the same abortion rights interest groups. These organizations are the ones that do not reflect the thinking of mainstream America on parental rights. Mainstream America supports the fundamental rights of parents in the rearing of their children, including the right to be involved in their minor daughter's reproductive choices.

The abortion rights interest groups, as they do over and over, predict doom and gloom if Justice Owen is allowed to take a seat on the Federal bench. They trot out the excited rhetoric about the nominee's hostility and extreme insensitivity to abortion rights. Occasionally they even top themselves. According to one group, Justice Owen must be opposed because "at this time of global turmoil, we don't need extremists in the courts willing to make a Dred Scott decision in the area of women's fundamental rights."

Give me a break. I would be ashamed to make those arguments, yet that is what they are doing. They are smearing this woman with these kinds of arguments that fly in the face of the vast majority of people who believe parents do have some role with regard to their children, especially in something as important as whether or not their daughter should have an abortion.

By now we know these outside groups' track record leaves much to be desired when it comes to predicting how judicial nominees will vote. These groups have cried wolf far too many times to be taken seriously any longer. We know they missed on Justice David Souter, Justice John Paul Stevens, Justice Lewis Powell, when they predicted at their hearings they would ignore the Constitution and put an end to freedom in America. No matter how

much some would prefer to argue the point, these cases were not about the right to an abortion.

The opposition to Justice Owen may show that the abortion litmus test is alive and well, but there was never any question about the girls' right to an abortion in these cases.

Indeed, Justice Owen argued in one such case that, based on Supreme Court precedent, a statute requiring a girl to notify both parents would also be questionable under the Constitution. She even went that far toward their position. Justice Owen recognizes a woman's right to obtain an abortion. She said so explicitly. Yet, they treat her like she is going to throw out *Roe v. Wade* all by herself and ignore precedent.

Justice Owen has been well within the mainstream of her court in the 14 decided notification cases, joining the majority judgment in 11 of those cases. And out of the close to 800 bypass cases since the Texas statute was passed, a mere 12 girls out of 800 have appealed all the way to the Texas Supreme Court. These are usually the toughest cases. The Democrats take the position that they ought to all be decided against the parents and in favor of the girl or of abortion rights. My gosh! By this time, two courts—the trial and the appeals courts—have already considered the bypass petition and turned it down. In other words, the right of a court to give a girl a bypass to avoid having to tell her parents. In these cases, they turned them down. Given the deference appellate courts must pay to the findings of the trial court, the decision is likely to affirm the lower court rulings denying a bypass. That should be no great surprise.

Certainly, Justice Owen and her colleagues on the Texas Supreme Court disagreed in some cases—that is no surprise either; that happens on State supreme courts—but in all cases there was a genuine effort to apply applicable precedent. These parental consent cases show Justice Owen takes Supreme Court precedent seriously. She looks to precedent for guidance, she cites it, and she makes a good faith effort to apply it to the case at hand. She is a judge who defers to the legislature's considered judgment in their policy choices and earnestly seeks to ascertain legislative intent in her ruling. None of her opinions, to quote the *Washington Post*, "seem[s] to us [to be] beyond the range of reasonable judicial disagreement."

What is beyond the range of reasonable disagreement is the charge that Justice Owen is not qualified to sit on the Fifth Circuit Court of Appeals.

A native of Texas, Justice Owen attended Baylor University and Baylor University School of Law. She graduated cum laude from both institutions. She finished third in her law school class.

Justice Owen earned the highest score on the Texas bar exam and thereafter worked for the next 17 years as a

commercial litigator specializing in oil and gas matters.

Justice Owen is known for her services for the poor and for her work on gender and family law issues. Justice Owen has taken a genuine interest in improving access to justice for the poor. She successfully fought with others for more funding for legal aid services for the indigent.

Justice Owen is committed to creating opportunities for women in the legal profession. She has been a member of the Texas Supreme Court Gender Neutral Task Force, and she served as one of the editors of the *Gender Neutral Handbook*. Incredibly, this is the same woman the usual interest groups mischaracterize as "anti-woman."

