

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
October 22, 2003

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On the Nomination of Janice Rogers Brown
Judiciary Committee Hearing
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Today we are here to consider the nomination of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit. I think it will come as no surprise to anyone here today that this nomination is one that will be closely scrutinized by many Senators on the Judiciary Committee. Justice Brown has a lengthy record both on the bench and off, and her record raises a variety of concerns about her judicial philosophy and fitness for a lifetime appointment to the D.C. Circuit. It is for just this purpose that the Constitution entrusted the appointment and confirmation of lifetime positions on the federal courts to not just one but to two branches of the government, and I know that this Committee takes its responsibility seriously.

Those of us who have exercised our constitutional duty to examine the records of judicial nominees have been barraged by some partisans with shrill and unfounded name-calling because of it. Let us hope that today we will see the end of that ugly game. When we opposed Charles Pickering, we were called anti-Southern. Of course our critics overlooked the fact that 38 percent of the judges we have confirmed are from the South, while Southern states make up about 25 percent of the nation's population. When we opposed Miguel Estrada, we were called anti-Hispanic, even though the record of Democrats supporting Latinos for the federal bench is unmatched in American history. When we opposed Priscilla Owen, they were reduced to branding us as being anti-woman. And, in an especially despicable ploy that had not been seen in the Senate in modern times, when we opposed William Pryor, they stooped to religious McCarthyism, which has no place in the United States Senate, or anywhere else in America.

Today, let us focus on the qualifications and the record of the nominees before us. Let the consideration of nominees not stoop to name-calling. When Senators of good conscience and true purpose ask serious, substantive questions of this nominee, let us stick to the substance and not sink to slurs that they are being anti-African American. Let the right-wing tactic of smears and name-calling subside and disappear. Let us not see the race card dealt from the shameful deck of unfounded charges that some stalwarts of this President's most extreme nominees have come more and more to rely upon as they further inject partisanship and politics into the appointment and consideration of judges to sit on the independent federal judiciary. No matter what position any Senator takes on this nomination, whether it is in support or opposition, I know that it will not be taken because of race. I expect that those who ultimately support Justice

Brown, even though they oppose affirmative action, will do so because they believe she would be even-tempered and even-handed. Those who may ultimately oppose her will do so because they retain serious doubts about her nomination, see her as an ideologue or a judicial activist, or for principled reasons without regard to her race.

Because of her record, several organizations oppose Justice Brown's confirmation, including the nation's premier African-American bar association, the National Bar Association; its State counterpart, the California Association of Black Lawyers; the foremost national civil rights organization, the Leadership Conference on Civil Rights; and the entire membership of the Congressional Black Caucus, including the Delegate from the District of Columbia, the Honorable Eleanor Holmes Norton. Are these groups and individuals going to be accused of being anti-African American in the way Hispanic organizations and leaders were maligned during the debate on the Estrada nomination? Let us hope for better.

And let us hope that during the questioning and the debate over this nomination we can focus on substance, because there is much to discuss. Justice Brown's outspoken judicial philosophy is unique. It raises many concerns. But that is what the hearing process is for -- to give Justice Brown an opportunity to explain her views on respect for precedent, on judicial activism, on statutory interpretation, free speech, civil liberties, limitation of damages, deference to jury verdicts, and the standards of review that apply to infringement of constitutional rights. She has written opinions or has spoken on all of these topics and more, and I find some of her views difficult to reconcile with one another.

The court to which she is nominated, the D.C. Circuit, is an especially important court in our nation's judicial system. It is the most prestigious and powerful appellate court below the Supreme Court, and Congress has chosen to vest the D.C. Circuit with exclusive or special jurisdiction over cases involving many environmental, civil rights, consumer protection, and workplace statutes.

Scores of President Clinton's nominees were not treated fairly, including Elena Kagan and Allen Snyder. Each was nominated unsuccessfully to vacancies on the D.C. Circuit. Elena Kagan and Allen Snyder were never allowed a Committee vote or Senate consideration. Dean Kagan, who now heads the Harvard Law School, never even received a Committee hearing.

That is not how this President's nominees have been treated. Both of his previous nominees received hearings and extensive consideration by the Senate. Justice Brown's is this President's third nomination to the D.C. Circuit, and all three will have received hearings. Indeed, with the confirmation of John Roberts to the D.C. Circuit earlier this year, the Senate has already confirmed more of President Bush's nominees to the D.C. Circuit than the Republican majority was willing to consider and vote on in the entire last three years of President Clinton's Administration.

I look forward to a hearing that will be constructive and that will help this Committee and the Senate better understand the nominee's record and fitness for this high office.

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