

Statement of
The Honorable John Cornyn

United States Senator
Texas
October 22, 2003

STATEMENT OF U.S. SENATOR JOHN CORNYN

BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

Nomination of Janice R. Brown to be
United States Circuit Judge for the District of Columbia Circuit

Wednesday, October 22, 2003, 10 a.m.
Hart Senate Office Building Room 216

Mr. Chairman and Ranking Member, I am privileged to introduce to the committee a distinguished jurist from the California Supreme Court, Justice Janice Rogers Brown, who has been nominated to serve on the U.S. Court of Appeals for the D.C. Circuit.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit court is currently vacant. As you also know, Presidents traditionally look across the nation for individuals to serve on the D.C. Circuit bench - from Judge Karen LeCraft Henderson, a former federal judge on the District of South Carolina, to former University of Colorado law professor Stephen F. Williams and former University of Michigan law professor Harry T. Edwards.

Justice Brown has almost ten years experience as an appellate judge. First appointed to the state court of appeals in 1994, she was elevated to the state supreme court in 1996, when she became California's first African-American female Supreme Court justice.

Even before 1994, Brown had already established a distinguished record of public service. She served as a Deputy Legislative Counsel from 1977 to 1979, Deputy Attorney General from 1979 to 1987, Deputy Secretary & General Counsel of California's Business, Transportation & Housing Agency from 1987 to 1990, and Legal Affairs Secretary for Governor Pete Wilson from 1991 to 1994.

As a judge, Justice Brown has received strong support from Californians. During the 1998 elections, four justices of the California Supreme Court - including the Chief Justice - were up for a retention vote before the California electorate. California voters supported all four justices. Justice Brown received yes votes from 76% of California voters - the highest vote percentage of all four justices, as you can see in the chart.

Justice Brown, along with her colleagues, also received strong support from the San Francisco Chronicle. As the Chronicle editorialized: "It takes judges with a deep respect for the law, and a willingness to set aside their personal views when making decisions. It takes judges with fearlessness, with a sense of confidence that the 'right' outcome will not always be the most popular. Californians have a chance to cast a vote for an independent judiciary . . . by retaining . . . Supreme Court justices who . . . have all demonstrated a commitment to sound decision making. . . . If you don't like a law - or if it conflicts with the state constitution - change it. The judiciary's job is to make sure that laws are applied fairly. . . . Brown [and her colleagues] have approached this duty with diligence and integrity" and "should be retained."

I am extremely impressed by this extensive record of dutiful public service. But of course, there is more to Justice Brown than just her resume. As a strong yet modest person, Justice Brown may not feel comfortable talking openly about her personal life story, but I hope that members of this committee will ask her about it. She was born in Greenville, Alabama, the daughter of sharecroppers. She is personally all too familiar with the scourge of racism and segregation. She came of age in the midst of Jim Crow policies in the South. She grew up listening to her grandmother's stories about NAACP lawyer Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks, and her experiences as a child of the South motivated her desire to become a lawyer.

After her father later joined the Air Force, she became - like me - a military brat, traveling with her family from military base to military base. I am pleased to observe that her travels included several years in the great state of Texas, including childhood stints in Ft. Worth, when her family moved to Carswell Air Force Base and she spent her third and fourth grade years at M.L. Kirkpatrick Elementary School, and San Antonio, when her family moved to Lackland Air Force Base in San Antonio and she spent her fourth through sixth grade years in the Edgewood School District.

Given Justice Brown's childhood and life experiences facing racism, I am especially alarmed by what I have seen and heard from some of her opponents. Perhaps the worst of all is a negative cartoon I recently saw, which I ask to be displayed on the easel. The cartoon depicts Justice Brown in an extremely negative and offensive light, all because of the color of her skin. Mr. Chairman, I sincerely hope that attacks like this will have no bearing whatsoever on this committee's consideration of her nomination.

Some have instead alleged that Justice Brown singlehandedly dismantled affirmative action in California. As a former state supreme court justice myself, I can tell you that these critics have no understanding of the law or of how judges operate.

In 1997, California voters amended their state Constitution by approving Proposition 209. As you can see on the easel, Article I, Section 31 of the California Constitution now states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race . . . in the operation of public employment, public education, or public contracting."

Because of the clear terms of Proposition 209, the U.S. Supreme Court recently noted in *Grutter v. Bollinger* (2003) that, "in California, . . . racial preferences in admissions are prohibited by

state law." Do Justice Brown's critics also disagree with Justice O'Connor, who authored the opinion, or Justices Stevens, Souter, Ginsburg, and Breyer, who joined her?

All Justice Brown did was author the majority opinion for a unanimous California Supreme Court to enforce the clear terms of Proposition 209. Every single judge involved in that case - at the trial court, the court of appeals, and the state supreme court - agreed with her that the challenged San Jose program violated the will of the voters as expressed in Proposition 209. Then-Justice Stanley Mosk - the court's "leading liberal" according to the San Francisco Chronicle - not only joined Justice Brown's opinion, he also wrote his own concurring opinion stating that "I agree with the court in the substance of its analysis" and, if anything, "I would go farther than it does."

If critics don't like Justice Brown's decisions, they should change the law, rather than attack her for partisan political gain. She's just doing her job as a judge, not as a politician. I'll quote the San Francisco Chronicle again: "If you don't like a law - or if it conflicts with the state constitution - change it."

Others have criticized Justice Brown for her willingness to enforce a common-sense law enacted by the California Legislature. The law would have required parental consent before a minor can obtain an abortion. But the California Supreme Court issued a divided 4-3 opinion invalidating that law. Justice Brown would have deferred to the state legislature and enforced the law.

She was hardly alone in that view. Then-Justice Stanley Mosk - again, the court's "leading liberal," according to the San Francisco Chronicle - also voted to uphold the law. Indeed, according to a June 2000 Los Angeles Times poll, 82% of Americans support parental consent laws. And the year after Justice Brown issued her opinion, the San Francisco Chronicle published the editorial I mentioned earlier, praising Justice Brown as well as her colleagues, and supporting her retention in the 1998 elections.

Mr. Chairman, I am deeply concerned about how hostile and destructive the Senate's judicial confirmation process has become. If this continues for much longer, fine jurists like Justice Brown will stop accepting nominations to the federal bench - and all Americans will lose as a result.

Senators should vote their conscience on every judicial nominee, of course. But most of all, Senators should vote - and they should vote on the basis of reasonable criteria and the merits of each nominee, and not on the basis of special interest group politics or other irrelevant and divisive criteria. I hope that this committee, and this Senate, will confirm this exceptional judicial nominee, Justice Janice Rogers Brown.

Thank you, Mr. Chairman.