Justice Owen's confirmation may not be cheered by the well-funded and partisan Texas trial-attorney interest groups, but she is backed by Texas lawyers such as E. Thomas Bishop, president of the Texas Association of Defense Counsel, and William B. Emmons, a Texas trial attorney and a Democrat who says that Justice Owen "will serve [the Fifth Circuit] and the United States exceptionally well."

Justice Owen has served on the Texas Supreme Court since 1994, winning reelection to another 6-year term in the year 2000 with 84 percent support.

This kind of support—running across the board and across party lines—leaves no doubt that Justice Owen is a fair-minded, mainstream jurist.

Mr. President, Justice Priscilla Owen will be a terrific Federal judge. As I said earlier, we have a choice this morning. Will we block another highly qualified nominee for partisan reasons or will we allow each Senator to decide the merits of the nomination for himself or herself. I know my choice: we should allow a vote. I hope my colleagues will do the right thing and make the same choice.

I will conclude by saying, look, when I hear on the other side that they are standing up for women's rights, while they are rejecting one of the leading woman jurists in the Nation who has said she will uphold their wonderful standard of *Roe v. Wade*, I have to say that is pure bunk. It is time to quit smearing these judges.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, how much time is available to the Senator from Vermont?

The PRESIDING OFFICER. There are 18 minutes 15 seconds remaining.

Mr. LEAHY. I thank the distinguished Presiding Officer.

Madam President, I regret we have to be here today, but we are here because the President has picked another fight with the Senate by renominating a divisive and controversial activist to another circuit court. That is regrettable. The Republican leadership in the Senate is forcing this confrontation at this time, and it is neither necessary nor constructive. I am sorry the White

House has chosen to make these matters into partisan political fights, rather than working with Senators on both sides of the aisle to fill judicial vacancies with qualified consensus nominees.

I have been here with six Presidents. Five of them, from both parties, would work with members on both sides of the aisle for consensus nominees. This is the first President who has not. Despite what is really a historic low level of cooperation from the White House—and it is the lowest level of cooperation from any White House I have ever had experience with in my 30 years in the Senate—we have already confirmed 120 of President Bush's judicial nominees. We have confirmed 120. We have rejected 2 out of 120. That is not a bad record. Some of them we voted for, including some of the most divisive and controversial nominees sent up by any President. So 120 passed, 2 are being held up. I don't know where that shows an obstructionist Senate. This week the Senate debated and voted on the nomination of Jeffrey Sutton to the Sixth Circuit. This was a divisive one, and I think the fact that it is so divisive is shown by the fact he got the fewest number of favorable votes of any confirmation in almost 20 years—barely a majority. He got 52. That is the lowest number of votes any judge has had in about 20 years. That reflects the fact we have reached the point in the queue where many of these nominations divide the American people and the Senate far more than they unite us. I urge the President to be a uniter, not a divider. This is the third controversial judicial nominee of this President against whom more than 40 negative votes were cast.

Our Senate Democratic leadership is working hard to correct some of the problems that arose with some of the earlier hearings and actions of the Judiciary Committee this year. Just yesterday, we were able to hold a hearing on the nomination of John Roberts to the District of Columbia Circuit. He was put in almost as an afterthought. There was a massive day of hearings, and he was not able to get a full hearing. This was done by the Republican leadership. I appreciate the fact they recognized that was wrong and they had another hearing yesterday. We are all working hard to complete committee consideration of that nomination at the earliest opportunity.

The distinguished chairman of the Senate Judiciary Committee said he will put off that nomination today for a hearing sometime next week, and we will have a vote on him.

I am optimistic our leadership will be able to work out a procedure for Senate consideration of the nomination of Deborah Cook to the Sixth Circuit. So a number of controversial nominations are being considered. I point out there are other nominations, such as that of Judge Edward Prado of Texas, a distinguished Hispanic jurist. Every Democratic Senator said they are willing to go forward with a vote on him. He has

been held up on the Republican side. I don't know if we are going to be blamed for holding up this judge or not. We have all agreed we are ready to go forward with a short time agreement and a vote. He will be confirmed. He is not being held up on the Democratic side, but by the Republican side, even though he is one of President Bush's nominees.

