

Testimony of

# The Honorable Orrin Hatch

July 23, 2002

I want to welcome all the nominees today, as well as the Members of Congress who have come to testify on their behalf, and I ask that I be able to put statements for Mistery Timothy Corrigan and Jose Martinez into the record. I look forward to your testimony and final vote by the Senate.

I would like especially to welcome Justice Priscilla Owen of Texas, our lone Circuit Court nominee. I intend today to comment on Justice Owen's qualifications, and to address some of the deceptions, distortions and demagoguery orchestrated against her nomination, that we have all read in the national and local papers. I have long looked forward to this hearing, as I expect has she.

I would like first to comment on the two jingos that are being used about her record as if they had substance: namely, that Justice Owen is "conservative" and that she is "out of the mainstream." Of course, this comes from the Washington interest groups, in many cases, who think that mainstream thought is more likely found in Paris, France, than Paris, Texas.

I must admit that it's curious to hear it argued that a nominee twice elected by the people of the most populous state in the Circuit for which she is now nominated is "out of the mainstream." Texans will no doubt be entertained by whoever says that.

Listening to some of my the commentary on judges, I sometimes think that main-stream for them is a northeastern river of thought that travels through New Hampshire early and often, widens in Massachusetts, swells in Vermont, and deposits at New York City. Well, the mainstream that I know, and that most Americans can relate to, runs much broader and further than that.

The other mantra repeated by Justice Owen's detractors is that she is "conservative." I believe that the use of political or ideological labels to distinguish judicial philosophies has become highly misleading and does a disservice to the public's confidence in the independent judiciary, of which this Committee is the steward.

I endorse the words of my friend, and former Chairman, Senator Biden when he said some years ago that: "[Judicial confirmation] is not about pro-life or pro-choice, conservative or liberal, it is not about Democrat or Republican. It is about intellectual and professional competence to serve as a member of the third co-equal branch of the Government."

I believe it is our duty to confirm judges who stand by the Constitution and the law as written, not as they would want to rewrite them. That was George Washington's first criterion for the federal bench, and it is mine. I also want common sense judges who respect American culture. I believe that is what the American people want.

I believe we do a disservice to the independence of the Judiciary by using partisan or ideological terms in referring to judges.

My reason was well stated by Senator Biden when he said that: "it is imperative [not to] compromise the public perception that judges and courts are a forum for the fair, unbiased, and impartial adjudication of disputes."

We compromise that perception, I believe, when we play partisan or ideological tricks with the judiciary. Surely, we can find other ways to raise money for campaigns and otherwise play at politics, without dragging this nation's trust in the judiciary through the mud, as some of the outside groups continue to do.

All you have to do to see my point is read two or three of the fund-raising letters that have become public over the past couple of weeks that spread mistruths and drag the judiciary branch into the mud, as many recent political campaigns increasingly find themselves.

On a lighter note, while on ideology, let me pause to point out that one of the groups deployed against Justice Owen is the Communist Party of America, but then I don't know that they have come out in favor of any of President Bush's nominees. I suspect after the fall of the Berlin Wall, they must have a lot of time on their hands these days.

Today I wish to address just why a nominee with such a stellar record, a respected judicial temperament, and as fine an intellect as Justice Owen has, -- who graduated third in her class from Baylor's law school, a great Baptist institution, when few women attended law school, let alone in the South, -- who obtained the highest score in the Texas Bar examination, -- and who has twice been elected by the people of Texas to serve on their Supreme Court, the last time with 83% of the votes and the support of every major newspaper of every political stripe, - I would like to address just why such a nominee could be here today with as much organized and untruthful opposition from the usual leftist, Washington special interest groups that we see. I will peel through what is at play for those groups. We need to expose and repel what is at play for the benefit and independence of this Committee.

And I would like to address also the reasons why I am confident that she will be confirmed notwithstanding. Not least of which is that this Committee has never voted against a Circuit nominee with the American Bar Association's unanimous rating of "Awell qualified." Justice Owen has that highest of ratings.

The first reason for the organized opposition, of course, is plain. Justice Owen is from Texas, and Washington's well-paid reputation destroyers could not help but attempt to attack the widely popular President of the United States, at this particular time in an election year, by attacking the judicial nominee most familiar to him. Justice Owen, welcome to Washington.

But as I prepared more deeply for this Hearing, the second reason became apparent to me. In my [26] years on this Committee I have seen no group of judicial nominees as superb as those that President Bush has sent to us, and he has sent both Democrats and Republicans, men women, Hispanics, African Americans, and Caucasians.

In reading Justice Owen's decisions, one sees a judge working hard to get it right, -- to get at the legislature's intent and to apply binding authority and rules of judicial construction. It is apparent to me that of all the sitting judges the President has nominated, Justice Owen is the most outstanding nominee. She is, in my estimation, the best that every American, every consumer and every parent could hope for.

