

Testimony of

The Honorable Edward Kennedy

September 5, 2002

I will vote against the confirmation of Justice Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. While Justice Owen is an intelligent jurist, her record gives me no confidence that she will set-aside her personal beliefs and be fair in her approach to a range of issues of concern to all Americans. I am particularly concerned about what seems to be Justice Owen's consistent bias against workers and consumers and in favor of businesses and corporations. Justice Owen's record also casts serious doubt on her willingness to safeguard the constitutional right to privacy and reproductive freedom. Justice Owen's dissents in a series of cases regarding the rights of young women to obtain an abortion reveal a disturbing willingness to misread or distort the law to support her view.

Justice Owen's consistent record of rulings against consumers, workers, and injured plaintiffs, stands out even among the conservative Texas Supreme Court. Certainly, the Justices on the Texas Court are frequently in agreement in ruling against plaintiffs, and, as Justice Owen stated at her hearing, she is not always in dissent from the Court's rulings. What remains striking, however, is the frequency with which Justice Owen is in dissent in cases concerning the rights of workers, plaintiffs and consumers-in several instances standing as the lone dissenter. Moreover, I could find no case in which Justice Owen dissented to stand up for an injured plaintiff, worker, or consumer.

In several of her dissents, Justice Owen appears to substitute her views for the plain meaning of statutory language, or ignores evidence that fails to support her position, prompting criticism from her colleagues for doing so. For instance, in *FM Properties Operating Co. v. City of Austin*, Justice Owen dissented from the majority's ruling that a state law that had been designed to allow a developer to bypass the City of Austin's municipal water-quality laws was unconstitutional. Justice Owen's dissent, in which she faulted the majority for restricting property rights, was so harsh that it was criticized by the majority as "nothing more than inflammatory rhetoric [which] merits no response."

In *Quantum Chemical Corporation v. Toennies*, Justice Owen joined a dissent that would have greatly increased an employee's burden in discrimination cases. Justice Owen appeared to ignore the plain meaning of a Texas Human Rights Statute, which allowed a plaintiff to prevail upon showing that discrimination was "a motivating factor" in the employment practice, requiring instead that a plaintiff show that discrimination was the sole motivating factor.

Even where Justice Owen has joined the majority in favor of a plaintiff, she has distinguished herself by announcing views hostile to plaintiffs. For instance, in *GTE Southwest v. Bruce*, Justice Owen, concurring from an otherwise unanimous Court decision in favor of three women employees, went out of her way to make clear her view that a supervisor's behavior did not amount to intentional infliction of emotional distress. This supervisor's behavior, included yelling and cursing frequently at employees, repeatedly verbally threatening employees, assaulting employees by physically charging and lunging towards them, and ordering a female employee to scrub a carpet with her hands and knees. Yet, disturbingly, to Justice Owen, this conduct standing alone would not constitute "outrageous behavior" as a matter of law.

I also remain troubled by Justice Owen's answers to concerns raised about her handling of the Ford v. Miles case. This was the case involving an African-American teenager, Willie Searce, who won damages from Ford Motor Company for injuries he suffered from a car crash that left him a quadriplegic, breathing only through the assistance of a respirator. The jury found that the seatbelt Searce was wearing was defective, because it created slack in the shoulder harness which then caused the seatbelt to catch his head and neck, severing his head from his spinal cord. The jury awarded Searce \$30 million for his lifetime medical care and \$10 million in punitive damages. On appeal, the appellate court substantially affirmed the trial court, remanding only the punitive damages award.

When the case reached the Texas Supreme Court, Searce filed a motion to expedite the case, attaching the affidavit of a doctor stating that without the funds to pay for a back-up respirator, a generator, and other critical medical and support services, Searce's condition would worsen, and that he could die. After oral argument, Justice Owen was assigned the task of writing the decision, but it took about a year and a half after oral arguments for a decision to be issued in the case. In the end, a majority of the Texas Supreme Court voted to reverse the case on grounds that it was brought in the wrong venue. While the case was awaiting trial on remand, Willie Searce died.

At the hearing, Justice Owen was asked about why she took so long to issue the opinion, and specifically why the Court failed to grant the Plaintiff's motion to expedite. Justice Owen suggested that the Plaintiffs had forum shopped by bringing the case in the wrong venue, stated that delay was caused by other courts, but never answered why, given the probable consequences to the life of this child, it took so long for the Court to issue the opinion. I asked again in writing, after the hearing, for a specific answer on the cause for the delay and the failure to grant the motion to expedite. Again here, while Justice Owen provides a substantial amount of information she fails to answer the central question of why the Court failed to expedite the case. In the context of Justice Owen's near unwavering support for the positions of business and corporations over that of injured individuals, and her consistent pattern of opinions that eviscerate protections for workers, consumers and individuals injured by unsafe products, the delay in the case and the eventual opinion reversing the case on venue grounds are troubling.

I am equally troubled by Justice Owen's opinions on the important question of a woman's right to choose. Justice Owen is not only frequently in dissent from rulings of the Texas Court majority sustaining a young woman's right to have an abortion, but she has grafted barriers to reproductive choice that are irreconcilable with the plain language of Texas law.

The Texas judicial bypass statute provides that if a minor woman can prove that (a) she is mature and sufficiently well informed to make her own decision, or (b) that parental notification would not be in her best interest, or (c) notification may lead to physical, sexual, or emotional abuse, the court must allow her to have an abortion without notifying her parents. Despite the language of the statute and the views of the majority of the Court, Justice Owen's record indicates that she would require a minor to consider religious issues; that she would create a high standard for a showing of abuse; that she would create a new requirement that the minor show that the abortion is in her best interest; and that she would require a consideration of the fetus' interests.

In her opinions, and again at the hearing, Justice Owen defends these additional requirements, by stating that she was merely following the Supreme Court's decisions in Casey and H.L. v.

Matheson. But nothing in the Supreme Court's decisions in these cases requires that minors must obtain this information or follow these requirements before being allowed an abortion. At most, those cases define what state statutes may impose, that is, they establish a ceiling. These cases,

thus, provide no support for importing additional requirements into a statute, such as Texas', that is otherwise silent.

Given these concerns, I cannot support Justice Owen's nomination. I do not vote against Justice Owen's nomination lightly. I have voted against only a handful of lower court nominees in my forty years on the Senate. However, the President has sent over a nominee whose record shows hostility to core protections for workers, consumers, women, and to the right to privacy and reproductive freedom. The Constitution requires the Senate's advice and consent on judicial nominations, and both our constitution and historical practice make clear that our duty is more than to rubber-stamp. I therefore oppose Justice Owen's nomination.