There is also Judge Cecilia Altonaga, on whom we have been seeking consideration for some time. I hope the Republican leadership will let them go forward.

We are making progress. The glass is not full, but it is more full than empty. More has been achieved than some want to acknowledge. There have been 120 lifetime confirmations in less than 2 years. That is better than in any 2-year period from 1995 through the year 2000. Why do I mention that time? Because the Republicans were in charge and President Clinton was the President. We have done better in less than 2 years than in any 2-year period when they were in charge. This time, 17 months of that was under Democratic control, where we set a record with the number of Senatorial confirmations of Presidential nominations.

We have reduced judicial vacancies to 48, which is the lowest percentage in more than 12 years. During the entire 8-year term of President Clinton, the Republicans never allowed the vacancy rate to get this low. We have made tremendous progress.

The Republicans continue their drumbeat of political recriminations. We ought to talk about how far we have come with the 110 vacancies Democrats inherited from the Republican majority in the summer of 2001. We have cut those vacancies in half.

Under the Republican majority, circuit vacancies more than doubled and overall vacancies increased significantly. Despite the fact that more than 40 additional vacancies have arisen since the summer of 2001, we have cut those vacancies by more than in half, from 110 to 48. If we had a little bit of cooperation from the other end of Pennsylvania Avenue and from the other side of the aisle, we could achieve so much more.

This is a nomination that should not have been made in the first place and never should have been remade in the second place. It was rejected by the Judiciary Committee last year after a fair hearing and extensive and thoughtful substantive consideration. I think the White House would rather play politics with judicial nominations than solve problems. This unprecedented re-nomination of a person voted down by the Senate Judiciary Committee is proof of that.

I thank the Democratic leader, the assistant leader, and my Democratic colleagues who have spoken so eloquently and passionately to these matters. Particularly the statements of Senators MIKULSKI, MURRAY, CANTWELL, and STABENOW yesterday were outstanding.

This nomination is extreme. This nominee has shown herself to be a judicial activist and extremist even on the very conservative Texas Supreme Court where her conservative colleagues have criticized her judgments as activist. They have done it not once, not twice but again and again.

The nomination process starts with the President. It is high time for the White House to stop the partisanship and campaign rhetoric. Work with us not to divide us but to unite us, and work with us to ensure the independence and impartiality of the Federal judiciary, something that Presidents have cherished for over 200 years, so that all the American people, whether they are Republicans or Democrats, rich, poor, White, Black, plaintiff or defendant, can go into every Federal courtroom across the country and know that they will receive a fair hearing and justice under the law; that they will come into the one place that is supposed to be impartial, the one place that is supposed to be non-political, the one place that is supposed to look only at the litigants and the law, and so they will not go instead into a politicized, partisan Federal judiciary. That would be a mistake that would hurt us all and that is what we are trying to avoid now.

How much time is remaining on this side?

THE PRESIDING OFFICER. Nine minutes twenty seconds remaining.

Mr. LEAHY. I yield such time as he may consume to the distinguished senior Senator from New York.

Mr. SCHUMER. Madam President, I want to thank our leader on the Judiciary Committee for his indefatigable efforts to keep the bench nonpartisan, or bipartisan, or at least moderate, as much as he has done. History will look back very kindly on the leadership of the Senator from Vermont and say that he made a courageous fight. Many of us are proud to be at his side in that fight.

I will speak for a few minutes about the nomination of Judge Owen. The issue is not whether Judge Owen is a conservative; it is whether she will take her own views and subrogate them to the views of what the law is. If we look at her history, time and time again Judge Owen has been unwilling to follow the law and instead impose her own very conservative ideology on the courts. She is clearly not a moderate, but it is not even that she is a conservative that bothers many of us. I have voted for over 100 judges that the President has nominated, and the vast majority could clearly be classified as conservative. In fact, what worries us about Judge Owen is that she is what conservatives used to excoriate, an activist, somebody who will impose her own views because she feels them so strongly and passionately.