Her opinions, whether majority, concurrences or dissents, could be used as a law school text book that illustrates exactly how - and not what -- an appellate judge should think, how she should write, and just how she should do the people justice by effecting their will through the laws adopted by their elected legislatures. Justice Owen clearly approaches these tasks with both scholarship and mainstream American common sense. She does not substitute her views for the legislature's, which is precisely the type of judge that the Washington groups who oppose her want.

She is precisely the kind of judge that our first two presidents, George Washington and John Adams, had in mind when they agreed that the justices of the state supreme courts would provide the most learned candidates for the federal bench.

So in studying her record, the second reason for the militant and deceptive opposition to Justice Owen became quite plain to me. In this world turned upside down, simply put, she is that good.

Another reason for the opposition against Justice Owen is the most demagogic - the issue of campaign contributions and campaign finance reform. Some of her critics are even eager to tie her to the current trouble with Enron. Well, she clearly has nothing to do with that. Neither Enron nor any other corporation has donated to her campaigns -- in fact, they are forbidden by Texas law to make campaign contributions in judicial elections. Despite the politics, I am certain that Justice Owen is quite eager to address this issue fully, and being a Texas woman, I trust she will not embarrass the questioner too badly.

Not that there is a need for more questions. The Enron and campaign contributions questions were amply clarified in a letter to Chairman Leahy and the Committee dated April 5th by Alberto Gonzales. I ask, Madam Chairman, to place this and other related letters into the record. And I would place into the record a retraction from The New York Times saying that they got their facts wrong on this Enron story. Such retractions don't come often, although the misstatement of facts by the destroyer groups do.

I also hope that Justice Owen will get a chance to address her views on election reform and judicial reform, of which she is a leading advocate in Texas. She is also a leader in Gender Bias Reform in the courts and a reformer on divorce and child support proceedings. I hope she will have an opportunity to address these matters and about her acclaimed advocacy to improve legal services and funding for the poor. All of these are aspects of her record her detractors would have us ignore - I don't know about my other colleagues, but I certainly did not read these positive attributes in those fancy documents, or should I say booklets, released over the past several weeks by the People for the American Way and their co-conspirators in the Washington special interest lobby.

I ask, Madam Chairman, to place into the record letters from leaders of the Legal Society and 14 past presidents of the Texas Bar Association, many of whom are Democrats.

The fourth reason for the opposition to Justice Owen is the most disturbing to me. For some months now, a few of my Democrat colleagues have strained to point out when they believe they are voting for judicial nominees that they believe to be pro-life. I have disputed this when they have said it because the record contains no such information of personal views from the judges we have confirmed.

Each time they assert it, my staff has scoured the transcripts of hearings and turned up nothing. What does turn up is that each time my colleagues have asserted this, they have done so only for nominees who are men.

I am afraid that the main reason Justice Owen is being opposed, is not that personal views - namely on the issue of abortion -- are being falsely ascribed to her -- they are -- but rather because she is a woman in public life who is believed to have personal views that some maintain should be unacceptable for a woman in public life to have.

Such penalization is a matter of the greatest concern to me because it represents a new glass ceiling for women jurists. And they have come too far to suffer now having their feet bound up just as they approach the tables of our high courts after long-struggling careers.

I am deeply concerned that such treatment will have a chilling effect on women jurists that will keep them from weighing in on exactly the sorts of cases that most invite their participation and their perspectives as women.

Ironically, the truth is that the cases that her detractors point to as proof of apparently unacceptable personal views are a series of fictions. This is what I mean about exposing the misstatements of the left-wing activist groups in Washington.

I will illustrate just three of these fictions.

The first sample fiction is the now often-cited comment attributed to then Texas Supreme Court Justice Alberto Gonzales, written in a case opinion, that Justice Owen's dissent signified "an unconscionable act of judicial activism." Someone should do a story about how often this little shibboleth has been repeated in the press and in several websites of the professional smear groups. I would venture that some of my colleagues have it on the first page of their briefing memos even now.

The problem with it is that it isn't true. Justice Gonzales was not referring to Justice Owen's dissent, but rather to the dissent of another colleague in the same case.

The second sample fiction is the smear group's misrepresented portrayal of a case involving buffer zones and abortion clinics. In that case, the majority of the Texas Supreme Court ruled for Planned Parenthood and affirmed a lower court's injunction that protected abortion clinics and doctor's homes and imposed 1.2 million dollars in damages against pro-life protestors. In only a few instances, the court tightened the buffer zones against protestors. Justice Owen joined the

majority opinion and was excoriated by dissenting colleagues -- who were admittedly pro-life, by the way.

When describing that decision then, abortion rights leaders hailed the result as a victory for abortion rights in Texas. Planned Parenthood's lawyer said the decision "isn't a home run, it's a grand slam."

Of course, that result hasn't changed, but the characterization of it has. This is how Planned Parenthood describes this same case in their fact sheet on Justice Owen: "[Owen] supports eliminating buffer zones around reproductive health care clinics..."

In fact, her decision did exactly the opposite. And I think this Committee deserves and should demand a formal apology and full explanation.

