Testimony of

The Honorable Patrick Leahy

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.

# # # # #