I respect people who feel things passionately. I do. But when someone is a judge, that is not what they should bring to the bench. It is not really passion, except in rare instances, that

serves the bench well. It is, rather, an ability to understand the law and follow it.

I do not have many doubts that Judge Owen understands the law. She is a bright person. I have very real doubts whether she will follow it.

Conservative members of the Texas bench, none other than Judge Gonzales, now the President's counsel, have pointed out in instance after instance where Judge Owen has simply gone far afield and imposed her own views rather than do what the Founding Fathers wanted. I speak of the Founding Fathers, and it is a timely coincidence that our leader from West Virginia has come in. He has been the guardian of the Constitution, and he could tell us better than anyone else that the Founding Fathers asked—judges to interpret the law, not make law. The great irony, as we go through these debates, is that in the 1960s and 1970s the hue and cry of people of Judge Owen's philosophy was that judges are making law from the bench.

I had some sympathy for those arguments then. I have sympathy now, even though I might be very sympathetic to the laws they were making. But now, all of a sudden we have had nominee after nominee who are not activists from the left but activists from the right. It is quite logical that if one is on either the far left or the far right, they will have much more of a desire—there are exceptions to every rule but much more of a desire to impose law rather than interpret law, and of all the nominees who have come before us, Judge Owen seems to be the apotheoses of that view because in case after case that is exactly what she has done.

Many of us believe, for instance, that Miguel Estrada would do the same thing, but he does not have a record and he refuses to answer questions. But with Judge Owen, the record is crystal clear that in instance after instance she has not subrogated her own personal feelings but, rather, let them dominate her decisionmaking. That is not what a judge ought to be.

We will defeat this motion for cloture, and I am glad we will. History will look kindly on that as well because never has a President of the United States been more ideological in his selection of judges, never.

I have been studying the history and for the first time, this President—whether because he wants to win political favor of the hard right or because he believes it himself, I do not know; I have not discussed it with him—this President wishes to change America through the article III section of Government, the judiciary. And so nominee after nominee is not just a mainstream conservative but somebody who wears their views on their sleeve and is not at all shy about imposing those views on court decisions.

So those of us on this side who are opposing Judge Owen, and some of the other judges, believe that we are fighting for the Constitution, we are fight-

ing for what the Founding Fathers intended judges to be, we are fighting a President who is more ideological in his selection of judges than any, and we will continue this fight.

I have seen our caucus. We were hesitant when we took the first steps. We are stronger. I think we feel this issue more passionately than before, not at all for political reasons. I can't tell you where the political chips fall out on this one. It is a rather esoteric issue. A few people in America on each side feel strongly about the issue but most do not. We know we are doing the right thing.

I am proud of our caucus. I am proud of this moment today. I think it is so important to try to get the President to back off this plan, which is so out of the thinking of the Founding Fathers, to make law from the one nonelected section of the Government, the judiciary, the article III section.

So I will stand proudly today and move that we not go to vote on Judge Owen, not because she has not answered questions. To her credit, she was more forthright than Miguel Estrada and, frankly, than John Robert of yesterday but, rather, because she does not represent the kind of judge the Founding Fathers wanted and America should have. I hope we can defeat her.

I yield my remaining time back to our leader from Vermont.

Mr. KOHL. Mr. President, I rise today in opposition to the nomination of Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit and also in opposition to ending debate on consideration of her nomination.

I believe that a filibuster of a judicial nominee is an extraordinary measure, a step to be taken only in the most compelling circumstances. The case of Justice Owen is one of those rare situations. In Justice Owen, we are presented with a nominee whose record demonstrates that she is so far outside the mainstream and so clearly prone to substitute her personal preferences for the legally required result as to compel this conclusion.

Our debate today is not, of course, the first time the Senate has considered Justice Owen's nomination. She was nominated for a seat on the Fifth Circuit last year, and we held an extensive hearing at the Judiciary Committee on her nomination. After meeting with her, and thoroughly reviewing her record and her testimony, I opposed her nomination. Despite her defeat in the Judiciary Committee last year, the President saw fit to renominate Justice Owen for the Fifth Circuit once again this year. Nothing at her most recent confirmation hearing alters my conclusion that she is fundamentally unfit for a federal appellate judgeship.