The third and most pervasive sample fiction concerns Justice Owen's rulings in a series of Jane Doe cases which first interpreted Texas' then-new parental involvement law. The law - which I think is important to emphasize was passed by the Texas legislature (NOT Justice Owen) with bipartisan support -- requires that an abortion clinic give notice to just one parent 48 hours prior to a minor's abortion. Unlike states with more restrictive laws such as Massachusetts, Wisconsin, and North Carolina, consent of the parent is not required in Texas. A minor may be exempted from giving such notice if they get court permission.

Since the law went into effect, over 650 notice bypasses have been requested from the courts. Of these 650 cases, only 10 have had facts so difficult that two lower courts denied a notice bypass, -- only 10 have risen to the Texas Supreme Court.

Justice Owen's detractors would have us believe that in these cases, she would have applied standards of her own choosing. Ironically, in each and every example they cite, whether concurring with the majority or dissenting, Justice Owen was applying not her own standards but the standards enunciated in the Roe v. Wade line of decisions of the United States Supreme Court, which she followed and recognized as authority.

For example, detractors take pains to tell us that Justice Owen would require that to be sufficiently informed to get an abortion without a parent's knowledge, that the minor show that they are being counseled on religious considerations. They appear to think this is nothing more than opposition to abortion rights. They are so bothered with this religious language that various documents produced by the abortion industry lobby italicize the word religious. But this standard is not Justice Owen's invention, but rather the words of the Supreme Court's pro-choice decision in Casey. Should she not follow one Supreme Court decision, but be required to follow another? Is that we want our judges to do - pick and choose which decisions to follow? That appears to be the type of activist judge these groups want, and this Committee should resist all such attempts.

The truth is that rather than altering the Texas law, Justice Owen was trying to effect the legislator's intent. No better evidence of this is the letter of the pro-choice woman Texas Senator stating her "unequivocal" support of Justice Owen. Senator Shapiro says of Justice Owen: "Her opinions interpreting the Texas [parental involvement law] serve as prime example of her judicial

restraint." I understand why the Washington left-wing groups don't like that in a judge, but this Committee should applaud and commend such restraint and temperament.

The truth is that, rather than being an activist foe of Roe, Justice Owen repeatedly cites and follows Roe and its progeny as authority. Compare this to Justice Ruth Bader Ginsburg who wrote in 1985 that the Roe v. Wade decision represented "heavy handed judicial intervention" that was "difficult to justify."

In relation to this, I would like briefly to comment on the mounting offensive of some to change the rules of judicial confirmation by asking nominees to share personal views or to ensure that nominees share the personal views of the Senator on certain cases.

To illustrate my view, I'll tell you that many people have recently called on this Committee to question nominees as to their views on the pledge of allegiance case. My full-throated answer to this is no, -- as much as I think that that case was wrongly decided. I also happen to think that the recent School Voucher case is the most important civil rights decision since Brown but I am not going to ask people what they think about that case either.

Such questions threaten the heart of the independent judiciary and attempt to accomplish by hidden indirection what Senators cannot do openly by constitutional amendment. It is an attempt to make the courts a mere extension of the Congress.

I speak against this practice in the strongest terms, and, in my view, any nominee who answers such questions would not be fit for judicial office and would not have my vote.

The truth is that there are many who, like Justice Ginsburg, think that cases like Griswold or Roe were wrongly decided as a constitutional matter even if they agree with the policy result, -- just as the great liberal Justice Hugo Black did in his dissent in Griswold. A few weeks ago we heard testimony that Chief Justice Warren thought Brown v. Board of Education was his worst ruling as matter of constitutional law, but not his least necessary.

Again, I welcome Justice Priscilla Owen. Considering the opposition mounted so unfairly against you, I have to tell you that today you may be the bravest woman in America. I hope that there are young women watching you right now - you are an excellent role model for anyone and especially young women.

Now, some of Justice Owen's detractors have made much about the fact that she is not afraid to dissent. Of course, they fail to mention dissents like her opinion in Hyundai Motor v Alvarado, in which Justice Owen's reasoning was later adopted by the United States Supreme Court on the same difficult issue of law.

They also overlooked her dissent in a repressed memory/sexual abuse case where she took the majority to task with these words: "This is reminiscent of the days when the crime of rape went unpunished unless corroborating evidence was available. The Court's opinion reflects the attitudes reflected in that era."

Perhaps, Madam Chairman, they thought that dissent reflected too well the perspective of a woman to point out to Senators like you.

Despite deceptive opposition I think that Justice Owen should be confirmed. First, because I believe that colleagues like you, Madam Chairman will be fair. You often remind us, in your modesty, that you are not a lawyer, but I think that is among the reasons that your common sense often shines through on this Committee.

I also believe my Democrat colleagues will be led by the time-tested standards well-stated by Senator Biden, and look again to qualifications and judicial temperament, not base politics. Whether the Biden standard will survive past our time, will be tested now.

If we fail the test we will breach our responsibility as auditors of the Washington special interest groups and the Judiciary's stewards on behalf of all the people, and not just some.

Thank you, Madam Chairman. I look forward to the testimonies today.