My opposition to Justice Owen is not because of any doubts regarding her intellectual ability—we all recognize her legal talents. And, unlike Miguel Estrada, my primary concern with re-

spect to Justice Owen does not center on her unwillingness to answer questions at her confirmation hearing. Quite the contrary: Justice Owen's answers to our questions made one thing crystal clear—her consistent record of judicial activism, and her demonstrated willingness to substitute her judgment and policy preferences for those of the legislature.

As Justice Owen's record became known last year, we grew increasingly concerned about her willingness to bend the law to suit her own strongly held opinions under the guise of "interpretation." We should not be concerned that her views are conservative on many issues. However, when those beliefs interfere with her ability to apply the law, we are forced to oppose her nomination.

Merely reviewing the comments of her fellow Texas Supreme Court justices compels us to the unfortunate conclusion she cannot be trusted to accurately interpret the law. In a variety of cases, her colleagues have criticized her opinions for not being grounded in the law. She is clearly and consistently outside of the mainstream in many cases. In an environmental case, FM Properties, she was criticized for basing her arguments on "flawed premises" and "inflammatory rhetoric." In an age discrimination suit, Quantum Chemical, she was criticized by the majority for not following the plain meaning of the statute. In a consumer lawsuit, Texas Department of Transportation, the majority criticized her, writing that "the statute's plain meaning" indicated that she was wrong. And, finally, in Doe I, a choice case in which she dissented, then Justice Alberto Gonzales called her dissent "an unconscionable act of judicial activism."

There is a pattern to this criticism that should not be ignored. She repeatedly alters the law to fit her views in ways that the legislature did not intend and that the majority of her own court condemns.

We all know that the law is subject to interpretation and manipulation. The manner in which a judge interprets law is particularly important when considering a nominee to an appellate court. On the circuit court, subject only to the infrequent supervision of the U.S. Supreme Court, a judge has considerable leeway to make policy if she chooses with little concern of being overruled.

Justice Owen's willingness to bend the law to suit her policy preferences are unacceptable, especially for a nominee to an appellate court judgeship. Justice Owen's nearly decade long record as a Texas Supreme Court Justice gives us little confidence that she will faithfully discharge her obligations as a federal appellate judge. To proceed with Justice Owen's nomination would mean taking the risk of placing on a Federal court of appeals for life someone who has repeatedly

demonstrated little hesitance to disregard clear statutory language to rewrite the law to suit her personal preferences. This is a risk we cannot take.

Anyone who reviews my record on judicial nominations knows that I have not reached my decision to support extended debate here—indeed my decision to oppose Justice Owen's confirmation—lightly. Justice Owen is only one of only seven judicial nominees I have opposed in my entire 14 years in the Senate. But this nominee's extreme record leaves me no choice. I will vote to oppose cloture on her nomination.

Mr. BAUCUS. Mr. President, I would like to briefly explain why I will vote against cloture on the nomination of Priscilla R. Owen to the U.S. Court of Appeals for the Fifth Circuit.

Ms. Owen's record reveals that she is a judicial activist and an ideologue. As newspaper editorials and several of our colleagues have pointed out, she has created a strong record of rewriting the law when it does not match her personal convictions and beliefs. For those reasons, she does not deserve a lifetime appointment to the U.S. Circuit Court of Appeals. I cannot in good conscience, exercising my duty under the Constitution, allow her to be appointed to as powerful and influential a body as the Fifth Circuit.

Appointees to the Federal bench must be able to set aside their personal philosophies and beliefs. They must be able to administer and enforce the law in a fair and impartial manner. Because the U.S. Supreme Court hears fewer and fewer cases each year, the circuit courts are the court of last resort for many ordinary citizens and businesses. The circuit courts often have the last word on important cases dealing with civil rights, environmental protection, labor issues, and many others. Circuit court judges must demonstrate a record of integrity, honesty, fairness, and a willingness to uphold the law. Ms. Owen fails this test.

For example, Ms. Owen has published opinions and dissents that have drawn criticism from other conservatives and Republicans as inconsistent with the law or facts in front of her. We've heard over and over about her decision in *FM Properties v. City of Austin*, where the majority on the Texas Supreme Court—consisting of two current Bush appointees and current White House counsel Alberto Gonzales—called her dissent “nothing more than inflammatory rhetoric.”

Additionally, in her dissent to the Texas Supreme Court decision *In re Jane Doe 1*, Owen proposed to require a minor to show knowledge of religious arguments against abortion. In a separate concurrence, Mr. Gonzales said that to interpret the law as Owen did “would be an unconscionable act of judicial activism.”

The administration has every right to appoint judges who share the President's philosophy and beliefs. That is entirely proper. However, that does not

give the President the right to appoint judicial activists who have not demonstrated a respect for the law, or an ability to set aside their personal beliefs in order to interpret the law in a fair and impartial manner.

Additionally, a President has never resubmitted a previously rejected circuit court nominee for the same vacancy, as this President has with Ms. Owen. And, the Judiciary Committee for the first time approved a nominee that it had previously rejected. That nominee is Ms. Owen.

So not only does her record of judicial activism disqualify her for a lifetime appointment to the Fifth Circuit, her approval by the Judiciary Committee and consideration by the full Senate is highly unusual and without precedent.

For all of the above reasons, I must oppose Ms. Owen's nomination to the Fifth Circuit and vote against cloture on her nomination.

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

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

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

Even after 8 years of a Democratic President, the Fifth Circuit had twice as many Republican appointees as Democratic appointees. That is because during the last 6 years of the Clinton administration, the Judiciary Committee did not report out a single judge to the Fifth Circuit. And as we all

know, that was not for lack of nominees to consider. President Clinton nominated three well-qualified lawyers to the Fifth Circuit—Jorge Rangel, Enrique Moreno, and Alson Johnson. None of these nominees even received a hearing before this Committee. When then-Chairman LEAHY held a hearing in July 2001 on the nomination of Judge Clement for a seat on the Fifth Circuit, only a few months after she was nominated, and less than 2 months after Democrats took control of the Senate, it was the first hearing in this committee for a Fifth Circuit nominee since September 1994. Judge Clement, of course, was confirmed later in the year.

So, there's a history here, and a special burden on President Bush to consult with our side on nominees for this Circuit. Otherwise, we would simply be rewarding the obstructionism that the President's party engaged in over the last 6 years by allowing him to fill with his choices seats that his party held open for years, even when qualified nominees were advanced by President Clinton. And I say once again, my colleagues on the Republican side bear some responsibility for this situation, and they can help resolve it by urging the administration to address the injustices suffered by so many Clinton nominees. One step in the right direction would be for my Republican colleagues to urge the President to renominate some of those Clinton nominees that never received a hearing or vote in this committee. That includes Clinton nominees to the Fifth Circuit.

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

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

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

Justice Owen has a disturbing record of siding against consumers or victims of personal injury and in favor of business and insurance companies. When the Texas Supreme Court, which is a very conservative and pro-business court, rules in favor of consumers or victims of personal injury, Justice Owen frequently dissents. According to

Texas Watch, during the period 1999–2002, Justice Owen dissented almost 40 percent of time in cases in which a consumer prevailed. But in cases where the consumer position has not succeeded, Justice Owen never dissented.

At her first hearing, Senator KENNEDY and Senator EDWARDS asked Justice Owen to cite cases in which she dissented from the majority and sided in favor of consumers. Justice Owen could cite only one case, *Saenz v. Fidelity Guaranty Ins. Underwriters*, 925 S.W. 2d 607, Tex. 1996. But Justice Owen's opinion in this case hardly took a pro-consumer position since it still would have deprived the plaintiff of the entire jury verdict. She did not join Justice Spector's dissent, which would have upheld the jury verdict in favor of Ms. Saenz.

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

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

During Justice Owen's first confirmation hearing, Senator CANTWELL questioned Justice Owen about her posi-

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

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

Even more disturbing, Justice Owen took the position, both at the first hearing and in her responses to written questions, that because the Texas Supreme Court Code of Conduct requires law clerks to recuse themselves from matters involving their prospective employers, there really is no ethical concern raised by law clerks accepting bonuses while employed with the Court. I disagree. It is not sufficient for law clerks to recuse themselves from matters involving their prospective employers if they have received thousands of dollars in bonuses while they are working for the court. The appearance of impropriety and unfairness that such a situation creates is untenable. As I understand it, the federal

courts have long prohibited federal law clerks both from receiving bonuses during their clerkships and from working on cases involving their prospective employers. I'm pleased that the Texas Supreme Court finally recognized this ethical problem and changed its code of conduct for clerks. Justice Owen, in contrast, seems intent on defending the prior, indefensible, practice.

Finally, I want to note the unusual nature of this particular nomination. Unlike so many nominees during the Clinton years, Justice Owen was considered in the Judiciary Committee under Senator LEAHY's leadership last year. She had a hearing, and she had a vote. Her nomination was rejected. This is the first time in history that a Circuit nominee who was formally rejected by the Committee, or the full Senate for that matter, has been renominated by the same President to the same position. I do not believe that defeated judicial nominations should be reconsidered like legislation that is not enacted. After all, legislation can be revisited after it is enacted. If Congress makes a mistake when it passes a law, it can fix that mistake in subsequent legislation. Judicial appointments are for life. Confirmations cannot be taken back or fixed. A vote to confirm a nominee is final. A vote to reject that nominee should be final as well. For the President to renominate a defeated nominee and the Senate to reconsider her simply because of the change of a few seats in an election cheapens the nomination process and the Senate's constitutional role in that process.

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

Mrs. BOXER. Mr. President, I want to respond to my colleague from Utah, Mr. HATCH, regarding Priscilla Owen's dissent in the case *In re Doe*, 19 S.W.3d 346, Texas 2000.

Let me emphasize the fact that Justice Owen wrote her own dissenting opinion in this case. Justice O'Neill delivered the opinion of the court, joined by Justice Enoch, Justice Baker, Justice Hankinson, and Justice Gonzales and by Chief Justice Phillips as to Parts II and III. Justice Enoch filed a concurring opinion, joined by Justice Baker. Justice Gonzales filed a concurring opinion, joined by Justice Enoch.

Three Justices dissented in this case, each filing the own separate opinion. The dissenting opinions were written by Justice Hecht, Justice Owen, and Justice Abbott.

Justices Gonzales, in his concurring opinion, very clearly voices criticism of the dissenting opinions:

The dissenting opinions suggest that the exceptions to the general rule of notification

should be very rare and require a high standard of proof. I respectfully submit that these are policy decisions for the Legislature. . . . 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 words of the statute, would be an unconscionable act of judicial activism. As a judge, I hold the rights of parents to protect and guide the education, safety, health, and development of their children as one of the most important rights in our society. But I cannot rewrite the statute to make parental rights absolute, or virtually absolute, particularly when, as here, the Legislature has elected not to do so.

The chairman of the Judiciary Committee states that Justice Owen did not write the opinion that Justice Gonzales criticized. I fail to see how Senator HATCH can reach that conclusion. Justice Gonzales clearly refers to "the dissenting opinions"—plural—and Justice Owen wrote one of those dissenting opinions.

I trust that this resolves any dispute regarding this matter.

Mr. LEAHY. Madam President, how much time remains for the Senator from Vermont?

The PRESIDING OFFICER. One minute and 40 seconds.

Mr. LEAHY. I yield back our time.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 86, the nomination of Priscilla R. Owen of Texas to be United States Circuit Judge for the Fifth Circuit:

Bill Frist, Orrin Hatch, Kay Bailey Hutchison, John Cornyn, Mitch McConnell, Jon Kyl, Wayne Allard, Sam Brownback, Jim Talent, Mike Crapo, Gordon Smith, Peter Fitzgerald, Jeff Sessions, Lindsey Graham, Lincoln Chafee, Saxby Chambliss.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call is waived.

The question is, Is it the sense of the Senate that debate on the nomination of Priscilla R. Owen, to be United States Circuit Judge for the Fifth Circuit, shall be brought to a close? The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. I announce that the Senator from Oklahoma (Mr. INHOFE) is necessarily absent.

Mr. REID. I announce that the Senator from Florida (Mr. GRAHAM), the Senator from Connecticut (Mr. LIEBERMAN), and the Senator from Maryland (Mr. SARBANES) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 52, nays 44, as follows:

(Rollcall Vote No. 137 Ex.)

YEAS—52

Alexander	Dole	Murkowski
Allard	Domenici	Nelson (NE)
Allen	Ensign	Nickles
Bennett	Enzi	Roberts
Bond	Fitzgerald	Santorum
Brownback	Frist	Sessions
Bunning	Graham (SC)	Shelby
Burns	Grassley	Smith
Campbell	Gregg	Snowe
Chafee	Hagel	Specter
Chambliss	Hatch	Stevens
Cochran	Hutchison	Sununu
Coleman	Kyl	Talent
Collins	Lott	Thomas
Cornyn	Lugar	Voinovich
Craig	McCain	Warner
Crapo	McConnell	
DeWine	Miller	

NAYS—44

Akaka	Dodd	Lautenberg
Baucus	Dorgan	Leahy
Bayh	Durbin	Levin
Biden	Edwards	Lincoln
Bingaman	Feingold	Mikulski
Boxer	Feinstein	Murray
Breaux	Harkin	Nelson (FL)
Byrd	Hollings	Pryor
Cantwell	Inouye	Reed
Carper	Jeffords	Reid
Clinton	Johnson	Rockefeller
Conrad	Kennedy	Schumer
Corzine	Kerry	Stabenow
Daschle	Kohl	Wyden
Dayton	Landrieu	

NOT VOTING—4

Graham (FL)	Lieberman
Inhofe	Sarbanes

The PRESIDING OFFICER. On this vote, the yeas are 52, the nays are 44. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. CRAPO). Without objection, it is so ordered.

MORNING BUSINESS

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business between 11 a.m. and 12 noon, with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). Without objection, it is so ordered.

Mr. REID. Mr. President, the Senator from Texas wishes to speak as in morning business. I ask unanimous consent that he be allowed to speak.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Texas.

HONORING OUR ARMED FORCES

Mr. CORNYN. Mr. President, I rise this morning to offer a tribute to our men and women in uniform.

As we all know, President Bush will speak this evening to the Nation and mark the end of a major conflict in Iraq and acknowledge the heroism and sacrifice of our brave men and women in the Armed Forces. I know I speak for the people of my State of Texas and for all Americans when I give thanks that this operation has reached such a swift end, with so few coalition lives lost.

Over the April recess, I took the opportunity to visit most of the military bases in my home State, along with my distinguished colleague Senator HUTCHISON. One in 10 active duty military personnel call Texas their home. As a member of the Armed Services Committee, I am dedicated to looking after their interests and the interests of all of our military personnel.

We must ensure that the United States military continues to have the training, the equipment, and the facilities they need to remain the greatest fighting force the world has ever known, both in war and in peace. The military bases we have in Texas are some of the strongest components of our military readiness in the current war against terror, from Afghanistan to Iraq and across the world. We must use these valuable assets to maintain our status as the world's lone superpower, as we transform our military to face the challenges of the future.

Seeing our soldiers face to face reminds us that they are not just numbers or statistics. They are real Americans, true patriots, with real families. When someone leaves their home to fight for American interests abroad, it affects their entire community; it affects their friends and, most profoundly, it affects their families.

We must remember not just the sacrifices of the brave men and women who fight on the battlefield but the sacrifices of the families they leave behind. I remember, most poignantly, as the deployment was occurring from Camp Lejeune, on CNN a young mother with her child was saying goodbye to her husband, the father of that child. I will never forget the comments she made. She said: