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Federal News Service

July 23, 2002 Tuesday
SECTION: CAPITOL HILL HEARING

LENGTH: 17404 words

HEADLINE: PANEL ONE AND TWO OF A HEARING OF THE SENATE JUDICIARY COMMITTEE

SUBJECT: JUDICIAL NOMINATIONS

CHAIRED BY: SENATOR DIANE FEINSTEIN (D-CA)

PANEL I: SENATOR PHIL GRAMM (R-TX); SENATOR KAY BAILEY HUTCHISON (R-TX); SENATOR BILL NELSON, (D-FL); AND REPRESENTATIVE KAY GRANGER (R-FL)

PANEL II: JUSTICE OWEN, TO BE A CIRCUIT COURT JUDGE FOR THE FIFTH CIRCUIT

LOCATION: 325 RUSSELL SENATE OFFICE BUILDING, WASHINGTON, D.C.

BODY:
SEN. FEINSTEIN: (Bangs gavel.) We'll begin the hearing. And members will be coming in from time to time. Before I make my opening statement, I would like to just quickly run through the protocol for this hearing.

There are three panels that we will be hearing today. Members will be called on the basis of the early bird rule. We will alternate from side to side. For those that don't know the early bird rule, is an incentive to get members to come to committee promptly so that they can respond to -- be responded to with questions.

There will be a vote I think around 10:30. We will recess for that vote. This session will run from 10:00 to 12:15. We will begin again at two o'clock and to through to five o'clock, at which point the hearing will end, and if we need an additional hearing, that could be determined at that time. There will be two votes this afternoon. I believe at 2:45, and we will do a similar thing. We will simply adjourn and go and cast our votes and promptly return here. I would like to begin by saying that there are three panels. If three distinguished members at the first panel. Senator Kay Bailey Hutchison is traveling and will arrive a little late, and I've agreed to take her statement as soon as she comes in. So, we'll stop whatever we're doing and listen to her when she comes in. We will then hear the statements from the members, and then a statement from the chairman of the committee and the ranking member.

I would like to welcome **Priscilla Owen** on behalf of the Judiciary Committee. Justice Owen

comes to us with a distinguished record and with recommendations of many respected individuals within her state of Texas. She currently sits as one of nine justices on the Texas Supreme Court, which is the court of last resort for civil cases in that state. Justice Owen is a graduate of Baylor and Baylor Law School, and before joining the Texas Supreme Court in 1995, she was a partner in the law firm of Andrews and Kirk.

As indicated by the large number of people in this room -- in fact, as indicated by the size of the room itself, this is a nomination that's received a lot of interest. My office has received dozens of letters of support and of opposition from organizations within Texas and from national organizations as well on both sides of the debate. So feelings run very very strong. We will, of course, keep order, and we do not appreciate any comment from the audience.

I'm keeping an open mind on this nominee, as I do with all nominees. I first met with her several weeks ago. I found her to be personable, intelligent and well-spoken. It's clear to me that Justice Owen knows the law, that she's very capable and that she'd be an excellent advocate for a cause. But the question this committee must answer for this and all nominees is whether this individual would make a good federal judge, a federal appellate judge, and that determination includes questions beyond intelligence and character. We must also ask about temperament, and the ability to decide cases on the law, not on personal beliefs.

The concerns that have been raised about Justice Owen go to the heart of these questions. Accusations have been made that Justice Owen too often stretches or even goes beyond the law as written by the Texas legislature to meet her personal beliefs on several core issues, including abortion and consumer rights.

I've read through a great deal of the material about Justice Owen in preparation for this hearing, including a number of opinions she has written on a variety of subjects. So, I'm very interested to hear from Justice Owen on these issues today, after which I'll carefully review the record and make what is sure to be a very difficult decision, as well we -- as we will all do.

So, now I would like to turn to the ranking member and then to the chairman of the committee.

SEN. ORRIN HATCH (R-UT): Well, thank you, Madame Chairman. I want to welcome all nominees today as well as the members of the Congress that have come to testify on their behalf. And I ask that I be able to put statements for Misters Timothy Corrigan and Jose Martinez into the record?

I would ask unanimous consent for that.

SEN. FEINSTEIN: Without objection.

SEN. HATCH: I would like to go especially -- especially to welcome Justice **Priscilla Owen** of Texas, our lone star, 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, and I expect she has as well.

I would like first to comment on the two jingoes that are being used about her record, as if they had substance. Namely, that Justice Owen is, quote, conservative, unquote; and that she is, quote, out of the mainstream, unquote. Of course this comes from the Washington interest groups that we've seen year after year, in many cases, who think that the mainstream thought is more likely to be found in Paris, France than in 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, quote, out of the mainstream, unquote. Texans will no doubt be entertained by whoever says that. Listening to some of my commentary on judges, I sometimes think that mainstream for them is a northeastern river of thought that travels through New Hampshire early and often, widens in Massachusetts, swells in Vermont, and deposits in New York City.

Well, the mainstream that I know of, and that most Americans --

SEN. LEAHY (D-VT): That's (impossible to do ?) geographically, but that's okay.

SEN. HATCH: (Laughs.) Understand. Well, the mainstr -- that's -- that was the point.

Well, the mainstream that I know, and that most Americans relate to runs much broader and further than that. The other mantra repeated by Justice Owen's detractors is that she is, quote, conservative, unquote. Now, I believe that the use of political and 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, quote, "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 confidence to serve as a member of the third co-equal branch of the government," unquote.

Now, 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 as well. 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, quote, "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," unquote.

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 of 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 on 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 percent 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 these 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 well- qualified, the highest rating they give. 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 cannot 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've 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 and 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 in rules of judicial construction. It is apparent to me that of all of the sitting judges the president has nominated, that of all of them, 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 textbook 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 normally 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 on 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, while 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, the White House counsel.

I ask, Madam Chairman, to place this and other related letters into the record at this point.

SEN. FEINSTEIN: So ordered.

SEN. HATCH: And I would place into the record a retraction from the New York Times saying that they got the facts wrong on this Enron story. Such retractions don't come often, although the misstatement of facts by the destroyer groups do. So I would ask unanimous consent that that go in the record.

SEN. FEINSTEIN: Without objection.

SEN. HATCH: I also hope that Justice Owen will get a chance to address her views on election reform and judicial reform, of which she is the 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 in the record letters from the leaders of the Legal Society and 14 past presidents of the Texas Bar Association, many of whom are Democrats. So I ask unanimous consent for that as well.

SEN. FEINSTEIN: Without objection.

SEN. HATCH: 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're voting for judicial nominees that they believe to be pro-life.

I have disputed this when they have said it is 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 transcript 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'm afraid that the main reason Justice Owen is being opposed is not that personal views, namely on the issue of abortion, are being false 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, in my opinion, 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 (must?) 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 web sites 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 groups' 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 doctors' homes and imposed $1.2 million in damages against pro-life protesters.

In only a few instances, the court tightened the buffer zones against protesters. 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, quote, "isn't a home run; it's a grand slam," unquote.

Of course, that result hasn't changed, but the characterization of it has. This is how Planned Parenthood describes the same case in their fact sheet on Justice Owen. Quote: "Owen supports eliminating buffer zones around reproductive health-care clinics," unquote. 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's 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, and 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 noticed bypasses have been requested from the courts. Of these 650 cases, only 10 have had facts so difficult that two lower courts denied a noticed 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-versus-Wade line of decisions of the United States Supreme

Court, which she followed and recognized as authority.

For example, detractors take pain to tell us that Justice Owen would require that to be sufficiently informed to get an abortion without a parent's knowledge, that the minors 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 what 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 to get that type of a judge.

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

I'm sorry I'm taking a little longer, but I'll finish in just a minute. 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-versus-Wade decision represented, quote, "heavy- handed judicial intervention," unquote, that was, quote, "difficult to justify," unquote.

Now, in relation to this, I would like to briefly 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'm 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, which senators cannot do openly by constitutional amendment. It is an attempt to make the courts a mere extension of the Congress.

Now, 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 versus Board of Education was his worst ruling as a 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 versus Alvarado, in which Justice Owen's reasoning was later adopted by the United States Supreme Court on the very 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. Quote: "This is reminiscent of the days when the crime of rape went unpublished unless corroborating evidence was available. The court's opinion reflects the attitudes reflected in that era," unquote. Perhaps, Madam Chairman, they thought that dissent reflected too well the perspective of a woman to point out to senators like all of us up here.

Despite deceptive opposition, I think that Justice Owen should be confirmed, first because I believe that colleagues, like many on this committee -- and, in fact, hopefully all of us -- will be fair. I also believe my Democratic 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 in this case. If we fail the test, we will breach our responsibility as auditors of the Washington special-interest groups and the judiciary stewards on behalf of all people and not just some.

So I want to thank you, Madam Chairman. I know I took a little longer than I usually do, but I felt that it needed to be done in this case. And I look forward to the testimonies here today.

SEN. FEINSTEIN: Thank you, Senator Hatch. The chairman of the committee, Mr. Leahy.

SEN. PATRICK LEAHY (D-VT): Madam Chair, I will not do as my friend from Utah did and give a long speech which simply delays these proceedings; I'll put my speech in the record. I also have great respect for the chair of this committee, the senator from California, and I know she'll hold a fair hearing. And, unlike my friend from Utah, I'll make up my mind after hearing the facts

and not decide them before we even have the hearing.

We will have hearings today on the 79th, 80th and 81st judicial nominees we've held since I took over on July 11th. Judge Owen is the 17th court of appeals hearing we've had. I would point out that this is for the United States Court of Appeals for the fifth circuit. That was the seat vacated by William Garwood in January 1997.

President Clinton had nominated Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, to fill that vacancy. He had a unanimous rating of well-qualified by the ABA, something the senator from Utah says is very important, but the senator from Utah and the Republican-controlled Senate refused to give him a hearing, and after 15 months his name was returned. He was never allowed to have a hearing.

So then President Clinton nominated Ricky Moreno, another outstanding Hispanic attorney, to fill the same vacancy. But this committee, under Republic chairmen, did not allow him to even have a hearing over the 17 months that his name was pending here, and then President Bush withdrew his name. And now we have Judge Owen, who is the third vacancy.

I trust the distinguished senator from California to hold a fair hearing, something that the two nominees, two Hispanic nominees, two extremely well-qualified Hispanic nominees nominated by President Clinton, were never allowed to have hearings before this committee.

I commend the senator from California and this committee for holding a hearing and not doing as had been past practice -- we've heard a lot about past practice -- did not follow past practice and instead we are having a hearing. I'll make up my mind based on what we hear. I would hope that other senators would refrain from the kind of name-calling we've heard about people who express their views. I have had a lot of views expressed on this, both for and against, Justice Owen. While I may not have liked the tenor, and even some of the things I was called in those dues, I am one who depends on the First Amendment. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you very much, Mr. Chairman. We will now turn to the members of --

SEN. SCHUMER: Madam Chair? May I ask -- there are a couple of things that I would just like to mention here in response to Senator Hatch. May I have a minute or two to do that?

SEN. FEINSTEIN: Well, we have a very long -- I think every other member probably has something they would like to say. What we generally do is turn to the members and then hear -- if you wouldn't mind, I think it would be appreciated.

SEN. SCHUMER: I'll defer to you, Madam Chair. I just thought certain things were on the record that were just so wrong that they need some refutation.

SEN. FEINSTEIN: I'll give you ample time to complaint --

SEN. SCHUMER: Thank you.

SEN. FEINSTEIN: -- later.

We now have three members of the Congress. I'd like to begin with the senior senator from Texas, the Honorable Phil Gramm, and then we'll proceed right down the line. Please, and if you could keep your statement to five minutes or so, that would be appreciated.

SEN. GRAMM: Well, Madam Chairman, first, thank you very much. I appreciate having an opportunity to be here. I am not going to waste your time telling you that **Priscilla Owen** is brilliant, that she's a distinguished student of the law. Everybody knows that. If she were a simpleton, there would not be all this opposition to her.

I just want to talk about the **Priscilla Owen** that I know and that the people of my state know. First of all, normally when there is an effort to attack somebody, you find one little thing about them and you blow it out of all proportion. What is so basically disturbing to me about this case is there is no one little thing to blow out of proportion. This attack is created out of whole cloth. **Priscilla Owen** is not a political person. **Priscilla Owen,** when she was recruited by people who wanted to have outstanding jurists, was probably our state's greatest commercial litigator. She was living in River Oaks, which is the richest neighborhood in our state. She was extraordinarily successful. She was totally nonpolitical. When she was approached about running for the court, she wasn't sure what primary she had voted in. The idea that this good woman is some kind of political activist or kook is as far from the truth as it can be as you can get from the truth.

She made an extraordinary decision. She gave up probably the most successful commercial litigation practice that any female lawyer in my state had or ever had, moved out of River Oaks as a single mom, to become a justice of the Supreme Court of Texas.

Now, I want to address two areas that have been brought up. One is Enron. Now, Priscilla is from Houston. Enron was the largest and most successful company in my state. So, is anybody shocked that people who work for the largest and most successful company in Texas, a company domiciled in Houston, supported the most successful commercial litigator in the state when she ran for the Texas Supreme Court? What is amazing for me is that people who worked for Enron contributed only $8,600. That should have been the beginning of a message that maybe these weren't good people. (Laughter.)

Now, there has been a -- there has been an accusation that somehow, because employees of the largest and most successful -- at that point -- company in my state contributed $8,600 that somehow this induced her to make a political ruling. Well, the case was pretty simple. The state law sets out a procedure whereby inventories are evaluated. The case came before the Supreme Court. There was a unanimous decision -- and even the lawyer -- and I've got a copy of a letter from Robert Mott -- writes a letter and says, "Justice Owen authored the opinion of a unanimous"

-- this is the lawyer who represented the other side of the case. "Justice Owen authored the opinion of a unanimous court, consisting of both Democrats and Republicans. While my client and I disagree with the decision, we were not surprised." So you read this propaganda being put out, you would get the idea that this person, bought and sold by Enron, and made a political ruling. You get down to the facts, it's insulting.

Second point, this abortion business. The Texas legislature wrote a law that basically said you have got to notify a parent when a minor is having an abortion. Now, to some people that is an extremist position. To most Americans that's a pretty straightforward position. I would have to say loving many members of the legislature, as I do, I would still have to say that the bill was written by people who were trying to be on three sides of a two-sided issue. It is a very poorly written law. It imposed very heavy burdens on the court. But if you go back and look at **Priscilla Owen's** rulings, if you listen to her, whether you agree or you don't agree with her efforts to try to bring logic and reason and precedent to a very poorly written law, you have got to be basically struck by the fact that this is a person who tried to follow precedent, which is what courts are supposed to be about.

Finally, let me say that if you need evidence that this is an extraordinary woman who has done a good job, who is basically nonpolitical, let me just give you some. When she ran for office, she was endorsed by every major newspaper in the state of Texas. There are a lot of newspapers in the state of Texas that never endorse me. Someone who is some kind of out of the mainstream person is not endorsed by the Austin American Statesman. In fact, most mainstream people are not endorsed by the Austin American Statesman. (Laughter.) The last Democrat who sat on the Texas Supreme Court is a strong supporter of Priscilla, and paid to come up here and tell people that. That was Raoul Gonzalez. The most respected living former chief justice, John Hill, came to Washington on his own initiative -- and he is a Democrat -- and was a Democrat candidate for governor, was attorney general, is one of the most loved former officeholders in our state -- came to Washington for the specific point of telling people that what they were saying about **Priscilla Owen** is simply not true.

So I want to urge my colleagues -- I know how these things work. I've been in this town for 24 years, and I've seen a lot of organized campaigns. And I know that this creates tremendous political pressure on both sides of the aisle. But I just want to say that if a group of special interests can convince people that this good woman is some kind of extremist, then these same groups could convince people that Chuck Schumer was a conservative or I was a liberal. There is no foundation to these charges that have been made. And I want to urge you to get the facts, look at them, and weigh them from the perspective of not what some advocate group says but in simply looking at the facts. If you will do that, I am confident that **Priscilla Owen** will be confirmed, and I think it will send a very good signal to America that when the facts don't comport to the charges that the Senate goes with the facts. And I thank you, Madam Chairman.

SEN. FEINSTEIN: Thank you very much, Senator Gramm. I should tell the witnesses that the light is now on. It is set at five minutes. And, Senator Nelson, you are next in line.

SEN. BEN NELSON (D-FL): Well, Madam Chairman, I am from Florida, and I am here for two noncontroversial nominations.

SEN. FEINSTEIN: Yes. I should tell everybody that we have two additional nominees following Justice Owen.

SEN. LEAHY: And I want to thank both Senator Nelson and Senator Graham of Florida for working out the situation with the White House so that we could have some noncontroversial nominees up here.

SEN. NELSON: And, Madam Chairman, if you would like I will be merciful and I will take a total of 30 seconds.

SEN. FEINSTEIN: We would appreciate that. Thank you for your mercy.

SEN. NELSON: Well, I am here on behalf of Jose Martinez and Tim Corrigan. They are noncontroversial nominees to the district court, one from the Southern District and one from the Middle District.

The reason they are noncontroversial -- and I am here on behalf of Bob Graham and myself, and with my permission will insert both Senator Graham's and my written statements into the record. They are noncontroversial because we have a selection process in Florida, called a Judicial Nominating Commission, appointed by distinguished members of the bar and prominent citizens of the community that screen the applicants. They go through an extensive formal written application, extensive interviews. Then the three nominees come to Senator Graham and me, and we interview them and tell the White House if we have an objection. And then the White House makes its selection for a district judge from the three.

And so I am happy to be here on behalf of Senator Graham and myself to tell you that we enthusiastically support both of these nominees, and they will be very good additions to the federal bench. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you, Senator Nelson. Representative Granger?

REP. GRANGER: Thank you, Madam Chairman. I am honored to be here today to support the nomination of **Priscilla Owen,** a highly qualified nominee from my state, home state of Texas. According to the Department of Justice, there are 91 vacancies in the federal court -- that's right, 91. Overall, the president has nominated 113 individuals to serve as federal judges, but only 59 of them have been confirmed, and 54 nominees are still pending. Specifically, the president nominated 32 individuals to the circuit courts, but only 11 have been confirmed. Today we have a chance to address that problem.

Today we can move to fill a vacancy that has been classified as a judicial emergency. The time has come to fill this seat, and fill it with a qualified, sensible nominee like **Priscilla Owen** -- **Priscilla Owen,** who received a unanimous rating of well qualified, the highest rating possible from the American Bar Association.

Justice Owen's academic achievements are remarkable, and her professional experience is exemplary. She graduated with honors from both Baylor University and Baylor Law School, and following graduation she received, as has been noted here, the highest score for that year on the Texas bar exam.

Justice Owen practiced commercial litigation for 17 years before her election to the Texas Supreme Court in 1994. She is well respected for her service to the highest state court. And in 2000 she was endorsed, as Ben said, by every major Texas newspaper for her successful reelection.

In her professional career, Justice Owen has worked to improve access to legal services to the poor, and increase funding for these programs. She served as the Texas Supreme Court liaison to statewide committees that strive to offer legal services to the poor. Justice Owen also participated in the state committee that successfully enacted legislation at the state level to significantly increase funding for indigent legal services.

Additionally, Justice Owen organized a group known as Family Law 2000. Family Law 2000 warns parents about the difficulties children face when parents go through a divorce. It's a program that also teaches parents how to address those difficulties and how to make the divorce process as painless as possible for children.

Madam Chairman, Justice Owen has proven herself to be the right candidate for this position. She has served the state of Texas with distinction, and I am confident she will serve our nation well in the federal court. In short, Justice Owen is an excellent choice for the Fifth U.S. Circuit Court of Appeals, and I thank you for the opportunity to speak for her.

SEN. FEINSTEIN: Thank you very much, Representative Granger. The chair will excuse the witnesses, and we'll ask Justice Owen to come forward. Justice Owen, before you sit down, if you would raise your right hand, and affirm the oath when I complete its reading. Do you swear that the testimony you are about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

JUSTICE OWEN: I do. (Witness sworn.)

SEN. FEINSTEIN: Please be seated.

JUSTICE OWEN: Thank you very much.

SEN. FEINSTEIN: And I have put the clock on ten minutes, but we're -- my intention would be to give you as much time as you require. Generally around here people begin by introducing any family members they might wish to, and we'd be delighted to meet any of your family or friends you care to introduce. Then the time is yours to say whatever you might like to the committee. And then we will proceed with rounds of questions, and each member will have ten minutes for their questions.

JUSTICE OWEN: Thank you, Madam Chair, Chairman Leahy, members of the committee. I do want to, before I introduce my family, and my special guests today, I do want to take the opportunity to thank you very much for the hearing today, and for being able to talk to you about some of the issues that have been raised.

I also want to thank the president, of course, for the honor of nominating me to the United States Court of Appeals for the Fifth Circuit. And I certainly want to thank Senator Gramm and Congresswoman Kay Granger for coming here today and for their kind words about me, and for introducing me.

And, as you mentioned, Madam Chair, Senator Hutchison will be here later this morning. But I did want to take this opportunity to express my thanks to Senator Hutchison for all that she has done and for her friendship and support throughout this process.

I also want to thank -- she's not here today, but the counsel to the president, who is also my former colleague, Alberto Gonzalez (ph), for his support and assistance throughout this process. And --

SEN. FEINSTEIN: I am going to stop you for a minute. Pull the mike -- this is unidirectional. It has to be directly in front of you. And you have to talk directly into it, or it blurs --

JUSTICE OWEN: Is that better?

SEN. FEINSTEIN: If you could put the mike directly in front of you, and then speak --

JUSTICE OWEN: Is that better?

SEN. FEINSTEIN: That's much better.

JUSTICE OWEN: Okay. I would like to introduce my family and some of the folks who are with me today. My sister, Nancy Lacey (ph), is here. And my pastor, Jeff Black, who is from my church in Austin.

SEN. FEINSTEIN: If they would stand, we would like to acknowledge you.

JUSTICE OWEN: And I would certainly be remiss if I did not introduce the former chief justice

of the Texas Supreme Court and the former Texas attorney general, John Hill, who is here today. And I want to thank him for his support and all that he has done. Some of my other friends who are here -- and I had hoped someone would help me with this, so I don't miss anyone -- because it's hard for me to see who all is here. Pat Meizel (ph), a former judge from Harris County; my special friend Harriett Myers, who is a former president of the State Bar of Texas, and who is now at the White House. Who am I missing? Oh, Judge Levi Benton, from Houston -- Harris County, Texas -- thank you, Levi for coming on short notice, and I appreciate it. Who else is? I am sorry I am not able to introduce everybody that's here. But thank you all for coming, and everybody who prepared to come last week -- and I thank you for changing your plans and getting here this week.

I also want to thank, although they couldn't make it this week, my former colleagues Raoul Gonzalez and Justice Jack Hightower. Jack Hightower is also a former congressman from Texas. And the 15 past state bar presidents, both Democrat and Republican, who have signed a letter of support and given that to the committee. And then last week there were a whole bunch of folks who came up from Texas to meet with senators and with their staffs, and I want to thank them for the effort and the time that they took to do that.

And, Madam Chair, Mr. Chairman and members, I also appreciate the opportunity to make an opening statement today. I know that that's not usually done, but for the reasons that have been discussed this morning, I think it's appropriate and necessary for me to at least give a brief opening statement.

Madam Chair, I truly believe that the picture that some special interest groups have painted of me is wrong, and I very much want the opportunity to try to set the record straight. I have been very honored to serve as a judge on the Supreme Court of Texas, and I am extremely humbled that the president has nominated me to serve on the U.S. Court of Appeals -- the United States Court of Appeals for the Fifth Circuit. But I have never forgotten where I've come -- where I came from and my basic values.

After my father died of polio when I was about 10 months old, my mother and I went to live with her parents and her brother on a farm in South Texas. And my family worked very hard for a living then, as they do now. That was a difficult time. But my mother eventually remarried to a wonderful man, and we moved to what I considered the big city, which was Waco. Some of you don't know where that is -- it's near Crawford. But even though we moved to Waco, I missed my family in South Texas and I spent my summers growing up on the farm. And I worked alongside a lot of folks from a very different background than mine, but I learned through that that all of us have a whole lot in common. It doesn't really matter much where we came from or how we make a living, but it does matter that we all respect one another.

I was fortunate enough to be able to go to Baylor University and Baylor Law School, and I started practicing law 24 years ago, when there weren't very many women in the profession. The law was very good to me. But, an opportunity came for me to run for the Supreme Court of Texas,

and I decided that I should pursue that opportunity. I believe that people like me, who had the experience, and who had the academic credentials, and who didn't have any kind of axe to grind, should be willing to step out of private practice and serve the public as judges. So I ran for the Supreme Court of Texas, and the people of Texas elected me in 1994, and reelected me in 2000.

Although I'm a judge, I believe it's very important that I try to serve people in other ways. And one of the first things I have -- did after I got to the court, I was to work to increase legal aid to the poor, and to improve their access to the courts. I also, as you have heard today, helped form a group called Family Law 2000 that has been concerned about the adversarial nature of divorces. I've also served on the Board of Texas Hearing and Service Dogs, which is a charitable organization that provides and trains service dogs for paraplegics and quadriplegics and for those who are hearing impaired. As I mentioned, I am a member of St. Barnabas Episcopal Mission. I teach Sunday school there to elementary school children, and I serve as head of the Altar Guild.

But as a Judge, I have worked very hard to carry out my responsibilities to the people of Texas, and I believe that I have done so. There have been four, I would say basic principles that have guided my work as a judge. The first is I always remember that the people that come to my court are real people with real problems and real issues, and that when we decide their cases, we're going to decide cases that affect a lot of other real people because of the precedent those cases set. So, when I decide a case, I must do so on the basis of the fair and consistent application of the law, and my decisions cannot be based, and are not based on whether a party is rich or poor, or who their lawyer is. My decisions are based on the law -- whether that's a statute, or United States Supreme Court decision, or a prior decision from my court.

Second, when it's a statute that's before me, I must enforce it, as you in the Congress, or a state legislature, as the case may be, has written it, unless it's unconstitutional. I believe my decisions demonstrate that I do respect the division between the judicial and the legislative branches of government. If I am confirmed, I will do my utmost to apply the statutes you have written, as you have written them, not as I would have written them or as others might want me to interpret them.

Third, I must strictly follow United States Supreme Court precedent. I have taken a solemn oath to do so. I've upheld that oath in the past, and if confirmed, I will continue to do so as a Fifth Circuit judge.

Fourth, and finally, judges must be independent, both from public opinion and from the parties and the lawyers who appear before them. And as you've heard, Texas selects its judges through partisan elections. That means that judges necessarily preside over cases in which people appear before them as parties or lawyers who may have contributed to campaigns. That's a system that several other states have, but I don't believe it's the best system. I have long advocated that we change the way we select judges in Texas. I have advocated that we essentially follow an election -- and the retention election after the judge is initially appointed.

In the meantime, I have led reforms in the judicial campaigning area. When I first ran for the Supreme Court of Texas, I voluntarily imposed limits on my campaign contributions when there weren't any laws at all imposing any kind of limits. And in -- when I ran for reelection in 2000, I returned over one-third of my contributions where I did not receive a major party opponent.

In closing, Madam Chair, Mr. Chairman, members of the committee, I recognize the tremendous responsibility that judges have, and I have tried the very best I could for the last seven years to carefully and faithfully execute those responsibilities. Those who know my record the best have written to you in my support and express their judgment that I have been a fair an impartial judge on the Supreme Court of Texas.

I thank you for allowing me to make this statement, and I truly welcome the opportunity to answer all of your questions today. Thank you very much.

SEN. FEINSTEIN: Thank you very much. I know that Senator Hutchison has just arrived. If she'd take her place, and while she is, I'd like to spell out the early bird order. It is Feinstein, Hatch, Leahy, DeWine, Kennedy, Sessions, Feingold, McConnell, Schumer, Brownback, Durbin, and Cantwell.

Senator Hutchison, welcome. Your colleagues have all testified, but as you told me, you were going to be a little late, and we're delighted to have you here. And if you would like to make a statement, if you could possibly confine it to five minutes, we be appreciative.

SEN. KAY BAILEY HUTCHISON (R-TX): Thank you very much, Senator Feinstein. And thanks to you and Senator Leahy for allowing me to make this statement a little early. I got the earliest flight out of Dallas this morning and it just arrived, so I do thank you for that.

Madam Chairman, I am here in total and full support of my friend Justice **Priscilla Owen.** She's a seven-year veteran on the Supreme Court of Texas. I think you know her exemplary career, starting from when she graduated cum laude from Baylor Law School in 1977, and Justice Owen also made the highest grade on the state bar exam that year. I think her academic credentials are unmatched. She also has the experience to be a good circuit court of appeals judge, having been elected, reelected to the supreme court with 84 percent of the vote in Texas. She was endorsed by every major newspaper in Texas during her successful reelection bid.

I think she has the best qualifications of anyone that I've ever seen come before this committee for a court of appeals appointment. The Dallas Morning News called her record one of accomplishment and integrity. The Houston Chronicle wrote that she has the proper balance of judicial experience, solid legal scholarship, and real- world know-how.

But despite the fact that she is a well-respected judge who has received high praise, her nomination has been targeted by special interest groups. Justice Owen's views have been mischaracterized and her opinions distorted. Today this committee and Justice Owen have an

opportunity to set the record straight. One particular area of misinformation concerns Enron. In Texas, we have statewide elections for judges. Whether any of us approve of that system or not, it is the current law in Texas, and as we all know, a person has to run a campaign and raise the funds to do that. **Priscilla Owen** has actually been a leader in trying to reform the way judges are elected in our state, having come out solidly against such elections. Like six other justices on the nine-member court, Justice Owen has received Enron contributions in her election bids. She not only received legitimate contributions from employees and the employee PAC, she didn't take corporate contributions, but at that time, Enron was one of our state's largest employers, and its employees were active. They were active politically. They were active civically, and they are -- they have been major charitable contributors in Texas and especially in Houston. So, it isn't -- it should be understandable that they did make political contributions which were absolutely legitimate. She only took $8,800 in Enron contributions out of a total of 1.2 million raised for her bid. Her opponent actually raised actually 1.5 million.

During her 2000 campaign, Priscilla imposed voluntary limits on herself, which included taking no more than $5,000 per individual and spouse, no more than $30,000 per law firm, and over half her total contributions were from non-lawyers. In fact, after she started the trend of voluntary limits, the state actually came in and made laws similar to her voluntary limits that she had led the way to make. After she did not have a major opponent in 2000, she returned over a third of her remaining contributions to her contributors.

I want to read the words of our former state supreme court chief justice, John L. Hill, who is a Democrat and was also elected attorney general of Texas as a democrat, denouncing the mischaracterization of **Priscilla Owen's** record by outside special interest groups. Their attacks on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups made no effort to assess whether her decisions are legally sound. I know Texas politics, and he can clearly say these assaults on Justice Owen's record are false, misleading, and deliberate distortions. As you know, Justice Owen enjoys bipartisan support and the ABA Standing Committee on the Federal Judiciary has unanimously voted Justice Owen well qualified.

So, Madam Chairman, I thank you for allowing me to sit in full support of my friend, Justice **Priscilla Owen,** a member of the Texas Supreme Court with an outstanding judicial record.

SEN. FEINSTEIN: Thank you, Senator, for the excellent statement. We appreciate it very much, and you're welcome to stay or be excused, whatever you wish.

I'm going to proceed with -- try to do two questions in this round, Justice Owen. The first, it relates to the Searcy case, and the second has to do with comments that were made.

My understanding of the Searcy case is this. Willie Searcy was a 14-year-old in a Ford pickup with a pickup -- with a seatbelt, when another car smashed into the pickup and the seatbelt severed. As a result, he became a quadriplegic. He was on a respirator. The case went to court.

He received a $30 million judgment, which was then reduced to a $20 million judgment, and the case came up on appeal. The young man was in every difficult circumstances. He was on a respirator. I understand that his family could only pay for a nurse through 4:00 a.m. and there was a quiet hour with nobody attending him, and then the parents attended him from 5:00 a.m. in the morning. Well, he had been in there from the age of 14 to 22, and while the year-and-a-half dragged by that you were supposed to be writing that opinion, one morning the respirator went out and he died.

And, you wrote an opinion and the opinion you wrote said that the appeal should not be granted on the basis of faulty venue, that it was brought in the wrong venue, which had never been argued in either of the lower courts that handled the case.

This was a very surprising case for me to read about you because I thought you, and hope I'm right, were a person with a great deal of compassion, and yet here was someone that had two courts sustaining a verdict which could have gotten him the nursing help that he needed to sustain his life, but during the delay, he died. And there are those in the writings that have been presented that have said that the delay was unnecessary, a year-and-a-half delay was unnecessary to write that opinion.

Could you respond to that, and could you also tell us the average length of time that you take to write an opinion like this?

JUSTICE OWEN: Senator, I appreciate that question because I do -- would like the opportunity to respond since there's been so much in the press that's simply wrong about that case.

First of all, we remanded the case to the lower court, and it was three years later that Mr. Searcy unfortunately passed away. Now, the court -- the case had been in the lower court system quite a while before it got to our court. It was over a year after the accident before the lawsuit was even filed in the trial court, so he did not pass away while the case was pending in my court.

What -- and I also want to specifically address the allegation, I guess, you would say, not from you, Senator, but that's been printed in the press, that the issue of venue was never raised in the lower courts or in my court, which is just ludicrous, frankly. I would be happy to produce the briefs all the way up in our court. Venue was argued in the trial. It was briefed in the court of appeals. The court of appeals decision wrote on venue. Venue was in the briefs permanently in our court. We -- it was -- it was definitely briefed.

And Senator, though this is kind of a legal technical explanation that I'm going to try to explain the best I can, there were no rendition points in that case. In other words, Ford was not saying that we win as a matter of law, they were saying "We want a new trial." And under those circumstances, our court had to address the venue issue. We had no choice, because there's a statute in Texas that says if the case is filed in the wrong trial court, then -- then reversal is mandatory. It's not discretionary, it's mandatory.

And what happened in this case, the Ford vehicle, the pickup was purchased in Dallas, where Miles -- Mr. Searcy, his family, lived in Dallas. The accident occurred in Dallas. Everybody agreed that all the operative facts centered around Dallas, Texas. Yet, the plaintiff's lawyer decided to file in Rusk County, in Texarkana, which is, I think, 180 or 200 miles northeast of Dallas, in a county that had absolutely nothing to do with the vehicle or the accident. Everybody stipulated that. The only basis for filing in the other country, a long way away from Dallas, was that there was a Ford dealership there, as I'm sure there's a Ford dealership in almost every county in Texas. And we looked at existing precedent in Texas, my court did, and we said, Ford doesn't own the dealership. Under the statute, again, applying our prior supreme court precedent and other courts of appeals decisions, we said venue was in the wrong county. This was essentially forum shopping issue.

And we were required by the statute, having concluded that venue was in error, to remand to the trial court, which we did. Once it got back to the trial court, the trial court granted a partial summary judgment against Mr. Searcy and his family, and that went up on interlocutory appeal, and the court of appeals considered that. The case came back to our court. We denied the petition. It went back down to the trial court. And it was at that point, three years after our decision remanding it to the trial court, based on the venue ruling, the Mr. Searcy passed away. And there's -- to this date there's been no, it is my understanding, trial to adjudicate whether Ford is liable in the first instance.

SEN. FEINSTEIN: Thank you. Since the distinguished ranking member and my friend raised Justice Gonzales, I thought I would get his actual statement and read it in some context, because this relates around the Jane Doe cases. And this where I think there has developed a feeling among some that you are a, in a sense a judicial activist, that you went beyond the law, as the law was written in Texas, with respect to notification, in asking for additional things to be presented, that the law itself in its three prongs on notification did not require. But let me just quote this.

"To the contrary, every member of this court agrees that the duty of a judge is to follow the law as written by the legislature. This case is no different." And then it goes on to say, "Our role as judges requires we put aside our own personal views of what we might like to see enacted and instead do our best to discern what the legislature actually intended. We take the words of the statute as the surest guide to legislative intent. Once we discern the legislature's intent, we must put it into effect, even if we see our, even if we ourselves might have made different policy choices." And then it goes on to say, "The dissenting opinions, of which you were one in this case, suggest that the exceptions to the general rule of notification should be very rare and require a high standard of proof. I respectfully submit that these are policy decisions for the legislature, and I find nothing in this statute to directly show that the legislature intended such a narrow construction. As the court demonstrates, the legislature certainly could have written Section 33.033(I) to make it harder to bypass a 366 parent's right to be involved in decisions affecting their daughters, but it did not.

Likewise, part of the statute's legislative history directly contradicts the suggestion that the legislature intended bypasses to be very rare. Thus to construe the Parental Notification Act so narrowly as to eliminate bypasses or to create hurdles that simply are not to be found in the words of the statute would be an unconscionable act of judicial activism.

And, of course, in reading your opinions in these Doe cases, you did, in fact, insist on certain tests that were not present in the statute. Could you speak to that, please?

MS. OWEN: Well, Senator, let me start in reverse order with some of the things in your question. First of all, this was the third in a series or down the line in a series of Doe cases.

The first Doe case that came to the court was, of course, Doe I. And in that opinion, I tried my very best to give effect to legislative intent. And, Senator, I honestly believe that I did not go outside of what the legislature intended. I looked at the words they chose.

The legislature said that a girl who is under 18 who wants to have an abortion without notifying one of her parents may get a judicial bypass if one of three prongs are met. And the language that they chose to put in the statute for the judicial bypass was language that was almost verbatim, if not verbatim, taken out of a U.S. Supreme Court opinion. And the opinion had blessed a judicial-bypass provision in another, although it was a consent statute.

And so I looked at the context in which the legislature was deciding what to write and why. And these words were not written in a vacuum. To me they had meaning within the context of all these U.S. Supreme Court cases.

So I looked at the U.S. Supreme Court decisions in this area, primarily Casey and Akron I -- excuse me, the second decision in City of Akron -- and looked at what the U.S. Supreme Court had said about what it is that states may have an interest in information being supplied about the abortion decision. So everything in my Doe I opinion tracked language from the U.S. Supreme Court's decision, specifically, as I said --

SEN. FEINSTEIN: I'm going to have to stop you mid-sentence, because we have three minutes to get to a vote. So I'm going to recess the committee, and we'll take up just where we left off.

MS. OWEN: Thank you.

SEN. FEINSTEIN: Thank you.

(Recess.)

SEN. FEINSTEIN: Justice Owens -- Owen -- I interrupted you right in the middle of a response. Let me just quickly better state the question. The issue here is not what some hypothetical state could impose, but what in fact the state of Texas did enact into legislation. And while various

Supreme Court cases may have indicated that requiring additional steps or information might be permissible, the Texas legislature, as Justice Gonzalez said, could have written that section, Section 33.0331, to make it harder to bypass a patient's right to be involved in decisions affecting their daughters. But the point is it did not. For instance, in one Jane Doe case you suggested a minor must show that she understands the impact the procedure will have on the fetus. I understand you point to the Casey case in support of this conclusion. But that case never said that such a requirement is mandatory. So what in the Texas statute itself would justify such an expansion of this statute?

JUSTICE OWEN: Well, Senator Feinstein, again, the words that the legislature used on the first prong were "mature and sufficiently well informed." And they in fact took the entire bypass straight out of U.S. Supreme Court cases. And if you look at the backdrop against which this whole statute was enacted, it seemed to me -- and a majority of the court agreed on this, is it's in their opinion -- that they were looking at all the U.S. Supreme Court precedent on this point. And the words "sufficiently well informed" connoted, to me at least, that they wanted us to look at what the U.S. Supreme Court has said is relevant to being fully informed. I think the Texas legislature intended, as explained in another Supreme Court case -- it's HL v. -- and I can't remember the second name of it -- that they realized that in these situations there was not going to be a parent involved, that neither parent was going to be notified, that an adult, standing in the shoes of the parent was not going to be able to give mature advice and information to this minor. Again, we are talking about minors. And the U.S. Supreme Court at one point in its opinion said of course the states are entitled to presume that parents would give this kind of information and counseling, but of course that's not going to happen in these situations. So, again, it seemed to me that the Texas legislature, when they said fully -- or, excuse me, "sufficiently informed," wanted us to look at what the U.S. Supreme Court had said. States may encourage women to know about the abortion decision, to be informed, to make an informed choice.

And so I looked at, as I have indicated, primarily Casey and the second decision, City of Akron, to see what has the U.S. Supreme Court said about the words "informed." And when you go to those cases -- I lifted directly out of the cases the issues that the Supreme Court had identified that they thought it was okay for states to look at in making this decision. And it seemed to me, again, you are talking about a minor here. These legislators were concerned that mothers and fathers would want their daughters to make the decision with as much information as they could have -- constitutionally, since there was not going to be an adult involved in the process, only the court, and that that's what the legislature intended within constitutional bounds.

SEN. FEINSTEIN: My time is up. Senator Hatch.

SEN. HATCH: Thank you, Madam Chairman. Justice Owen, I will ask you more on this later, but let me make sure that everybody understands some of the answers you have just given on the Jane Doe cases. When you argued in Jane Doe, one, that for oar minor to be, quote, "sufficiently well informed," unquote, a minor would need to, quote, "demonstrate that she has sought and obtained meaningful counseling from a qualified source about the emotional and psychological

impact," unquote, and so on. This was not your personal standard that you were imposing, but an application of the United States Supreme Court standard -- isn't that correct?

JUSTICE OWEN: Yes, Senator Hatch, that's correct. That cane out of one of the U.S. Supreme Court decisions.

SEN. HATCH: Can we presume that when the justices of the Supreme Court, the United States Supreme Court, established these standards that they had before them the best available medical and psychological information?

JUSTICE OWEN: Yes, senator, I agree with that.

SEN. HATCH: It just seems to me that your detractors are speaking -- not talking about people up here, who have a right to ask any questions they want -- but your detractors on the outside are seeking to retry Casey and every other Supreme Court case by attacking you. But what you were doing was applying Roe v. Wade and its progeny. Am I right about that?

JUSTICE OWEN: Yes, senator. I quoted Roe v. Wade as modified by Casey, and I clearly recognize throughout the opinion that that is the law of the land, and I was trying faithfully to follow it. And I also pointed out in the course of the -- I think it was the Jane Doe I opinion, that if we applied that rationale of those cases it would probably mean some of our family law statutes were unconstitutional in this context.

SEN. HATCH: Well now, much has been made of your opinion that for a minor to be sufficiently informed for purposes of the judicial bypass, she must, quote, "exhibit an awareness that there are issues, including religious ones, surrounding the abortion decision," unquote. Now, I have to tell you that nothing panics your detractors --that is, these liberal special interest groups -- more than a judge suggesting that religion exists. I think they think that it's crazy talk. To be clear though, your language that a minor should, quote, "indicate to the court that she is aware of and has considered that there are philosophical, social, moral and religious arguments that can be brought to bear when considering abortion," unquote, is nothing but a faithful -- maybe I shouldn't use that term -- mere application of Sandra Day O'Connor's language in the Casey decision -- isn't that right?

JUSTICE OWEN: Yes, senator, it was in Casey. It was in -- I believe it was also in Akron 2 -- and the specific words, "religious beliefs" and "religion" was included in HL v. Matheson.

SEN. HATCH: You didn't wake up one morning and suddenly decide you were going to impose a standard that was all your own, did you?

JUSTICE OWEN: No, senator. Frankly, when this statute hit the court we were all a little caught unawares. And I went to the -- straight to the U.S. -- looked at the history of it, and went straight to the U.S. Supreme Court decisions and started reading to see what have they said about states'

abilities to see that a minor is sufficiently informed in making the choice.

SEN. HATCH: Well, it would seem to me that your detractors would like you to cherry-pick among Supreme Court cases or precedents that you should follow and Supreme Court precedents you should ignore. Of course that's typical of how some of them actually read the Constitution.

Now, let me ask you this. On your decision in Ford Motor Company v. Miles, is it not true that a bipartisan majority of the Texas Supreme Court held that lawsuit, which arose out of a car accident, was filed in the wrong county, and therefore remanded for transfer and a new trial in a different county?

JUSTICE OWEN: That's correct, senator.

SEN. HATCH: Now, the decision did not eliminate the plaintiff's ability to sue for the injuries they had suffered. It simply ordered that the case be reassigned to the appropriate venue. Is that correct?

JUSTICE OWEN: That's correct, senator.

SEN. HATCH: Okay, well, I just wanted to make that clear.

Now, Justice Owen, I would like to ask you further about your decisions concerning the Texas statute that regulates the ability of minors to obtain abortions without telling their parents in certain circumstances. First, I want to make sure that we all understand exactly what that statute does. As I understand it, the statute codifies the right of minors to obtain abortions without permission from their parents, but requires that one of the young woman's parents simply be notified of their daughter's decision 48 hours before the procedure is performed. Is that correct?

JUSTICE OWEN: That's correct, senator. It is not a consent statute, it's a notification statute.

SEN. HATCH: I see. In addition, the statute provides for what is called a judicial bypass, which means that a judge can allow the abortion to go forward without parental notification, provided that the girl ask the trial judge to do so, and proves with testimony or other evidence that she meets one of the stated reasons for such a bypass. Is that correct?

JUSTICE OWEN: That's correct.

SEN. HATCH: Okay. Now, Justice Owen, do you know how many cases have been found since that statute went into effect by girls seeking to obtain abortions without notifying their parents?

JUSTICE OWEN: We don't know the precise number, because they're confidential. In some -- we do know that there have at least been 650-some odd since the statute went into effect in 2000. And the reason we know that is that the statute provides that the court can appoint counsel or

appoint guardian ad litems for these girls at state expense. And so we know that that number of reimbursements in that number of cases have been applied for. But we also know that there are quite a number of lawyers who do these cases for free on a pro bono basis. So we don't know the exact number, but we do know at least that many --

SEN. HATCH: And how many of these cases reached the Texas Supreme Court?

JUSTICE OWEN: Ten different minors have come to our court in 12 different cases. Jane Doe and Jane Doe 4 came back after the remand.

SEN. HATCH: I see. And what happened to the rest of the cases of the 650?

JUSTICE OWEN: Well, the first two cases that came, Jane Doe and Jane Doe 2, a majority of the court, including me, believed that she, based on the evidence, that she had not met the statutory standards. But because our court had never written on either the "mature and sufficiently well informed" prong of the statute or the best interest statute, that she didn't -- and those were sort of amorphous concepts standing alone -- that she and her lawyer did not really know what standard they were trying to meet. So, in the interest of justice, we remanded those cases to the trial court for another hearing. And Jane Doe 3 -- that case was remanded. We don't know what happened to Jane Doe 3 -- she -- we just don't know because the confidentiality. Jane Doe 4 -- the court affirmed the two lower courts and denied the bypass.

And let me say -- I think it's been said, but let me make clear that none of these cases ever get to my court unless both the trial court and the Court of Appeals have denied the bypass. If the --

SEN. HATCH: I am correct in saying that the Texas Supreme Court hears such cases only after a trial court has heard them --that's the court that actually hears the testimony and the evidence -- and that trial court denies the bypass, and then the Court of Appeals reviews the trial court decision, and agrees that the bypass should be denied?

JUSTICE OWEN: Or, say, if they disagree and grant the bypass, that's the end of it. There are no further appeals. It would not come to my court.

SEN. HATCH: So is it safe to say, Justice Owen, that the cases reaching the Texas Supreme Court are the tough cases, because there have only been a few of them that have made it up there.

JUSTICE OWEN: Well, yes, senator, with this caveat -- caveat, or however you pronounce it -- we have had some cases that came to the court that -- there were five of them actually -- where the court affirmed the lower court's judgment without opinion. And it takes under our rules at least six judges to agree to do that. And if any judge had dissented and noted their dissent publicly, then we would have reflected that. I can't get into the deliberations on our court or disclose what was at issue in those cases, but I think it's a fair inference from those circumstances, given the number of opinions written in all those other cases, that these were not

close cases in those five instances.

SEN. HATCH: So it leads to the more difficult case, where evidence of maturity, best interests or abuse happens to be not very clear -- is that right?

JUSTICE OWEN: Yes, senator.

SEN. HATCH: And where the precise definition of words used by the Texas legislature has to be determined?

JUSTICE OWEN: That was the -- we had never obviously construed the statute before, and it needed to be construed by my court to give guidance to the trial courts and the courts of appeals.

SEN. HATCH: Of course some of the abortion rights advocacy groups would prefer that you simply always rule in favor of bypassing parents rather than look at the words of the statute. But I have got to say I think the method of your decisions, your principled examination of legislative intent, is exactly the kind of judging that most Americans really want from their judges -- and expect.

Now, the judicial bypass law in Texas has been in effect for a relatively short time. Am I right about that?

JUSTICE OWEN: Senator, it came into effect in January of 2000.

SEN. HATCH: Okay, so it's only been a year or so. Therefore, disputes arising out of that law are cases of first impression, meaning that the court was deciding the proper standards that the Texas legislature intended for the first time. Is that right?

JUSTICE OWEN: Yes, senator.

SEN. HATCH: Okay. Now, Justice Owen, some of the liberal interest group lobbyists that oppose your nomination have accused you of lacking sympathy for the girls whose cases made it all the way up to the Supreme Court for review. Some of those groups want the public to believe that your decisions reflect an opposition to abortion itself, rather than a thoughtful and principled approach to applying the law as the legislature intended that are meant. I know that these accusations are false, but I have examined your record and your opinions, as I have done for a huge percentage of the judges sitting on the federal bench today, and I've concluded that some of these groups have set out to ruin your reputation, and they've simply gotten it wrong. But they don't always take my word for it, unfortunately. So let me just ask you when you were writing your judicial opinions in the Jane Doe cases, were you motivated simply by a desire to achieve a particular public policy result, or was your objective to ascertain and enforce the intent of the Texas legislature?

JUSTICE OWEN: Well, my personal beliefs don't enter into any of my decisions. They certainly didn't enter into these decisions. We had a statute in front of us that again was enacted after long debate in the Texas legislature against a backdrop of a series of U.S. Supreme Court decisions that mapped out some of the perimeters of this area.

SEN. HATCH: Well, I'd like to pursue this further, but I just noticed the red light, and my time is up.

SEN. FEINSTEIN: Before recognizing Senator Leahy -- after Senator Leahy, Senators DeWine, Kennedy, Sessions -- it is my understanding that, Senator McConnell, that you wanted to move up in that order. I'll leave it up to you to work out with --

SEN. DEWINE: That would be fine with me.

SEN. FEINSTEIN: All right, excellent. Then we'll move Senator McConnell up in place of Senator DeWine. DeWine will go into McConnell's place.

Senator Leahy.

SEN. LEAHY: Thank you, Madam Chair. I -- and, Justice Owen, good to have you here. I'm glad you are able to have this hearing.

JUSTICE OWEN: Thank you.

SEN. LEAHY: And, as I noted before, just to cut through the basic rhetoric, when the other party was in charge of this committee, Jorge Rangel and Enrique Moreno, who had been nominated by President Clinton for a seat, were never even allowed to have a hearing. And I mention that because of some of the -- as I hear some of the comments being made on my comment line by the White House supporters about you, they were probably unaware of that. And, also, to forestall some of the other comments that the White House is trying to get out on your behalf, that we did notify the White House of the various cases that I was going to ask you about -- about a week ago -- is that correct?

JUSTICE OWEN: I'm sorry?

SEN. LEAHY: About a week ago we gave the White House a heads-up on the type of cases I was going to ask you about -- is that correct?

JUSTICE OWEN: I really don't know, Senator Leahy.

SEN. LEAHY: Well, then that's -- you should talk to them, because we did.

In FM Properties v. City of Austin -- let me go to that a bit, because you have developed a

reputation for opinions which if not every time most of the time favor big business interests. And this is a case that doesn't change that reputation. A large majority of the Texas Supreme Court in FM Properties v. City of Austin found a section of the Texas water code unconstitutional because it gave too much legislative power to corporate land owners with large tracts of land. As a majority of your court saw it -- and I think very convincingly explained their legal reasoning for it, the code section simply went too far -- it allowed these large land owners to regulate themselves, even though that would affect their financial interests, even though it may adversely affect the environment of those around them. So the farmer is telling the fox to guard the henhouse. And the court said, and I am quoting, "that your dissent in that case was nothing more than inflammatory rhetoric." The six justices and the majority explained why your legal objections were mistaken. They said that no matter what the state legislature had the power to do on its own, it was simply unconstitutional to give the power of the people to a land owner. Now, could you tell me why you thought it was proper for the legislature to grant these large corporate land owners the power to regulate themselves? Because under this, as I understand it, with limited government review there would be very little opportunity for citizens to challenge the regulations. There's clear financial interests in those who would be regulating themselves. If that's not giving up too much to a private interest, what would be?

JUSTICE OWEN: Senator Leahy, I know that some have tried to characterize this case as involving a fight between the City of Austin and big business, but in all honesty when you get down and look at it, what this was really a fight about was the state of Texas versus the City of Austin. And when this case hit our court, the then attorney general of Texas, Dan Rawlins, intervened in the case and filed a long, thorough brief in support of the constitutionality of the state statute. There had been a long-standing rivalry between the city of Austin and the state of Texas over Austin trying to regulate within its extraterritorial jurisdiction. And the legislature came back and said, you know, we want state regulations to apply in your ETJ, which they couldn't -- that's a technical term, but it wasn't technically part of the city of Austin, but it was their ETJ. The state said, Look, we gave you the ability to have an ETJ in the first place, and we want state regulations, not city regulations, to apply in that area. And this was not an unregulated area. The entire area was subject to all of the laws of the Texas natural resources code, all of the other water laws and conservation laws that apply to every piece of land in the state of Texas. So it was not regulated.

SEN. LEAHY: But just so on -- that's not really the way the majority saw it. They did refer to your opinion as being inflammatory rhetoric, your dissent. There was very limited ability for the citizens to question it. Frankly, if you followed your dissent, one could argue that the problems on Wall Street right now, there'd be no problem in delegating the power to the corporations and the accountants to regulate themselves, no matter what effect it might have on ordinary citizens, no matter the lack of regulation.

Let me ask you about another one, Read versus Scott Fetzer. The Texas Supreme Court, by a vote of 6-3, held a vacuum cleaner company liable when one of its dealers raped a customer after an in-home demonstration required by the company.

Now, a jury of Texans found the company should be held accountable. The Supreme Court affirmed. The Texas appellate court had agreed first. They said the company had a duty to exercise reasonable control over the vacuum sales representatives because in this case it required in-home sales. And in this case you had a person who had enough in his record to raise warning flags to the company.

But you said this was wrong, if I understand the dissent you joined; that it's a wrong view of corporate responsibility because it would impose liability on all in-home vendors, as if the outcome might provide too much justice and compensation to future victims, even though this case was a pretty blatant one. Do you think that's a fair basis to shield corporations from the actions of their agents?

MS. OWEN: Senator Leahy --

SEN. LEAHY: It seems to be going against basic horn book of tort law.

MS. OWEN: I was trying to follow basic horn book tort law. And I think this case was very sympathetic. There were terrible facts in the sense that this woman was raped in her home. But basic hornbook law is that when there are independent contractors involved that you don't have respondeat superior liability. And here we had not just one independent contractor but we had two layers of independent contractors.

The Kirby vacuum cleaner company, at the national level, hired or engaged distributors -- this is all stipulated that they were independent contractors -- this wasn't my view; the parties agreed to this; there was no issue about it -- that Kirby's distributors were independent contractors and that Kirby in turn contracted with other independent contractors to go door to door and make the sales. And under hornbook contract law, you're typically not liable for the acts of your independent contractor.

SEN. LEAHY: Well, this -- but the Texas trial court disagreed with you. The Texas appellate court disagreed with you. The Texas Supreme Court disagreed with you. I mention this only because I find so many of these things where you seem to be outside even the mainstream of what is arguably a very conservative supreme court, the Texas Supreme Court.

I saw this in the City of Garland versus Dallas Morning News on allowing -- you seemed to be wanting to write in such a large exception to any kind of public disclosure that anybody could hide anything from public disclosure. That is why -- and I will submit a number of questions for the record, because I understand that there's time -- time is running out.

But I will submit a number of questions on these where you seem to be outside the mainstream even of your own court, and the other area being the area of campaign contributions. And I realize that judges are allowed to raise campaign contributions. You've raised over a million

dollars for your 1994 and 2000 election campaigns from law firms, lawyers, litigants, including Enron and Halliburton. Many of them regularly appear and have interests before your court.

It appears that in many of the cases in which your past contributors were parties, you did not disqualify or recuse yourself. In our state, we would see this as a major conflict of interest. Apparently it is not in Texas.

So I'd just ask you this. While you don't have any duty to disclose contributions, did you make a full disclosure to the parties of campaign contributions that you received related to those who may have interest in the case?

MS. OWEN: Senator Leahy, all of my contributions are a matter of public record. For the 2000 election, they're all available on the Internet. Anybody -- I had 3,000 of them, individual contributors, in my 1994 campaign.

SEN. LEAHY: But some of these are fairly significant. I mean, the Enron ones, for example, were significant. Yet you, shortly after receiving them, were arguing a case. In 1994 you got 21 percent of your total campaign funds from non-law firm businesses, including individuals with political action committees -- Enron, Halliburton, Shell, Kinetic.

You -- my question is, whether required or not, did you ever have a case, one, where you recused yourself because of campaign contributions, first? Did you?

MS. OWEN: No.

SEN. LEAHY: Did you ever have a case where you noted, aside from whatever might be on a web site, that you noted to the parties involved that you'd had significant contributions from one of the parties?

MS. OWEN: Senator, again, they're a matter of public record. And everybody --

SEN. LEAHY: I know, but that's an easy --

MS. OWEN: And no one's ever asked me --

SEN. LEAHY: I'm not trying to do a trick question, Justice Owen, just a simple yes or no. Did you ever have a case where you went out of your way to make such a disclosure to the parties? And I would note that you're not required to. I'm just asking, did you ever?

MS. OWEN: No, Senator, no one's ever asked me to recuse because of campaign contributions.

SEN. LEAHY: Well, did you ever -- no, that's not my question. And I posit this by saying, in fairness to you, you're not required to do this. But did you ever have a case where you had had

significant contributions from one of the parties involved where you noted that fact to the litigants when they were before you?

MS. OWEN: No, Senator, I did not.

SEN. LEAHY: Thank you. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you.

MS. OWEN: Mr. Leahy?

SEN. HATCH: Could the witness answer some of the other questions that Senator Leahy raised? He cut her off.

SEN. HATCH: I wonder if -- Madam Chair, I tried to make -- I don't think I cut her off, but I'll leave that to the chair to determine. I will have a number of --

SEN. HATCH: Well, but if she would like to say more, I'd like her to have the opportunity.

SEN. FEINSTEIN: Let me just ask, do you have anything else you'd like to say on that?

MS. OWEN: I would like to make -- there was a lot in there, but there are two points I would like to make quickly --

SEN. FEINSTEIN: Please.

MS. OWEN: -- particularly about the comment that I'm out of the mainstream on my own court. We've had 890-something decisions or close to 900 that I've participated in since I've been on the court, and I have been in the dissent apparently -- I haven't counted them myself, but according to some of my opposition, 86 times, which means I've been in the dissent on my court less than 10 percent of the time.

SEN. LEAHY: A lot of those cases, though, were unanimous, were they not, and just -- there were no significant dissents?

MS. OWEN: I don't believe so, Senator Leahy.

SEN. LEAHY: Okay.

MS. OWEN: We split up quite frequently on my court. The second point I wanted to -- well, I can deal with FM Properties, I guess, in detail, but they were subject to a lot of regulation by the state, just like every land-owner in the state of Texas. And so I would like the opportunity at some point to fully address all of that, if not today in the hearing, certainly by --

SEN. LEAHY: Well, please understand that on the time, you have the opportunity -- and I'm sure that Senator Feinstein would agree with this -- you have an opportunity to expand on any of your answers. Nobody wants to cut you off. If you have an area where you feel you did not have an opportunity to fully answer, of course you can add that for the record. And I will be submitting other questions. And, of course, if you feel that they're not clear and you need more information, we'll do that too.

MS. OWEN: I appreciate it.

SEN. LEAHY: Nobody is trying -- as I said at the beginning, unlike Senator Hatch, I try to make up my mind after the hearing, not before.

MS. OWEN: I appreciate that.

SEN. HATCH: I've noticed that.

SEN. FEINSTEIN: Now, now, gentlemen. Now, now. The next questioner is Senator McConnell. And directly -- finishing with his time, we will recess until 2:15. Senator McConnell.

SEN. MITCH MCCONNELL (R-KY): Justice Owen, I gather from your testimony and that of others that you share my view that judges ought not to be elected.

MS. OWEN: Yes, Senator McConnell. From the very first time since I've been on the court, since the '95 legislature on upward, I have advocated that we allow the people of Texas to amend the state constitution, which is what it would take in Texas, to change the way we pick judges and allow them to choose to go to a system that's essentially an appointment system whereby the judges would then stand for retention in a totally nonpartisan manner.

SEN. MCCONNELL: You've probably noticed the U.S. Supreme Court decision a few weeks ago on the issue of whether or not states are permitted to have, in effect, gag rules on judges if they do elect them. The Supreme Court held -- I got the impression, from reading Justice Scalia's opinion, that he too was unenthusiastic about electing judges. But he said if you're going to elect them, you can't say they can't say anything.

And I was reminded, we have a similar rule in Kentucky. And I've noticed over the years judges showing up at events, standing up, introducing themselves, smiling sweetly and sitting down, because they are essentially not allowed to say anything.

I raise this because it is, of course, permissible to elect judges, and Texas has chosen to do that. And while that's maybe not how I would do it, the people of Texas didn't consult me on that. And this issue about your contributions, I find fascinating how one could run for office unless the taxpayers provide funding for an election, one could run for office without speaking, and having

the funds available to speak to a large audience like you have in Texas is beyond me.

You were successful in raising funds in order to carry your message to the people of Texas. And now you are being, I gather, criticized for raising perfectly legal contributions to engage in perfectly permissible campaigns in order to hold the office that you have now.

You certainly received de minimis contributions from Enron, smaller amounts than at least one member of this committee. And there's no evidence whatsoever that Enron was given any favorable treatment in any of the cases that it might have had before you.

All evidence indicates that you've acted ethically and ruled correctly with respect to any matters involving Enron. You never received any contributions from the company or from Enron-affiliated corporations. And while you received some contributions from Enron employees, as I read it, it's less than 1 percent of the total amount of funds you raised.

The one opinion that I gather is frequently referred to, relating to Enron, that you wrote was unanimous and bipartisan and relied on two on-point Supreme Court decisions. So the notion that you somehow were tainted by any of these Enron employee corporations is utterly without any basis.

The committee has received a letter from two Democratic justices on the Texas Supreme Court, Raoul Gonzalez and Rose Specter, who joined in that unanimous decision and who confirm that there was nothing extraordinary, let alone improper, about it. And if no one else has put that letter in the record to date, I'd like to ask that that letter be put in the record.

Others have referred to the lawyer who lost that case and the letter he sent saying that he was disturbed by suggestions that your decision in the case was influenced by campaign contributions from Enron employees. The lawyer said, "I personally believe that such suggestions are nonsense." This was the guy who lost.

You could have taken a much more expansive view of what the contribution system allowed in Texas. But I hold up your pledge you made to the people of Texas when you ran in 1994, that you didn't have to make, with regard to the parameters that you were going to superimpose over your contributions during that campaign.

You unilaterally decided to accept no more than $5,000 from a PAC, a political party, any other entity, or an individual, together with his or her spouse and independent family members. You didn't have to do that, did you?

MS. OWEN: That's correct, Senator. At that time there were no laws at all in Texas limiting judicial campaign contributions.

SEN. MCCONNELL: And you pledged to have "no more than half my contributors be lawyers"

and in a statewide race accept no more than 60 percent of your total contributions from lawyers. You didn't have to do that, did you?

MS. OWEN: I met all the -- I met my pledge.

SEN. MCCONNELL: Yeah. But you didn't have to do that.

MS. OWEN: I did not have to do that.

SEN. MCCONNELL: This is something you chose to do because you were troubled by having to raise funds in order to run for a judicial race. But, of course, if you didn't, nobody would have known who the heck you were.

MS. OWEN: That's correct, Senator.

SEN. MCCONNELL: Third, you said you would allow no PAC or political party "to spend more than $5,000 pro-rated to aid my campaign." You didn't have to do that, did you?

MS. OWEN: No, Senator, I didn't.

SEN. MCCONNELL: You, fourth, said you would accept no more than $25,000 from a law firm and all its employees and members, their spouses and dependent family members. You didn't have to do that, did you?

MS. OWEN: No, Senator.

SEN. MCCONNELL: Fifth, you said you would accept no more than 15 percent of your total contributions from non-lawyer PACs. You didn't have to do that, did you?

MS. OWEN: No, Senator.

SEN. MCCONNELL: Sixth, you said you would use no funds raised for any non-judicial office. You didn't have to do that, did you?

MS. OWEN: No, Senator.

SEN. MCCONNELL: Seventh, you said you'd spend or loan "no more than $10,000 of my money on my campaign." You didn't have to do that, did you?

MS. OWEN: No, sir.

SEN. MCCONNELL: Eight, you said you'd spend no more than $2 million. You didn't have to do that, did you?

MS. OWEN: No, sir.

SEN. MCCONNELL: And, ninth, you said you'd make a good-faith effort to report the occupation and employer of each person who contributes more than $50. Did you have to do that?

MS. OWEN: I wasn't required by law to do it, no.

SEN. MCCONNELL: All right. So you were somewhat troubled by the fact that you had to run for office like a regular candidate here, and you were on your own trying to impose some standards in order to diminish the appearance, at least, of undue influence on the part of these contributors to your campaign. Is that correct?

MS. OWEN: Well, let me do say that when you say I was on my own, Senator -- one of my colleagues who also running at the same time also took the same pledge, and Chief Justice Phillips had not done exactly that, but he has imposed limit when he had run prior to that. So, I was certainly not the only one that had ever done it, but -- but not many of us have had.

SEN. MCCONNELL: Well, that's nice of you to say that. The others obviously had more trouble by -- by the process in some ways as well. And as several of the people who testified on your behalf pointed out, you've actually backed -- been a leader in trying to nudge Texas in the direction of adoption a different system, have you not?

MS. OWEN: I have.

SEN. MCCONNELL: Frankly, I think you ought to be sainted for your exemplary conduct in running for this office. Some people are insisting on painting you as some kind of a Ma Barker here, of a Depression Era gang land thing, and it's utterly absurd. So, just to explore how much attention you may have paid to these contributors, can you name for me your top five largest contributors?

MS. OWEN: I can -- I can name the top one because it was my former law firm, and the employees, including the mailroom people, contributed and they exceeded the cap and I gave a bunch of their money back. But I know -- I know because of that that they were my largest contributor, but other than that, I don't know.

SEN. MCCONNELL: You can't remember any of the rest of them, right?

MS. OWEN: I can remember some -- certainly I can remember some of the law firms that contributed because they are people I practiced law with for 17 years, but I don't know where they fell in terms of were they 100th, or 10th, or -- I don't remember.

SEN. MCCONNELL: And so the suggestions made that you should have somehow notified parties arguing cases before you of your -- the fact that you had received contributions when in fact that isn't required by Texas law and the contributions would be available in publicly disclosed forum to anybody who was curious enough to ask, and certainly including the lawyers who were appearing before you, correct?

MS. OWEN: That's correct.

SEN. MCCONNELL: Well, I think these suggestions that you've somehow engaged in rulings that favor your donors is -- is absolutely absurd on its -- on its face. And I commend you for really traversing the waters here of elected politics for a judicial position in a very ethical manner. As I said, you know, at the risk of being repetitious, I don't think judges ought to be elected, but if we are going to elect them, they certainly ought to be free to speak, and the supreme court has made it clear they're free to speak. The supreme court also made it clear over 25 years ago that in order to speak you have to reach the audience. And the only way you're going to reach the audience is to raise funds to reach the audience, particularly in an enormous state like yours, with a population currently of what?

MS. OWEN: I -- I don't know --

SEN. MCCONNELL: Over 20 million?

MS. OWEN: Five million people, I think, close to five million people voted in my race.

SEN. MCCONNELL: Yeah, over 20 million people in Texas. You managed to do that in an extraordinarily thoughtful and ethical manner for which you ought to be commended, not condemned. And I think the suggestion that you have in any way been tainted by these contributions is completely and totally baseless -- completely and totally baseless. It -- it just troubles me greatly that you've even been subjected to this criticism because there is essentially nothing that I can find in the record that justifies it.

SEN. FEINSTEIN: Senator, your time is up.

SEN. MCCONNELL: Madam President -- Madam Chairman, I think we are about to the end of our time here anyway, and I'll save the balance of my observations for another round.

SEN. FEINSTEIN: All right. And Senator Hatch, you have a question --

SEN. HATCH: Madam Chair, if I could, I feel compelled to respond to the questions raised earlier about the nominations of Judge Rangel and Enrique Moreno, because these nominations were made when I was chairman of this committee, and I understand those remarks as an attack on my record of fairness. Those -- Jorge Rangel voluntarily withdrew his nomination citing frustration with the pace of the confirmation process. It is interesting to note that his nomination

was pending for fewer in-session days than Justice Owen's. Mr. Wrangler quit after waiting 192 days of Senate business while Justice Owen is here after 212 Senate business days. When Mr. Rangel, President Clinton decided not to allow the Texas Senators Federal Judiciary Advisory Group to review and recommend potential candidates. Instead, President Clinton nominated Enrique Moreno. This put the advisory group in the unprecedented position of interviewing someone who had already been nominated to determine his qualifications. And when the advisory group voted, two-thirds of the voting members opposed the nomination. Now, anyone acquainted with the history of Senate consultation on nominations would fully understand that bypassing the home state senators is not an effective strategy for confirmation. In contrast, Justice Owen enjoys the full and strong support of both of her home state senators, and, of course, many others in a bipartisan way as well.

So, I just wanted to set the record straight because I didn't want anybody walking out of here thinking that -- that there was a lack of fairness.

Thanks, Madam Chairman, for letting me make that point.

SEN. FEINSTEIN: All right. You're welcome.

SEN. HATCH: Could I also put in the record, Madam Chairman, a letter -- a letter to Senator Leahy from -- concerning the Ford Motor case that was raised earlier -- yes, written by Victor E. Schwartz, who, of course, is one of the true authorities on tort law in this country and knows what horn book law really is.

SEN. FEINSTEIN: Without objection. The hearing will recess until 2:15. I earlier said 2:00, but the party conferences generally don't end until 2:15, so we'll make it that. Thank you very much.

END

July 23, 2002 Tuesday
SECTION: CAPITOL HILL HEARING

LENGTH: 19648 words

HEADLINE: AFTERNOON SESSION OF PANEL II OF A SENATE JUDICIARY COMMITTEE HEARING

CHAIRED BY: SEN. DIANNE FEINSTEIN (D-CA)

SUBJECT: NOMINATION OF **PRISCILLA OWEN** TO BE A CIRCUIT COURT JUDGE FOR THE FIFTH CIRCUIT

WITNESSES: PRISCILLA OWEN, NOMINEE

BODY:
SEN. FEINSTEIN: The hearing will come to order. Justice Owen, just a reminder: You are still under oath. And we will resume the first round of questioning. I would remind the committee that we'll recess for any floor votes that occur during the remainder of the day. And once again we're following the early-bird order, and it begins with Senator Kennedy; after Senator Kennedy, Senators DeWine, Feingold, Sessions, Schumer, Brownback, Durbin, Cantwell and Edwards is what I have so far.

Senator Kennedy.

SEN. EDWARD KENNEDY (D-MA): Thank you very much, Senator Feinstein. Welcome, Judge Owen.

MS. OWEN: Thank you.

SEN. KENNEDY: I apologize not being here earlier. I was here in the very beginning of the hearing. We're, as you have heard, considering the prescription drug issue. And as the floor manager of that, I needed to be on the floor. So I'm going to ask questions and then, with permission of the chairman, submit some follow-on questions. But I'd like to cover, if I could, in the time that I do have, two areas. As I look at your cases, I see that you have a pattern of siding against the consumer or the victim of personal injury in favor of business and insurance companies. And I'm struck by the fact that when the court does rule in favor of consumers or victims of personal injury, you're frequently in dissent.

In a few instances you've gone along with the majority of the case and ruled in favor of injured individuals. But looking at the information over the last three years, you've dissented almost half the time that a consumer wins. And you've never dissented from a case in which the consumer loses.

Do you disagree that you're among the most likely on the Texas Supreme Court to dissent from favoring -- cases favoring a consumer or injured plaintiff?

MS. OWEN: No, Senator, I don't. I judge each case on its merits. I'd like to address one thing you said. One case that comes to mind where I was in the dissent in favor of the plaintiff was Sands versus Fidelity Guaranty, or I'm not sure what comes after Fidelity.

But it was a workers' compensation case, and the woman entered into a settlement agreement of her workers' compensation claim and she ultimately claimed that she was fraudulently induced into it and claimed damages for bad faith. And I agreed with the majority of the court that the

bad-faith claim couldn't stand. But I dissented because she should have been entitled to rescind that settlement agreement and go back and reassert her original workers' compensation claim. That's one that comes to mind. I can go back and --

SEN. KENNEDY: Let's take the example where the majority found -- over the objections of the majority. Have you ever dissented over the objections of the majority and found for a consumer of plaintiff? Do you have any recollection of any cases?

MS. OWEN: Well, that would be one of them, the Sands versus Fidelity.

SEN. KENNEDY: That wasn't a majority case.

MS. OWEN: I was in the dissent in that case. You're asking me if I've been in the majority for consumers?

SEN. KENNEDY: Any time that -- can you point to a case in which you stood up for a consumer or individual plaintiff over the objections of the majority?

MS. OWEN: Well, there's --

SEN. KENNEDY: That is, a case in which the consumer lost and you dissented.

MS. OWEN: Well, I think the Sands case that I just described is one of them. I think there are probably others. Again, there are 900 of them. I don't remember them all. But I could go look.

SEN. KENNEDY: Well, if you could be good enough to provide some of those.

MS. OWEN: Now, I've certainly voted -- there are a number of opinions where I have -- obviously the consumer has recovered and I joined those opinions.

SEN. KENNEDY: In the past two years, the Texas Supreme Court has ruled on cases brought under the Texas Parental Notification Act, and the law passed by the state legislature in 2000 permits the young woman to have an abortion without notifying her parents if she proves, by a preponderance of the evidence, that she's mature and sufficiently well-informed to make the decision or if notification would not be in her best interest or if notification would lead to physical, sexual or emotional abuse.

Many, if not most, would describe members of the Texas Supreme Court as conservatives. And as cases have come before the court, it's clear that its members have struggled with the task of restraining their personal beliefs on abortion and parental notification to ensure they adhere to the letter of the law.

In fact, former Texas Supreme Court member, current White House Counsel Alberto Gonzales,

wrote, "I cannot rewrite the statute to make parental rights absolute or virtually absolute, particularly when, as here, the legislature has elected not to do so. However the ramifications of such a law and the results of the court's decision here may be personally troubling to me as a parent, it is my obligation as a judge to impartially apply the laws of this state without imposing my moral view on the decisions of the legislature." That's all his quote.

Now, Justice Owen, a majority of the court have applied the plain language of the parental-notification statute to the relevant cases and they have refrained from legislating from the bench and placing new hurdles before young women who are already required to meet the stringent standards required by the statute.

On the other hand, you've repeatedly tried to impose new standards, standards not found in the statute, on the young women whose cases come before you. For example, you'd require young women to meet unusually high standards to prove "the direct, clear and positive," quote, proof of abuse instead of showing that the notification may lead to abuse.

Your standard is so high that four of your colleagues wrote, "Abuse is abuse. It is neither to be trifled with nor its severity to be second-guessed." Similarly, you would require a minor to exhibit an awareness of religious issues. In no place does the statute require such a showing.

So, Justice Owen, you seem to be making, not interpreting, the law. And, in fact, many might call your actions on the court activist. Can you tell the committee why, if you believe that your views reflect the plain language of the statute, you have been unable to persuade a majority of your colleagues to interpret the statute such that it includes the additional hurdles that you've grafted onto the parental-notification law?

MS. OWEN: Senator, obviously my court disagreed. We divided up initially on these cases. I -- let me go back and address the "clear, direct, positive." That was not the standard that -- the statute says "abuse may occur." And I looked for a definition of emotional abuse in another piece of the same family code. And I didn't say that you actually have to have that, but I said that's the definition of abuse if it may lead to that. That's all I was saying there.

The "clear, direct evidence" piece comes in to -- that's our standard of review as an appellate court, not in the trial court; not in the trial court. In the trial court, the burden of proof is preponderance of the evidence. And if there's some evidence to support what the trial court did, that's that.

But on appeal, if the trial court denies the minor the bypass, and even if there's no evidence to support that denial, she still must, under established law that the majority agrees with, she must still establish, by clear, direct evidence that's unequivocal as a matter of law, that she's entitled to that bypass. And a majority agrees with that. It's in our case law. That's just the standard of review, for her to establish, is a matter of law. She's entitled to it on appeal. That's not the standard that would be applied in the trial court.

SEN. KENNEDY: Well, are you saying that the four justices didn't have a different position than you had on this particular case?

MS. OWEN: I'm saying there are two different inquiries. In Doe I, I differed with the majority. I said that there are other factors that ought to be considered in deciding whether a minor is sufficiently informed. And once Doe was over, that was the standard that I applied in every case thereafter.

A separate issue that we don't disagree on --

SEN. KENNEDY: These are other factors in the law? You were looking at the law and you found that there were other aspects of the law that you noticed that the other judges did notice?

MS. OWEN: I looked, again, at everything that the U.S. Supreme Court had said, that it's okay for states to include in ensuring that a minor is sufficiently well-informed to make this decision without the knowledge of either of her parents. There are factors that appear in at least three Supreme Court cases that I thought the legislature intended to reference when they used the word "sufficiently informed and mature."

And so I was looking, again, at what the U.S. Supreme Court had said in this whole area about being informed and being mature. The court did not agree with me. But after Doe I, I applied the court's standards that they pronounced. And then this "clear, direct evidence," it's not tied to the statute. That's an appellate standard that the majority agrees with. That's just -- she's not entitled to a bypass in our court unless she establishes in the record the evidence established by clear, direct, positive testimony, free from doubt, as a matter of law, she had met the standard.

SEN. KENNEDY: Well, if you had that, do you have the same ruling today as you had at that particular time? Do you still read that the way you did at that particular time?

MS. OWEN: No, Senator, I apply the -- after Doe I, in all the other Doe cases that have come up involving "mature and sufficiently well-informed," I apply the same -- I only look at the same factors that the court did. The big controversy the second time Doe came up was whether there was any evidence at all to support what the trial court did.

And I said it was a close case, but I said the trial court was actually there on the ground. He saw -- he or she saw the minor testify, judged her credibility. And I think maturity is something that's particularly hard to do from a cold record. And I said there's some evidence, even though it's close, to support what the trial court did. And under appellate standards of review, I felt I was bound to uphold what the trial court did, even though I might have ruled a different way had I been on the trial court.

SEN. KENNEDY: Madam Chair, I thank -- my time is up. I'll have a chance to examine this

record further, but I'm troubled by this conclusion. Thank you.

SEN. FEINSTEIN: Thank you very much, Senator Kennedy. Senator DeWine.

SEN. MIKE DEWINE (R-OH): Justice Owen, thank you for being with us. I want to clarify something, to follow up on Senator Kennedy's questioning. You do now follow Roe I.

MS. OWEN: Yes. That's -- yes.

SEN. DEWINE: That is the law of Texas today.

MS. OWEN: It is the law.

SEN. DEWINE: And you have followed that ever since Roe I was decided. Is that correct?

MS. OWEN: Yes, Senator.

SEN. DEWINE: Now, in Roe I, both the minority and the majority were trying to decide what guidance to give the trial court.

MS. OWEN: Yes.

SEN. DEWINE: Isn't that correct?

MS. OWEN: Yes. We were trying to --

SEN. DEWINE: And isn't it correct that the only dispute was what guidance to give? It wasn't a dispute over whether you were going to give guidance.

MS. OWEN: That's correct.

SEN. DEWINE: And, in fact, isn't it true that the majority did give guidance to the lower court?

MS. OWEN: They did.

SEN. DEWINE: And that's the guidance that you follow today.

MS. OWEN: That's correct.

SEN. DEWINE: There are a number of rules of construction that courts apply when interpreting a statute. Isn't it true that one of those rules is that a legislature is presumed to be aware of United States Supreme Court precedent in an area in which it has passed a statute?

MS. OWEN: That's where the standard presumption is in statutory construction.

SEN. DEWINE: Basic rule of construction, the courts will follow.

MS. OWEN: Yes.

SEN. DEWINE: So in the case of the Texas parental-notification statute, the Texas court's presumption would be that the Texas legislature was, in fact, aware of Supreme Court precedent when it crafted its judicial-bypass process.

MS. OWEN: Yes, Senator. And we all agreed on that. The majority agreed that that was true.

SEN. DEWINE: Now, I'm looking at the end of Section -- Roman numeral IV in the Texas Supreme Court's majority opinion in the first Jane Doe case. In Section 4, your court's majority is discussing a line of U.S. Supreme Court cases on parental bypass, starting with Bellotti. Your court majority concludes, and I quote, "Our legislature was obviously aware of this jurisprudence when it drafted the statute before us," end of quote.

So you weren't alone in your conclusion that the Texas legislature drafted the parental-notification statute with the Supreme Court case in mind, were you?

MS. OWEN: No, sir.

SEN. DEWINE: The majority had the same opinion.

MS. OWEN: They did.

SEN. DEWINE: Let me really get back to basics in regard to this issue. I want to go back to the statute that was passed by the Texas legislature in this area. And I will quote from it. When a minor files this application for a bypass -- in other words, saying, "I do not want either one of my parents notified" -- and this is, in fact, a minor we're dealing with -- "When a minor files such an application, the court shall determine" -- I'm quoting from the statute -- "by a preponderance of the evidence, whether, one, the minor is mature and sufficiently well-informed to make the decision to have an abortion performed without notification to either of her parents, or, two, notification would not be in the best interest of the minor, or, three, notification may lead to physical, sexual or emotional abuse of the minor."

And the statute continues. "And if the court makes any of these determinations" -- that's my emphasis -- "any of these determinations, the court shall enter an order authorizing the minor to consent to the performance of the abortion."

So -- now, as the Supreme Court, you're not the trier of fact, are you?

MS. OWEN: No, we're not.

SEN. DEWINE: That is the lower court, the originating court.

MS. OWEN: Yes.

SEN. DEWINE: And in Texas, you have three layers?

MS. OWEN: That's correct.

SEN. DEWINE: Okay. So before that case gets to you -- any of these, what, 10 cases, 12 cases?

MS. OWEN: Well, there were 10 girls.

SEN. DEWINE: Whatever they were -- about that. Before they got to you, the trier of fact had already determined that none of these three items applied, because if any of them would have applied, the trier of fact, who was watching the witness, who was talking to the young lady, who was taking all the circumstances into consideration, if that trier of fact had found any of these three, that case never would have got to you, would it?

MS. OWEN: That's correct.

SEN. DEWINE: Now, is it my understanding, under Texas law, that once a lower court makes that determination, that ends the case --

MS. OWEN: That ends the case.

SEN. DEWINE: -- because there's no one to appeal the case?

MS. OWEN: That's correct. There's no one to --

SEN. DEWINE: The plaintiff has won or the person who's filing, the young lady who's filing, her lawyer, they've won the case.

MS. OWEN: And the statute specifically says there's no appeal from a grant of the bypass.

SEN. DEWINE: So before these cases get to you, the lower court has found all three or has found that none of the three apply, then an appellate court has gone through and done a review.

MS. OWEN: That would be a three-judge panel.

SEN. DEWINE: Three-judge panel. That's how it works in Texas. All right. Now, as all lawyers know and judges know, and I think many people know, when a case gets to an appellate court,

such as your Supreme Court, you're not retrying that case.

JUSTICE OWEN: No, Senator, we're not.

SEN. DEWINE: And there are different standards. The majority came down with one standard. You came down with another standard of review. Those standards are not very dissimilar. Those are -- what are the basic standards?

JUSTICE OWEN: Well, in terms of the factors on --

SEN. DEWINE: Yeah, what are you looking for to overturn a case? What do you have to find?

JUSTICE OWEN: On the "mature and sufficiently well-informed," there are two things. You first have to conclude that there was absolutely no evidence to support the trial court's failure to find. But then you also have to take the second step and look at the evidence and see if the minor established, from clear, direct, convincing evidence -- I may not be quoting exactly, but it's in the majority opinion -- and there's no factual dispute at all, before she's entitled to a bypass --

SEN. DEWINE: That is the law in Texas today.

JUSTICE OWEN: Yes.

SEN. DEWINE: That, though, in a sense, is not totally dissimilar to what we have in many appellate cases, where the basic principle of law that we have in this country is that we give deference to the lower court, the trier of fact, whether it is a jury or whether it is a judge who is -- has the opportunity to watch the witness, has the opportunity to judge the demeanor of the witness on the stand, has the opportunity to take all the totality of circumstances into account, isn't that true?

JUSTICE OWEN: That's correct.

SEN. DEWINE: So I think, Madam Chairman, it seems to me that when we look at and judge these cases, these parental notification cases, it seems to me that as we see whether or not these have any bearing on this justice's qualification to sit on the federal bench, it's good for us to be mindful of the fact that all appellate courts give a great deal of deference to the lower courts, that all appellate courts understand that the trial court judge has his job or her job, and they are the ones who are looking at the witnesses. And it would seem to me that particularly when we're dealing with such a very delicate case, and a case where the understanding of the young lady involved is so important, and what -- not just she has been told but what she truly understands, that the trial court judge is in a unique position to make -- make that decision. And I think that we all should consider that as we look at these cases.

Thank you very much.

SEN. FEINSTEIN: Thank you, Senator DeWine. Senator Feingold, you're next.

SEN. RUSSELL FEINGOLD (D-WI): I thank the chair. Welcome, Justice Owen.

JUSTICE OWEN: Thank you.

SEN. FEINGOLD: Justice Owen, the independence of the Texas Supreme Court has recently been attacked for allowing its law clerks to accept large bonuses, as much as $45,000 from law firms that law clerks plan to join after completing their clerkships. And the potential for a conflict of interest here is very real and serious, I think. The clerks review and express opinion on cases brought by or against the firms paying their bonuses. I'm told this issue provoked an investigation by the Travis County attorney into whether the practice violates Texas criminal law. The Texas Ethics Commission ruled last year that the bonuses could be in violation of the state's bribery laws. In response, the supreme court issued new guidelines concerning these so-called clerk perks. I'm told that you, however, defended the clerk perks and dismissed the criticism as a, quote, "political issue that is being dressed up as a good government issue," unquote. Why do you believe that this was simply a political issue and not a genuine issue of ethics, fairness and independence of the judiciary?

JUSTICE OWEN: Senator, I'm glad you asked that question because, first of all, my quote, I do -- I do think I said it was a political issue, I don't remember the second part of it. But let me give some background, if I may, on the entire clerk issue. First of all, the -- there -- the investigation was not of my court or any judge on the court. That was an issue between the employers and the law clerks. The court or the justices were never under any kind of scrutiny at all from the criminal law standpoint. But this is a long-standing practice that I would say many if not most federal district courts, federal circuits, and I think even some judges on the U.S. Supreme Court -- law firms around the country typically give so-called "clerkship bonuses," to their lawyers who take their first year of practice and clerk for a court, not just my court, as I said federal district courts, federal courts of appeals, U.S. Supreme Court, and nobody -- that was a practice that's been around for a long time. Every -- since -- ever since I've been at my court, I mean, everybody -- it was a clearly understood rule, and certainly a hard and fast rule in my chambers, that if you had clerked for any law firm, if you were even thinking about taking a job offer from any law firm, you were completely recused from all of their cases permanently, as long as you were an employee of the court. You don't get near that file. You didn't work on memos, or when matters touching that case were brought up in conference, you'd have to leave the conference room so that there's just no opportunity at all for a law clerk that has any connection or any potential connection as an employee with a law firm to come into contact with those files. So --

SEN. FEINGOLD: So, the clerks have recused themselves in each of the cases?

JUSTICE OWEN: They have. And we -- we -- that's a -- that's been a rule for years, as far as to my knowledge --

SEN. FEINGOLD: Let me -- I appreciate that background. Let me just return to my original question. Do you believe this is a simply political issue, or is it also a genuine issue of ethics, fairness, and independence of the judiciary?

JUSTICE OWEN: The reason I said it was a political issue is because it was only my court that was singled out, this practice -- they didn't criticize the federal courts. They didn't criticize any of the lower state courts of appeals who do it. They didn't criticize the criminal court. And they didn't criticize the U.S. Supreme Court. It was just my court that was singled out by a group who routinely issues press releases accusing my court of ethical violations.

SEN. FEINGOLD: Well let me ask you more broadly then, the broader practice, is it a -- simply a political question or is it a question of whether this creates potential problems, a legitimate question of ethics and fairness?

JUSTICE OWEN: I didn't think because of the way we always structured the clerkship program that it was an ethical issue because it was such a well-settled, long-standing practice, and because these clerks had no access whatsoever, I didn't think it was an ethical issue. The way it was resolved is, not -- again, this is mainly an issue between the employers and our clerks, not the court -- but we did say, put in new rules so that the clerks would be absolutely clear, wouldn't inadvertently get in trouble with anyone. We said -- the authorities said that if they could take the clerkships over -- their bonus over a period of a year after they leave the court. They -- it was -- it was -- they still get the bonus, it's just a question of timing.

SEN. FEINGOLD: I appreciate those answers. Let me turn to a different question. I understand that you are a member of a local church in Austin, Texas, the St. Barnabas Episcopal Church.

JUSTICE OWEN: I am.

SEN. FEINGOLD: According to Alliance for Justice, in 1998, while you were a sitting justice, you lobbied then-governor George W. Bush with a private meeting with your pastor for state funds for an evangelical prison ministry program, Alpha Prison Ministries. Now, according to Jose Juarez, a law professor at St. Mary's School of Law in Texas, this conduct is in -- a violation of Cannons 1, 2, 2(a), 2(b), 4(a), 4(b), 4(c) and 5 of the Texas Code of Judicial Conduct. Cannon 2(b) states that a judge, quote, "shall not lend the prestige of a judicial office to advance the private interest of the judge or others," end of quote. Cannon 4(c) states that a judge, quote, "shall not solicit funds for any educational, religious, charitable, fraternal, or civic organization," unquote. Professor Juarez concludes by stating, quote, "Any Texas judge should have known that such a meeting would violate the Texas Code of Judicial Conduct." Could you please explain why you held this meeting in violation of the letter and the spirit of the Texas Code of Judicial Conduct?

JUSTICE OWEN: Well, Senator, I respectfully submit that I didn't violate any ethical code at all.

I facilitated a meeting between my pastor and then-Governor Bush to ask if -- for my pastor to ask him if he would consider allowing a prison ministry, headed up by my church, in a -- in a prison. No state funds were asked for whatsoever. This -- the whole prison ministry was -- didn't cost the state any money. It was totally voluntary on the prisoners' part. They didn't get any special perks or any special treatment if they took part in the prison ministry. It was a small group of people, as I understand it -- I didn't participate -- but as I understand it, who ended up going to the women's prison in Barnett, Texas on Friday evenings for a period of I think six weeks or so to do this prison ministry. It didn't cost -- again, no funds were involved. It was simply, on Friday evenings -- again, as I understand it, (Justice ?) is here, he can give you the details if necessary, but --

SEN. FEINGOLD: So, there was no solicitation for funds at all?

JUSTICE OWEN: Absolutely none.

SEN. FEINGOLD: And that's why it's your contention that none of the cannons of ethics were violated?

JUSTICE OWEN: That, and the fact that although I am a judge, I am also a friend of then-Governor Bush, and we had discussed some of these issues, some of our respective beliefs before, and I had told him about my pastor. And I guess in my mind it was more friend-to- friend as opposed to judge-to-governor, but in either event, even if I had had my judge hat on, no fund -- no funding was involved at all. And it wasn't a lobbying effort, it was simply a -- would you consider letting us do this prison ministry?

SEN. FEINGOLD: I appreciate your answers to my questions, Justice.

JUSTICE OWEN: Thank you.

SEN. FEINSTEIN: Thank you, Senator Feingold. Senator Sessions is not here. Schumer, Brownback, and Senator Durbin, you're next up.

SEN. DURBIN: Thank you very much, Madam Chair. Justice Owen, thank you for joining us. I have followed in the news reports a suggestion that the Texas Supreme Court has changed rather dramatically over the last 10 or 15 years. There have been suggestions that because of active political campaigns that those justices now serving on the court, at least a substantial majority, are certainly more sympathetic to business interests, and corporate interests, and insurance company interests than previous courts. In fact, some national news programs have suggested that it is nothing short of a statewide, coordinated, long-term campaign for those interests to make certain that they are well-represented on that Texas Supreme Court. Have you heard these same press reports?

JUSTICE OWEN: Certainly.

SEN. DURBIN: Do you believe they are true?

JUSTICE OWEN: No, Senator, I don't.

SEN. DURBIN: And so you would say that the court is -- how would you describe the court today?

JUSTICE OWEN: I would describe it as I think some of our colleagues in other states have described it, as a very good court. The justice -- a justice on the Massachusetts court has said when they start looking at common law issues in particular, they start with the Texas Supreme Court because our opinions are well researched and thoroughly reasoned. That's where they start.

SEN. DURBIN: And on -- on the court itself, where would you place yourself on the spectrum -- more conservative than the majority, or in the center position, or more liberal?

JUSTICE OWEN: Senator Durbin, I -- I frankly don't -- I don't think it's very instructive to imply -- to apply words like conservative or liberal in terms of judging. I don't take a political viewpoint into my chambers or on to the bench when I judge cases or as I am sitting there reading the briefs.

SEN. DURBIN: Well, let me ask about a few of those cases to see if I can deduce my own conclusion from them. Let me ask you just directly, what is your position on abortion?

JUSTICE OWEN: My position is that Roe v. Wade has been the law of the land for many, many years. Now it's modified by Casey. And I -- none of my personal beliefs would get in the way of me applying that law or any other law.

SEN. DURBIN: And yet if someone were to take a look at the opinion that -- opinions that you've written on the parental notification statute in Texas, they would find, would they not, in the overwhelming majority of cases you have decided against allowing a minor to go forward with an abortion procedure under Texas law.

JUSTICE OWEN: Senator Durbin, there were -- there were only five girls that my -- my court has written on. And out of those five cases, I voted to grant the bypass in one case. And the first time that they came to the court in the other two, I voted to remand those cases to the trial court so that Jane Doe 1 and Jane Doe 2 could each get another shot at getting the bypass. And if the trial court had granted the bypasses a second time, that would have been the end of it. When the second time Doe 2 came back, I said it was a close call, but based on the record I had -- I felt like I had to go with the trial court's call. In five of the cases, as I think I talked about earlier, they came up to the court and without opinion the court affirmed the lower court. As I said, that would take at least six votes. There were not public dissents. If there had been, they would had to have -- all the judges would have had to have noted where they lined up. And I think it's a fair

assumption, given -- given the amount that occurred on the other five cases that if they had been close cases we would have written on them. So, we're talk --

SEN. DURBIN: Is it not true that you've ruled against judicial bypass in every opinion you've offered -- authored, in 13 of the 14 cases you've considered on the court?

JUSTICE OWEN: Yes sir, that's -- that's -- I voted in the first two cases -- I didn't say she doesn't get the bypass, I said she gets another chance to convince the trial court that she should get it --

SEN. DURBIN: Do you understand --

JUSTICE OWEN: -- and then I granted the bypass, I voted with the court with Doe 10 to outright grant the bypass.

SEN. DURBIN: Do you understand the timeliness of the decisions that the courts are making in these cases?

JUSTICE OWEN: The timeliness?

SEN. DURBIN: Yes.

JUSTICE OWEN: As soon as they come in, we drop everything and deal with these.

SEN. DURBIN: And remanding them for another court review --

JUSTICE OWEN: It's within two days. We told them that you've got two business days under the statute to resolve it.

SEN. DURBIN: In Jane Doe 2, you wrote in your concurrence, "the court has omitted any requirement that a trial court find an abortion to be in the best interest of the minor." The law says that the notification has to be in the best interest of the minor. Could you tell me where you came up with the notion that the legislature required that the abortion be in the best interest of the minor?

JUSTICE OWEN: Yes sir, I can. The -- that's directly out of the U.S. Supreme Court case that said we construe notification to mean notif -- that -- I'm sorry, notification, best interest to mean that abortion without notification is in the best interest, and it's straight out of a majority opinion from the U.S. Supreme Court.

SEN. DURBIN: I find in each of these cases, though, that you have tended to expand and embellish on the state legislative decision in Texas. Now, Senator Gramm, your sponsor, one of your sponsors today, has said that he thinks the Texas legislature was trying to take three sides on a two-sided issue. That's a statement that's fairly critical of this legislature. Clearly, they have

taken a position, and I take it from what you've said to us today that these court decisions, where you consistently find problems with the Texas parental notification statute, you're saying don't reflect any opposition on your part to a woman's right to choose?

JUSTICE OWEN: No, Senator, I don't think they do. Again, the -- the exact language that's in the statute, best interest, that exact same language was construed by the U.S. Supreme Court to mean that the abortion without notification was in the best interest. Sir, I followed what the U.S. Supreme Court had construed that to mean. And I thought that was a reasonable construction given that the legislature had taken the language out of -- if not that very case, it may have been that very case --

SEN. DURBIN: I'll have to say that I've been on this committee for a few years, and the issue of judicial activism has arisen when there were Republican chairs and Democratic chairs. And I have come to conclude that it is in the eye of the beholder that Republicans only want judges who are actively pursuing their agenda, and Democrats only want judges actively pursuing their agenda. I don't think it is an objective standard that is being used here. And so the term is being used back and forth here.

What I am looking for really are some fundamentals in terms of your philosophy. I believe the president has a right to fill vacancies. But I also believe the people of this country, and certainly the people in this circuit that you are aspiring to, deserve judges who are going to be moderate and centrist, and try to be reasonable and balanced in their decision-making.

Let me go to a specific case, if I can for a moment.

JUSTICE OWEN: Senator, before we leave this area, can I make one point on this activist in this whole area of a woman's right to choose? Two cases that have come before my court that I would like you to be aware of -- one, I believe it was Sepulveda v. Krishnan. In that case the question was can a mother and a mother recover damages for the death of a fetus. And I think you can see the implications in all this debate over that particular issue. And my court had for many years construed the Texas wrongful death statute and the survival statute to say, no, you cannot recover for the death of a fetus. We were asked to reconsider that construction, and we pointed out that the vast majority of states now allow recovery in those circumstances. But I agreed with the majority that, no, that had been Texas law. We are not going to change it. You cannot recover for the death of a fetus. That's the law in Texas.

SEN. DURBIN: I'm sorry to interrupt you, but I have very little time here, and if you'd like to submit something along that point of view, I'll be happy to consider it.

I want to go to one specific case though, the Provident American case -- versus Castenada -- do you remember it?

JUSTICE OWEN: I do.

SEN. DURBIN: I read this case, and read your decision, and I often wondered how a court could come down, as you did, writing a majority opinion here in a case involving coverage on a health insurance plan where frankly the insurance company decided to try to find anything it could in its policy to avoid paying for a critical surgery that was needed by this family. In fact, you came down and found on the side of the insurance company, and said that there was an exclusion out of their policy. The dissent that was written in this case by Justice Raoul Gonzalez I think went to great lengths to point out facts that you chose to ignore. You said the court sustains -- let me find this -- the court ignores important evidence that supports the judgment, emphasizing evidence and indulging inferences contrary to the verdict -- resolves all conflicts in the evidence against the verdict for the family that was denied coverage. And it goes on to say, "I want to recite the facts the court chooses to ignore in its decision."

The reason I raise this issue -- and Justice Gonzalez was very forthright in believing that this was a slam-duck for the insurance company, that they got an opinion from you that he didn't believe was sustained by the policy or the evidence. In fact, he said he thought with your opinion you were destroying the bad faith tort in the state of Texas.

Going back to my original point, I think it is fairly well known that the Texas Supreme Court is much more conservative today than it once was, that it was an all-out effort by major corporations and by insurance companies to try to build a majority on that court. And as I read this decision, sometimes it's hard for me to imagine how someone in good faith can look at the facts as in this case and basically say to a family, after they had preapproval for a surgery, that an insurance company could come in and say no, we are not going to cover, and then have a Supreme Court in Texas stand behind them, and say to the family, You're out of luck -- they found a little provision in the policy here -- you're not covered. This troubles me, because frankly that kind of a finding reflects a philosophy that does not tell me there is a well balanced approach here. And certainly Justice Gonzalez felt the same in his dissent. And I invite you to comment.

JUSTICE OWEN: Thank you, senator, I really do appreciate the opportunity, because this case was not about coverage. They were covered. The only dispute here was bad faith. These people were covered under their policy. They got their attorney's fees for breach of contract, and they got either 12 percent or 18 percent penalty under the statute -- I can't remember which one applied at the time. They lost on the coverage question -- no doubt about it. That was not the issue in front of my court.

The issue was whether in addition to their coverage -- their full policy limits, plus attorney's fees, plus the penalty -- could they recover extra contractual damages for bad faith? And the standard there is that the insurance company had absolutely no reasonable basis whatsoever to deny the coverage. And the facts in this case were the family had two children who had been jaundiced all of their lives. They called up an insurance company and applied for a policy, after their uncle had told them that he had a hereditary blood disease called HS. The policy had a 30-day waiting period, and they didn't disclose to the insurance company anything about the hereditary disease.

Three days after -- or maybe it was two --

SEN. DURBIN: Three.

JUSTICE OWEN: Three days after the 30 days had run they took their children to a physician who on the spot diagnosed this hereditary disease and removed their -- I believe it was their spleen. So the question was under those circumstances -- not should the insurance -- could they deny coverage? -- but is there any reasonable basis for them to delay in paying policy limits? And we have said under all those circumstances that you can't say that there was no reasonable basis to delay. But they were covered. That was not the issue.

SEN. DURBIN: I could tell you that -- I think we are carping on a trifle here as to whether they're covered. The fact was the insurance company approved the surgery, did they not, before it took place?

JUSTICE OWEN: Yes.

SEN. DURBIN: And the fact is the insurance company then refused to pay. And you were arguing in your majority opinion here on behalf of the insurance company that waiting the three days after the 30-day period was not enough; that these -- that this family was deceiving the insurance company -- was operating in bad faith. And I think Justice Gonzalez and Justice Specter (ph) make a compelling argument here that the facts just don't come up that way. I have represented insurance companies. I have represented plaintiffs. You were the answer to the insurance company's prayer if you would buy this argument, if you would turn on a company -- turn on a family that is facing this kind of peril and make this kind of interpretation. And that is what troubles me about what you are asking for, is to be elevated to a court where you can make significant decisions involving insurance companies and major corporations, which I am afraid if you follow the logic, as you did in the Provident case, would not be in the best interests of serving the people and the court. Thank you for being here. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you very much. I don't see other senators here at the moment, but I thought I might just say something. I am deeply concerned, because I've read all the Doe cases, and I've read the notification law. And the notification law is pretty straightforward. One, the minor is mature, sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or managing conservator or guardian; or the notification would not be the best interests of the minor; or notification may lead to physical, sexual or emotional abuse of the minor. That's it's. And any one of the three factors has to be present. That's it. It seems to me on that basis you make a decision. But you really haven't done that. You've looked in other places, it seems to me, to find a rationale not to do what the Texas law called for -- you know, invoking a religious implication, invoking concern about the fetus, invoking, Well, the emotional wrongdoing was just threatened by the parents -- it may not have happened. It seemed to me that you -- maybe this is what being an activist means -- that you worked to come out where you came out in your opinion. And that's a very deep concern,

because if the Texas legislature wanted to change "may" to "must," they could have. They could have said, "notification must lead to physical, sexual, or emotional abuse of the minor," but they didn't. They said it "may," which means it either may or may not. And this I find troubling.

Now, I had some Texas lawyers come to me who were consumer lawyers. And they said their concern was they didn't believe they could ever get a fair shot in your courtroom. And that was in ten years of serving on this committee no one has ever said that before. And the case that Senator Durbin just raised, which I was going to mention as well, the fact is that there was a judgment. The fact is that the family was entitled to coverage. But your invalidation of the trial verdict completely threw out their entire reward. And, again -- I mean, the law is there for little people. This is the remedy for little people, not for the providence of the world certainly have the right to be taken at face value. But what disturbs me is it's in so many places in these notification cases, in these health benefit cases, in other consumer related cases, in the Searcy (ph) case. These are people very much harmed, and their redress was cut off. Could you respond to that?

JUSTICE OWEN: Yes, senator, I would like to. You know, there are a lot of cases that come before our court that I think tug at all of our hearts strings. And that's part of being a judge sometimes. But, again, I have committed and have got to apply the law, and there are guiding principles in contracts, in the bad faith area and other areas that have to dictate what the law says. Again, in the Castaneda case, let me emphasize it was not about their insurance coverage. They won on the coverage issue. They got all of their policy benefits. They recovered attorney's fees. There's a statutory penalty in Texas if the insurance company doesn't timely pay -- and I am assuming that they recovered that statutory penalty. The issue in my court was not policy benefits. The issue in my court was do they get extra contractual benefits for bad faith, which is a common law tort or sometimes it's brought under a statute, Article 2121. So we weren't -- it was not a coverage issue. They did get their policy benefits.

On the parental notification cases, let me make clear that I never advocated in my opinion or anywhere else that a young girl has to have religious beliefs of any type at all. I -- you know, I said, as the U.S. Supreme Court has said, these are weighed decisions, and that a minor ought to exhibit some awareness that there are philosophical, and moral, and religious issues out there. And I hasten to add if she doesn't have any, it's not an inquiry what they are -- simply that if she has those beliefs, has she thought about them, has she considered them? Has she considered the philosophical and social and moral arguments whether she agreed with them or not? Just an awareness that they exist. She doesn't have to adhere to any particular viewpoint. She doesn't have to explain or justify her viewpoint or her philosophy or her moral stance, or whether she has religious beliefs. The U.S. Supreme Court has said, and I tried to apply that, that it simply -- she needs to exhibit some awareness as a mature person, an adult -- you would hope an adult would exhibit - that there are at least these arguments out there on both sides, and that she's aware of both sides -- not that she agrees with it or again has to justify any of this.

And, again, the -- I really do -- I did think that given that the legislature had lifted word for word what mature and sufficiently well informed meant, best interests and all of this out of a statute

that had been -- from another state that had been approved by the U.S. Supreme Court, that they were trying to adhere to all of that precedent. And sooner -- I think it's hard. If I were a trial judge and I was told, Well, decide if she's mature -- decide if she's sufficiently well informed -- well, without some guidance I think you are going to get varying results around the state, What does that mean? So I think it was necessary for my court to speak, so that girls in West Texas wouldn't be held to a different standard that girls in East Texas were. My court ultimately -- I didn't totally agree with the majority on every aspect, but I did my best to adhere to what I thought the legislature intended. It was not anti anything, it was not activism. Once the court made its decision in Doe, those are the factors, and I abide by that.

SEN. FEINSTEIN: Well, I believe that this completes the testimony. Is there any -- I am going to adjourn the hearing, and we have two other --

SEN. : (Off mike.)

SEN. FEINSTEIN: Oh, we have more people coming? I would recess for the vote then and go down and vote, and just ask you to forbear, if you don't mind.

JUSTICE OWEN: Okay, not at all, senator.

SEN. FEINSTEIN: So we'll take a brief recess. Thanks everybody. (Sounds gavel.)

JUSTICE OWEN: Thank you.

(Recess.)

SEN. FEINSTEIN: (Sounds gavel.) The hearing will reconvene. And next on the list, Senator Schumer, then Brownback, Cantwell, and Edwards.

JUSTICE OWEN: Madam Chair? Before we proceed, can I amend an answer?

SEN. FEINSTEIN: Certainly. Go right ahead.

JUSTICE OWEN: It was regarding the Provident American v. Castaneda case. I remembered that it was the only issue in front of my court was bad faith, and I had thought -- I incorrectly remembered -- I just assumed that they had won on the contract claim in the trial court, and that was not in front of us. I was right that the contract --

SEN. FEINSTEIN: Are you talking about Castaneda now?

JUSTICE OWEN: Yes.

SEN. FEINSTEIN: All right.

JUSTICE OWEN: I was right that the contract claim was not in front of us. They never pled breach of contract or asked for any refindings on breach of contract. They only sued on a bad faith denial of the claim. So I was wrong. It was incorrect -- I had not read the case in quite a while -- that I said that they recovered their contract damages. They just never pled that. They were seeking solely a so-called bad faith claim under the Texas Deceptive Trade Practices Act and under the insurance code. They were statutory claims -- not under the policy but so-called extracontractual claims.

SEN. FEINSTEIN: Yes. And but they did not get the extra contractual claims?

JUSTICE OWEN: That's correct, they did not get the extra contractual --

SEN. FEINSTEIN: But they did get the surgery paid for?

JUSTICE OWEN: Well, that's my -- I thought they did, but they never pled --

SEN. FEINSTEIN: They did not?

JUSTICE OWEN: No, because they never asked or pled for policy benefits under the contract.

SEN. FEINSTEIN: So then they got nothing?

JUSTICE OWEN: They -- as it ended up, because they didn't ask or plead in the trial court, or ask for the jury to find breach of contract of the policy, we didn't have that in front of us, so we couldn't grant that for them. In other words --

SEN. FEINSTEIN: Didn't the trial court grant it?

JUSTICE OWEN: No, senator, they never pled it. They went solely on noncontractual claims. They never pled in the trial court, or asked the jury to find if the insurance company owed the policy benefits under the policy. And I don't know why that was. And I had just assumed that the only thing that they had -- I assumed they had gotten the contract benefits, because I knew the only issue in front of us was bad faith. But as I reread -- someone handed me the opinion during the break, and they just didn't ever raise the contract claims in the trial court. SEN. FEINSTEIN: Thank you for clearing that up. Appreciate it.

Senator Schumer?

SEN. SCHUMER: Thank you, Madam Chairwoman, and I very much appreciate the opportunity to testify. And thank you, Judge Owen.

Before I get into what I want to ask you, I did want to make a few points in reference to what

Senator Hatch said in his opening remarks. Unfortunately, he's not here. I tried to make them while he was here, but -- so he knows I am going to make them.

Three points. First, you know, let's try to keep this debate at a reasonable level. Senator Hatch keeps saying "left-wing pressure groups," "left-wing pressure groups." I don't hear anything about right-wing pressure groups or moderate pressure groups. There are a whole bunch of groups that support Judge Owen's nomination. They are doing their civic duty, but anybody who opposes it is a "left-wing ideological pressure group." Enough of that. That kind of foolishness should not go on in this committee room or anywhere else. Let's be fair about it. There are groups on both sides pushing everybody, and we are all independent and have to make our own decisions -- we may be influenced by them on one side of the aisle or the other. But this idea that the only pressure groups are from the left is a joke.

Second, related. Senator Hatch talked about something that I agree with, which is well, we are picking -- we are looking for little personal things about people, and they are going to put you through the wringer -- "Welcome to Washington," he said to you, judge. I am aghast. After eight years of them looking and turning President Clinton, his family, and everyone who worked for him inside-out about every single issue under the sun, now all of a sudden it's, "Welcome to Washington." Again, what's good -- I don't believe in it on either side, but let's have some semblance of fairness about this.

About not nominating women? What a canard. What kind of argument is that? I mean, I don't think anybody can -- anything -- any cursory look at what this committee has done has stood up to that. We have on the floor voted for 12 women. My guess is that's about as high a percentage in terms of the gender as the men who were sent to us. How about not voting for anyone who is pro life? My guess is of the 78 judges I voted for, the majority are pro life in this session. So let's cut out the games. Let's not try to beat people up with two- by-fours with specious arguments. Let's have a real discussion about what makes a good judge. And we'll have differing views on that, and that's fair, and that's why we have a Senate. But, I'll tell you, I'm not going to be bamboozled by arguments like that, and I don't think anybody should be. And I just wanted the record to show that. I thought that kind of hyperbole is not fair.

Okay, now to Judge Owen -- oh, and one other point, which I'll -- I'm glad Senator Hatch is here --

SEN. FEINSTEIN: You just missed it. (Laughter.)

SEN. SCHUMER: Sorry.

SEN. HATCH: Is he running me down again? (Laughter.)

SEN. FEINSTEIN: -- responding.

SEN. SCHUMER: I'm just responding.

SEN. HATCH: That's what we call it now? (Laughter.)

SEN. FEINSTEIN: You're terrible.

SEN. SCHUMER: He is. But he's a nice guy. He is truly a nice guy.

SEN. HATCH: Not nearly as terrible -- (laughter) --

SEN. SCHUMER: His arguments are not as nice as he is. In any case, the other point that Senator Hatch made which I'll address as I address you, (Justice ?) Owen, is, What kind of questions are legitimate to ask and not ask to a candidate for a high lifetime position?

But let me say this to you, Judge Owen, and then I am going to make some statements and ask some questions, and weave them in together. Last week we had the pleasure to meet privately, and when we talked I told you I've had I think since I've come here three standards in terms of nominating, choosing, voting for judges. They are excellence -- legal excellence, moderation -- I don't like judges too far left, too far right -- and diversity -- I don't think the bench should be all white males. I don't think there's any question about your legal excellence. You've had a distinguished academic and professional career in the ABA, whose ratings reviews the nominee's legal excellence no more, no less, has rated you well qualified with good reason -- I think anyone who has listened to even 10 minutes of this hearing today has no doubt about the excellence in terms of the quality of your legal knowledge and your intelligence, your articulateness, et cetera.

On the diversity front, the population of the Fifth Circuit, the court you have been nominated to, the population within the body of the Fifth Circuit is the most racially diverse in the country -- even more so than in the Fourth Circuit. And President Clinton -- let the record just show -- made three nominations to that circuit, two of whom were Latino -- there is a large Latino population within the Fifth Circuit, namely in your home state of Texas -- none of them received confirmation hearings. So one of the reasons we don't have diversity on this court is that reason. But, obviously, in terms of gender diversity, you get an A-plus.

The third standard is moderation, and that's really where I have concerns, and that's where my focus will be. Now, there is some idea out there that all of a sudden has sort of taken root among people of a particular ideology I might add that you can look deep into space and divine the correct legal interpretation of a statute, that we all would come out with the same -- in the same exact place, that our ideology has nothing to do with how we interpret the law. We all know that's bunk. It's obvious when you look at any court. Judges bring their experiences, their biases, their ideology to the table when they decide cases. Whether it happens consciously or subconsciously, we know it happens. If it didn't, why would Justices Scalia and Thomas come out exactly almost the same way on so many cases -- so different than, say, Justice Breyer and Justice Ginsburg? If it was -- if ideology made no difference, the number of times -- they are all

very smart people, they are all great lawyers -- the number of times that Scalia would agree with Thomas would be about the same as the number he agreed with every one of the judges.

Look at the nominees that Presidents Reagan and Bush made to the court versus the nominees that President Clinton made to the court. How come they all seem to vote so similarly? It's because ideology does matter. We all know it. This administration knows it. How come they haven't sent up a single so-called liberal judge? If they were just looking for legal excellence, they'd send some judges from the left, some judges from the center, some judges from the right. The president said it himself. He said he wanted to send judges up in the mold of Scalia and Thomas. I give him credit for honesty. He's doing that. Whether that's good for the country or not, is the debate at least that I have chose to engage in over the last few years that we have been here.

That happens on your -- it happened in the Texas Supreme Court as well. You and Judge Hecht have frequently come down on the same side on the Texas Supreme Court. It's not accident. It's not simply that you went to the same law school, read the same law books. Philosophically you're in the same place -- similar places. So this idea that ideology shouldn't matter, that we shouldn't ask questions about someone's judicial philosophy, which is what my good friend from Utah said, I think is so, so wrong, that it is almost hard to -- hard to accept if you look at it in any way at all. And my guess is if we looked at the way my good friend from Utah voted on judges over the last years he's been in office, and the way I voted on judges -- we'd agree on most of them, because we agree on most judges as we vote. But it's clear that his philosophy would dictate he voted against certain judges and for others, and I probably did the mirror image, because our philosophy does influence how we vote. We are just not simply interpreting the legal excellence of the mind. I do agree with him, as I said before you came in, that I don't like this gotcha stuff. I think that's become a substitute for all of this. But how come it is when there is a Republican nominee it's the Democrats who focus on the gotcha stuff, and when it's a Republican -- when it's a Democratic nominee it's the Republicans who focus on the gotcha stuff? Again, if we weren't doing ideology -- whether someone smoked marijuana in college or went to some bookshop and got a certain book or movie, the votes should be evenly dispersed throughout the political spectrum. It's not, because it's sort of a kabuki game.

Well, what I've tried to do in the year that I've been chairman of the Court Subcommittee is bring some level -- at least I would call it -- of honesty to the debate. Let's admit that ideology should play a role. Let's ask those questions. I think it's my obligation to ask those questions. And I'll tell you I am the opposite of Senator Hatch. Any judge who doesn't answer questions about their philosophy, their views on the First, or Second or Fourth Amendments, should not be put in such an important and august position where there is a lifetime appointment. So let me --

SEN. FEINSTEIN: Senator, your significant treatise took 10 minutes and 32 seconds.

SEN. SCHUMER: May I ask one question?

SEN. HATCH: Could I as a point of personal privilege just make one note for the record? I only voted against one Clinton judge out of the 378 that we passed --

SEN. SCHUMER: Bet it wasn't --

SEN. HATCH: So I hardly used ideology --

SEN. SCHUMER: Bet it wasn't a conservative.

SEN. HATCH: Well, I don't know what it was, to be honest with you, other than I didn't feel it was right.

SEN. SCHUMER: Could I ask one question, Madam Chair?

SEN. FEINSTEIN: Yes. One question, and then we go to Senator Sessions.

SEN. SCHUMER: Okay. So here is my question, and maybe if we have a second round I'd like to ask some specific ones. I did not intend to take that long, but this is a subject that excites me.

Now, let us assume, because I think choice is a very legitimate issue for us to question judges on, and so I'd like to know your views. And here's the way I would phrase it. It's 1965. You are sitting in the Supreme Court of the United States. Chief Justice Warren comes into your chambers with a copy of the opinion in Griswold v. Connecticut, the seminal case that held there is a right to privacy in the Constitution. He asks for your thoughts on the opinion. Now, there is no law to follow right now, but he is asking for your opinion in terms of everything that has been part of you. What do you tell him? Do you agree with the holding? Do you agree with the outcome, but get there in a different way? In other words, that there is a constitutional right to privacy, the penumbra of which extends to at least the first two trimesters of a woman's pregnancy -- what do you tell Judge Griswold?

JUSTICE OWEN: Well, senator, again, I responded somewhat to this question before, but I can assure you that nothing in my personal views on any topic has influenced or would influence my ability to read the U.S. Supreme Court precedent and to apply it. And, frankly, I don't --

SEN. SCHUMER: But this time there was no precedent. That's why I am asking you the question as I did --

JUSTICE OWEN: But I don't see it as my role as a judge on the Supreme Court of Texas or as an intermediate judge to delve into decisions and critique them or say this was wrong in the law or this was right on the law. And, frankly, when I have read those decisions, that's not the way I approached them as a lawyer, and that's not the way I've approached them as a judge: Are they right on the law? Are they wrong on the law? I have always approached them with trying to figure out what did they say in these opinions. What was the basis for their opinion? And how

does that play out in the factual situation that either my client when I was a lawyer has or now as a judge in the case before me?

SEN. SCHUMER: Judge Owen, being on the Texas Supreme Court, certainly being on the Fifth Circuit -- as you know, the Supreme Court only deals with about 75 cases a year. You are going to be asked when you are a judge questions like this every day. To say -- to duck the question -- and that is what you did -- and I am not trying to surprise you. My staff told the people in the Justice Department I would ask you this very question. I don't think it's fair to us. I don't think it's fair to me. I don't think it's fair to the 19 million people I represent in New York. I want to know your opinion. This was a case where there was very little precedent that was directly relevant. The Supreme Court made a decision that is still with us in terms of its controversy, in terms of the heat that it generates on both sides. I think the American people, the people of the Fifth Circuit are entitled to know how you would advise Judge Griswold on that opinion, because it shows your view, something very important about whether you think there's a constitutional right to privacy, how far you think it extends, et cetera. And this is a case that's already been decided, but it can tell us how you think, and where you come down. And I don't think your answer -- I understand that you do that, but on the Texas Supreme Court, I'm -- you're much more familiar with it than I am, you have to make decisions like this all the time. You certainly will on the Fifth Circuit.

So I'd ask you again, can you give me something more specific rather than telling me that your methodology is not to answer questions like that?

MS. OWEN: Well, let me -- let me tell you --

SEN. SCHUMER: Because you'd have to answer them when you sat on the court, when you wrote opinions, when you agreed with the majority opinion, when you've dissented, and you've done it, and we all know you've done it.

MS. OWEN: But I don't approach decision-making that way. I've never -- I'm not asked to come in -- in a vacuum and say "well, what do you think" --

SEN. SCHUMER: Well, I'm not giving you a vacuum question.

MS. OWEN: Well --

SEN. SCHUMER: I'm giving you the specific facts of the case. I mean, we've talked a lot about parental consent. I mean, I'm sure you've read the Griswold decision.

MS. OWEN: Yes, I have.

SEN. SCHUMER: Okay.

MS. OWEN: (Inaudible) --

SEN. SCHUMER: I'm asking -- all right, okay. Well, it's an important decision, even in terms of talking about parental consent. Obviously you're dealing with a different constitution here, Texas versus the United States, but you have to be able to tell us more than this is not the way I think. I mean --

MS. OWEN: Well, I was going --

SEN. SCHUMER: -- I just don't --

MS. OWEN: -- to expand on my answer, but when --

SEN. SCHUMER: (Inaudible.)

MS. OWEN: -- you say that that's the way -- you're going to have to think that way, and I respectfully --

SEN. SCHUMER: No, I'm asking you --

SEN. HATCH (?): Senator Schumer, let the lady answer the question. You've asked her --

SEN. SCHUMER: Well, I'm just trying -- okay, go ahead.

MS. OWEN: The way I would approach that case, had I been on the court then, is the same way that I approach constitutional issues today, and that is I read everything that the U.S. Supreme Court has written up to that point on the issue. And frankly, Senator, I don't know, I didn't read the briefs in Griswold, and I'm frankly so influenced by the existing body of law that we've had the right to privacy for so many years, my court has recognized a right to privacy under the Texas Constitution, I think it's kind of hard at this point for me to erase all of that out of my mind and put myself back in their shoes without -- without all of this case law that's come down the pipe, and not having the benefit of the briefs or (arguments ?) how would you have written, were you writing on a clean slate -- it's very difficult for me to write on a clean slate when I have all of this historical law now out there. And again, I don't write on a clean slate when I answer constitutional issues.

SEN. SCHUMER: What I'd like to do, because I know my time is up and I appreciate the indulgence, Madam Chairperson, is I'd like to submit some written questions that specifically ask some of these things and see if we can get a more specific answer, and give you a little time maybe to review the case law, whatever you would have to review, as if you were being a judge on the case, in some sense.

SEN. FEINSTEIN: Thank you, Senator Schumer. Senator Sessions, you're next up.

SEN. SESSIONS: Justice Owen, you recognize Griswold to be the law and would follow it?

MS. OWEN: Yes, Senator.

SEN. SESSIONS: And if called upon to apply its principles, you would apply them in your decision-making process?

MS. OWEN: Absolutely.

SEN. SESSIONS: Well, I think you handled this precisely right. And I'm sorry Senator Schumer was unhappy with your answer, but you were -- you handled it precisely like a judge should answer it. How should you -- how could you be expected to put yourself back into that circumstance, without having read all the briefs, without having studied the law carefully, and to render an opinion on a case of that importance. I note Senator Schumer left, and recently he complimented Justice Hugo Black of the Supreme Court on his views on the Constitution, and, of course, Hugo Black dissented in Griswold (sp). So, these things are of interest in -- I guess fun to talk about, but in reality, as a person who is being considered for a judgeship, I think you demonstrated the right characteristics in a judge, that is to be cautious not to express opinions until you've fully studied all the briefs, all the law involved, as your record demonstrates you do so skillfully.

And I would just note that your testimony has been extraordinary. I have been very impressed with your command of the cases you've handled, the hundreds that you've handled. I've been very impressed with your ability to articulate your thoughts in a reasoned and fair way. I see no hint of extremism or activism or some obsession with forcing some political agenda on anybody -- not one hint of it. And it's disturbing, actually, to have those comments being made. I just don't believe there's one hint of it.

Justice Owen, I've been also impressed, as Senator Gramm and Senator Hatch noted, that you came at this service to the Supreme Court of Texas because of a desire to serve. It cost you, I'm sure, financially significantly. You have won reelection with 84 percent of the vote. The American Bar Association, who this committee insisted must have a bigger role than they've had in recent years, and in the process has unanimously rated you well qualified -- that's the highest rating you can get -- and a unanimous vote for well qualified is very rare. And they had the opportunity to study your record. They've had -- they've seen you on the bench. And they've talked to your former law partners. They've talked to lawyers who have litigated against you. They know your reputation and your ability, and I think they made a well and a wise choice in rating you well qualified unanimously. I must -- I have to be impressed with your academic record -- number two or three in your class, the -- made the highest score on the bar exam. What an accomplishment that is in a big state like Texas particularly. So, I just think you have so much to be proud of, and I particularly like your demeanor and the way you've handled yourself under some of the questions that have been brought forward.

And I also note, it seems to me that you've not been just a potted plant, you have been a reformer in your life on the law about the rule of law. Tell me how you feel about the responsibility of a judge or a public official -- what is their responsibility about defending and strengthening the rule of law in America?

MS. OWEN: Well, I think that's the ultimate responsibility, is to defend and strengthen the rule of law in America. I think we all understand that our society is built on laws, and that that is what basically orders our society -- that helps us plan, that helps us have predictability. It helps us have stability. It helps us know that cases won't be decided randomly based on sympathy or passion or when they should be decided another way under the law. So I think the rule of law is very important, that it's consistently and fairly, but with common sense, applied in every case.

SEN. SESSIONS: Well now is that why when you are asked to rule on a case you just don't spout off the answer as some would have you do in this hearing -- but is that why go back and you take the Texas statute on notification, parental notification, and then you know that it passed during a time in which they were considering the Supreme Court ruling as they tried to craft a statute for Texas? Is that why you went back and studied the U.S. Supreme Court cases to try to understand what Texas was trying to do so that you could give a fair and objective answer as to what the statute really meant and what the legislature intended?

MS. OWEN: Yes, Senator -- (inaudible) -- if I could explain this, maybe I have not done a very good job of it yet, but when the legislature used the words "mature and sufficiently well informed," that could mean a lot of different things to different judges all across Texas. And so given that that was of a Morpheus (?) definition, I thought where did they come up with these words? What did -- what definition did they have in their minds when they picked these words? And then when I went and read the Supreme Court cases that they pulled the exact language out of, I looked at how did the U.S. Supreme Court define informed? What did they say is relevant to an informed consent? How did they define informed consent? And I believed that the legislature was looking to the cases out of which it picked the words mature and sufficiently well informed, for us to glean what the actual definition was, what the factors that courts were to consider in deciding if someone was making an informed decision.

SEN. SESSIONS: Well, I think that's what a great jurist does, and I think you've handled that -- you did it exactly right. That's precisely what should be done.

You know, you -- my -- looking at your background, I see a person who's worked hard to reform and improve the system. As Senator McConnell noted, your voluntary limiting your contribution, he did not mention the fact that after you had a relatively easy race last time, you gave back one-third of the contributions. I don't know anybody in this body that's ever done that, and that's a remarkable thing indeed.

I noticed that you work hard to encourage the Texas legislature to secure more legal service

funding for the poor, and were successful in that?

JUSTICE OWEN: Yes sir. We were particularly hard hit in Texas when legal funding for LSC, the Legal Services Corporation, nationwide was cut back. Texas kind of got a double whammy. Not only were our traditional legal services officers cut back in budget, but Texas has a large migrant worker population and funding for the migrant workers was particularly hard hit. And a lot of people, including me, were concerned that the basic infrastructure through which legal services to the poor were delivered in Texas was going to collapse because we were that close to the line. So, we had to look for ways to put more money in the system to keep the professionals who were involved in through the backbone of the delivery system in place, because if we lost that, we would not be able to anywhere come near meeting the legal services needs of the poor in Texas. And so a group of folks, not just me, certainly, I was the court's liaison and was involved in it, but explored ways that we could get more funds, and ultimately the legislature passed a statute that put more money into legal services for the poor.

SEN. SESSIONS: And I noticed you helped organize Family Law 2000, a conference, an effort to educate parents about the effects of divorce on children. I have heard a lot of people in the know in the legal system express concern that too often a divorce proceeding becomes an adversarial gladiator sport, and that children are hurt unnecessarily in the process. Is that what you were dealing with there?

JUSTICE OWEN: Yes, Senator. I did not practice family law, but when I got to the court it was clear to me that 51 percent of the civil cases in Texas are family law matters, and that's sort of where the rubber hits the road, if you will, for most citizens in Texas. And they almost, you know, so many people have experience with the family law court, and a lot of lawyers and a lot of family law judges and psychologists have -- (AUDIO BREAK) -- that this is a -- that the adversarial process is really hard on the children, and that sometimes lawyers escalate the process. Sometimes the way the laws are designed -- (AUDIO BREAK) -- to the point of maybe really restructuring the way legal services are delivered, the family laws, to try to make this more a unified approach to divorces, not just from the legal standpoint, but from other aspects, and again try to focus on getting people to make consensus decisions, particularly for their children, in the divorce context, but in not such -- not in such an adversarial way.

SEN. SESSIONS: Well, I think that's good. And I know you've served on the board of the Texas Hearing and Service Dogs, a program that helps the blind and those with disabilities. You teach Sunday School at St. Barnabas Episcopal Mission. You've given back to your community in a lot of different ways.

Let me ask you this. I know that my friend Dan Morales, the attorney general of Texas, we served together, and you were asked about the City of Austin case, and suggested that you were somehow doing something to -- I don't know, help polluters or evil groups, but I noticed, and I assume Texas is like Alabama, where the attorney general represents the state in legal matters and speaks for the state in court.

JUSTICE OWEN: That's true.

SEN. SESSIONS: Is that correct?

JUSTICE OWEN: That's correct.

SEN. SESSIONS: And the attorney general, Dan Morales, intervened in that case on the side of the state of Texas, and he took the position, as I understand it, that Texas state had entered into this area, and their law predominated, and that cities, the City of Austin did not have authority. And you eventually agreed with him in general on that -- (inaudible) --

JUSTICE OWEN: I did. Absolutely. I agreed that the state -- the state basically trumps the city, it was my view. And there were -- there were extensive regulations in this area above and beyond the water regulations that applies to everybody in the state. This was not a non-regulated area. This is the same regulations that apply to any landowner in Texas applied to these folks, plus they had to have a water quality plan under the TNR -- and subject to the TNRCC. They were subject to ongoing federal regulations. So this was -- this was far from an unregulated area. The question was whose law was going to control, the state statute or the city's ordinances, and it seemed to me that the state certainly could take away the ETJ, extra-territorial jurisdiction in it's entirety, and if that were so, why couldn't they regulate here and tell the city "No, our regulations -- we choose how to regulate, we don't want you regulating here."

SEN. SESSIONS: Well, I think you're right. And, of course, Mr. Morales is a Democrat and a capable attorney general who was advocating for the state's interest. And, of course, a lot of people don't think about this, and a lot of cities don't like to think about it, but cities are creatures of the state. The states are sovereign, have a sovereign power within the constitutional scheme, as does the national government, but cities are total creatures of the state, and if there's a conflict, I think you've come down on the right side between -- which is the preeminent authority within a state.

Well, I just think that's -- there's several other cases that I could go through. I do just want to say I think your ruling with regard to the Ford Motor Company case and venue was important. Venue is important. It's not correct and not just to allow a plaintiff to choose any county in the state of Texas to file a lawsuit just because there's a Ford dealership in that county. In this case, as I understood it, you ruled consistent with Texas law that case should be filed where the plaintiff lived, where the car was purchased, and where the accident occurred. All of those occurred in the country where venue was proper, and you did not deny them relief, but you simply sent the case back with an order to go to the correct county for venue purposes, is that correct?

JUSTICE OWEN: That's correct.

SEN. FEINSTEIN: Senator, your time is --

SEN. SESSIONS: My time is up. And I would just say that I appreciate your candor. I appreciate your ability. I am impressed with the American Bar Association's evaluation of your performance. I'm impressed with the evaluation of the people in Texas of your performance, when you got 84 percent of the vote. And I believe we've had few nominees come before this committee ever who have testified more ably or who have better qualifications for the federal bench.

JUSTICE OWEN: Thank you.

SEN. FEINSTEIN: Thank you, Senator. Senator Edwards.

SEN. EDWARDS: Thank you. Thank you, Madam Chairman. Good afternoon, Justice Owen. You've been here a long time. I want to focus on your, if I can, on your judicial decisions.

JUSTICE OWEN: Okay.

SEN. EDWARDS: Tell me first, in cases involving the intentional infliction of emotional distress, whether you agree with the decisions in your court, in the Texas Supreme Court, that say, and I'm reading now from one of those, that the overwhelming weight of authority both in Texas and around the country is that conduct involved in any particular case should be evaluated as a whole in determining whether it's extreme.

JUSTICE OWEN: I think that's generally true, yes.

SEN. EDWARDS: The case that I want to ask you about that I -- (inaudible) -- you about today, is a case involving three women who brought a case against GTE -- the lead plaintiff was Bruce -- Rhonda Bruce, Linda Davis, and Joyce Pulstra (sp) -- based upon what they contended was extreme conduct in the workplace.

And the evidence in the case -- I'm looking at the opinion now, was that the employer -- the employer's manager, who was the person involved in the case, the defendant's manager, soon after arriving at work engaged in a pattern of grossly abusive, threatening and degrading conduct, and again, I'm reading from the decision now, and he began using the harshest vulgarity shortly after his arrival. He regularly heaped abusive profanity on the employees, including these three women. On one occasion when he was asked to curb his language because it was offensive, he positioned himself in front of one of the plaintiffs, one of the women, and screamed, "I'll do and say any blank thing I want, and I don't give a blank who likes it." At one point another female employee raised a question, and he said, "I'm tired of walking on blank eggshells, trying to make people happy around here." The opinion says, "More importantly, the employees testifies that Shields repeatedly physically and verbally threatened, abused and terrorized them."

And then the court, in considering that conduct as a whole, as you just indicated the law

provides, found that the jury verdict against the defendant was -- was appropriate. And you wrote a concurring decision, where you agreed I part with the majority decision and dissented in part, disagreed in part -- you didn't dissent but you disagreed with some of the conclusions that the majority had raised. And among those disagreements, you found that the following conduct is not a basis for sustaining a cause of action for intentional infliction of emotional distress.

And before I go through this long list of things that you said was not evidence to be considered, taken as a whole, in whether the defendant had acted outrageously, because I understand that you've told me that that's the legal standard -- the question is whether any of these things taken as part of the overall case is something that would constitute extreme behavior under the law.

The first thing you listed was not -- not to be included --

JUSTICE OWEN: But, Senator, my --

SEN. EDWARDS: Sure. Sure.

JUSTICE OWEN: I just want to make clear what -- that you understand, that everybody understands, what I was saying here. I was not saying that you can't consider the totality of the circumstances. And I absolutely agreed with the majority that this guy was way over the line in this case.

My only point in writing this was if you take -- my only point was if you take these things that I listed out of that -- the context of all of the other things that happened and standing alone, that you can't -- this would not support a judgement, standing alone, that -- and I was concerned particularly --

SEN. EDWARDS: Did you -- excuse me. Did you say that? What you just said?

JUSTICE OWEN: I said that "The following conduct is not a basis for sustaining a cause of action for intentional infliction of emotional distress, even when the employees who were upset by the conduct are women." And my point here was that if this is all that happened, I mean if you just have someone -- and we can go through them -- cursing, but it's not accompanied by sexual harassment, or cursing, but it's not directed at the woman, that by itself will not give you, I don't think, sufficient grounds for intentional infliction of emotional distress.

And I was concerned that people would read all the laundry list of what happened in the majority opinion and say, well, if I can prove any one of these things, then I'm there. And I wanted to make it clear that I did not agree that if this is what you had, without all of the other things that this man did --

SEN. EDWARDS: Let me -- excuse me, I'm sorry.

JUSTICE OWEN: -- that you wouldn't get there. And that was all I was trying to make clear. Because there were some statements that I thought conflicted particularly with very recent decisions out of our court, and people might get confused. And so, I wrote separately to point that out.

SEN. EDWARDS: Well, I guess I would first point out that the majority opinion I don't think ever said that any of those things, standing alone, would be enough. They applied the law, as you have recognized it to be, which is you look at the totality of the circumstances.

JUSTICE OWEN: And I agreed with that.

SEN. EDWARDS: And they listed these things as things to be considered as part of the totality of the circumstances. And what you said, if I'm reading it correctly, in your decision, "The following conduct is not a basis for sustaining a cause of action." Can I just go through them and ask you about each one?

JUSTICE OWEN: Sure.

SEN. EDWARDS: The first one, you said, was cursing, profanity or yelling and screaming unless -- when it is not simultaneously accompanied by sexual harassment or physical threatening behavior.

The second you listed was pounding fists on a table when requesting employees to do things. Third was going into a rage when employees leave an umbrella or purse on a chair or a filing cabinet. The fourth you listed was screaming at employees if they don't get things picked up. Five -- I'm jumping around. You've got a long list and I'm not going to read them all -- is requiring an employee to clean a spot off the carpet while yelling at her. Another one is telling an employee that she must wear a Post-it note that says, "Don't forget your paperwork."

So this is a list of things that the majority, as I understand it, considered, taken as a whole, as evidence that would support a verdict in favor of these three women, which the jury had found, as I believe. You have listed these things and said that they -- in the language of your decision -- that they are "not a basis for sustaining a cause of action." And what I understand you to be saying today is that standing alone, these things are not a basis for a cause of action. Is that correct?

JUSTICE OWEN: That's correct. I also want to make it clear that we're not talking about sexual discrimination here or anything of the sort, because lots of these things obviously would be grounds. We are talking about a tort that's been reserved by my court for very extraordinary circumstances, the so-called tort of intentional infliction of emotional distress as defined by the restatement. So we're not -- this is not conduct that I would say that is okay in the workplace under other causes of action. We're looking at one --

SEN. EDWARDS: But you specifically said that each of those things that I just read would not --

JUSTICE OWEN: I specifically said standing -- again, my point was that if this is what a plaintiff shows, that would be insufficient. You can't just say, "Okay, in GTE v. Bruce, they said this, so therefore I've met the standard." I'd want to make sure there wasn't any confusion about what else would have to accompany that conduct to get to intentional infliction of emotional distress.

SEN. EDWARDS: Yes, ma'am. But I believe, as you said a few minutes ago, the majority never suggested that any of those things standing alone would be enough.

JUSTICE OWEN I --

SEN. EDWARDS: You didn't specifically say, unless I'm missing it in your opinion, that any of those things standing alone would not be enough.

JUSTICE OWEN: I didn't use the words "standing alone." The --

SEN. EDWARDS: No, ma'am. What you said was they would not sustain -- or form a basis for a cause of action -- which has legal meaning, as I understand it. Is that correct?

JUSTICE OWEN: That's correct.

SEN. EDWARDS: Okay.

Can I ask you about another area?

JUSTICE OWEN: Sure.

SEN. EDWARDS: There are some cases where you have dissented. I'll just mention some. Some have already been mentioned today, and I won't go over those again. But they are primarily cases where, you know, a child or a family or someone was involved bringing a case against either an insurance company or a manufacturer or a corporate defendant of some kind.

And in several of these cases that I'm looking at now, you dissented, you disagreed. And in each case, you sided with the defendants. You sided -- your ruling was against the person who brought the case, the individual who brought the case.

One was a boy who brought a malpractice case from having surgery with serious complications -- the Wiener (sp) versus Wasan (sp) case.

Another was the Wilkins versus Helena Chemical Company case, where a farmer sued a seed manufacturer because the seeds he bought didn't work. They didn't grow. Again, you sided with

the chemical company.

Another was a worker's arm's -- the Sonnier (sp) case, versus Chisholm-Ryder Company, where a worker's arm was severed by a tomato chopper. He brought a case against the manufacturer. You sided -- you dissented against the worker, on behalf of the manufacturer.

And another was a man who was injured changing a tire when the tire exploded, and he brought a case against Uniroyal Goodrich Tire.

And in these -- some of these cases and some of the cases -- other cases that have been mentioned during the course of the day, your dissent was pretty sharply criticized by those in the majority, as -- for different reasons. But --

SEN. FEINSTEIN: Senator?

SEN. EDWARDS: Yes?

SEN. FEINSTEIN: Not only is your time up, but just so everybody knows, I'm really going to be strict on the time limit because we have two other judges to go. It is 10 minutes after 4:00, and we're going to adjourn at 5:00.

SEN. EDWARDS: Can I just get an answer to this question? Sure. That's fine.

Let me get an answer to this question. In these cases, all of which you dissented in favor and -- against individuals, in favor of the manufacturers' defendants -- companies, against individuals -- and in some of these cases, at least, there were some pretty sharp criticism of your decision -- your dissent, I should say -- as there were in some of the other cases that have been mentioned in the course of the day -- I just wondered if you can point us to any cases where you have been criticized by your colleagues on the court for having gone too far in favor of an individual, child, a family who brought a case against a defendant, a manufacturer or a corporation.

And if you don't know -- and in fairness to you, I know you can remember everything, sitting here today -- if you can tell me of any today, I would appreciate that. If you can't, I'll give you a chance to provide that information to us, because I would like to see it.

MS. OWEN: One case that comes to mind -- and I -- let me talk about it for a minute -- is the Sands v. Fidelity -- I don't want to say it's Guaranty. I'm not sure. It's Fidelity-something. It was a worker's compensation case. And the plaintiff ended up settling with the worker's comp carrier. And she later contended that she had been defrauded into entering that settlement, and she sued for bad faith. And the court, a majority of the court ended up saying for various reasons that she didn't have a bad faith cause of action. I agreed with that, but I dissented from the case because I said she's established fraud. And under the law, she's entitled to rescind that worker's comp decision and go back and claim her benefits and start all over again. And a majority of the court

disagreed with me and said no, she does not get to rescind, she does not get to go back and start all over. And I've certainly ruled for -- you've named four cases; I can name cases where I've ruled in favor of workers, consumers --

SEN. EDWARDS: Can -- can I interrupt you just a -- I want to be very specific about --

SEN. FEINSTEIN: Senator --

SEN. EDWARDS: I'm asking her to provide something very specific, cases where you have, in fact, been criticized -- these are -- some of these cases are cases where you've been criticized by your colleagues for going too far on one side of the equation.

MS. OWEN: Well, I --

SEN. EDWARDS: I'm just asking now whether you can point us to cases where -- you've just indicated one case, where I believe you actually ruled with the majority against the jury verdict, if I remember correctly: the Sands case. And --

MS. OWEN: That's correct. But I thought she should get a remand and be able to set aside the agreement and proceed with her cause of action. If I --

SEN. EDWARDS: Let me ask you, if you can't -- I know my time is up, and we need to let other people ask questions. If you have cases such as that, I would actually like to see them. I think all of us would like to see them.

MS. OWEN: You -- you want me to find cases where my colleagues have criticized me, even if I -- you don't care about the cases where I --

SEN. EDWARDS: Or disagreed with you. Disagreed with you is also okay.

MS. OWEN: So -- is there -- you just want cases -- you don't care if I rule for the consumer, as long as -- it has to be a case where I was criticized doing so. Is that the same question?

SEN. EDWARDS: No, ma'am. You have -- there are a series of cases where your colleagues on the court have been critical and strongly disagreed with what you did, where you ruled for one side, some of the ones I've mentioned today and some of the ones that have mentioned by others. I'm asking you whether there -- are there cases on the other side of that equation?

MS. OWEN: Well, there are certainly cases where I have ruled large verdicts for injured people. And I -- I guess -- I don't remember if people criticized that or not, but we've upheld -- and I've been part of it -- upheld holding rules of law in verdicts for plaintiffs of significant rules of law: statute of limitations areas, independent contractor areas. I don't remember if there were dissents, I don't remember if I was criticized for doing it, but I have certainly --

SEN. FEINSTEIN: What you're asking is that she send those cases to us in writing --

SEN. EDWARDS: Right. That's correct.

SEN. FEINSTEIN: -- if you would.

And thank you very much, Senator Edwards.

SEN. EDWARDS: Thank you, Madame Chairman.

SEN. FEINSTEIN: Senator Brownback?

SEN. SAM BROWNBACK (R-KS): Thank you, Madame Chairman.

And thank you as well, Justice Owen, for appearing here.

And you've waited a long time for the hearing -- 14 months to be able to get in front of the committee. So I'm delighted that we're holding the hearing and going to be able to talk with you today about your qualifications, your background and your service on the circuit court, which I hope we're able to affirm and move forward with.

If I could point out one thing, just in listening to the last discussion on the case -- I believe that was GTE versus Bruce, the case you were talking about -- I believe in that case you joined the unanimous court ruling on the court in affirming the $275,000 jury verdict for the female employees that had been sexually harassed. Is that correct?

JUSTICE OWEN: I did. I did.

SEN. BROWNBACK: So we're talking about a unanimous opinion by the court. You wrote a concurring opinion on that that did hold for the female employees. Is that correct?

JUSTICE OWEN: Yes, and the reason I wrote the concurring opinion again is, we had just recently issued in the last few years on the Hill -- right in front of this case -- cases involving intentional infliction of emotional distress in the workplace. And I was concerned that people would pick up GTE versus Bruce, pick up our prior decisions and say, "There's an inconsistency here. How could you have said in these cases it's not intentional infliction of emotional distress and then list the things that I listed and say that is?" And I wanted to try to square --

SEN. BROWNBACK: You didn't want to redefine the common-law tort. You didn't want to try to redefine that.

JUSTICE OWEN: I did not. I was just trying to make sure that I was explaining how I could

square our prior decisions -- again, which were fairly recent -- in the employment context with the specific evidence that was in this case.

SEN. BROWNBACK: I just didn't want anybody to get the impression that you ruled against the female employees or held against their case. You held for their case.

JUSTICE OWEN: I did, absolutely.

SEN. BROWNBACK: You upheld a $275,000 verdict in the case by the plaintiffs against the defendant. Is that correct?

JUSTICE OWEN: That's correct.

SEN. BROWNBACK: Okay. I think that's important, because we sometimes lose it in the factual setting that somehow you didn't find this bad behavior; you did, and you agreed with the court that this is illegal, wrongful behavior and that the jury verdict should be upheld. And I think that's important for us to get clear.

Another thing I want to go to -- because a lot of the outside groups that really -- trying to derail nominations in this town and pick apart people's records who are very well qualified -- and you certainly are well qualified for this position -- is the parental- notification Texas law. And we visited this a couple of times today, but I just -- I went to make sure that I'm clear and that we're all clear on this. The only cases that got applied on up to the Texas Supreme Court were those where the judicial review had been denied. In other words, the easier cases were taken at the lower court, and at the lower court, if a girl had come forward, wanted an abortion, wanted not to have her parents informed, the court had already ruled yes, you can do that. The only cases that were appealed were the ones where that had been denied. Is that correct?

JUSTICE OWEN: That's correct. If either the trial court of the intermediate court granted the bypass, that was the end of it.

SEN. BROWNBACK: Okay. So if the judicial bypass was granted, abortion's granted, it moves on forward.

And if I understand your numbers correctly, about 600 of those were done at the lower court level in the time period we've been talking about on your service in the Texas supreme court.

JUSTICE OWEN: We know that at least 650 bypass proceedings have occurred. There may be a lot more. We just don't know. But we know at least that many bypass proceedings have occurred.

SEN. BROWNBACK: Where the court ruled that the girl did not have to inform her parents to obtain the abortion, is that correct?

JUSTICE OWEN: Well, we don't know because they're confidential, so we don't know the outcome. We -- out of the 650, only 10 girls have appealed to my court.

SEN. BROWNBACK: Okay.

JUSTICE OWEN: So --

SEN. BROWNBACK: So, somewhere in there. But out of 650, 10 were appealed to the Texas supreme court where judicial bypass had been denied.

JUSTICE OWEN: That's correct.

SEN. BROWNBACK: And that was a requirement that it had to have been denied. So, you had 10 cases that got in front of you of 650, so you're looking at, you know, a small percentage. You're looking at less than 2 percent of the cases that get to the Texas supreme court. And in those 10 cases, how did you rule? What was your opinion on the 10? Do you recall how you split on those?

JUSTICE OWEN: Yes, I do. The first Jane Doe came to our court twice, Jane Doe 1. The first time that she came, I agreed with the majority of the court. Everybody on the court actually agreed that she did not meet the statutory standard, but I agreed with the majority of the court, was because mature and sufficiently well- informed was such a loose definition, and trial courts could apply it -- that could mean so many different things to so many different trial courts that we needed to put some parameters on it. And because she didn't have the benefit of that, she should be remanded to the trial court and have another hearing. So, if the trial court had granted her a bypass on the remand, I would never have seen the case again. The trial court denied the bypass again, the court of appeals again denied it. And the second go-round, I said it was a close call, but I looked at the record, and under our evidentiary standards, I said there's some evidence to support what the trial court did, so I would have denied it, and the majority granted it.

Doe 2, I voted with the majority to remand it for the same types of reasons, only this time it was a best interest issue. We don't know what happened to Doe 2. We never heard from her again. Doe 3, I voted to deny the bypass. Doe 4, I agreed with the majority of the court that she did not meet the statutory standard. Let me -- and then Doe 10, which was the last Doe to come to our court, I agreed unanimously -- or the court did, that she was entitled to the bypass as a matter of law.

And I think I've mentioned this before today, but there were five other Does that came in between Doe 4 and Doe 10, where the court did not write an opinion.

We affirmed the lower judgment of the court. And as I explained, it takes at least six votes to do that. No dissents were published or were noted. If they had been noted, we would have had to have wound up and said who voted which way.

But I think it's a fair inference, given our opinions on either side of those five Doe cases, that these probably weren't close cases or somebody would have written something.

SEN. BROWNBACK: Because of the 10 cases, these were already 10 cases who -- where two courts, the trial court and the appellate court, had already voted, already ruled to deny judicial bypass. So they had said no, you cannot bypass your parents. Two courts had already ruled that in these 10 cases, is that correct? In all of the 10 cases?

JUSTICE OWEN: Correct. In all of them, yes.

SEN. BROWNBACK: And then in these -- the 10 that came to you, and on the Texas Supreme Court, you and the court split on some of these cases and voted to remand to the lower court to look at again to see if they should grant the judicial bypass. And in a majority of cases, you agreed with the lower two courts, in essence, that a judicial bypass should not be granted. Would that be a correct characterization of the --

JUSTICE OWEN: That's correct. And I believe that out of the 12 cases, I was -- had a different view of the judgment than the majority did in three cases. So I was with the majority, I guess that means nine out of 12 times in terms of the judgment.

SEN. BROWNBACK: I just -- it seems to me to make something about this in your record as being outside the philosophical mainstream is really a far stretch. You've got 600-some cases; 10 that have been ruled against a judicial bypass at two lower courts, and then it comes in front of you and the court splits and you vote with the majority most of the time, and some of the cases are remanded for this reconsideration; others are not. It just seems to me striking that this would somehow say that you should be set apart on the issue of abortion when you're interpreting the law in tough cases, is what these cases amounted to.

And I would hope that my colleagues would look at the factual setting here and how you've ruled. I think very common sense and very broad-based and non-ideologically in these cases. Some cases you voted to remand, for it to be looked at again for judicial bypass; other cases, not. I think that's a very fair-minded way on your part.

Let me just say, Justice, I thank you for putting yourself through this process. You are extraordinarily qualified for this position. And to wait for the 14 months that you have and then go through having narrow points on cases picked apart and your record maligned, abused, and then trying to somehow point you out as an ideologue in any instance is totally unfair to you and something you didn't need to go through, and could have remained absent from. But yet you've gone ahead and submitted yourself to this process to be able to serve the public.

And I appreciate you doing that. You didn't have to do that. A lot of people don't like going through these sort of process, and I don't blame them. But thank you for staying in here and staying in the process. And I think you're going to make an outstanding circuit court judge. I hope

we can move this on to the committee process and through the floor.

Thank you, Madame Chairman.

SEN. FEINSTEIN: Thank you, Senator.

Senator Cantwell.

SEN. MARIA CANTWELL (D-WA): Thank you, Madame Chair. And thank you, Justice Owen, for your time today and patience in answering these many questions.

I think several of my colleagues have brought up the specific issues relating to some of your decisions around parental consent, and I think some of my colleagues have asked a little bit broader questions as it relates to the issue of privacy, but I'm hoping that I can expound a little bit on and understand your judicial philosophy on these important issues that I think are growing in magnitude as they face our country. I think privacy, whether it's government intrusion in personal decisions, or nowadays government acquiring information about activities of American citizens, or businesses handling some of your most personal information, this issue is just growing in magnitude. So, understanding your broad philosophy on this is, I think, very helpful for this committee and for the Congress.

My first issue is really your general thoughts on the right to privacy, and whether you believe that that right exists in the Constitution, and where you think that right to privacy does exist in the Constitution.

JUSTICE OWENS: Well, of course I'm guided by the U.S. Supreme Court cases that have recognized the right to privacy. I think Griswold is one we discussed earlier that clearly recognizes that. And there are cases from my court that construe the Texas Constitution as having a right to privacy.

SEN. CANTWELL: I'm asking you whether -- I mean, because we've had lots of nominees come before the committee who have recited the same things about "We'll follow precedent and the recognition in various decisions." but, after being confirmed, have not followed those exact decisions or interpretations. So that's why I'm asking the broader question of whether you believe that the Constitution guarantees a right to privacy.

JUSTICE OWEN: Well, I think that's the law of the land. And there's nothing in my personal beliefs at all that would keep me from understanding and applying that law.

SEN. CANTWELL: And where do you think that exists within the Constitution?

JUSTICE OWEN: Well, I wish I -- because I do not want to misstep here. I'd like to have of the U.S. Supreme Court precedent in front of me on that particular issue because that's just -- I don't

want to -- that's not a question I would answer as a judge off the cuff if I were deciding a case. I would certainly go pull the U.S. Supreme Court precedent, I would pull the Constitution, I would sit down and read it and then give an answer. But I --

SEN. FEINSTEN: Senator, if you'll excuse me just for a moment, wasn't your question, does the Supreme Court guarantee a right to privacy?

SEN. CANTWELL: The Constitution, I asked --

SEN. FEINSTEIN: I mean the Constitution, guarantee a right to privacy?

SEN. CANTWELL: Yes.

SEN. FEINSTEIN: You can't answer that yes or no?

JUSTICE OWEN: Well, yes, clearly it does. The U.S. Supreme Court has said it does. That's been the law for a long, long time. I thought that she was asking me specifically can you tell me where that is derived from, the specific language.

SEN. CANTWELL: Whether you believed that there existed such a right, because in interpreting these cases -- and I think when we get to follow up on some of your other cases and comments, I mean, that the issue. We're trying to find out whether you will follow precedent. And obviously, in a variety of cases, you've dissented, and dissented in such a way that it's left a question mark, at least in my mind and, I think, perhaps some of my colleagues, as to why you dissented and some of the issues that you brought into the dissent. And so this particular issue, it's not -- we've had other people who have said that they believe in upholding a woman's right to choose, and then when it came to major decisions, went in an opposite direction, obviously because they saw something within the case. And that's why I'm trying to understand your personal belief in that right.

JUSTICE OWEN: Well, again, I don't let my personal views get into it, but I very clearly pointed out at several junctures, particularly my Doe 1 case, that there is a right to choose recognized by the U.S. Supreme Court. It applies to minors, that you cannot prevent a minor from going to court without the knowledge of her parents to get a judicial bypass. I pointed out that I had concerns about some of the Texas Family Code provisions in the divorce context when a minor -- a parent would be required to notify another parent under a divorce decree, if that might lead to some of the problems under sexual, physical, emotional abuse. I said that that would probably be unconstitutional. I think I clearly demonstrated that I have thought about the U.S. Supreme Court decisions and how they apply in this context and also how they might apply under other Texas laws that impact this area, and that I am willing and able to follow it.

SEN. CANTWELL: Well, let's -- let's go specifically to that. And I'm sorry I don't know exactly -- I know -- I have what your statement was earlier on the Doe case; I'm not sure which one,

whether it was Doe I or Doe II. But you found that a woman seeking a judicial bypass should demonstrate that she has considered philosophical, social, moral and religious arguments that can be brought to bear when considering abortion, and that you were following the decision of the Supreme Court in Casey (sp). However, in Casey (sp) the court ruled that states can enact rules designed to encourage her to know that there are philosophical and social arguments of great weight that can be brought to bear in considering an abortion, but there is never any mention of religious implications.

MS. OWEN: That's in H.L. v. Matheson (sp). That -- the reference to religion is in H.L. v. Matheson (sp). I think they said -- I can give you the cite, but they talked about -- see if I can read it here for you. But that was a factor that they said, that there are religious concerns. People -- let's see: "As a general proposition that such consultations" --

SEN. CANTWELL: That's not -- that's not in Casey (sp).

MS. OWEN: It's in the U.S. Supreme Court decision H.L. v. Matheson (sp). In my opinion, these were -- as you -- I hope you understand, were drafted fairly quickly. I did cite H.L.-Matheson (sp) in my Doe I decision, not on this point. I cited Casey (sp), and I cited the second decision in City of Akron. And I cited Matheson (sp) on another point. But in Matheson (sp) they talk about that for some, people raise profound moral and religious concerns, and they're talking about the desirability or the state's interest in these kinds of considerations in making an informed decision. They don't say you have to have religious beliefs, and I don't for a minute advocate that. The only point I was making --

SEN. CANTWELL: I think there was -- I think there was detail in there that basically said that you didn't think that the physician would be the person who could give that kind of input or advice. And so I think you can our concern, obviously. And I want to get back to the broader question. But our concern is, you know, you're dissenting in these decisions about a major issue of privacy. And in this particular issue, you're injecting in, where, obviously, the others on the court didn't, this issue of religious -- religion and pulling it out. And so, I don't know -- I don't know the right example. I think on parental notification. I mean, these laws have been thought and passed by legislatures because they want to think of the extreme cases. And I'm obviously -- we've talked about the abuse issues and various things. But now we're saying to a young woman that she has to sit down not with her doctor, but some religious leader and have an explanation about this issue before she's going to have the ability to get this approval.

JUSTICE OWEN: Well, let me make sure that we're talking about the same thing. If there's abuse, this all goes out the window. It's a separate ground. You don't --

SEN. CANTWELL: Say it's two 18-year-old cousins.

JUSTICE OWEN: I'm sorry?

SEN. CANTWELL: Say it's two 18-year-old cousins.

JUSTICE OWEN: Well, 18-year-olds aren't covered by the statute -- oh, you mean that she's consulting? Again, the U.S. Supreme Court has talked about getting counseling from a qualified source. And it was not me but Justice White --

SEN. CANTWELL: What if I'm not religious?

JUSTICE OWEN: I'm sorry?

SEN. CANTWELL: What if I'm --

JUSTICE OWEN: That's -- I'm not saying you have to get religious counseling. I never advocated that.

SEN. CANTWELL: Well who delivers the religious counseling?

JUSTICE OWEN: I never advocated that you have to have religious counseling. What the U.S. Supreme Court said, and what I followed, what I agreed was part of the definition of information, that it's not just information about the physical impact on the girl or the physical risks. And what Justice O'Connor wrote for the court was that there are "profound" -- and that's her word, not mine -- philosophical and moral and other considerations that go into an informed choice. And in the --

SEN. CANTWELL: That's exactly right. And that's where in your dissent -- again, your dissent from your colleagues -- threw in the word "religious consideration." So I'm trying to figure out -- you're telling me where you --

JUSTICE OWEN: And that came from H.L. versus Matheson (sp).

SEN. CANTWELL: And you believe it should be -- if you were the majority, it would have been implemented how?

JUSTICE OWEN: All I'm -- it would have implemented that the girl who is seeking an abortion should indicate to the trial court an awareness that there are arguments and issues. She doesn't have to agree with any of them, she doesn't have to explain what her philosophy is, she doesn't have to rationalize or justify her philosophy or her moral code or her religion, if she has any.

But all that I said was, and what I think is a fair reading of what Justice O'Connor said, is we're talking about awareness that there are arguments out there on both sides, philosophical, moral, and in H.L. versus Matheson (sp) arguments -- religious. If she doesn't have religious beliefs, that's no business of the court's. The only question is, if she does, has she thought about her own beliefs? Is she aware of the philosophical debate, the moral debate, just the issues. She doesn't

have to get into does she agree with them and debate it with the judge, but simply is she aware --

SEN. CANTWELL: Is the doctor capable of giving that advice or not?

JUSTICE OWEN: I think it depends. I think it depends. I think it depends on -- and I'm not sure she has to identify where she got -- where she obtained her understanding of the philosophical and other issues. That doesn't necessarily have to be from a counselor, as long as she exhibits an understanding of it.

I think she may need a counselor to give her some help on her options, the physical risks, that sort of thing, but I'm not advocating that she have any particular set of values or morals or religious beliefs.

SEN. CANTWELL: Madam Chairman, I see my time has expired. So I don't know if we're going to -- if we're moving on or --

SEN. FEINSTEIN: Did you have one more question, because this will be the last question before --

SEN. CANTWELL: Well, I just, if I could just -- just quickly, and obviously, if you're confirmed to the Fifth Circuit, you'll be responsible for determining the types of laws that are the undo burden on a woman's right to choose. And so given your record in this area, you know, I have some questions about, you know, recognizing when a statute imposes, particularly given some of the laws that are still on the books in the Fifth Circuit. So I guess I'm asking you, do you believe that you really have the ability to recognize what the Court has recognized in Casey, and that there are some laws that, you know, can prevent a woman from obtain abortion just as surely if they were outlawed? Do you think you're going to be able to recognize that?

JUSTICE OWEN: Senator, I do. And I would point to you again other places in my Doe 1 decision where I've recognized that in some situations, even a notification statute can amount to a consent statute because of a particular girl's situation, and I quoted the Supreme Court on that. As I pointed out, I expressed concern about the impact, the undo burden on a minor's right to choose that might occur because of particular provisions in our family code that deal with divorce decrees.

So, I've -- yes, I do believe that I can apply Casey and Akron to -- and the other decisions of the U.S. Supreme Court, I believe faithfully.

SEN. CANTWELL: Thank you. Thank you, Madam Chairman.

SEN. FEINSTEIN: Thank you, Senator. Justice Owen, believe it or not, this is going come to an end.

JUSTICE OWEN: (Laughs.)

SEN. FEINSTEIN: And you have held up very well. And I want to say the audience has held up very well. I didn't note anybody going to sleep. And we have two additional judges to do, so I'm going to excuse you and thank you very much.

JUSTICE OWEN: Appreciate it. Thank you.

SEN. FEINSTEIN: And ask the two other judges to please come forward. And those leaving the room, if you could do so quietly, we would be very appreciative.

JUSTICE OWEN: Thank you, Senator Feinstein, very much.

SEN. FEINSTEIN: Thank you, Justice.

SEN. : You did awful well, Judge.

SEN. HATCH: Madam Chairman, can I put some more material in the record.

SEN. FEINSTEIN: Yes, certainly.

SEN. HATCH: Okay, thank you. And others as well.

SEN. FEINSTEIN: Yes. The record will remain open for one week.

END

Federal News Service

July 23, 2002 Tuesday
SECTION: CAPITOL HILL HEARING

LENGTH: 17404 words

HEADLINE: PANEL ONE AND TWO OF A HEARING OF THE SENATE JUDICIARY COMMITTEE

SUBJECT: JUDICIAL NOMINATIONS

CHAIRED BY: SENATOR DIANE FEINSTEIN (D-CA)

PANEL I: SENATOR PHIL GRAMM (R-TX); SENATOR KAY BAILEY HUTCHISON (R-TX); SENATOR BILL NELSON, (D-FL); AND REPRESENTATIVE KAY GRANGER (R-FL)

PANEL II: JUSTICE OWEN, TO BE A CIRCUIT COURT JUDGE FOR THE FIFTH CIRCUIT

LOCATION: 325 RUSSELL SENATE OFFICE BUILDING, WASHINGTON, D.C.

BODY:
SEN. FEINSTEIN: (Bangs gavel.) We'll begin the hearing. And members will be coming in from time to time. Before I make my opening statement, I would like to just quickly run through the protocol for this hearing.

There are three panels that we will be hearing today. Members will be called on the basis of the early bird rule. We will alternate from side to side. For those that don't know the early bird rule, is an incentive to get members to come to committee promptly so that they can respond to -- be responded to with questions.

There will be a vote I think around 10:30. We will recess for that vote. This session will run from 10:00 to 12:15. We will begin again at two o'clock and to through to five o'clock, at which point the hearing will end, and if we need an additional hearing, that could be determined at that time. There will be two votes this afternoon. I believe at 2:45, and we will do a similar thing. We will simply adjourn and go and cast our votes and promptly return here. I would like to begin by saying that there are three panels. If three distinguished members at the first panel. Senator Kay Bailey Hutchison is traveling and will arrive a little late, and I've agreed to take her statement as soon as she comes in. So, we'll stop whatever we're doing and listen to her when she comes in. We will then hear the statements from the members, and then a statement from the chairman of the committee and the ranking member.

I would like to welcome **Priscilla Owen** on behalf of the Judiciary Committee. Justice Owen comes to us with a distinguished record and with recommendations of many respected individuals within her state of Texas. She currently sits as one of nine justices on the Texas Supreme Court, which is the court of last resort for civil cases in that state. Justice Owen is a graduate of Baylor and Baylor Law School, and before joining the Texas Supreme Court in 1995, she was a partner in the law firm of Andrews and Kirk.

As indicated by the large number of people in this room -- in fact, as indicated by the size of the room itself, this is a nomination that's received a lot of interest. My office has received dozens of letters of support and of opposition from organizations within Texas and from national organizations as well on both sides of the debate. So feelings run very very strong. We will, of course, keep order, and we do not appreciate any comment from the audience.

I'm keeping an open mind on this nominee, as I do with all nominees. I first met with her several weeks ago. I found her to be personable, intelligent and well-spoken. It's clear to me that Justice Owen knows the law, that she's very capable and that she'd be an excellent advocate for a cause. But the question this committee must answer for this and all nominees is whether this individual would make a good federal judge, a federal appellate judge, and that determination includes questions beyond intelligence and character. We must also ask about temperament, and the ability to decide cases on the law, not on personal beliefs.

The concerns that have been raised about Justice Owen go to the heart of these questions. Accusations have been made that Justice Owen too often stretches or even goes beyond the law as written by the Texas legislature to meet her personal beliefs on several core issues, including abortion and consumer rights.

I've read through a great deal of the material about Justice Owen in preparation for this hearing, including a number of opinions she has written on a variety of subjects. So, I'm very interested to hear from Justice Owen on these issues today, after which I'll carefully review the record and make what is sure to be a very difficult decision, as well we -- as we will all do.

So, now I would like to turn to the ranking member and then to the chairman of the committee.

SEN. ORRIN HATCH (R-UT): Well, thank you, Madame Chairman. I want to welcome all nominees today as well as the members of the Congress that have come to testify on their behalf. And I ask that I be able to put statements for Misters Timothy Corrigan and Jose Martinez into the record?

I would ask unanimous consent for that.

SEN. FEINSTEIN: Without objection.

SEN. HATCH: I would like to go especially -- especially to welcome Justice **Priscilla Owen** of Texas, our lone star, 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, and I expect she has as well.

I would like first to comment on the two jingoes that are being used about her record, as if they had substance. Namely, that Justice Owen is, quote, conservative, unquote; and that she is, quote, out of the mainstream, unquote. Of course this comes from the Washington interest groups that we've seen year after year, in many cases, who think that the mainstream thought is more likely to be found in Paris, France than in 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, quote, out of the mainstream, unquote. Texans will no doubt be entertained by whoever says that. Listening to some of my commentary on judges, I sometimes think that mainstream for them is a northeastern river of thought that travels through New Hampshire early and often, widens in Massachusetts, swells in Vermont, and deposits in New York City.

Well, the mainstream that I know of, and that most Americans --

SEN. LEAHY (D-VT): That's (impossible to do ?) geographically, but that's okay.

SEN. HATCH: (Laughs.) Understand. Well, the mainstr -- that's -- that was the point.

Well, the mainstream that I know, and that most Americans relate to runs much broader and further than that. The other mantra repeated by Justice Owen's detractors is that she is, quote, conservative, unquote. Now, I believe that the use of political and 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, quote, "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 confidence to serve as a member of the third co-equal branch of the government," unquote.

Now, 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 as well. 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, quote, "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," unquote.

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 of 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 on 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 percent 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 these 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 well- qualified, the highest rating they give. 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 cannot 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've 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 and 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 in rules of judicial construction. It is apparent to me that of all of the sitting judges the president has nominated, that of all of them, 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 textbook 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 normally 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 on 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, while 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, the White House counsel.

I ask, Madam Chairman, to place this and other related letters into the record at this point.

SEN. FEINSTEIN: So ordered.

SEN. HATCH: And I would place into the record a retraction from the New York Times saying that they got the facts wrong on this Enron story. Such retractions don't come often, although the misstatement of facts by the destroyer groups do. So I would ask unanimous consent that that go in the record.

SEN. FEINSTEIN: Without objection.
SEN. HATCH: I also hope that Justice Owen will get a chance to address her views on election reform and judicial reform, of which she is the 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 in the record letters from the leaders of the Legal Society and 14 past presidents of the Texas Bar Association, many of whom are Democrats. So I ask unanimous consent for that as well.

SEN. FEINSTEIN: Without objection.

SEN. HATCH: 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're voting for judicial nominees that they believe to be pro-life.

I have disputed this when they have said it is 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 transcript 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'm afraid that the main reason Justice Owen is being opposed is not that personal views, namely on the issue of abortion, are being false 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, in my opinion, 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 (must?) 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 web sites 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 groups' 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 doctors' homes and imposed $1.2 million in damages against pro-life protesters.

In only a few instances, the court tightened the buffer zones against protesters. 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, quote, "isn't a home run; it's a grand slam," unquote.

Of course, that result hasn't changed, but the characterization of it has. This is how Planned Parenthood describes the same case in their fact sheet on Justice Owen. Quote: "Owen supports eliminating buffer zones around reproductive health-care clinics," unquote. 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's 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, and 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 noticed bypasses have been requested from the courts. Of these 650 cases, only 10 have had facts so difficult that two lower courts denied a noticed 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-versus-Wade line of decisions of the United States Supreme Court, which she followed and recognized as authority.

For example, detractors take pain to tell us that Justice Owen would require that to be sufficiently informed to get an abortion without a parent's knowledge, that the minors 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 what 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 to get that type of a judge.

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

I'm sorry I'm taking a little longer, but I'll finish in just a minute. 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-versus-Wade decision represented, quote, "heavy- handed judicial intervention," unquote, that was, quote, "difficult to justify," unquote.

Now, in relation to this, I would like to briefly 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'm 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, which senators cannot do openly by constitutional amendment. It is an attempt to make the courts a mere extension of the Congress.
Now, 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 versus Board of Education was his worst ruling as a 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 versus Alvarado, in which Justice Owen's reasoning was later adopted by the United States Supreme Court on the very 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. Quote: "This is reminiscent of the days when the crime of rape went unpublished unless corroborating evidence was available. The court's opinion reflects the attitudes reflected in that era," unquote. Perhaps, Madam Chairman, they thought that dissent reflected too well the perspective of a woman to point out to senators like all of us up here.

Despite deceptive opposition, I think that Justice Owen should be confirmed, first because I believe that colleagues, like many on this committee -- and, in fact, hopefully all of us -- will be fair. I also believe my Democratic 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 in this case. If we fail the test, we will breach our responsibility as auditors of the Washington special-interest groups and the judiciary stewards on behalf of all people and not just some.

So I want to thank you, Madam Chairman. I know I took a little longer than I usually do, but I felt that it needed to be done in this case. And I look forward to the testimonies here today.

SEN. FEINSTEIN: Thank you, Senator Hatch. The chairman of the committee, Mr. Leahy.

SEN. PATRICK LEAHY (D-VT): Madam Chair, I will not do as my friend from Utah did and give a long speech which simply delays these proceedings; I'll put my speech in the record. I also have great respect for the chair of this committee, the senator from California, and I know she'll hold a fair hearing. And, unlike my friend from Utah, I'll make up my mind after hearing the facts and not decide them before we even have the hearing.

We will have hearings today on the 79th, 80th and 81st judicial nominees we've held since I took over on July 11th. Judge Owen is the 17th court of appeals hearing we've had. I would point out that this is for the United States Court of Appeals for the fifth circuit. That was the seat vacated by William Garwood in January 1997.

President Clinton had nominated Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, to fill that vacancy. He had a unanimous rating of well-qualified by the ABA, something the senator from Utah says is very important, but the senator from Utah and the Republican-controlled Senate refused to give him a hearing, and after 15 months his name was returned. He

was never allowed to have a hearing.

So then President Clinton nominated Ricky Moreno, another outstanding Hispanic attorney, to fill the same vacancy. But this committee, under Republic chairmen, did not allow him to even have a hearing over the 17 months that his name was pending here, and then President Bush withdrew his name. And now we have Judge Owen, who is the third vacancy.

I trust the distinguished senator from California to hold a fair hearing, something that the two nominees, two Hispanic nominees, two extremely well-qualified Hispanic nominees nominated by President Clinton, were never allowed to have hearings before this committee.

I commend the senator from California and this committee for holding a hearing and not doing as had been past practice -- we've heard a lot about past practice -- did not follow past practice and instead we are having a hearing. I'll make up my mind based on what we hear. I would hope that other senators would refrain from the kind of name-calling we've heard about people who express their views. I have had a lot of views expressed on this, both for and against, Justice Owen. While I may not have liked the tenor, and even some of the things I was called in those dues, I am one who depends on the First Amendment. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you very much, Mr. Chairman. We will now turn to the members of --

SEN. SCHUMER: Madam Chair? May I ask -- there are a couple of things that I would just like to mention here in response to Senator Hatch. May I have a minute or two to do that?

SEN. FEINSTEIN: Well, we have a very long -- I think every other member probably has something they would like to say. What we generally do is turn to the members and then hear -- if you wouldn't mind, I think it would be appreciated.

SEN. SCHUMER: I'll defer to you, Madam Chair. I just thought certain things were on the record that were just so wrong that they need some refutation.

SEN. FEINSTEIN: I'll give you ample time to complaint --
SEN. SCHUMER: Thank you.

SEN. FEINSTEIN: -- later.

We now have three members of the Congress. I'd like to begin with the senior senator from Texas, the Honorable Phil Gramm, and then we'll proceed right down the line. Please, and if you could keep your statement to five minutes or so, that would be appreciated.

SEN. GRAMM: Well, Madam Chairman, first, thank you very much. I appreciate having an opportunity to be here. I am not going to waste your time telling you that **Priscilla Owen** is brilliant, that she's a distinguished student of the law. Everybody knows that. If she were a simpleton, there would not be all this opposition to her.

I just want to talk about the **Priscilla Owen** that I know and that the people of my state know. First of all, normally when there is an effort to attack somebody, you find one little thing about them and you blow it out of all proportion. What is so basically disturbing to me about this case is there is no one little thing to blow out of proportion. This attack is created out of whole cloth. **Priscilla Owen** is not a political person. **Priscilla Owen,** when she was recruited by people who wanted to have outstanding jurists, was probably our state's greatest commercial litigator. She was living in River Oaks, which is the richest neighborhood in our state. She was extraordinarily successful. She was totally nonpolitical. When she was approached about running for the court, she wasn't sure what primary she had voted in. The idea that this good woman is some kind of political activist or kook is as far from the truth as it can be as you can get from the truth.

She made an extraordinary decision. She gave up probably the most successful commercial litigation practice that any female lawyer in my state had or ever had, moved out of River Oaks as a single mom, to become a justice of the Supreme Court of Texas.

Now, I want to address two areas that have been brought up. One is Enron. Now, Priscilla is from Houston. Enron was the largest and most successful company in my state. So, is anybody shocked that people who work for the largest and most successful company in Texas, a company domiciled in Houston, supported the most successful commercial litigator in the state when she ran for the Texas Supreme Court? What is amazing for me is that people who worked for Enron contributed only $8,600. That should have been the beginning of a message that maybe these weren't good people. (Laughter.)

Now, there has been a -- there has been an accusation that somehow, because employees of the largest and most successful -- at that point -- company in my state contributed $8,600 that somehow this induced her to make a political ruling. Well, the case was pretty simple. The state law sets out a procedure whereby inventories are evaluated. The case came before the Supreme Court. There was a unanimous decision -- and even the lawyer -- and I've got a copy of a letter from Robert Mott -- writes a letter and says, "Justice Owen authored the opinion of a unanimous" -- this is the lawyer who represented the other side of the case. "Justice Owen authored the opinion of a unanimous court, consisting of both Democrats and Republicans. While my client and I disagree with the decision, we were not surprised." So you read this propaganda being put out, you would get the idea that this person, bought and sold by Enron, and made a political ruling. You get down to the facts, it's insulting.

Second point, this abortion business. The Texas legislature wrote a law that basically said you have got to notify a parent when a minor is having an abortion. Now, to some people that is an extremist position. To most Americans that's a pretty straightforward position. I would have to say loving many members of the legislature, as I do, I would still have to say that the bill was written by people who were trying to be on three sides of a two-sided issue. It is a very poorly written law. It imposed very heavy burdens on the court. But if you go back and look at **Priscilla Owen's** rulings, if you listen to her, whether you agree or you don't agree with her efforts to try to bring logic and reason and precedent to a very poorly written law, you have got to be basically

struck by the fact that this is a person who tried to follow precedent, which is what courts are supposed to be about.

Finally, let me say that if you need evidence that this is an extraordinary woman who has done a good job, who is basically nonpolitical, let me just give you some. When she ran for office, she was endorsed by every major newspaper in the state of Texas. There are a lot of newspapers in the state of Texas that never endorse me. Someone who is some kind of out of the mainstream person is not endorsed by the Austin American Statesman. In fact, most mainstream people are not endorsed by the Austin American Statesman. (Laughter.) The last Democrat who sat on the Texas Supreme Court is a strong supporter of Priscilla, and paid to come up here and tell people that. That was Raoul Gonzalez. The most respected living former chief justice, John Hill, came to Washington on his own initiative -- and he is a Democrat -- and was a Democrat candidate for governor, was attorney general, is one of the most loved former officeholders in our state -- came to Washington for the specific point of telling people that what they were saying about **Priscilla Owen** is simply not true.

So I want to urge my colleagues -- I know how these things work. I've been in this town for 24 years, and I've seen a lot of organized campaigns. And I know that this creates tremendous political pressure on both sides of the aisle. But I just want to say that if a group of special interests can convince people that this good woman is some kind of extremist, then these same groups could convince people that Chuck Schumer was a conservative or I was a liberal. There is no foundation to these charges that have been made. And I want to urge you to get the facts, look at them, and weigh them from the perspective of not what some advocate group says but in simply looking at the facts. If you will do that, I am confident that **Priscilla Owen** will be confirmed, and I think it will send a very good signal to America that when the facts don't comport to the charges that the Senate goes with the facts. And I thank you, Madam Chairman.

SEN. FEINSTEIN: Thank you very much, Senator Gramm. I should tell the witnesses that the light is now on. It is set at five minutes. And, Senator Nelson, you are next in line.
SEN. BEN NELSON (D-FL): Well, Madam Chairman, I am from Florida, and I am here for two noncontroversial nominations.

SEN. FEINSTEIN: Yes. I should tell everybody that we have two additional nominees following Justice Owen.

SEN. LEAHY: And I want to thank both Senator Nelson and Senator Graham of Florida for working out the situation with the White House so that we could have some noncontroversial nominees up here.

SEN. NELSON: And, Madam Chairman, if you would like I will be merciful and I will take a total of 30 seconds.

SEN. FEINSTEIN: We would appreciate that. Thank you for your mercy.

SEN. NELSON: Well, I am here on behalf of Jose Martinez and Tim Corrigan. They are noncontroversial nominees to the district court, one from the Southern District and one from the Middle District.

The reason they are noncontroversial -- and I am here on behalf of Bob Graham and myself, and with my permission will insert both Senator Graham's and my written statements into the record. They are noncontroversial because we have a selection process in Florida, called a Judicial Nominating Commission, appointed by distinguished members of the bar and prominent citizens of the community that screen the applicants. They go through an extensive formal written application, extensive interviews. Then the three nominees come to Senator Graham and me, and we interview them and tell the White House if we have an objection. And then the White House makes its selection for a district judge from the three.

And so I am happy to be here on behalf of Senator Graham and myself to tell you that we enthusiastically support both of these nominees, and they will be very good additions to the federal bench. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you, Senator Nelson. Representative Granger?

REP. GRANGER: Thank you, Madam Chairman. I am honored to be here today to support the nomination of **Priscilla Owen,** a highly qualified nominee from my state, home state of Texas. According to the Department of Justice, there are 91 vacancies in the federal court -- that's right, 91. Overall, the president has nominated 113 individuals to serve as federal judges, but only 59 of them have been confirmed, and 54 nominees are still pending. Specifically, the president nominated 32 individuals to the circuit courts, but only 11 have been confirmed. Today we have a chance to address that problem.
Today we can move to fill a vacancy that has been classified as a judicial emergency. The time has come to fill this seat, and fill it with a qualified, sensible nominee like **Priscilla Owen** -- **Priscilla Owen,** who received a unanimous rating of well qualified, the highest rating possible from the American Bar Association.

Justice Owen's academic achievements are remarkable, and her professional experience is exemplary. She graduated with honors from both Baylor University and Baylor Law School, and following graduation she received, as has been noted here, the highest score for that year on the Texas bar exam.

Justice Owen practiced commercial litigation for 17 years before her election to the Texas Supreme Court in 1994. She is well respected for her service to the highest state court. And in 2000 she was endorsed, as Ben said, by every major Texas newspaper for her successful reelection.

In her professional career, Justice Owen has worked to improve access to legal services to the poor, and increase funding for these programs. She served as the Texas Supreme Court liaison to statewide committees that strive to offer legal services to the poor. Justice Owen also

participated in the state committee that successfully enacted legislation at the state level to significantly increase funding for indigent legal services.

Additionally, Justice Owen organized a group known as Family Law 2000. Family Law 2000 warns parents about the difficulties children face when parents go through a divorce. It's a program that also teaches parents how to address those difficulties and how to make the divorce process as painless as possible for children.

Madam Chairman, Justice Owen has proven herself to be the right candidate for this position. She has served the state of Texas with distinction, and I am confident she will serve our nation well in the federal court. In short, Justice Owen is an excellent choice for the Fifth U.S. Circuit Court of Appeals, and I thank you for the opportunity to speak for her.

SEN. FEINSTEIN: Thank you very much, Representative Granger. The chair will excuse the witnesses, and we'll ask Justice Owen to come forward. Justice Owen, before you sit down, if you would raise your right hand, and affirm the oath when I complete its reading. Do you swear that the testimony you are about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

JUSTICE OWEN: I do. (Witness sworn.)

SEN. FEINSTEIN: Please be seated.

JUSTICE OWEN: Thank you very much.
SEN. FEINSTEIN: And I have put the clock on ten minutes, but we're -- my intention would be to give you as much time as you require. Generally around here people begin by introducing any family members they might wish to, and we'd be delighted to meet any of your family or friends you care to introduce. Then the time is yours to say whatever you might like to the committee. And then we will proceed with rounds of questions, and each member will have ten minutes for their questions.

JUSTICE OWEN: Thank you, Madam Chair, Chairman Leahy, members of the committee. I do want to, before I introduce my family, and my special guests today, I do want to take the opportunity to thank you very much for the hearing today, and for being able to talk to you about some of the issues that have been raised.

I also want to thank the president, of course, for the honor of nominating me to the United States Court of Appeals for the Fifth Circuit. And I certainly want to thank Senator Gramm and Congresswoman Kay Granger for coming here today and for their kind words about me, and for introducing me.

And, as you mentioned, Madam Chair, Senator Hutchison will be here later this morning. But I did want to take this opportunity to express my thanks to Senator Hutchison for all that she has done and for her friendship and support throughout this process.

I also want to thank -- she's not here today, but the counsel to the president, who is also my former colleague, Alberto Gonzalez (ph), for his support and assistance throughout this process. And --

SEN. FEINSTEIN: I am going to stop you for a minute. Pull the mike -- this is unidirectional. It has to be directly in front of you. And you have to talk directly into it, or it blurs --

JUSTICE OWEN: Is that better?

SEN. FEINSTEIN: If you could put the mike directly in front of you, and then speak --

JUSTICE OWEN: Is that better?

SEN. FEINSTEIN: That's much better.

JUSTICE OWEN: Okay. I would like to introduce my family and some of the folks who are with me today. My sister, Nancy Lacey (ph), is here. And my pastor, Jeff Black, who is from my church in Austin.

SEN. FEINSTEIN: If they would stand, we would like to acknowledge you.

JUSTICE OWEN: And I would certainly be remiss if I did not introduce the former chief justice of the Texas Supreme Court and the former Texas attorney general, John Hill, who is here today. And I want to thank him for his support and all that he has done. Some of my other friends who are here -- and I had hoped someone would help me with this, so I don't miss anyone -- because it's hard for me to see who all is here. Pat Meizel (ph), a former judge from Harris County; my special friend Harriett Myers, who is a former president of the State Bar of Texas, and who is now at the White House. Who am I missing? Oh, Judge Levi Benton, from Houston -- Harris County, Texas -- thank you, Levi for coming on short notice, and I appreciate it. Who else is? I am sorry I am not able to introduce everybody that's here. But thank you all for coming, and everybody who prepared to come last week -- and I thank you for changing your plans and getting here this week.

I also want to thank, although they couldn't make it this week, my former colleagues Raoul Gonzalez and Justice Jack Hightower. Jack Hightower is also a former congressman from Texas. And the 15 past state bar presidents, both Democrat and Republican, who have signed a letter of support and given that to the committee. And then last week there were a whole bunch of folks who came up from Texas to meet with senators and with their staffs, and I want to thank them for the effort and the time that they took to do that.

And, Madam Chair, Mr. Chairman and members, I also appreciate the opportunity to make an opening statement today. I know that that's not usually done, but for the reasons that have been discussed this morning, I think it's appropriate and necessary for me to at least give a brief

opening statement.

Madam Chair, I truly believe that the picture that some special interest groups have painted of me is wrong, and I very much want the opportunity to try to set the record straight. I have been very honored to serve as a judge on the Supreme Court of Texas, and I am extremely humbled that the president has nominated me to serve on the U.S. Court of Appeals -- the United States Court of Appeals for the Fifth Circuit. But I have never forgotten where I've come -- where I came from and my basic values.

After my father died of polio when I was about 10 months old, my mother and I went to live with her parents and her brother on a farm in South Texas. And my family worked very hard for a living then, as they do now. That was a difficult time. But my mother eventually remarried to a wonderful man, and we moved to what I considered the big city, which was Waco. Some of you don't know where that is -- it's near Crawford. But even though we moved to Waco, I missed my family in South Texas and I spent my summers growing up on the farm. And I worked alongside a lot of folks from a very different background than mine, but I learned through that that all of us have a whole lot in common. It doesn't really matter much where we came from or how we make a living, but it does matter that we all respect one another.

I was fortunate enough to be able to go to Baylor University and Baylor Law School, and I started practicing law 24 years ago, when there weren't very many women in the profession. The law was very good to me. But, an opportunity came for me to run for the Supreme Court of Texas, and I decided that I should pursue that opportunity. I believe that people like me, who had the experience, and who had the academic credentials, and who didn't have any kind of axe to grind, should be willing to step out of private practice and serve the public as judges. So I ran for the Supreme Court of Texas, and the people of Texas elected me in 1994, and reelected me in 2000.

Although I'm a judge, I believe it's very important that I try to serve people in other ways. And one of the first things I have -- did after I got to the court, I was to work to increase legal aid to the poor, and to improve their access to the courts. I also, as you have heard today, helped form a group called Family Law 2000 that has been concerned about the adversarial nature of divorces. I've also served on the Board of Texas Hearing and Service Dogs, which is a charitable organization that provides and trains service dogs for paraplegics and quadriplegics and for those who are hearing impaired. As I mentioned, I am a member of St. Barnabas Episcopal Mission. I teach Sunday school there to elementary school children, and I serve as head of the Altar Guild.

But as a Judge, I have worked very hard to carry out my responsibilities to the people of Texas, and I believe that I have done so. There have been four, I would say basic principles that have guided my work as a judge. The first is I always remember that the people that come to my court are real people with real problems and real issues, and that when we decide their cases, we're going to decide cases that affect a lot of other real people because of the precedent those cases set. So, when I decide a case, I must do so on the basis of the fair and consistent application of the law, and my decisions cannot be based, and are not based on whether a party is rich or poor,

or who their lawyer is. My decisions are based on the law -- whether that's a statute, or United States Supreme Court decision, or a prior decision from my court.

Second, when it's a statute that's before me, I must enforce it, as you in the Congress, or a state legislature, as the case may be, has written it, unless it's unconstitutional. I believe my decisions demonstrate that I do respect the division between the judicial and the legislative branches of government. If I am confirmed, I will do my utmost to apply the statutes you have written, as you have written them, not as I would have written them or as others might want me to interpret them.

Third, I must strictly follow United States Supreme Court precedent. I have taken a solemn oath to do so. I've upheld that oath in the past, and if confirmed, I will continue to do so as a Fifth Circuit judge.

Fourth, and finally, judges must be independent, both from public opinion and from the parties and the lawyers who appear before them. And as you've heard, Texas selects its judges through partisan elections. That means that judges necessarily preside over cases in which people appear before them as parties or lawyers who may have contributed to campaigns. That's a system that several other states have, but I don't believe it's the best system. I have long advocated that we change the way we select judges in Texas. I have advocated that we essentially follow an election -- and the retention election after the judge is initially appointed.
In the meantime, I have led reforms in the judicial campaigning area. When I first ran for the Supreme Court of Texas, I voluntarily imposed limits on my campaign contributions when there weren't any laws at all imposing any kind of limits. And in -- when I ran for reelection in 2000, I returned over one-third of my contributions where I did not receive a major party opponent.

In closing, Madam Chair, Mr. Chairman, members of the committee, I recognize the tremendous responsibility that judges have, and I have tried the very best I could for the last seven years to carefully and faithfully execute those responsibilities. Those who know my record the best have written to you in my support and express their judgment that I have been a fair an impartial judge on the Supreme Court of Texas.

I thank you for allowing me to make this statement, and I truly welcome the opportunity to answer all of your questions today. Thank you very much.

SEN. FEINSTEIN: Thank you very much. I know that Senator Hutchison has just arrived. If she'd take her place, and while she is, I'd like to spell out the early bird order. It is Feinstein, Hatch, Leahy, DeWine, Kennedy, Sessions, Feingold, McConnell, Schumer, Brownback, Durbin, and Cantwell.

Senator Hutchison, welcome. Your colleagues have all testified, but as you told me, you were going to be a little late, and we're delighted to have you here. And if you would like to make a statement, if you could possibly confine it to five minutes, we be appreciative.

SEN. KAY BAILEY HUTCHISON (R-TX): Thank you very much, Senator Feinstein. And thanks to you and Senator Leahy for allowing me to make this statement a little early. I got the earliest flight out of Dallas this morning and it just arrived, so I do thank you for that.

Madam Chairman, I am here in total and full support of my friend Justice **Priscilla Owen.** She's a seven-year veteran on the Supreme Court of Texas. I think you know her exemplary career, starting from when she graduated cum laude from Baylor Law School in 1977, and Justice Owen also made the highest grade on the state bar exam that year. I think her academic credentials are unmatched. She also has the experience to be a good circuit court of appeals judge, having been elected, reelected to the supreme court with 84 percent of the vote in Texas. She was endorsed by every major newspaper in Texas during her successful reelection bid.

I think she has the best qualifications of anyone that I've ever seen come before this committee for a court of appeals appointment. The Dallas Morning News called her record one of accomplishment and integrity. The Houston Chronicle wrote that she has the proper balance of judicial experience, solid legal scholarship, and real- world know-how.

But despite the fact that she is a well-respected judge who has received high praise, her nomination has been targeted by special interest groups. Justice Owen's views have been mischaracterized and her opinions distorted. Today this committee and Justice Owen have an opportunity to set the record straight. One particular area of misinformation concerns Enron. In Texas, we have statewide elections for judges. Whether any of us approve of that system or not, it is the current law in Texas, and as we all know, a person has to run a campaign and raise the funds to do that. **Priscilla Owen** has actually been a leader in trying to reform the way judges are elected in our state, having come out solidly against such elections. Like six other justices on the nine-member court, Justice Owen has received Enron contributions in her election bids. She not only received legitimate contributions from employees and the employee PAC, she didn't take corporate contributions, but at that time, Enron was one of our state's largest employers, and its employees were active. They were active politically. They were active civically, and they are -- they have been major charitable contributors in Texas and especially in Houston. So, it isn't -- it should be understandable that they did make political contributions which were absolutely legitimate. She only took $8,800 in Enron contributions out of a total of 1.2 million raised for her bid. Her opponent actually raised actually 1.5 million.

During her 2000 campaign, Priscilla imposed voluntary limits on herself, which included taking no more than $5,000 per individual and spouse, no more than $30,000 per law firm, and over half her total contributions were from non-lawyers. In fact, after she started the trend of voluntary limits, the state actually came in and made laws similar to her voluntary limits that she had led the way to make. After she did not have a major opponent in 2000, she returned over a third of her remaining contributions to her contributors.

I want to read the words of our former state supreme court chief justice, John L. Hill, who is a Democrat and was also elected attorney general of Texas as a democrat, denouncing the mischaracterization of **Priscilla Owen's** record by outside special interest groups. Their attacks

on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups made no effort to assess whether her decisions are legally sound. I know Texas politics, and he can clearly say these assaults on Justice Owen's record are false, misleading, and deliberate distortions. As you know, Justice Owen enjoys bipartisan support and the ABA Standing Committee on the Federal Judiciary has unanimously voted Justice Owen well qualified.

So, Madam Chairman, I thank you for allowing me to sit in full support of my friend, Justice **Priscilla Owen,** a member of the Texas Supreme Court with an outstanding judicial record.

SEN. FEINSTEIN: Thank you, Senator, for the excellent statement. We appreciate it very much, and you're welcome to stay or be excused, whatever you wish.

I'm going to proceed with -- try to do two questions in this round, Justice Owen. The first, it relates to the Searcy case, and the second has to do with comments that were made.

My understanding of the Searcy case is this. Willie Searcy was a 14-year-old in a Ford pickup with a pickup -- with a seatbelt, when another car smashed into the pickup and the seatbelt severed. As a result, he became a quadriplegic. He was on a respirator. The case went to court. He received a $30 million judgment, which was then reduced to a $20 million judgment, and the case came up on appeal. The young man was in every difficult circumstances. He was on a respirator. I understand that his family could only pay for a nurse through 4:00 a.m. and there was a quiet hour with nobody attending him, and then the parents attended him from 5:00 a.m. in the morning. Well, he had been in there from the age of 14 to 22, and while the year-and-a-half dragged by that you were supposed to be writing that opinion, one morning the respirator went out and he died.

And, you wrote an opinion and the opinion you wrote said that the appeal should not be granted on the basis of faulty venue, that it was brought in the wrong venue, which had never been argued in either of the lower courts that handled the case.

This was a very surprising case for me to read about you because I thought you, and hope I'm right, were a person with a great deal of compassion, and yet here was someone that had two courts sustaining a verdict which could have gotten him the nursing help that he needed to sustain his life, but during the delay, he died. And there are those in the writings that have been presented that have said that the delay was unnecessary, a year-and-a-half delay was unnecessary to write that opinion.

Could you respond to that, and could you also tell us the average length of time that you take to write an opinion like this?

JUSTICE OWEN: Senator, I appreciate that question because I do -- would like the opportunity to respond since there's been so much in the press that's simply wrong about that case.

First of all, we remanded the case to the lower court, and it was three years later that Mr. Searcy unfortunately passed away. Now, the court -- the case had been in the lower court system quite a while before it got to our court. It was over a year after the accident before the lawsuit was even filed in the trial court, so he did not pass away while the case was pending in my court.

What -- and I also want to specifically address the allegation, I guess, you would say, not from you, Senator, but that's been printed in the press, that the issue of venue was never raised in the lower courts or in my court, which is just ludicrous, frankly. I would be happy to produce the briefs all the way up in our court. Venue was argued in the trial. It was briefed in the court of appeals. The court of appeals decision wrote on venue. Venue was in the briefs permanently in our court. We -- it was -- it was definitely briefed.

And Senator, though this is kind of a legal technical explanation that I'm going to try to explain the best I can, there were no rendition points in that case. In other words, Ford was not saying that we win as a matter of law, they were saying "We want a new trial." And under those circumstances, our court had to address the venue issue. We had no choice, because there's a statute in Texas that says if the case is filed in the wrong trial court, then -- then reversal is mandatory. It's not discretionary, it's mandatory.
And what happened in this case, the Ford vehicle, the pickup was purchased in Dallas, where Miles -- Mr. Searcy, his family, lived in Dallas. The accident occurred in Dallas. Everybody agreed that all the operative facts centered around Dallas, Texas. Yet, the plaintiff's lawyer decided to file in Rusk County, in Texarkana, which is, I think, 180 or 200 miles northeast of Dallas, in a county that had absolutely nothing to do with the vehicle or the accident. Everybody stipulated that. The only basis for filing in the other country, a long way away from Dallas, was that there was a Ford dealership there, as I'm sure there's a Ford dealership in almost every county in Texas. And we looked at existing precedent in Texas, my court did, and we said, Ford doesn't own the dealership. Under the statute, again, applying our prior supreme court precedent and other courts of appeals decisions, we said venue was in the wrong county. This was essentially forum shopping issue.

And we were required by the statute, having concluded that venue was in error, to remand to the trial court, which we did. Once it got back to the trial court, the trial court granted a partial summary judgment against Mr. Searcy and his family, and that went up on interlocutory appeal, and the court of appeals considered that. The case came back to our court. We denied the petition. It went back down to the trial court. And it was at that point, three years after our decision remanding it to the trial court, based on the venue ruling, the Mr. Searcy passed away. And there's -- to this date there's been no, it is my understanding, trial to adjudicate whether Ford is liable in the first instance.

SEN. FEINSTEIN: Thank you. Since the distinguished ranking member and my friend raised Justice Gonzales, I thought I would get his actual statement and read it in some context, because this relates around the Jane Doe cases. And this where I think there has developed a feeling among some that you are a, in a sense a judicial activist, that you went beyond the law, as the law was written in Texas, with respect to notification, in asking for additional things to be

presented, that the law itself in its three prongs on notification did not require. But let me just quote this.

"To the contrary, every member of this court agrees that the duty of a judge is to follow the law as written by the legislature. This case is no different." And then it goes on to say, "Our role as judges requires we put aside our own personal views of what we might like to see enacted and instead do our best to discern what the legislature actually intended. We take the words of the statute as the surest guide to legislative intent. Once we discern the legislature's intent, we must put it into effect, even if we see our, even if we ourselves might have made different policy choices." And then it goes on to say, "The dissenting opinions, of which you were one in this case, suggest that the exceptions to the general rule of notification should be very rare and require a high standard of proof. I respectfully submit that these are policy decisions for the legislature, and I find nothing in this statute to directly show that the legislature intended such a narrow construction. As the court demonstrates, the legislature certainly could have written Section 33.033(I) to make it harder to bypass a 366 parent's right to be involved in decisions affecting their daughters, but it did not.
Likewise, part of the statute's legislative history directly contradicts the suggestion that the legislature intended bypasses to be very rare. Thus to construe the Parental Notification Act so narrowly as to eliminate bypasses or to create hurdles that simply are not to be found in the words of the statute would be an unconscionable act of judicial activism.

And, of course, in reading your opinions in these Doe cases, you did, in fact, insist on certain tests that were not present in the statute. Could you speak to that, please?

MS. OWEN: Well, Senator, let me start in reverse order with some of the things in your question. First of all, this was the third in a series or down the line in a series of Doe cases.

The first Doe case that came to the court was, of course, Doe I. And in that opinion, I tried my very best to give effect to legislative intent. And, Senator, I honestly believe that I did not go outside of what the legislature intended. I looked at the words they chose.

The legislature said that a girl who is under 18 who wants to have an abortion without notifying one of her parents may get a judicial bypass if one of three prongs are met. And the language that they chose to put in the statute for the judicial bypass was language that was almost verbatim, if not verbatim, taken out of a U.S. Supreme Court opinion. And the opinion had blessed a judicial-bypass provision in another, although it was a consent statute.

And so I looked at the context in which the legislature was deciding what to write and why. And these words were not written in a vacuum. To me they had meaning within the context of all these U.S. Supreme Court cases.

So I looked at the U.S. Supreme Court decisions in this area, primarily Casey and Akron I -- excuse me, the second decision in City of Akron -- and looked at what the U.S. Supreme Court had said about what it is that states may have an interest in information being supplied about the

abortion decision. So everything in my Doe I opinion tracked language from the U.S. Supreme Court's decision, specifically, as I said --

SEN. FEINSTEIN: I'm going to have to stop you mid-sentence, because we have three minutes to get to a vote. So I'm going to recess the committee, and we'll take up just where we left off.

MS. OWEN: Thank you.

SEN. FEINSTEIN: Thank you.

(Recess.)

SEN. FEINSTEIN: Justice Owens -- Owen -- I interrupted you right in the middle of a response. Let me just quickly better state the question. The issue here is not what some hypothetical state could impose, but what in fact the state of Texas did enact into legislation. And while various Supreme Court cases may have indicated that requiring additional steps or information might be permissible, the Texas legislature, as Justice Gonzalez said, could have written that section, Section 33.0331, to make it harder to bypass a patient's right to be involved in decisions affecting their daughters. But the point is it did not. For instance, in one Jane Doe case you suggested a minor must show that she understands the impact the procedure will have on the fetus. I understand you point to the Casey case in support of this conclusion. But that case never said that such a requirement is mandatory. So what in the Texas statute itself would justify such an expansion of this statute?

JUSTICE OWEN: Well, Senator Feinstein, again, the words that the legislature used on the first prong were "mature and sufficiently well informed." And they in fact took the entire bypass straight out of U.S. Supreme Court cases. And if you look at the backdrop against which this whole statute was enacted, it seemed to me -- and a majority of the court agreed on this, is it's in their opinion -- that they were looking at all the U.S. Supreme Court precedent on this point. And the words "sufficiently well informed" connoted, to me at least, that they wanted us to look at what the U.S. Supreme Court has said is relevant to being fully informed. I think the Texas legislature intended, as explained in another Supreme Court case -- it's HL v. -- and I can't remember the second name of it -- that they realized that in these situations there was not going to be a parent involved, that neither parent was going to be notified, that an adult, standing in the shoes of the parent was not going to be able to give mature advice and information to this minor. Again, we are talking about minors. And the U.S. Supreme Court at one point in its opinion said of course the states are entitled to presume that parents would give this kind of information and counseling, but of course that's not going to happen in these situations. So, again, it seemed to me that the Texas legislature, when they said fully -- or, excuse me, "sufficiently informed," wanted us to look at what the U.S. Supreme Court had said. States may encourage women to know about the abortion decision, to be informed, to make an informed choice.

And so I looked at, as I have indicated, primarily Casey and the second decision, City of Akron, to see what has the U.S. Supreme Court said about the words "informed." And when you go to

those cases -- I lifted directly out of the cases the issues that the Supreme Court had identified that they thought it was okay for states to look at in making this decision. And it seemed to me, again, you are talking about a minor here. These legislators were concerned that mothers and fathers would want their daughters to make the decision with as much information as they could have -- constitutionally, since there was not going to be an adult involved in the process, only the court, and that that's what the legislature intended within constitutional bounds.

SEN. FEINSTEIN: My time is up. Senator Hatch.

SEN. HATCH: Thank you, Madam Chairman. Justice Owen, I will ask you more on this later, but let me make sure that everybody understands some of the answers you have just given on the Jane Doe cases. When you argued in Jane Doe, one, that for oar minor to be, quote, "sufficiently well informed," unquote, a minor would need to, quote, "demonstrate that she has sought and obtained meaningful counseling from a qualified source about the emotional and psychological impact," unquote, and so on. This was not your personal standard that you were imposing, but an application of the United States Supreme Court standard -- isn't that correct?

JUSTICE OWEN: Yes, Senator Hatch, that's correct. That cane out of one of the U.S. Supreme Court decisions.

SEN. HATCH: Can we presume that when the justices of the Supreme Court, the United States Supreme Court, established these standards that they had before them the best available medical and psychological information?

JUSTICE OWEN: Yes, senator, I agree with that.

SEN. HATCH: It just seems to me that your detractors are speaking -- not talking about people up here, who have a right to ask any questions they want -- but your detractors on the outside are seeking to retry Casey and every other Supreme Court case by attacking you. But what you were doing was applying Roe v. Wade and its progeny. Am I right about that?

JUSTICE OWEN: Yes, senator. I quoted Roe v. Wade as modified by Casey, and I clearly recognize throughout the opinion that that is the law of the land, and I was trying faithfully to follow it. And I also pointed out in the course of the -- I think it was the Jane Doe I opinion, that if we applied that rationale of those cases it would probably mean some of our family law statutes were unconstitutional in this context.

SEN. HATCH: Well now, much has been made of your opinion that for a minor to be sufficiently informed for purposes of the judicial bypass, she must, quote, "exhibit an awareness that there are issues, including religious ones, surrounding the abortion decision," unquote. Now, I have to tell you that nothing panics your detractors --that is, these liberal special interest groups -- more than a judge suggesting that religion exists. I think they think that it's crazy talk. To be clear though, your language that a minor should, quote, "indicate to the court that she is aware of and has considered that there are philosophical, social, moral and religious arguments that can be

brought to bear when considering abortion," unquote, is nothing but a faithful -- maybe I shouldn't use that term -- mere application of Sandra Day O'Connor's language in the Casey decision -- isn't that right?

JUSTICE OWEN: Yes, senator, it was in Casey. It was in -- I believe it was also in Akron 2 -- and the specific words, "religious beliefs" and "religion" was included in HL v. Matheson.

SEN. HATCH: You didn't wake up one morning and suddenly decide you were going to impose a standard that was all your own, did you?

JUSTICE OWEN: No, senator. Frankly, when this statute hit the court we were all a little caught unawares. And I went to the -- straight to the U.S. -- looked at the history of it, and went straight to the U.S. Supreme Court decisions and started reading to see what have they said about states' abilities to see that a minor is sufficiently informed in making the choice.

SEN. HATCH: Well, it would seem to me that your detractors would like you to cherry-pick among Supreme Court cases or precedents that you should follow and Supreme Court precedents you should ignore. Of course that's typical of how some of them actually read the Constitution.

Now, let me ask you this. On your decision in Ford Motor Company v. Miles, is it not true that a bipartisan majority of the Texas Supreme Court held that lawsuit, which arose out of a car accident, was filed in the wrong county, and therefore remanded for transfer and a new trial in a different county?

JUSTICE OWEN: That's correct, senator.

SEN. HATCH: Now, the decision did not eliminate the plaintiff's ability to sue for the injuries they had suffered. It simply ordered that the case be reassigned to the appropriate venue. Is that correct?

JUSTICE OWEN: That's correct, senator.

SEN. HATCH: Okay, well, I just wanted to make that clear.

Now, Justice Owen, I would like to ask you further about your decisions concerning the Texas statute that regulates the ability of minors to obtain abortions without telling their parents in certain circumstances. First, I want to make sure that we all understand exactly what that statute does. As I understand it, the statute codifies the right of minors to obtain abortions without permission from their parents, but requires that one of the young woman's parents simply be notified of their daughter's decision 48 hours before the procedure is performed. Is that correct?

JUSTICE OWEN: That's correct, senator. It is not a consent statute, it's a notification statute.

SEN. HATCH: I see. In addition, the statute provides for what is called a judicial bypass, which

means that a judge can allow the abortion to go forward without parental notification, provided that the girl ask the trial judge to do so, and proves with testimony or other evidence that she meets one of the stated reasons for such a bypass. Is that correct?

JUSTICE OWEN: That's correct.

SEN. HATCH: Okay. Now, Justice Owen, do you know how many cases have been found since that statute went into effect by girls seeking to obtain abortions without notifying their parents?

JUSTICE OWEN: We don't know the precise number, because they're confidential. In some -- we do know that there have at least been 650-some odd since the statute went into effect in 2000. And the reason we know that is that the statute provides that the court can appoint counsel or appoint guardian ad litems for these girls at state expense. And so we know that that number of reimbursements in that number of cases have been applied for. But we also know that there are quite a number of lawyers who do these cases for free on a pro bono basis. So we don't know the exact number, but we do know at least that many --

SEN. HATCH: And how many of these cases reached the Texas Supreme Court?

JUSTICE OWEN: Ten different minors have come to our court in 12 different cases. Jane Doe and Jane Doe 4 came back after the remand.

SEN. HATCH: I see. And what happened to the rest of the cases of the 650?

JUSTICE OWEN: Well, the first two cases that came, Jane Doe and Jane Doe 2, a majority of the court, including me, believed that she, based on the evidence, that she had not met the statutory standards. But because our court had never written on either the "mature and sufficiently well informed" prong of the statute or the best interest statute, that she didn't -- and those were sort of amorphous concepts standing alone -- that she and her lawyer did not really know what standard they were trying to meet. So, in the interest of justice, we remanded those cases to the trial court for another hearing. And Jane Doe 3 -- that case was remanded. We don't know what happened to Jane Doe 3 -- she -- we just don't know because the confidentiality. Jane Doe 4 -- the court affirmed the two lower courts and denied the bypass.

And let me say -- I think it's been said, but let me make clear that none of these cases ever get to my court unless both the trial court and the Court of Appeals have denied the bypass. If the --

SEN. HATCH: I am correct in saying that the Texas Supreme Court hears such cases only after a trial court has heard them --that's the court that actually hears the testimony and the evidence -- and that trial court denies the bypass, and then the Court of Appeals reviews the trial court decision, and agrees that the bypass should be denied?

JUSTICE OWEN: Or, say, if they disagree and grant the bypass, that's the end of it. There are no further appeals. It would not come to my court.

SEN. HATCH: So is it safe to say, Justice Owen, that the cases reaching the Texas Supreme Court are the tough cases, because there have only been a few of them that have made it up there.

JUSTICE OWEN: Well, yes, senator, with this caveat -- caveat, or however you pronounce it -- we have had some cases that came to the court that -- there were five of them actually -- where the court affirmed the lower court's judgment without opinion. And it takes under our rules at least six judges to agree to do that. And if any judge had dissented and noted their dissent publicly, then we would have reflected that. I can't get into the deliberations on our court or disclose what was at issue in those cases, but I think it's a fair inference from those circumstances, given the number of opinions written in all those other cases, that these were not close cases in those five instances.

SEN. HATCH: So it leads to the more difficult case, where evidence of maturity, best interests or abuse happens to be not very clear -- is that right?

JUSTICE OWEN: Yes, senator.

SEN. HATCH: And where the precise definition of words used by the Texas legislature has to be determined?

JUSTICE OWEN: That was the -- we had never obviously construed the statute before, and it needed to be construed by my court to give guidance to the trial courts and the courts of appeals.

SEN. HATCH: Of course some of the abortion rights advocacy groups would prefer that you simply always rule in favor of bypassing parents rather than look at the words of the statute. But I have got to say I think the method of your decisions, your principled examination of legislative intent, is exactly the kind of judging that most Americans really want from their judges -- and expect.

Now, the judicial bypass law in Texas has been in effect for a relatively short time. Am I right about that?

JUSTICE OWEN: Senator, it came into effect in January of 2000.

SEN. HATCH: Okay, so it's only been a year or so. Therefore, disputes arising out of that law are cases of first impression, meaning that the court was deciding the proper standards that the Texas legislature intended for the first time. Is that right?

JUSTICE OWEN: Yes, senator.

SEN. HATCH: Okay. Now, Justice Owen, some of the liberal interest group lobbyists that oppose your nomination have accused you of lacking sympathy for the girls whose cases made it all the way up to the Supreme Court for review. Some of those groups want the public to believe

that your decisions reflect an opposition to abortion itself, rather than a thoughtful and principled approach to applying the law as the legislature intended that are meant. I know that these accusations are false, but I have examined your record and your opinions, as I have done for a huge percentage of the judges sitting on the federal bench today, and I've concluded that some of these groups have set out to ruin your reputation, and they've simply gotten it wrong. But they don't always take my word for it, unfortunately. So let me just ask you when you were writing your judicial opinions in the Jane Doe cases, were you motivated simply by a desire to achieve a particular public policy result, or was your objective to ascertain and enforce the intent of the Texas legislature?
JUSTICE OWEN: Well, my personal beliefs don't enter into any of my decisions. They certainly didn't enter into these decisions. We had a statute in front of us that again was enacted after long debate in the Texas legislature against a backdrop of a series of U.S. Supreme Court decisions that mapped out some of the perimeters of this area.

SEN. HATCH: Well, I'd like to pursue this further, but I just noticed the red light, and my time is up.

SEN. FEINSTEIN: Before recognizing Senator Leahy -- after Senator Leahy, Senators DeWine, Kennedy, Sessions -- it is my understanding that, Senator McConnell, that you wanted to move up in that order. I'll leave it up to you to work out with --

SEN. DEWINE: That would be fine with me.

SEN. FEINSTEIN: All right, excellent. Then we'll move Senator McConnell up in place of Senator DeWine. DeWine will go into McConnell's place.

Senator Leahy.

SEN. LEAHY: Thank you, Madam Chair. I -- and, Justice Owen, good to have you here. I'm glad you are able to have this hearing.

JUSTICE OWEN: Thank you.

SEN. LEAHY: And, as I noted before, just to cut through the basic rhetoric, when the other party was in charge of this committee, Jorge Rangel and Enrique Moreno, who had been nominated by President Clinton for a seat, were never even allowed to have a hearing. And I mention that because of some of the -- as I hear some of the comments being made on my comment line by the White House supporters about you, they were probably unaware of that. And, also, to forestall some of the other comments that the White House is trying to get out on your behalf, that we did notify the White House of the various cases that I was going to ask you about -- about a week ago -- is that correct?

JUSTICE OWEN: I'm sorry?

SEN. LEAHY: About a week ago we gave the White House a heads-up on the type of cases I was going to ask you about -- is that correct?

JUSTICE OWEN: I really don't know, Senator Leahy.

SEN. LEAHY: Well, then that's -- you should talk to them, because we did.

In FM Properties v. City of Austin -- let me go to that a bit, because you have developed a reputation for opinions which if not every time most of the time favor big business interests. And this is a case that doesn't change that reputation. A large majority of the Texas Supreme Court in FM Properties v. City of Austin found a section of the Texas water code unconstitutional because it gave too much legislative power to corporate land owners with large tracts of land. As a majority of your court saw it -- and I think very convincingly explained their legal reasoning for it, the code section simply went too far -- it allowed these large land owners to regulate themselves, even though that would affect their financial interests, even though it may adversely affect the environment of those around them. So the farmer is telling the fox to guard the henhouse. And the court said, and I am quoting, "that your dissent in that case was nothing more than inflammatory rhetoric." The six justices and the majority explained why your legal objections were mistaken. They said that no matter what the state legislature had the power to do on its own, it was simply unconstitutional to give the power of the people to a land owner. Now, could you tell me why you thought it was proper for the legislature to grant these large corporate land owners the power to regulate themselves? Because under this, as I understand it, with limited government review there would be very little opportunity for citizens to challenge the regulations. There's clear financial interests in those who would be regulating themselves. If that's not giving up too much to a private interest, what would be?

JUSTICE OWEN: Senator Leahy, I know that some have tried to characterize this case as involving a fight between the City of Austin and big business, but in all honesty when you get down and look at it, what this was really a fight about was the state of Texas versus the City of Austin. And when this case hit our court, the then attorney general of Texas, Dan Rawlins, intervened in the case and filed a long, thorough brief in support of the constitutionality of the state statute. There had been a long-standing rivalry between the city of Austin and the state of Texas over Austin trying to regulate within its extraterritorial jurisdiction. And the legislature came back and said, you know, we want state regulations to apply in your ETJ, which they couldn't -- that's a technical term, but it wasn't technically part of the city of Austin, but it was their ETJ. The state said, Look, we gave you the ability to have an ETJ in the first place, and we want state regulations, not city regulations, to apply in that area. And this was not an unregulated area. The entire area was subject to all of the laws of the Texas natural resources code, all of the other water laws and conservation laws that apply to every piece of land in the state of Texas. So it was not regulated.

SEN. LEAHY: But just so on -- that's not really the way the majority saw it. They did refer to your opinion as being inflammatory rhetoric, your dissent. There was very limited ability for the citizens to question it. Frankly, if you followed your dissent, one could argue that the problems

on Wall Street right now, there'd be no problem in delegating the power to the corporations and the accountants to regulate themselves, no matter what effect it might have on ordinary citizens, no matter the lack of regulation.

Let me ask you about another one, Read versus Scott Fetzer. The Texas Supreme Court, by a vote of 6-3, held a vacuum cleaner company liable when one of its dealers raped a customer after an in-home demonstration required by the company.
Now, a jury of Texans found the company should be held accountable. The Supreme Court affirmed. The Texas appellate court had agreed first. They said the company had a duty to exercise reasonable control over the vacuum sales representatives because in this case it required in-home sales. And in this case you had a person who had enough in his record to raise warning flags to the company.

But you said this was wrong, if I understand the dissent you joined; that it's a wrong view of corporate responsibility because it would impose liability on all in-home vendors, as if the outcome might provide too much justice and compensation to future victims, even though this case was a pretty blatant one. Do you think that's a fair basis to shield corporations from the actions of their agents?

MS. OWEN: Senator Leahy --

SEN. LEAHY: It seems to be going against basic horn book of tort law.

MS. OWEN: I was trying to follow basic horn book tort law. And I think this case was very sympathetic. There were terrible facts in the sense that this woman was raped in her home. But basic hornbook law is that when there are independent contractors involved that you don't have respondeat superior liability. And here we had not just one independent contractor but we had two layers of independent contractors.

The Kirby vacuum cleaner company, at the national level, hired or engaged distributors -- this is all stipulated that they were independent contractors -- this wasn't my view; the parties agreed to this; there was no issue about it -- that Kirby's distributors were independent contractors and that Kirby in turn contracted with other independent contractors to go door to door and make the sales. And under hornbook contract law, you're typically not liable for the acts of your independent contractor.

SEN. LEAHY: Well, this -- but the Texas trial court disagreed with you. The Texas appellate court disagreed with you. The Texas Supreme Court disagreed with you. I mention this only because I find so many of these things where you seem to be outside even the mainstream of what is arguably a very conservative supreme court, the Texas Supreme Court.

I saw this in the City of Garland versus Dallas Morning News on allowing -- you seemed to be wanting to write in such a large exception to any kind of public disclosure that anybody could hide anything from public disclosure. That is why -- and I will submit a number of questions for

the record, because I understand that there's time -- time is running out.

But I will submit a number of questions on these where you seem to be outside the mainstream even of your own court, and the other area being the area of campaign contributions. And I realize that judges are allowed to raise campaign contributions. You've raised over a million dollars for your 1994 and 2000 election campaigns from law firms, lawyers, litigants, including Enron and Halliburton. Many of them regularly appear and have interests before your court.

It appears that in many of the cases in which your past contributors were parties, you did not disqualify or recuse yourself. In our state, we would see this as a major conflict of interest. Apparently it is not in Texas.

So I'd just ask you this. While you don't have any duty to disclose contributions, did you make a full disclosure to the parties of campaign contributions that you received related to those who may have interest in the case?

MS. OWEN: Senator Leahy, all of my contributions are a matter of public record. For the 2000 election, they're all available on the Internet. Anybody -- I had 3,000 of them, individual contributors, in my 1994 campaign.

SEN. LEAHY: But some of these are fairly significant. I mean, the Enron ones, for example, were significant. Yet you, shortly after receiving them, were arguing a case. In 1994 you got 21 percent of your total campaign funds from non-law firm businesses, including individuals with political action committees -- Enron, Halliburton, Shell, Kinetic.

You -- my question is, whether required or not, did you ever have a case, one, where you recused yourself because of campaign contributions, first? Did you?

MS. OWEN: No.

SEN. LEAHY: Did you ever have a case where you noted, aside from whatever might be on a web site, that you noted to the parties involved that you'd had significant contributions from one of the parties?

MS. OWEN: Senator, again, they're a matter of public record. And everybody --

SEN. LEAHY: I know, but that's an easy --

MS. OWEN: And no one's ever asked me --

SEN. LEAHY: I'm not trying to do a trick question, Justice Owen, just a simple yes or no. Did you ever have a case where you went out of your way to make such a disclosure to the parties? And I would note that you're not required to. I'm just asking, did you ever?

MS. OWEN: No, Senator, no one's ever asked me to recuse because of campaign contributions.

SEN. LEAHY: Well, did you ever -- no, that's not my question. And I posit this by saying, in fairness to you, you're not required to do this. But did you ever have a case where you had had significant contributions from one of the parties involved where you noted that fact to the litigants when they were before you?

MS. OWEN: No, Senator, I did not.

SEN. LEAHY: Thank you. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you.

MS. OWEN: Mr. Leahy?

SEN. HATCH: Could the witness answer some of the other questions that Senator Leahy raised? He cut her off.

SEN. HATCH: I wonder if -- Madam Chair, I tried to make -- I don't think I cut her off, but I'll leave that to the chair to determine. I will have a number of --

SEN. HATCH: Well, but if she would like to say more, I'd like her to have the opportunity.

SEN. FEINSTEIN: Let me just ask, do you have anything else you'd like to say on that?

MS. OWEN: I would like to make -- there was a lot in there, but there are two points I would like to make quickly --

SEN. FEINSTEIN: Please.

MS. OWEN: -- particularly about the comment that I'm out of the mainstream on my own court. We've had 890-something decisions or close to 900 that I've participated in since I've been on the court, and I have been in the dissent apparently -- I haven't counted them myself, but according to some of my opposition, 86 times, which means I've been in the dissent on my court less than 10 percent of the time.

SEN. LEAHY: A lot of those cases, though, were unanimous, were they not, and just -- there were no significant dissents?

MS. OWEN: I don't believe so, Senator Leahy.

SEN. LEAHY: Okay.

MS. OWEN: We split up quite frequently on my court. The second point I wanted to -- well, I

can deal with FM Properties, I guess, in detail, but they were subject to a lot of regulation by the state, just like every land-owner in the state of Texas. And so I would like the opportunity at some point to fully address all of that, if not today in the hearing, certainly by --
SEN. LEAHY: Well, please understand that on the time, you have the opportunity -- and I'm sure that Senator Feinstein would agree with this -- you have an opportunity to expand on any of your answers. Nobody wants to cut you off. If you have an area where you feel you did not have an opportunity to fully answer, of course you can add that for the record. And I will be submitting other questions. And, of course, if you feel that they're not clear and you need more information, we'll do that too.

MS. OWEN: I appreciate it.

SEN. LEAHY: Nobody is trying -- as I said at the beginning, unlike Senator Hatch, I try to make up my mind after the hearing, not before.

MS. OWEN: I appreciate that.

SEN. HATCH: I've noticed that.

SEN. FEINSTEIN: Now, now, gentlemen. Now, now. The next questioner is Senator McConnell. And directly -- finishing with his time, we will recess until 2:15. Senator McConnell.

SEN. MITCH MCCONNELL (R-KY): Justice Owen, I gather from your testimony and that of others that you share my view that judges ought not to be elected.

MS. OWEN: Yes, Senator McConnell. From the very first time since I've been on the court, since the '95 legislature on upward, I have advocated that we allow the people of Texas to amend the state constitution, which is what it would take in Texas, to change the way we pick judges and allow them to choose to go to a system that's essentially an appointment system whereby the judges would then stand for retention in a totally nonpartisan manner.

SEN. MCCONNELL: You've probably noticed the U.S. Supreme Court decision a few weeks ago on the issue of whether or not states are permitted to have, in effect, gag rules on judges if they do elect them. The Supreme Court held -- I got the impression, from reading Justice Scalia's opinion, that he too was unenthusiastic about electing judges. But he said if you're going to elect them, you can't say they can't say anything.

And I was reminded, we have a similar rule in Kentucky. And I've noticed over the years judges showing up at events, standing up, introducing themselves, smiling sweetly and sitting down, because they are essentially not allowed to say anything.

I raise this because it is, of course, permissible to elect judges, and Texas has chosen to do that. And while that's maybe not how I would do it, the people of Texas didn't consult me on that. And

this issue about your contributions, I find fascinating how one could run for office unless the taxpayers provide funding for an election, one could run for office without speaking, and having the funds available to speak to a large audience like you have in Texas is beyond me.

You were successful in raising funds in order to carry your message to the people of Texas. And now you are being, I gather, criticized for raising perfectly legal contributions to engage in perfectly permissible campaigns in order to hold the office that you have now.

You certainly received de minimis contributions from Enron, smaller amounts than at least one member of this committee. And there's no evidence whatsoever that Enron was given any favorable treatment in any of the cases that it might have had before you.

All evidence indicates that you've acted ethically and ruled correctly with respect to any matters involving Enron. You never received any contributions from the company or from Enron-affiliated corporations. And while you received some contributions from Enron employees, as I read it, it's less than 1 percent of the total amount of funds you raised.

The one opinion that I gather is frequently referred to, relating to Enron, that you wrote was unanimous and bipartisan and relied on two on-point Supreme Court decisions. So the notion that you somehow were tainted by any of these Enron employee corporations is utterly without any basis.

The committee has received a letter from two Democratic justices on the Texas Supreme Court, Raoul Gonzalez and Rose Specter, who joined in that unanimous decision and who confirm that there was nothing extraordinary, let alone improper, about it. And if no one else has put that letter in the record to date, I'd like to ask that that letter be put in the record.

Others have referred to the lawyer who lost that case and the letter he sent saying that he was disturbed by suggestions that your decision in the case was influenced by campaign contributions from Enron employees. The lawyer said, "I personally believe that such suggestions are nonsense." This was the guy who lost.

You could have taken a much more expansive view of what the contribution system allowed in Texas. But I hold up your pledge you made to the people of Texas when you ran in 1994, that you didn't have to make, with regard to the parameters that you were going to superimpose over your contributions during that campaign.

You unilaterally decided to accept no more than $5,000 from a PAC, a political party, any other entity, or an individual, together with his or her spouse and independent family members. You didn't have to do that, did you?

MS. OWEN: That's correct, Senator. At that time there were no laws at all in Texas limiting judicial campaign contributions.

SEN. MCCONNELL: And you pledged to have "no more than half my contributors be lawyers" and in a statewide race accept no more than 60 percent of your total contributions from lawyers. You didn't have to do that, did you?

MS. OWEN: I met all the -- I met my pledge.

SEN. MCCONNELL: Yeah. But you didn't have to do that.

MS. OWEN: I did not have to do that.

SEN. MCCONNELL: This is something you chose to do because you were troubled by having to raise funds in order to run for a judicial race. But, of course, if you didn't, nobody would have known who the heck you were.

MS. OWEN: That's correct, Senator.

SEN. MCCONNELL: Third, you said you would allow no PAC or political party "to spend more than $5,000 pro-rated to aid my campaign." You didn't have to do that, did you?

MS. OWEN: No, Senator, I didn't.

SEN. MCCONNELL: You, fourth, said you would accept no more than $25,000 from a law firm and all its employees and members, their spouses and dependent family members. You didn't have to do that, did you?

MS. OWEN: No, Senator.

SEN. MCCONNELL: Fifth, you said you would accept no more than 15 percent of your total contributions from non-lawyer PACs. You didn't have to do that, did you?

MS. OWEN: No, Senator.

SEN. MCCONNELL: Sixth, you said you would use no funds raised for any non-judicial office. You didn't have to do that, did you?

MS. OWEN: No, Senator.

SEN. MCCONNELL: Seventh, you said you'd spend or loan "no more than $10,000 of my money on my campaign." You didn't have to do that, did you?

MS. OWEN: No, sir.

SEN. MCCONNELL: Eight, you said you'd spend no more than $2 million. You didn't have to do that, did you?

MS. OWEN: No, sir.

SEN. MCCONNELL: And, ninth, you said you'd make a good-faith effort to report the occupation and employer of each person who contributes more than $50. Did you have to do that?

MS. OWEN: I wasn't required by law to do it, no.

SEN. MCCONNELL: All right. So you were somewhat troubled by the fact that you had to run for office like a regular candidate here, and you were on your own trying to impose some standards in order to diminish the appearance, at least, of undue influence on the part of these contributors to your campaign. Is that correct?

MS. OWEN: Well, let me do say that when you say I was on my own, Senator -- one of my colleagues who also running at the same time also took the same pledge, and Chief Justice Phillips had not done exactly that, but he has imposed limit when he had run prior to that. So, I was certainly not the only one that had ever done it, but -- but not many of us have had.

SEN. MCCONNELL: Well, that's nice of you to say that. The others obviously had more trouble by -- by the process in some ways as well. And as several of the people who testified on your behalf pointed out, you've actually backed -- been a leader in trying to nudge Texas in the direction of adoption a different system, have you not?

MS. OWEN: I have.

SEN. MCCONNELL: Frankly, I think you ought to be sainted for your exemplary conduct in running for this office. Some people are insisting on painting you as some kind of a Ma Barker here, of a Depression Era gang land thing, and it's utterly absurd. So, just to explore how much attention you may have paid to these contributors, can you name for me your top five largest contributors?

MS. OWEN: I can -- I can name the top one because it was my former law firm, and the employees, including the mailroom people, contributed and they exceeded the cap and I gave a bunch of their money back. But I know -- I know because of that that they were my largest contributor, but other than that, I don't know.

SEN. MCCONNELL: You can't remember any of the rest of them, right?

MS. OWEN: I can remember some -- certainly I can remember some of the law firms that contributed because they are people I practiced law with for 17 years, but I don't know where they fell in terms of were they 100th, or 10th, or -- I don't remember.
SEN. MCCONNELL: And so the suggestions made that you should have somehow notified parties arguing cases before you of your -- the fact that you had received contributions when in fact that isn't required by Texas law and the contributions would be available in publicly

disclosed forum to anybody who was curious enough to ask, and certainly including the lawyers who were appearing before you, correct?

MS. OWEN: That's correct.

SEN. MCCONNELL: Well, I think these suggestions that you've somehow engaged in rulings that favor your donors is -- is absolutely absurd on its -- on its face. And I commend you for really traversing the waters here of elected politics for a judicial position in a very ethical manner. As I said, you know, at the risk of being repetitious, I don't think judges ought to be elected, but if we are going to elect them, they certainly ought to be free to speak, and the supreme court has made it clear they're free to speak. The supreme court also made it clear over 25 years ago that in order to speak you have to reach the audience. And the only way you're going to reach the audience is to raise funds to reach the audience, particularly in an enormous state like yours, with a population currently of what?

MS. OWEN: I -- I don't know --

SEN. MCCONNELL: Over 20 million?

MS. OWEN: Five million people, I think, close to five million people voted in my race.

SEN. MCCONNELL: Yeah, over 20 million people in Texas. You managed to do that in an extraordinarily thoughtful and ethical manner for which you ought to be commended, not condemned. And I think the suggestion that you have in any way been tainted by these contributions is completely and totally baseless -- completely and totally baseless. It -- it just troubles me greatly that you've even been subjected to this criticism because there is essentially nothing that I can find in the record that justifies it.

SEN. FEINSTEIN: Senator, your time is up.

SEN. MCCONNELL: Madam President -- Madam Chairman, I think we are about to the end of our time here anyway, and I'll save the balance of my observations for another round.

SEN. FEINSTEIN: All right. And Senator Hatch, you have a question --

SEN. HATCH: Madam Chair, if I could, I feel compelled to respond to the questions raised earlier about the nominations of Judge Rangel and Enrique Moreno, because these nominations were made when I was chairman of this committee, and I understand those remarks as an attack on my record of fairness. Those -- Jorge Rangel voluntarily withdrew his nomination citing frustration with the pace of the confirmation process. It is interesting to note that his nomination was pending for fewer in-session days than Justice Owen's. Mr. Wrangler quit after waiting 192 days of Senate business while Justice Owen is here after 212 Senate business days. When Mr. Rangel, President Clinton decided not to allow the Texas Senators Federal Judiciary Advisory Group to review and recommend potential candidates. Instead, President Clinton nominated

Enrique Moreno. This put the advisory group in the unprecedented position of interviewing someone who had already been nominated to determine his qualifications. And when the advisory group voted, two-thirds of the voting members opposed the nomination. Now, anyone acquainted with the history of Senate consultation on nominations would fully understand that bypassing the home state senators is not an effective strategy for confirmation. In contrast, Justice Owen enjoys the full and strong support of both of her home state senators, and, of course, many others in a bipartisan way as well.

So, I just wanted to set the record straight because I didn't want anybody walking out of here thinking that -- that there was a lack of fairness.

Thanks, Madam Chairman, for letting me make that point.

SEN. FEINSTEIN: All right. You're welcome.

SEN. HATCH: Could I also put in the record, Madam Chairman, a letter -- a letter to Senator Leahy from -- concerning the Ford Motor case that was raised earlier -- yes, written by Victor E. Schwartz, who, of course, is one of the true authorities on tort law in this country and knows what horn book law really is.

SEN. FEINSTEIN: Without objection. The hearing will recess until 2:15. I earlier said 2:00, but the party conferences generally don't end until 2:15, so we'll make it that. Thank you very much.

END

Federal News Service

July 23, 2002 Tuesday
SECTION: CAPITOL HILL HEARING

LENGTH: 19648 words

HEADLINE: AFTERNOON SESSION OF PANEL II OF A SENATE JUDICIARY COMMITTEE HEARING

CHAIRED BY: SEN. DIANNE FEINSTEIN (D-CA)

SUBJECT: NOMINATION OF **PRISCILLA OWEN** TO BE A CIRCUIT COURT JUDGE FOR THE FIFTH CIRCUIT

WITNESSES: PRISCILLA OWEN, NOMINEE

BODY:

SEN. FEINSTEIN: The hearing will come to order. Justice Owen, just a reminder: You are still under oath. And we will resume the first round of questioning. I would remind the committee that we'll recess for any floor votes that occur during the remainder of the day. And once again we're following the early-bird order, and it begins with Senator Kennedy; after Senator Kennedy, Senators DeWine, Feingold, Sessions, Schumer, Brownback, Durbin, Cantwell and Edwards is what I have so far.

Senator Kennedy.

SEN. EDWARD KENNEDY (D-MA): Thank you very much, Senator Feinstein. Welcome, Judge Owen.

MS. OWEN: Thank you.

SEN. KENNEDY: I apologize not being here earlier. I was here in the very beginning of the hearing. We're, as you have heard, considering the prescription drug issue. And as the floor manager of that, I needed to be on the floor. So I'm going to ask questions and then, with permission of the chairman, submit some follow-on questions. But I'd like to cover, if I could, in the time that I do have, two areas. As I look at your cases, I see that you have a pattern of siding against the consumer or the victim of personal injury in favor of business and insurance companies. And I'm struck by the fact that when the court does rule in favor of consumers or victims of personal injury, you're frequently in dissent.

In a few instances you've gone along with the majority of the case and ruled in favor of injured individuals. But looking at the information over the last three years, you've dissented almost half the time that a consumer wins. And you've never dissented from a case in which the consumer loses.

Do you disagree that you're among the most likely on the Texas Supreme Court to dissent from favoring -- cases favoring a consumer or injured plaintiff?

MS. OWEN: No, Senator, I don't. I judge each case on its merits. I'd like to address one thing you said. One case that comes to mind where I was in the dissent in favor of the plaintiff was Sands versus Fidelity Guaranty, or I'm not sure what comes after Fidelity.

But it was a workers' compensation case, and the woman entered into a settlement agreement of her workers' compensation claim and she ultimately claimed that she was fraudulently induced into it and claimed damages for bad faith. And I agreed with the majority of the court that the bad-faith claim couldn't stand. But I dissented because she should have been entitled to rescind that settlement agreement and go back and reassert her original workers' compensation claim. That's one that comes to mind. I can go back and --

SEN. KENNEDY: Let's take the example where the majority found -- over the objections of the majority. Have you ever dissented over the objections of the majority and found for a consumer

of plaintiff? Do you have any recollection of any cases?

MS. OWEN: Well, that would be one of them, the Sands versus Fidelity.

SEN. KENNEDY: That wasn't a majority case.

MS. OWEN: I was in the dissent in that case. You're asking me if I've been in the majority for consumers?

SEN. KENNEDY: Any time that -- can you point to a case in which you stood up for a consumer or individual plaintiff over the objections of the majority?

MS. OWEN: Well, there's --

SEN. KENNEDY: That is, a case in which the consumer lost and you dissented.

MS. OWEN: Well, I think the Sands case that I just described is one of them. I think there are probably others. Again, there are 900 of them. I don't remember them all. But I could go look.

SEN. KENNEDY: Well, if you could be good enough to provide some of those.

MS. OWEN: Now, I've certainly voted -- there are a number of opinions where I have -- obviously the consumer has recovered and I joined those opinions.

SEN. KENNEDY: In the past two years, the Texas Supreme Court has ruled on cases brought under the Texas Parental Notification Act, and the law passed by the state legislature in 2000 permits the young woman to have an abortion without notifying her parents if she proves, by a preponderance of the evidence, that she's mature and sufficiently well-informed to make the decision or if notification would not be in her best interest or if notification would lead to physical, sexual or emotional abuse.

Many, if not most, would describe members of the Texas Supreme Court as conservatives. And as cases have come before the court, it's clear that its members have struggled with the task of restraining their personal beliefs on abortion and parental notification to ensure they adhere to the letter of the law.

In fact, former Texas Supreme Court member, current White House Counsel Alberto Gonzales, wrote, "I cannot rewrite the statute to make parental rights absolute or virtually absolute, particularly when, as here, the legislature has elected not to do so. However the ramifications of such a law and the results of the court's decision here may be personally troubling to me as a parent, it is my obligation as a judge to impartially apply the laws of this state without imposing my moral view on the decisions of the legislature." That's all his quote.

Now, Justice Owen, a majority of the court have applied the plain language of the parental-

notification statute to the relevant cases and they have refrained from legislating from the bench and placing new hurdles before young women who are already required to meet the stringent standards required by the statute.

On the other hand, you've repeatedly tried to impose new standards, standards not found in the statute, on the young women whose cases come before you. For example, you'd require young women to meet unusually high standards to prove "the direct, clear and positive," quote, proof of abuse instead of showing that the notification may lead to abuse.

Your standard is so high that four of your colleagues wrote, "Abuse is abuse. It is neither to be trifled with nor its severity to be second-guessed." Similarly, you would require a minor to exhibit an awareness of religious issues. In no place does the statute require such a showing.

So, Justice Owen, you seem to be making, not interpreting, the law. And, in fact, many might call your actions on the court activist. Can you tell the committee why, if you believe that your views reflect the plain language of the statute, you have been unable to persuade a majority of your colleagues to interpret the statute such that it includes the additional hurdles that you've grafted onto the parental-notification law?

MS. OWEN: Senator, obviously my court disagreed. We divided up initially on these cases. I -- let me go back and address the "clear, direct, positive." That was not the standard that -- the statute says "abuse may occur." And I looked for a definition of emotional abuse in another piece of the same family code. And I didn't say that you actually have to have that, but I said that's the definition of abuse if it may lead to that. That's all I was saying there.

The "clear, direct evidence" piece comes in to -- that's our standard of review as an appellate court, not in the trial court; not in the trial court. In the trial court, the burden of proof is preponderance of the evidence. And if there's some evidence to support what the trial court did, that's that.

But on appeal, if the trial court denies the minor the bypass, and even if there's no evidence to support that denial, she still must, under established law that the majority agrees with, she must still establish, by clear, direct evidence that's unequivocal as a matter of law, that she's entitled to that bypass. And a majority agrees with that. It's in our case law. That's just the standard of review, for her to establish, is a matter of law. She's entitled to it on appeal. That's not the standard that would be applied in the trial court.
SEN. KENNEDY: Well, are you saying that the four justices didn't have a different position than you had on this particular case?

MS. OWEN: I'm saying there are two different inquiries. In Doe I, I differed with the majority. I said that there are other factors that ought to be considered in deciding whether a minor is sufficiently informed. And once Doe was over, that was the standard that I applied in every case thereafter.

A separate issue that we don't disagree on --

SEN. KENNEDY: These are other factors in the law? You were looking at the law and you found that there were other aspects of the law that you noticed that the other judges did notice?

MS. OWEN: I looked, again, at everything that the U.S. Supreme Court had said, that it's okay for states to include in ensuring that a minor is sufficiently well-informed to make this decision without the knowledge of either of her parents. There are factors that appear in at least three Supreme Court cases that I thought the legislature intended to reference when they used the word "sufficiently informed and mature."

And so I was looking, again, at what the U.S. Supreme Court had said in this whole area about being informed and being mature. The court did not agree with me. But after Doe I, I applied the court's standards that they pronounced. And then this "clear, direct evidence," it's not tied to the statute. That's an appellate standard that the majority agrees with. That's just -- she's not entitled to a bypass in our court unless she establishes in the record the evidence established by clear, direct, positive testimony, free from doubt, as a matter of law, she had met the standard.

SEN. KENNEDY: Well, if you had that, do you have the same ruling today as you had at that particular time? Do you still read that the way you did at that particular time?

MS. OWEN: No, Senator, I apply the -- after Doe I, in all the other Doe cases that have come up involving "mature and sufficiently well-informed," I apply the same -- I only look at the same factors that the court did. The big controversy the second time Doe came up was whether there was any evidence at all to support what the trial court did.

And I said it was a close case, but I said the trial court was actually there on the ground. He saw -- he or she saw the minor testify, judged her credibility. And I think maturity is something that's particularly hard to do from a cold record. And I said there's some evidence, even though it's close, to support what the trial court did. And under appellate standards of review, I felt I was bound to uphold what the trial court did, even though I might have ruled a different way had I been on the trial court.

SEN. KENNEDY: Madam Chair, I thank -- my time is up. I'll have a chance to examine this record further, but I'm troubled by this conclusion. Thank you.

SEN. FEINSTEIN: Thank you very much, Senator Kennedy. Senator DeWine.

SEN. MIKE DEWINE (R-OH): Justice Owen, thank you for being with us. I want to clarify something, to follow up on Senator Kennedy's questioning. You do now follow Roe I.

MS. OWEN: Yes. That's -- yes.

SEN. DEWINE: That is the law of Texas today.

MS. OWEN: It is the law.

SEN. DEWINE: And you have followed that ever since Roe I was decided. Is that correct?

MS. OWEN: Yes, Senator.

SEN. DEWINE: Now, in Roe I, both the minority and the majority were trying to decide what guidance to give the trial court.

MS. OWEN: Yes.

SEN. DEWINE: Isn't that correct?

MS. OWEN: Yes. We were trying to --

SEN. DEWINE: And isn't it correct that the only dispute was what guidance to give? It wasn't a dispute over whether you were going to give guidance.

MS. OWEN: That's correct.

SEN. DEWINE: And, in fact, isn't it true that the majority did give guidance to the lower court?

MS. OWEN: They did.

SEN. DEWINE: And that's the guidance that you follow today.

MS. OWEN: That's correct.

SEN. DEWINE: There are a number of rules of construction that courts apply when interpreting a statute. Isn't it true that one of those rules is that a legislature is presumed to be aware of United States Supreme Court precedent in an area in which it has passed a statute?
MS. OWEN: That's where the standard presumption is in statutory construction.

SEN. DEWINE: Basic rule of construction, the courts will follow.

MS. OWEN: Yes.

SEN. DEWINE: So in the case of the Texas parental-notification statute, the Texas court's presumption would be that the Texas legislature was, in fact, aware of Supreme Court precedent when it crafted its judicial-bypass process.

MS. OWEN: Yes, Senator. And we all agreed on that. The majority agreed that that was true.

SEN. DEWINE: Now, I'm looking at the end of Section -- Roman numeral IV in the Texas Supreme Court's majority opinion in the first Jane Doe case. In Section 4, your court's majority is discussing a line of U.S. Supreme Court cases on parental bypass, starting with Bellotti. Your court majority concludes, and I quote, "Our legislature was obviously aware of this jurisprudence when it drafted the statute before us," end of quote.

So you weren't alone in your conclusion that the Texas legislature drafted the parental-notification statute with the Supreme Court case in mind, were you?

MS. OWEN: No, sir.

SEN. DEWINE: The majority had the same opinion.

MS. OWEN: They did.

SEN. DEWINE: Let me really get back to basics in regard to this issue. I want to go back to the statute that was passed by the Texas legislature in this area. And I will quote from it. When a minor files this application for a bypass -- in other words, saying, "I do not want either one of my parents notified" -- and this is, in fact, a minor we're dealing with -- "When a minor files such an application, the court shall determine" -- I'm quoting from the statute -- "by a preponderance of the evidence, whether, one, the minor is mature and sufficiently well-informed to make the decision to have an abortion performed without notification to either of her parents, or, two, notification would not be in the best interest of the minor, or, three, notification may lead to physical, sexual or emotional abuse of the minor."

And the statute continues. "And if the court makes any of these determinations" -- that's my emphasis -- "any of these determinations, the court shall enter an order authorizing the minor to consent to the performance of the abortion."

So -- now, as the Supreme Court, you're not the trier of fact, are you?
MS. OWEN: No, we're not.

SEN. DEWINE: That is the lower court, the originating court.

MS. OWEN: Yes.

SEN. DEWINE: And in Texas, you have three layers?

MS. OWEN: That's correct.

SEN. DEWINE: Okay. So before that case gets to you -- any of these, what, 10 cases, 12 cases?

MS. OWEN: Well, there were 10 girls.

SEN. DEWINE: Whatever they were -- about that. Before they got to you, the trier of fact had already determined that none of these three items applied, because if any of them would have applied, the trier of fact, who was watching the witness, who was talking to the young lady, who was taking all the circumstances into consideration, if that trier of fact had found any of these three, that case never would have got to you, would it?

MS. OWEN: That's correct.

SEN. DEWINE: Now, is it my understanding, under Texas law, that once a lower court makes that determination, that ends the case --

MS. OWEN: That ends the case.

SEN. DEWINE: -- because there's no one to appeal the case?

MS. OWEN: That's correct. There's no one to --

SEN. DEWINE: The plaintiff has won or the person who's filing, the young lady who's filing, her lawyer, they've won the case.

MS. OWEN: And the statute specifically says there's no appeal from a grant of the bypass.

SEN. DEWINE: So before these cases get to you, the lower court has found all three or has found that none of the three apply, then an appellate court has gone through and done a review.

MS. OWEN: That would be a three-judge panel.

SEN. DEWINE: Three-judge panel. That's how it works in Texas. All right. Now, as all lawyers know and judges know, and I think many people know, when a case gets to an appellate court, such as your Supreme Court, you're not retrying that case.

JUSTICE OWEN: No, Senator, we're not.

SEN. DEWINE: And there are different standards. The majority came down with one standard. You came down with another standard of review. Those standards are not very dissimilar. Those are -- what are the basic standards?

JUSTICE OWEN: Well, in terms of the factors on --

SEN. DEWINE: Yeah, what are you looking for to overturn a case? What do you have to find?

JUSTICE OWEN: On the "mature and sufficiently well-informed," there are two things. You first have to conclude that there was absolutely no evidence to support the trial court's failure to find. But then you also have to take the second step and look at the evidence and see if the minor

established, from clear, direct, convincing evidence -- I may not be quoting exactly, but it's in the majority opinion -- and there's no factual dispute at all, before she's entitled to a bypass --

SEN. DEWINE: That is the law in Texas today.

JUSTICE OWEN: Yes.

SEN. DEWINE: That, though, in a sense, is not totally dissimilar to what we have in many appellate cases, where the basic principle of law that we have in this country is that we give deference to the lower court, the trier of fact, whether it is a jury or whether it is a judge who is -- has the opportunity to watch the witness, has the opportunity to judge the demeanor of the witness on the stand, has the opportunity to take all the totality of circumstances into account, isn't that true?

JUSTICE OWEN: That's correct.

SEN. DEWINE: So I think, Madam Chairman, it seems to me that when we look at and judge these cases, these parental notification cases, it seems to me that as we see whether or not these have any bearing on this justice's qualification to sit on the federal bench, it's good for us to be mindful of the fact that all appellate courts give a great deal of deference to the lower courts, that all appellate courts understand that the trial court judge has his job or her job, and they are the ones who are looking at the witnesses. And it would seem to me that particularly when we're dealing with such a very delicate case, and a case where the understanding of the young lady involved is so important, and what -- not just she has been told but what she truly understands, that the trial court judge is in a unique position to make -- make that decision. And I think that we all should consider that as we look at these cases.

Thank you very much.
SEN. FEINSTEIN: Thank you, Senator DeWine. Senator Feingold, you're next.

SEN. RUSSELL FEINGOLD (D-WI): I thank the chair. Welcome, Justice Owen.

JUSTICE OWEN: Thank you.

SEN. FEINGOLD: Justice Owen, the independence of the Texas Supreme Court has recently been attacked for allowing its law clerks to accept large bonuses, as much as $45,000 from law firms that law clerks plan to join after completing their clerkships. And the potential for a conflict of interest here is very real and serious, I think. The clerks review and express opinion on cases brought by or against the firms paying their bonuses. I'm told this issue provoked an investigation by the Travis County attorney into whether the practice violates Texas criminal law. The Texas Ethics Commission ruled last year that the bonuses could be in violation of the state's bribery laws. In response, the supreme court issued new guidelines concerning these so-called clerk perks. I'm told that you, however, defended the clerk perks and dismissed the criticism as a, quote, "political issue that is being dressed up as a good government issue,"

unquote. Why do you believe that this was simply a political issue and not a genuine issue of ethics, fairness and independence of the judiciary?

JUSTICE OWEN: Senator, I'm glad you asked that question because, first of all, my quote, I do -- I do think I said it was a political issue, I don't remember the second part of it. But let me give some background, if I may, on the entire clerk issue. First of all, the -- there -- the investigation was not of my court or any judge on the court. That was an issue between the employers and the law clerks. The court or the justices were never under any kind of scrutiny at all from the criminal law standpoint. But this is a long-standing practice that I would say many if not most federal district courts, federal circuits, and I think even some judges on the U.S. Supreme Court -- law firms around the country typically give so-called "clerkship bonuses," to their lawyers who take their first year of practice and clerk for a court, not just my court, as I said federal district courts, federal courts of appeals, U.S. Supreme Court, and nobody -- that was a practice that's been around for a long time. Every -- since -- ever since I've been at my court, I mean, everybody -- it was a clearly understood rule, and certainly a hard and fast rule in my chambers, that if you had clerked for any law firm, if you were even thinking about taking a job offer from any law firm, you were completely recused from all of their cases permanently, as long as you were an employee of the court. You don't get near that file. You didn't work on memos, or when matters touching that case were brought up in conference, you'd have to leave the conference room so that there's just no opportunity at all for a law clerk that has any connection or any potential connection as an employee with a law firm to come into contact with those files. So --

SEN. FEINGOLD: So, the clerks have recused themselves in each of the cases?

JUSTICE OWEN: They have. And we -- we -- that's a -- that's been a rule for years, as far as to my knowledge --
SEN. FEINGOLD: Let me -- I appreciate that background. Let me just return to my original question. Do you believe this is a simply political issue, or is it also a genuine issue of ethics, fairness, and independence of the judiciary?

JUSTICE OWEN: The reason I said it was a political issue is because it was only my court that was singled out, this practice -- they didn't criticize the federal courts. They didn't criticize any of the lower state courts of appeals who do it. They didn't criticize the criminal court. And they didn't criticize the U.S. Supreme Court. It was just my court that was singled out by a group who routinely issues press releases accusing my court of ethical violations.

SEN. FEINGOLD: Well let me ask you more broadly then, the broader practice, is it a -- simply a political question or is it a question of whether this creates potential problems, a legitimate question of ethics and fairness?

JUSTICE OWEN: I didn't think because of the way we always structured the clerkship program that it was an ethical issue because it was such a well-settled, long-standing practice, and because these clerks had no access whatsoever, I didn't think it was an ethical issue. The way it was resolved is, not -- again, this is mainly an issue between the employers and our clerks, not

the court -- but we did say, put in new rules so that the clerks would be absolutely clear, wouldn't inadvertently get in trouble with anyone. We said -- the authorities said that if they could take the clerkships over -- their bonus over a period of a year after they leave the court. They -- it was -- it was -- they still get the bonus, it's just a question of timing.

SEN. FEINGOLD: I appreciate those answers. Let me turn to a different question. I understand that you are a member of a local church in Austin, Texas, the St. Barnabas Episcopal Church.

JUSTICE OWEN: I am.

SEN. FEINGOLD: According to Alliance for Justice, in 1998, while you were a sitting justice, you lobbied then-governor George W. Bush with a private meeting with your pastor for state funds for an evangelical prison ministry program, Alpha Prison Ministries. Now, according to Jose Juarez, a law professor at St. Mary's School of Law in Texas, this conduct is in -- a violation of Cannons 1, 2, 2(a), 2(b), 4(a), 4(b), 4(c) and 5 of the Texas Code of Judicial Conduct. Cannon 2(b) states that a judge, quote, "shall not lend the prestige of a judicial office to advance the private interest of the judge or others," end of quote. Cannon 4(c) states that a judge, quote, "shall not solicit funds for any educational, religious, charitable, fraternal, or civic organization," unquote. Professor Juarez concludes by stating, quote, "Any Texas judge should have known that such a meeting would violate the Texas Code of Judicial Conduct." Could you please explain why you held this meeting in violation of the letter and the spirit of the Texas Code of Judicial Conduct?

JUSTICE OWEN: Well, Senator, I respectfully submit that I didn't violate any ethical code at all. I facilitated a meeting between my pastor and then-Governor Bush to ask if -- for my pastor to ask him if he would consider allowing a prison ministry, headed up by my church, in a -- in a prison. No state funds were asked for whatsoever. This -- the whole prison ministry was -- didn't cost the state any money. It was totally voluntary on the prisoners' part. They didn't get any special perks or any special treatment if they took part in the prison ministry. It was a small group of people, as I understand it -- I didn't participate -- but as I understand it, who ended up going to the women's prison in Barnett, Texas on Friday evenings for a period of I think six weeks or so to do this prison ministry. It didn't cost -- again, no funds were involved. It was simply, on Friday evenings -- again, as I understand it, (Justice ?) is here, he can give you the details if necessary, but --

SEN. FEINGOLD: So, there was no solicitation for funds at all?

JUSTICE OWEN: Absolutely none.

SEN. FEINGOLD: And that's why it's your contention that none of the cannons of ethics were violated?

JUSTICE OWEN: That, and the fact that although I am a judge, I am also a friend of then-Governor Bush, and we had discussed some of these issues, some of our respective beliefs

before, and I had told him about my pastor. And I guess in my mind it was more friend-to- friend as opposed to judge-to-governor, but in either event, even if I had had my judge hat on, no fund -- no funding was involved at all. And it wasn't a lobbying effort, it was simply a -- would you consider letting us do this prison ministry?

SEN. FEINGOLD: I appreciate your answers to my questions, Justice.

JUSTICE OWEN: Thank you.

SEN. FEINSTEIN: Thank you, Senator Feingold. Senator Sessions is not here. Schumer, Brownback, and Senator Durbin, you're next up.

SEN. DURBIN: Thank you very much, Madam Chair. Justice Owen, thank you for joining us. I have followed in the news reports a suggestion that the Texas Supreme Court has changed rather dramatically over the last 10 or 15 years. There have been suggestions that because of active political campaigns that those justices now serving on the court, at least a substantial majority, are certainly more sympathetic to business interests, and corporate interests, and insurance company interests than previous courts. In fact, some national news programs have suggested that it is nothing short of a statewide, coordinated, long-term campaign for those interests to make certain that they are well-represented on that Texas Supreme Court. Have you heard these same press reports?

JUSTICE OWEN: Certainly.
SEN. DURBIN: Do you believe they are true?

JUSTICE OWEN: No, Senator, I don't.

SEN. DURBIN: And so you would say that the court is -- how would you describe the court today?

JUSTICE OWEN: I would describe it as I think some of our colleagues in other states have described it, as a very good court. The justice -- a justice on the Massachusetts court has said when they start looking at common law issues in particular, they start with the Texas Supreme Court because our opinions are well researched and thoroughly reasoned. That's where they start.

SEN. DURBIN: And on -- on the court itself, where would you place yourself on the spectrum -- more conservative than the majority, or in the center position, or more liberal?

JUSTICE OWEN: Senator Durbin, I -- I frankly don't -- I don't think it's very instructive to imply -- to apply words like conservative or liberal in terms of judging. I don't take a political viewpoint into my chambers or on to the bench when I judge cases or as I am sitting there reading the briefs.

SEN. DURBIN: Well, let me ask about a few of those cases to see if I can deduce my own

conclusion from them. Let me ask you just directly, what is your position on abortion?

JUSTICE OWEN: My position is that Roe v. Wade has been the law of the land for many, many years. Now it's modified by Casey. And I -- none of my personal beliefs would get in the way of me applying that law or any other law.

SEN. DURBIN: And yet if someone were to take a look at the opinion that -- opinions that you've written on the parental notification statute in Texas, they would find, would they not, in the overwhelming majority of cases you have decided against allowing a minor to go forward with an abortion procedure under Texas law.

JUSTICE OWEN: Senator Durbin, there were -- there were only five girls that my -- my court has written on. And out of those five cases, I voted to grant the bypass in one case. And the first time that they came to the court in the other two, I voted to remand those cases to the trial court so that Jane Doe 1 and Jane Doe 2 could each get another shot at getting the bypass. And if the trial court had granted the bypasses a second time, that would have been the end of it. When the second time Doe 2 came back, I said it was a close call, but based on the record I had -- I felt like I had to go with the trial court's call. In five of the cases, as I think I talked about earlier, they came up to the court and without opinion the court affirmed the lower court. As I said, that would take at least six votes. There were not public dissents. If there had been, they would had to have -- all the judges would have had to have noted where they lined up. And I think it's a fair assumption, given -- given the amount that occurred on the other five cases that if they had been close cases we would have written on them. So, we're talk --

SEN. DURBIN: Is it not true that you've ruled against judicial bypass in every opinion you've offered -- authored, in 13 of the 14 cases you've considered on the court?

JUSTICE OWEN: Yes sir, that's -- that's -- I voted in the first two cases -- I didn't say she doesn't get the bypass, I said she gets another chance to convince the trial court that she should get it --

SEN. DURBIN: Do you understand --

JUSTICE OWEN: -- and then I granted the bypass, I voted with the court with Doe 10 to outright grant the bypass.

SEN. DURBIN: Do you understand the timeliness of the decisions that the courts are making in these cases?

JUSTICE OWEN: The timeliness?

SEN. DURBIN: Yes.

JUSTICE OWEN: As soon as they come in, we drop everything and deal with these.

SEN. DURBIN: And remanding them for another court review --

JUSTICE OWEN: It's within two days. We told them that you've got two business days under the statute to resolve it.

SEN. DURBIN: In Jane Doe 2, you wrote in your concurrence, "the court has omitted any requirement that a trial court find an abortion to be in the best interest of the minor." The law says that the notification has to be in the best interest of the minor. Could you tell me where you came up with the notion that the legislature required that the abortion be in the best interest of the minor?

JUSTICE OWEN: Yes sir, I can. The -- that's directly out of the U.S. Supreme Court case that said we construe notification to mean notif -- that -- I'm sorry, notification, best interest to mean that abortion without notification is in the best interest, and it's straight out of a majority opinion from the U.S. Supreme Court.

SEN. DURBIN: I find in each of these cases, though, that you have tended to expand and embellish on the state legislative decision in Texas. Now, Senator Gramm, your sponsor, one of your sponsors today, has said that he thinks the Texas legislature was trying to take three sides on a two-sided issue. That's a statement that's fairly critical of this legislature. Clearly, they have taken a position, and I take it from what you've said to us today that these court decisions, where you consistently find problems with the Texas parental notification statute, you're saying don't reflect any opposition on your part to a woman's right to choose?

JUSTICE OWEN: No, Senator, I don't think they do. Again, the -- the exact language that's in the statute, best interest, that exact same language was construed by the U.S. Supreme Court to mean that the abortion without notification was in the best interest. Sir, I followed what the U.S. Supreme Court had construed that to mean. And I thought that was a reasonable construction given that the legislature had taken the language out of -- if not that very case, it may have been that very case --

SEN. DURBIN: I'll have to say that I've been on this committee for a few years, and the issue of judicial activism has arisen when there were Republican chairs and Democratic chairs. And I have come to conclude that it is in the eye of the beholder that Republicans only want judges who are actively pursuing their agenda, and Democrats only want judges actively pursuing their agenda. I don't think it is an objective standard that is being used here. And so the term is being used back and forth here.

What I am looking for really are some fundamentals in terms of your philosophy. I believe the president has a right to fill vacancies. But I also believe the people of this country, and certainly the people in this circuit that you are aspiring to, deserve judges who are going to be moderate and centrist, and try to be reasonable and balanced in their decision-making.

Let me go to a specific case, if I can for a moment.

JUSTICE OWEN: Senator, before we leave this area, can I make one point on this activist in this whole area of a woman's right to choose? Two cases that have come before my court that I would like you to be aware of -- one, I believe it was Sepulveda v. Krishnan. In that case the question was can a mother and a mother recover damages for the death of a fetus. And I think you can see the implications in all this debate over that particular issue. And my court had for many years construed the Texas wrongful death statute and the survival statute to say, no, you cannot recover for the death of a fetus. We were asked to reconsider that construction, and we pointed out that the vast majority of states now allow recovery in those circumstances. But I agreed with the majority that, no, that had been Texas law. We are not going to change it. You cannot recover for the death of a fetus. That's the law in Texas.

SEN. DURBIN: I'm sorry to interrupt you, but I have very little time here, and if you'd like to submit something along that point of view, I'll be happy to consider it.

I want to go to one specific case though, the Provident American case -- versus Castenada -- do you remember it?

JUSTICE OWEN: I do.
SEN. DURBIN: I read this case, and read your decision, and I often wondered how a court could come down, as you did, writing a majority opinion here in a case involving coverage on a health insurance plan where frankly the insurance company decided to try to find anything it could in its policy to avoid paying for a critical surgery that was needed by this family. In fact, you came down and found on the side of the insurance company, and said that there was an exclusion out of their policy. The dissent that was written in this case by Justice Raoul Gonzalez I think went to great lengths to point out facts that you chose to ignore. You said the court sustains -- let me find this -- the court ignores important evidence that supports the judgment, emphasizing evidence and indulging inferences contrary to the verdict -- resolves all conflicts in the evidence against the verdict for the family that was denied coverage. And it goes on to say, "I want to recite the facts the court chooses to ignore in its decision."

The reason I raise this issue -- and Justice Gonzalez was very forthright in believing that this was a slam-duck for the insurance company, that they got an opinion from you that he didn't believe was sustained by the policy or the evidence. In fact, he said he thought with your opinion you were destroying the bad faith tort in the state of Texas.

Going back to my original point, I think it is fairly well known that the Texas Supreme Court is much more conservative today than it once was, that it was an all-out effort by major corporations and by insurance companies to try to build a majority on that court. And as I read this decision, sometimes it's hard for me to imagine how someone in good faith can look at the facts as in this case and basically say to a family, after they had preapproval for a surgery, that an insurance company could come in and say no, we are not going to cover, and then have a Supreme Court in Texas stand behind them, and say to the family, You're out of luck -- they found a little provision in the policy here -- you're not covered. This troubles me, because frankly

that kind of a finding reflects a philosophy that does not tell me there is a well balanced approach here. And certainly Justice Gonzalez felt the same in his dissent. And I invite you to comment.

JUSTICE OWEN: Thank you, senator, I really do appreciate the opportunity, because this case was not about coverage. They were covered. The only dispute here was bad faith. These people were covered under their policy. They got their attorney's fees for breach of contract, and they got either 12 percent or 18 percent penalty under the statute -- I can't remember which one applied at the time. They lost on the coverage question -- no doubt about it. That was not the issue in front of my court.

The issue was whether in addition to their coverage -- their full policy limits, plus attorney's fees, plus the penalty -- could they recover extra contractual damages for bad faith? And the standard there is that the insurance company had absolutely no reasonable basis whatsoever to deny the coverage. And the facts in this case were the family had two children who had been jaundiced all of their lives. They called up an insurance company and applied for a policy, after their uncle had told them that he had a hereditary blood disease called HS. The policy had a 30-day waiting period, and they didn't disclose to the insurance company anything about the hereditary disease. Three days after -- or maybe it was two --

SEN. DURBIN: Three.

JUSTICE OWEN: Three days after the 30 days had run they took their children to a physician who on the spot diagnosed this hereditary disease and removed their -- I believe it was their spleen. So the question was under those circumstances -- not should the insurance -- could they deny coverage? -- but is there any reasonable basis for them to delay in paying policy limits? And we have said under all those circumstances that you can't say that there was no reasonable basis to delay. But they were covered. That was not the issue.

SEN. DURBIN: I could tell you that -- I think we are carping on a trifle here as to whether they're covered. The fact was the insurance company approved the surgery, did they not, before it took place?

JUSTICE OWEN: Yes.

SEN. DURBIN: And the fact is the insurance company then refused to pay. And you were arguing in your majority opinion here on behalf of the insurance company that waiting the three days after the 30-day period was not enough; that these -- that this family was deceiving the insurance company -- was operating in bad faith. And I think Justice Gonzalez and Justice Specter (ph) make a compelling argument here that the facts just don't come up that way. I have represented insurance companies. I have represented plaintiffs. You were the answer to the insurance company's prayer if you would buy this argument, if you would turn on a company -- turn on a family that is facing this kind of peril and make this kind of interpretation. And that is what troubles me about what you are asking for, is to be elevated to a court where you can make significant decisions involving insurance companies and major corporations, which I am afraid if

you follow the logic, as you did in the Provident case, would not be in the best interests of serving the people and the court. Thank you for being here. Thank you, Madam Chair.

SEN. FEINSTEIN: Thank you very much. I don't see other senators here at the moment, but I thought I might just say something. I am deeply concerned, because I've read all the Doe cases, and I've read the notification law. And the notification law is pretty straightforward. One, the minor is mature, sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or managing conservator or guardian; or the notification would not be the best interests of the minor; or notification may lead to physical, sexual or emotional abuse of the minor. That's it's. And any one of the three factors has to be present. That's it. It seems to me on that basis you make a decision. But you really haven't done that. You've looked in other places, it seems to me, to find a rationale not to do what the Texas law called for -- you know, invoking a religious implication, invoking concern about the fetus, invoking, Well, the emotional wrongdoing was just threatened by the parents -- it may not have happened. It seemed to me that you -- maybe this is what being an activist means -- that you worked to come out where you came out in your opinion. And that's a very deep concern, because if the Texas legislature wanted to change "may" to "must," they could have. They could have said, "notification must lead to physical, sexual, or emotional abuse of the minor," but they didn't. They said it "may," which means it either may or may not. And this I find troubling.

Now, I had some Texas lawyers come to me who were consumer lawyers. And they said their concern was they didn't believe they could ever get a fair shot in your courtroom. And that was in ten years of serving on this committee no one has ever said that before. And the case that Senator Durbin just raised, which I was going to mention as well, the fact is that there was a judgment. The fact is that the family was entitled to coverage. But your invalidation of the trial verdict completely threw out their entire reward. And, again -- I mean, the law is there for little people. This is the remedy for little people, not for the providence of the world certainly have the right to be taken at face value. But what disturbs me is it's in so many places in these notification cases, in these health benefit cases, in other consumer related cases, in the Searcy (ph) case. These are people very much harmed, and their redress was cut off. Could you respond to that?

JUSTICE OWEN: Yes, senator, I would like to. You know, there are a lot of cases that come before our court that I think tug at all of our hearts strings. And that's part of being a judge sometimes. But, again, I have committed and have got to apply the law, and there are guiding principles in contracts, in the bad faith area and other areas that have to dictate what the law says. Again, in the Castaneda case, let me emphasize it was not about their insurance coverage. They won on the coverage issue. They got all of their policy benefits. They recovered attorney's fees. There's a statutory penalty in Texas if the insurance company doesn't timely pay -- and I am assuming that they recovered that statutory penalty. The issue in my court was not policy benefits. The issue in my court was do they get extra contractual benefits for bad faith, which is a common law tort or sometimes it's brought under a statute, Article 2121. So we weren't -- it was not a coverage issue. They did get their policy benefits.

On the parental notification cases, let me make clear that I never advocated in my opinion or

anywhere else that a young girl has to have religious beliefs of any type at all. I -- you know, I said, as the U.S. Supreme Court has said, these are weighed decisions, and that a minor ought to exhibit some awareness that there are philosophical, and moral, and religious issues out there. And I hasten to add if she doesn't have any, it's not an inquiry what they are -- simply that if she has those beliefs, has she thought about them, has she considered them? Has she considered the philosophical and social and moral arguments whether she agreed with them or not? Just an awareness that they exist. She doesn't have to adhere to any particular viewpoint. She doesn't have to explain or justify her viewpoint or her philosophy or her moral stance, or whether she has religious beliefs. The U.S. Supreme Court has said, and I tried to apply that, that it simply -- she needs to exhibit some awareness as a mature person, an adult -- you would hope an adult would exhibit - that there are at least these arguments out there on both sides, and that she's aware of both sides -- not that she agrees with it or again has to justify any of this.

And, again, the -- I really do -- I did think that given that the legislature had lifted word for word what mature and sufficiently well informed meant, best interests and all of this out of a statute that had been -- from another state that had been approved by the U.S. Supreme Court, that they were trying to adhere to all of that precedent. And sooner -- I think it's hard. If I were a trial judge and I was told, Well, decide if she's mature -- decide if she's sufficiently well informed -- well, without some guidance I think you are going to get varying results around the state, What does that mean? So I think it was necessary for my court to speak, so that girls in West Texas wouldn't be held to a different standard that girls in East Texas were. My court ultimately -- I didn't totally agree with the majority on every aspect, but I did my best to adhere to what I thought the legislature intended. It was not anti anything, it was not activism. Once the court made its decision in Doe, those are the factors, and I abide by that.

SEN. FEINSTEIN: Well, I believe that this completes the testimony. Is there any -- I am going to adjourn the hearing, and we have two other --

SEN. : (Off mike.)

SEN. FEINSTEIN: Oh, we have more people coming? I would recess for the vote then and go down and vote, and just ask you to forbear, if you don't mind.

JUSTICE OWEN: Okay, not at all, senator.

SEN. FEINSTEIN: So we'll take a brief recess. Thanks everybody. (Sounds gavel.)

JUSTICE OWEN: Thank you.

(Recess.)

SEN. FEINSTEIN: (Sounds gavel.) The hearing will reconvene. And next on the list, Senator Schumer, then Brownback, Cantwell, and Edwards.

JUSTICE OWEN: Madam Chair? Before we proceed, can I amend an answer?

SEN. FEINSTEIN: Certainly. Go right ahead.

JUSTICE OWEN: It was regarding the Provident American v. Castaneda case. I remembered that it was the only issue in front of my court was bad faith, and I had thought -- I incorrectly remembered -- I just assumed that they had won on the contract claim in the trial court, and that was not in front of us. I was right that the contract --

SEN. FEINSTEIN: Are you talking about Castaneda now?

JUSTICE OWEN: Yes.

SEN. FEINSTEIN: All right.
JUSTICE OWEN: I was right that the contract claim was not in front of us. They never pled breach of contract or asked for any refindings on breach of contract. They only sued on a bad faith denial of the claim. So I was wrong. It was incorrect -- I had not read the case in quite a while -- that I said that they recovered their contract damages. They just never pled that. They were seeking solely a so-called bad faith claim under the Texas Deceptive Trade Practices Act and under the insurance code. They were statutory claims -- not under the policy but so-called extracontractual claims.

SEN. FEINSTEIN: Yes. And but they did not get the extra contractual claims?

JUSTICE OWEN: That's correct, they did not get the extra contractual --

SEN. FEINSTEIN: But they did get the surgery paid for?

JUSTICE OWEN: Well, that's my -- I thought they did, but they never pled --

SEN. FEINSTEIN: They did not?

JUSTICE OWEN: No, because they never asked or pled for policy benefits under the contract.

SEN. FEINSTEIN: So then they got nothing?

JUSTICE OWEN: They -- as it ended up, because they didn't ask or plead in the trial court, or ask for the jury to find breach of contract of the policy, we didn't have that in front of us, so we couldn't grant that for them. In other words --

SEN. FEINSTEIN: Didn't the trial court grant it?

JUSTICE OWEN: No, senator, they never pled it. They went solely on noncontractual claims. They never pled in the trial court, or asked the jury to find if the insurance company owed the

policy benefits under the policy. And I don't know why that was. And I had just assumed that the only thing that they had -- I assumed they had gotten the contract benefits, because I knew the only issue in front of us was bad faith. But as I reread -- someone handed me the opinion during the break, and they just didn't ever raise the contract claims in the trial court. SEN. FEINSTEIN: Thank you for clearing that up. Appreciate it.

Senator Schumer?

SEN. SCHUMER: Thank you, Madam Chairwoman, and I very much appreciate the opportunity to testify. And thank you, Judge Owen.

Before I get into what I want to ask you, I did want to make a few points in reference to what Senator Hatch said in his opening remarks. Unfortunately, he's not here. I tried to make them while he was here, but -- so he knows I am going to make them.

Three points. First, you know, let's try to keep this debate at a reasonable level. Senator Hatch keeps saying "left-wing pressure groups," "left-wing pressure groups." I don't hear anything about right-wing pressure groups or moderate pressure groups. There are a whole bunch of groups that support Judge Owen's nomination. They are doing their civic duty, but anybody who opposes it is a "left-wing ideological pressure group." Enough of that. That kind of foolishness should not go on in this committee room or anywhere else. Let's be fair about it. There are groups on both sides pushing everybody, and we are all independent and have to make our own decisions -- we may be influenced by them on one side of the aisle or the other. But this idea that the only pressure groups are from the left is a joke.

Second, related. Senator Hatch talked about something that I agree with, which is well, we are picking -- we are looking for little personal things about people, and they are going to put you through the wringer -- "Welcome to Washington," he said to you, judge. I am aghast. After eight years of them looking and turning President Clinton, his family, and everyone who worked for him inside-out about every single issue under the sun, now all of a sudden it's, "Welcome to Washington." Again, what's good -- I don't believe in it on either side, but let's have some semblance of fairness about this.

About not nominating women? What a canard. What kind of argument is that? I mean, I don't think anybody can -- anything -- any cursory look at what this committee has done has stood up to that. We have on the floor voted for 12 women. My guess is that's about as high a percentage in terms of the gender as the men who were sent to us. How about not voting for anyone who is pro life? My guess is of the 78 judges I voted for, the majority are pro life in this session. So let's cut out the games. Let's not try to beat people up with two- by-fours with specious arguments. Let's have a real discussion about what makes a good judge. And we'll have differing views on that, and that's fair, and that's why we have a Senate. But, I'll tell you, I'm not going to be bamboozled by arguments like that, and I don't think anybody should be. And I just wanted the record to show that. I thought that kind of hyperbole is not fair.

Okay, now to Judge Owen -- oh, and one other point, which I'll -- I'm glad Senator Hatch is here --

SEN. FEINSTEIN: You just missed it. (Laughter.)

SEN. SCHUMER: Sorry.

SEN. HATCH: Is he running me down again? (Laughter.)

SEN. FEINSTEIN: -- responding.
SEN. SCHUMER: I'm just responding.

SEN. HATCH: That's what we call it now? (Laughter.)

SEN. FEINSTEIN: You're terrible.

SEN. SCHUMER: He is. But he's a nice guy. He is truly a nice guy.

SEN. HATCH: Not nearly as terrible -- (laughter) --

SEN. SCHUMER: His arguments are not as nice as he is. In any case, the other point that Senator Hatch made which I'll address as I address you, (Justice ?) Owen, is, What kind of questions are legitimate to ask and not ask to a candidate for a high lifetime position?

But let me say this to you, Judge Owen, and then I am going to make some statements and ask some questions, and weave them in together. Last week we had the pleasure to meet privately, and when we talked I told you I've had I think since I've come here three standards in terms of nominating, choosing, voting for judges. They are excellence -- legal excellence, moderation -- I don't like judges too far left, too far right -- and diversity -- I don't think the bench should be all white males. I don't think there's any question about your legal excellence. You've had a distinguished academic and professional career in the ABA, whose ratings reviews the nominee's legal excellence no more, no less, has rated you well qualified with good reason -- I think anyone who has listened to even 10 minutes of this hearing today has no doubt about the excellence in terms of the quality of your legal knowledge and your intelligence, your articulateness, et cetera.

On the diversity front, the population of the Fifth Circuit, the court you have been nominated to, the population within the body of the Fifth Circuit is the most racially diverse in the country -- even more so than in the Fourth Circuit. And President Clinton -- let the record just show -- made three nominations to that circuit, two of whom were Latino -- there is a large Latino population within the Fifth Circuit, namely in your home state of Texas -- none of them received confirmation hearings. So one of the reasons we don't have diversity on this court is that reason. But, obviously, in terms of gender diversity, you get an A-plus.

The third standard is moderation, and that's really where I have concerns, and that's where my focus will be. Now, there is some idea out there that all of a sudden has sort of taken root among

people of a particular ideology I might add that you can look deep into space and divine the correct legal interpretation of a statute, that we all would come out with the same -- in the same exact place, that our ideology has nothing to do with how we interpret the law. We all know that's bunk. It's obvious when you look at any court. Judges bring their experiences, their biases, their ideology to the table when they decide cases. Whether it happens consciously or subconsciously, we know it happens. If it didn't, why would Justices Scalia and Thomas come out exactly almost the same way on so many cases -- so different than, say, Justice Breyer and Justice Ginsburg? If it was -- if ideology made no difference, the number of times -- they are all very smart people, they are all great lawyers -- the number of times that Scalia would agree with Thomas would be about the same as the number he agreed with every one of the judges.

Look at the nominees that Presidents Reagan and Bush made to the court versus the nominees that President Clinton made to the court. How come they all seem to vote so similarly? It's because ideology does matter. We all know it. This administration knows it. How come they haven't sent up a single so-called liberal judge? If they were just looking for legal excellence, they'd send some judges from the left, some judges from the center, some judges from the right. The president said it himself. He said he wanted to send judges up in the mold of Scalia and Thomas. I give him credit for honesty. He's doing that. Whether that's good for the country or not, is the debate at least that I have chose to engage in over the last few years that we have been here.

That happens on your -- it happened in the Texas Supreme Court as well. You and Judge Hecht have frequently come down on the same side on the Texas Supreme Court. It's not accident. It's not simply that you went to the same law school, read the same law books. Philosophically you're in the same place -- similar places. So this idea that ideology shouldn't matter, that we shouldn't ask questions about someone's judicial philosophy, which is what my good friend from Utah said, I think is so, so wrong, that it is almost hard to -- hard to accept if you look at it in any way at all. And my guess is if we looked at the way my good friend from Utah voted on judges over the last years he's been in office, and the way I voted on judges -- we'd agree on most of them, because we agree on most judges as we vote. But it's clear that his philosophy would dictate he voted against certain judges and for others, and I probably did the mirror image, because our philosophy does influence how we vote. We are just not simply interpreting the legal excellence of the mind. I do agree with him, as I said before you came in, that I don't like this gotcha stuff. I think that's become a substitute for all of this. But how come it is when there is a Republican nominee it's the Democrats who focus on the gotcha stuff, and when it's a Republican -- when it's a Democratic nominee it's the Republicans who focus on the gotcha stuff? Again, if we weren't doing ideology -- whether someone smoked marijuana in college or went to some bookshop and got a certain book or movie, the votes should be evenly dispersed throughout the political spectrum. It's not, because it's sort of a kabuki game.

Well, what I've tried to do in the year that I've been chairman of the Court Subcommittee is bring some level -- at least I would call it -- of honesty to the debate. Let's admit that ideology should play a role. Let's ask those questions. I think it's my obligation to ask those questions. And I'll tell you I am the opposite of Senator Hatch. Any judge who doesn't answer questions about their

philosophy, their views on the First, or Second or Fourth Amendments, should not be put in such an important and august position where there is a lifetime appointment. So let me --

SEN. FEINSTEIN: Senator, your significant treatise took 10 minutes and 32 seconds.

SEN. SCHUMER: May I ask one question?
SEN. HATCH: Could I as a point of personal privilege just make one note for the record? I only voted against one Clinton judge out of the 378 that we passed --

SEN. SCHUMER: Bet it wasn't --

SEN. HATCH: So I hardly used ideology --

SEN. SCHUMER: Bet it wasn't a conservative.

SEN. HATCH: Well, I don't know what it was, to be honest with you, other than I didn't feel it was right.

SEN. SCHUMER: Could I ask one question, Madam Chair?

SEN. FEINSTEIN: Yes. One question, and then we go to Senator Sessions.

SEN. SCHUMER: Okay. So here is my question, and maybe if we have a second round I'd like to ask some specific ones. I did not intend to take that long, but this is a subject that excites me.

Now, let us assume, because I think choice is a very legitimate issue for us to question judges on, and so I'd like to know your views. And here's the way I would phrase it. It's 1965. You are sitting in the Supreme Court of the United States. Chief Justice Warren comes into your chambers with a copy of the opinion in Griswold v. Connecticut, the seminal case that held there is a right to privacy in the Constitution. He asks for your thoughts on the opinion. Now, there is no law to follow right now, but he is asking for your opinion in terms of everything that has been part of you. What do you tell him? Do you agree with the holding? Do you agree with the outcome, but get there in a different way? In other words, that there is a constitutional right to privacy, the penumbra of which extends to at least the first two trimesters of a woman's pregnancy -- what do you tell Judge Griswold?

JUSTICE OWEN: Well, senator, again, I responded somewhat to this question before, but I can assure you that nothing in my personal views on any topic has influenced or would influence my ability to read the U.S. Supreme Court precedent and to apply it. And, frankly, I don't --

SEN. SCHUMER: But this time there was no precedent. That's why I am asking you the question as I did --

JUSTICE OWEN: But I don't see it as my role as a judge on the Supreme Court of Texas or as

an intermediate judge to delve into decisions and critique them or say this was wrong in the law or this was right on the law. And, frankly, when I have read those decisions, that's not the way I approached them as a lawyer, and that's not the way I've approached them as a judge: Are they right on the law? Are they wrong on the law? I have always approached them with trying to figure out what did they say in these opinions. What was the basis for their opinion? And how does that play out in the factual situation that either my client when I was a lawyer has or now as a judge in the case before me?

SEN. SCHUMER: Judge Owen, being on the Texas Supreme Court, certainly being on the Fifth Circuit -- as you know, the Supreme Court only deals with about 75 cases a year. You are going to be asked when you are a judge questions like this every day. To say -- to duck the question -- and that is what you did -- and I am not trying to surprise you. My staff told the people in the Justice Department I would ask you this very question. I don't think it's fair to us. I don't think it's fair to me. I don't think it's fair to the 19 million people I represent in New York. I want to know your opinion. This was a case where there was very little precedent that was directly relevant. The Supreme Court made a decision that is still with us in terms of its controversy, in terms of the heat that it generates on both sides. I think the American people, the people of the Fifth Circuit are entitled to know how you would advise Judge Griswold on that opinion, because it shows your view, something very important about whether you think there's a constitutional right to privacy, how far you think it extends, et cetera. And this is a case that's already been decided, but it can tell us how you think, and where you come down. And I don't think your answer -- I understand that you do that, but on the Texas Supreme Court, I'm -- you're much more familiar with it than I am, you have to make decisions like this all the time. You certainly will on the Fifth Circuit.

So I'd ask you again, can you give me something more specific rather than telling me that your methodology is not to answer questions like that?

MS. OWEN: Well, let me -- let me tell you --

SEN. SCHUMER: Because you'd have to answer them when you sat on the court, when you wrote opinions, when you agreed with the majority opinion, when you've dissented, and you've done it, and we all know you've done it.

MS. OWEN: But I don't approach decision-making that way. I've never -- I'm not asked to come in -- in a vacuum and say "well, what do you think" --

SEN. SCHUMER: Well, I'm not giving you a vacuum question.

MS. OWEN: Well --

SEN. SCHUMER: I'm giving you the specific facts of the case. I mean, we've talked a lot about parental consent. I mean, I'm sure you've read the Griswold decision.

MS. OWEN: Yes, I have.

SEN. SCHUMER: Okay.
MS. OWEN: (Inaudible) --

SEN. SCHUMER: I'm asking -- all right, okay. Well, it's an important decision, even in terms of talking about parental consent. Obviously you're dealing with a different constitution here, Texas versus the United States, but you have to be able to tell us more than this is not the way I think. I mean --

MS. OWEN: Well, I was going --

SEN. SCHUMER: -- I just don't --

MS. OWEN: -- to expand on my answer, but when --

SEN. SCHUMER: (Inaudible.)

MS. OWEN: -- you say that that's the way -- you're going to have to think that way, and I respectfully --

SEN. SCHUMER: No, I'm asking you --

SEN. HATCH (?): Senator Schumer, let the lady answer the question. You've asked her --

SEN. SCHUMER: Well, I'm just trying -- okay, go ahead.

MS. OWEN: The way I would approach that case, had I been on the court then, is the same way that I approach constitutional issues today, and that is I read everything that the U.S. Supreme Court has written up to that point on the issue. And frankly, Senator, I don't know, I didn't read the briefs in Griswold, and I'm frankly so influenced by the existing body of law that we've had the right to privacy for so many years, my court has recognized a right to privacy under the Texas Constitution, I think it's kind of hard at this point for me to erase all of that out of my mind and put myself back in their shoes without -- without all of this case law that's come down the pipe, and not having the benefit of the briefs or (arguments ?) how would you have written, were you writing on a clean slate -- it's very difficult for me to write on a clean slate when I have all of this historical law now out there. And again, I don't write on a clean slate when I answer constitutional issues.

SEN. SCHUMER: What I'd like to do, because I know my time is up and I appreciate the indulgence, Madam Chairperson, is I'd like to submit some written questions that specifically ask some of these things and see if we can get a more specific answer, and give you a little time maybe to review the case law, whatever you would have to review, as if you were being a judge on the case, in some sense.

SEN. FEINSTEIN: Thank you, Senator Schumer. Senator Sessions, you're next up.
SEN. SESSIONS: Justice Owen, you recognize Griswold to be the law and would follow it?

MS. OWEN: Yes, Senator.

SEN. SESSIONS: And if called upon to apply its principles, you would apply them in your decision-making process?

MS. OWEN: Absolutely.

SEN. SESSIONS: Well, I think you handled this precisely right. And I'm sorry Senator Schumer was unhappy with your answer, but you were -- you handled it precisely like a judge should answer it. How should you -- how could you be expected to put yourself back into that circumstance, without having read all the briefs, without having studied the law carefully, and to render an opinion on a case of that importance. I note Senator Schumer left, and recently he complimented Justice Hugo Black of the Supreme Court on his views on the Constitution, and, of course, Hugo Black dissented in Griswold (sp). So, these things are of interest in -- I guess fun to talk about, but in reality, as a person who is being considered for a judgeship, I think you demonstrated the right characteristics in a judge, that is to be cautious not to express opinions until you've fully studied all the briefs, all the law involved, as your record demonstrates you do so skillfully.

And I would just note that your testimony has been extraordinary. I have been very impressed with your command of the cases you've handled, the hundreds that you've handled. I've been very impressed with your ability to articulate your thoughts in a reasoned and fair way. I see no hint of extremism or activism or some obsession with forcing some political agenda on anybody -- not one hint of it. And it's disturbing, actually, to have those comments being made. I just don't believe there's one hint of it.

Justice Owen, I've been also impressed, as Senator Gramm and Senator Hatch noted, that you came at this service to the Supreme Court of Texas because of a desire to serve. It cost you, I'm sure, financially significantly. You have won reelection with 84 percent of the vote. The American Bar Association, who this committee insisted must have a bigger role than they've had in recent years, and in the process has unanimously rated you well qualified -- that's the highest rating you can get -- and a unanimous vote for well qualified is very rare. And they had the opportunity to study your record. They've had -- they've seen you on the bench. And they've talked to your former law partners. They've talked to lawyers who have litigated against you. They know your reputation and your ability, and I think they made a well and a wise choice in rating you well qualified unanimously. I must -- I have to be impressed with your academic record -- number two or three in your class, the -- made the highest score on the bar exam. What an accomplishment that is in a big state like Texas particularly. So, I just think you have so much to be proud of, and I particularly like your demeanor and the way you've handled yourself under some of the questions that have been brought forward.

And I also note, it seems to me that you've not been just a potted plant, you have been a reformer in your life on the law about the rule of law. Tell me how you feel about the responsibility of a judge or a public official -- what is their responsibility about defending and strengthening the rule of law in America?

MS. OWEN: Well, I think that's the ultimate responsibility, is to defend and strengthen the rule of law in America. I think we all understand that our society is built on laws, and that that is what basically orders our society -- that helps us plan, that helps us have predictability. It helps us have stability. It helps us know that cases won't be decided randomly based on sympathy or passion or when they should be decided another way under the law. So I think the rule of law is very important, that it's consistently and fairly, but with common sense, applied in every case.

SEN. SESSIONS: Well now is that why when you are asked to rule on a case you just don't spout off the answer as some would have you do in this hearing -- but is that why go back and you take the Texas statute on notification, parental notification, and then you know that it passed during a time in which they were considering the Supreme Court ruling as they tried to craft a statute for Texas? Is that why you went back and studied the U.S. Supreme Court cases to try to understand what Texas was trying to do so that you could give a fair and objective answer as to what the statute really meant and what the legislature intended?

MS. OWEN: Yes, Senator -- (inaudible) -- if I could explain this, maybe I have not done a very good job of it yet, but when the legislature used the words "mature and sufficiently well informed," that could mean a lot of different things to different judges all across Texas. And so given that that was of a Morpheus (?) definition, I thought where did they come up with these words? What did -- what definition did they have in their minds when they picked these words? And then when I went and read the Supreme Court cases that they pulled the exact language out of, I looked at how did the U.S. Supreme Court define informed? What did they say is relevant to an informed consent? How did they define informed consent? And I believed that the legislature was looking to the cases out of which it picked the words mature and sufficiently well informed, for us to glean what the actual definition was, what the factors that courts were to consider in deciding if someone was making an informed decision.

SEN. SESSIONS: Well, I think that's what a great jurist does, and I think you've handled that -- you did it exactly right. That's precisely what should be done.

You know, you -- my -- looking at your background, I see a person who's worked hard to reform and improve the system. As Senator McConnell noted, your voluntary limiting your contribution, he did not mention the fact that after you had a relatively easy race last time, you gave back one-third of the contributions. I don't know anybody in this body that's ever done that, and that's a remarkable thing indeed.

I noticed that you work hard to encourage the Texas legislature to secure more legal service funding for the poor, and were successful in that?

JUSTICE OWEN: Yes sir. We were particularly hard hit in Texas when legal funding for LSC, the Legal Services Corporation, nationwide was cut back. Texas kind of got a double whammy. Not only were our traditional legal services officers cut back in budget, but Texas has a large migrant worker population and funding for the migrant workers was particularly hard hit. And a lot of people, including me, were concerned that the basic infrastructure through which legal services to the poor were delivered in Texas was going to collapse because we were that close to the line. So, we had to look for ways to put more money in the system to keep the professionals who were involved in through the backbone of the delivery system in place, because if we lost that, we would not be able to anywhere come near meeting the legal services needs of the poor in Texas. And so a group of folks, not just me, certainly, I was the court's liaison and was involved in it, but explored ways that we could get more funds, and ultimately the legislature passed a statute that put more money into legal services for the poor.

SEN. SESSIONS: And I noticed you helped organize Family Law 2000, a conference, an effort to educate parents about the effects of divorce on children. I have heard a lot of people in the know in the legal system express concern that too often a divorce proceeding becomes an adversarial gladiator sport, and that children are hurt unnecessarily in the process. Is that what you were dealing with there?

JUSTICE OWEN: Yes, Senator. I did not practice family law, but when I got to the court it was clear to me that 51 percent of the civil cases in Texas are family law matters, and that's sort of where the rubber hits the road, if you will, for most citizens in Texas. And they almost, you know, so many people have experience with the family law court, and a lot of lawyers and a lot of family law judges and psychologists have -- (AUDIO BREAK) -- that this is a -- that the adversarial process is really hard on the children, and that sometimes lawyers escalate the process. Sometimes the way the laws are designed -- (AUDIO BREAK) -- to the point of maybe really restructuring the way legal services are delivered, the family laws, to try to make this more a unified approach to divorces, not just from the legal standpoint, but from other aspects, and again try to focus on getting people to make consensus decisions, particularly for their children, in the divorce context, but in not such -- not in such an adversarial way.

SEN. SESSIONS: Well, I think that's good. And I know you've served on the board of the Texas Hearing and Service Dogs, a program that helps the blind and those with disabilities. You teach Sunday School at St. Barnabas Episcopal Mission. You've given back to your community in a lot of different ways.

Let me ask you this. I know that my friend Dan Morales, the attorney general of Texas, we served together, and you were asked about the City of Austin case, and suggested that you were somehow doing something to -- I don't know, help polluters or evil groups, but I noticed, and I assume Texas is like Alabama, where the attorney general represents the state in legal matters and speaks for the state in court.
JUSTICE OWEN: That's true.

SEN. SESSIONS: Is that correct?

JUSTICE OWEN: That's correct.

SEN. SESSIONS: And the attorney general, Dan Morales, intervened in that case on the side of the state of Texas, and he took the position, as I understand it, that Texas state had entered into this area, and their law predominated, and that cities, the City of Austin did not have authority. And you eventually agreed with him in general on that -- (inaudible) --

JUSTICE OWEN: I did. Absolutely. I agreed that the state -- the state basically trumps the city, it was my view. And there were -- there were extensive regulations in this area above and beyond the water regulations that applies to everybody in the state. This was not a non-regulated area. This is the same regulations that apply to any landowner in Texas applied to these folks, plus they had to have a water quality plan under the TNR -- and subject to the TNRCC. They were subject to ongoing federal regulations. So this was -- this was far from an unregulated area. The question was whose law was going to control, the state statute or the city's ordinances, and it seemed to me that the state certainly could take away the ETJ, extra-territorial jurisdiction in it's entirety, and if that were so, why couldn't they regulate here and tell the city "No, our regulations -- we choose how to regulate, we don't want you regulating here."

SEN. SESSIONS: Well, I think you're right. And, of course, Mr. Morales is a Democrat and a capable attorney general who was advocating for the state's interest. And, of course, a lot of people don't think about this, and a lot of cities don't like to think about it, but cities are creatures of the state. The states are sovereign, have a sovereign power within the constitutional scheme, as does the national government, but cities are total creatures of the state, and if there's a conflict, I think you've come down on the right side between -- which is the preeminent authority within a state.

Well, I just think that's -- there's several other cases that I could go through. I do just want to say I think your ruling with regard to the Ford Motor Company case and venue was important. Venue is important. It's not correct and not just to allow a plaintiff to choose any county in the state of Texas to file a lawsuit just because there's a Ford dealership in that county. In this case, as I understood it, you ruled consistent with Texas law that case should be filed where the plaintiff lived, where the car was purchased, and where the accident occurred. All of those occurred in the country where venue was proper, and you did not deny them relief, but you simply sent the case back with an order to go to the correct county for venue purposes, is that correct?

JUSTICE OWEN: That's correct.

SEN. FEINSTEIN: Senator, your time is --
SEN. SESSIONS: My time is up. And I would just say that I appreciate your candor. I appreciate your ability. I am impressed with the American Bar Association's evaluation of your performance. I'm impressed with the evaluation of the people in Texas of your performance, when you got 84 percent of the vote. And I believe we've had few nominees come before this

committee ever who have testified more ably or who have better qualifications for the federal bench.

JUSTICE OWEN: Thank you.

SEN. FEINSTEIN: Thank you, Senator. Senator Edwards.

SEN. EDWARDS: Thank you. Thank you, Madam Chairman. Good afternoon, Justice Owen. You've been here a long time. I want to focus on your, if I can, on your judicial decisions.

JUSTICE OWEN: Okay.

SEN. EDWARDS: Tell me first, in cases involving the intentional infliction of emotional distress, whether you agree with the decisions in your court, in the Texas Supreme Court, that say, and I'm reading now from one of those, that the overwhelming weight of authority both in Texas and around the country is that conduct involved in any particular case should be evaluated as a whole in determining whether it's extreme.

JUSTICE OWEN: I think that's generally true, yes.

SEN. EDWARDS: The case that I want to ask you about that I -- (inaudible) -- you about today, is a case involving three women who brought a case against GTE -- the lead plaintiff was Bruce -- Rhonda Bruce, Linda Davis, and Joyce Pulstra (sp) -- based upon what they contended was extreme conduct in the workplace.

And the evidence in the case -- I'm looking at the opinion now, was that the employer -- the employer's manager, who was the person involved in the case, the defendant's manager, soon after arriving at work engaged in a pattern of grossly abusive, threatening and degrading conduct, and again, I'm reading from the decision now, and he began using the harshest vulgarity shortly after his arrival. He regularly heaped abusive profanity on the employees, including these three women. On one occasion when he was asked to curb his language because it was offensive, he positioned himself in front of one of the plaintiffs, one of the women, and screamed, "I'll do and say any blank thing I want, and I don't give a blank who likes it." At one point another female employee raised a question, and he said, "I'm tired of walking on blank eggshells, trying to make people happy around here." The opinion says, "More importantly, the employees testifies that Shields repeatedly physically and verbally threatened, abused and terrorized them."

And then the court, in considering that conduct as a whole, as you just indicated the law provides, found that the jury verdict against the defendant was -- was appropriate. And you wrote a concurring decision, where you agreed I part with the majority decision and dissented in part, disagreed in part -- you didn't dissent but you disagreed with some of the conclusions that the majority had raised. And among those disagreements, you found that the following conduct is not a basis for sustaining a cause of action for intentional infliction of emotional distress.

And before I go through this long list of things that you said was not evidence to be considered, taken as a whole, in whether the defendant had acted outrageously, because I understand that you've told me that that's the legal standard -- the question is whether any of these things taken as part of the overall case is something that would constitute extreme behavior under the law.

The first thing you listed was not -- not to be included --

JUSTICE OWEN: But, Senator, my --

SEN. EDWARDS: Sure. Sure.

JUSTICE OWEN: I just want to make clear what -- that you understand, that everybody understands, what I was saying here. I was not saying that you can't consider the totality of the circumstances. And I absolutely agreed with the majority that this guy was way over the line in this case.

My only point in writing this was if you take -- my only point was if you take these things that I listed out of that -- the context of all of the other things that happened and standing alone, that you can't -- this would not support a judgement, standing alone, that -- and I was concerned particularly --

SEN. EDWARDS: Did you -- excuse me. Did you say that? What you just said?

JUSTICE OWEN: I said that "The following conduct is not a basis for sustaining a cause of action for intentional infliction of emotional distress, even when the employees who were upset by the conduct are women." And my point here was that if this is all that happened, I mean if you just have someone -- and we can go through them -- cursing, but it's not accompanied by sexual harassment, or cursing, but it's not directed at the woman, that by itself will not give you, I don't think, sufficient grounds for intentional infliction of emotional distress.

And I was concerned that people would read all the laundry list of what happened in the majority opinion and say, well, if I can prove any one of these things, then I'm there. And I wanted to make it clear that I did not agree that if this is what you had, without all of the other things that this man did --

SEN. EDWARDS: Let me -- excuse me, I'm sorry.
JUSTICE OWEN: -- that you wouldn't get there. And that was all I was trying to make clear. Because there were some statements that I thought conflicted particularly with very recent decisions out of our court, and people might get confused. And so, I wrote separately to point that out.

SEN. EDWARDS: Well, I guess I would first point out that the majority opinion I don't think ever said that any of those things, standing alone, would be enough. They applied the law, as you have recognized it to be, which is you look at the totality of the circumstances.

JUSTICE OWEN: And I agreed with that.

SEN. EDWARDS: And they listed these things as things to be considered as part of the totality of the circumstances. And what you said, if I'm reading it correctly, in your decision, "The following conduct is not a basis for sustaining a cause of action." Can I just go through them and ask you about each one?

JUSTICE OWEN: Sure.

SEN. EDWARDS: The first one, you said, was cursing, profanity or yelling and screaming unless -- when it is not simultaneously accompanied by sexual harassment or physical threatening behavior.

The second you listed was pounding fists on a table when requesting employees to do things. Third was going into a rage when employees leave an umbrella or purse on a chair or a filing cabinet. The fourth you listed was screaming at employees if they don't get things picked up. Five -- I'm jumping around. You've got a long list and I'm not going to read them all -- is requiring an employee to clean a spot off the carpet while yelling at her. Another one is telling an employee that she must wear a Post-it note that says, "Don't forget your paperwork."

So this is a list of things that the majority, as I understand it, considered, taken as a whole, as evidence that would support a verdict in favor of these three women, which the jury had found, as I believe. You have listed these things and said that they -- in the language of your decision -- that they are "not a basis for sustaining a cause of action." And what I understand you to be saying today is that standing alone, these things are not a basis for a cause of action. Is that correct?

JUSTICE OWEN: That's correct. I also want to make it clear that we're not talking about sexual discrimination here or anything of the sort, because lots of these things obviously would be grounds. We are talking about a tort that's been reserved by my court for very extraordinary circumstances, the so-called tort of intentional infliction of emotional distress as defined by the restatement. So we're not -- this is not conduct that I would say that is okay in the workplace under other causes of action. We're looking at one --
SEN. EDWARDS: But you specifically said that each of those things that I just read would not --

JUSTICE OWEN: I specifically said standing -- again, my point was that if this is what a plaintiff shows, that would be insufficient. You can't just say, "Okay, in GTE v. Bruce, they said this, so therefore I've met the standard." I'd want to make sure there wasn't any confusion about what else would have to accompany that conduct to get to intentional infliction of emotional distress.

SEN. EDWARDS: Yes, ma'am. But I believe, as you said a few minutes ago, the majority never suggested that any of those things standing alone would be enough.

JUSTICE OWEN I --

SEN. EDWARDS: You didn't specifically say, unless I'm missing it in your opinion, that any of those things standing alone would not be enough.

JUSTICE OWEN: I didn't use the words "standing alone." The --

SEN. EDWARDS: No, ma'am. What you said was they would not sustain -- or form a basis for a cause of action -- which has legal meaning, as I understand it. Is that correct?

JUSTICE OWEN: That's correct.

SEN. EDWARDS: Okay.

Can I ask you about another area?

JUSTICE OWEN: Sure.

SEN. EDWARDS: There are some cases where you have dissented. I'll just mention some. Some have already been mentioned today, and I won't go over those again. But they are primarily cases where, you know, a child or a family or someone was involved bringing a case against either an insurance company or a manufacturer or a corporate defendant of some kind.

And in several of these cases that I'm looking at now, you dissented, you disagreed. And in each case, you sided with the defendants. You sided -- your ruling was against the person who brought the case, the individual who brought the case.

One was a boy who brought a malpractice case from having surgery with serious complications -- the Wiener (sp) versus Wasan (sp) case.

Another was the Wilkins versus Helena Chemical Company case, where a farmer sued a seed manufacturer because the seeds he bought didn't work. They didn't grow. Again, you sided with the chemical company.

Another was a worker's arm's -- the Sonnier (sp) case, versus Chisholm-Ryder Company, where a worker's arm was severed by a tomato chopper. He brought a case against the manufacturer. You sided -- you dissented against the worker, on behalf of the manufacturer.

And another was a man who was injured changing a tire when the tire exploded, and he brought a case against Uniroyal Goodrich Tire.

And in these -- some of these cases and some of the cases -- other cases that have been mentioned during the course of the day, your dissent was pretty sharply criticized by those in the

majority, as -- for different reasons. But --

SEN. FEINSTEIN: Senator?

SEN. EDWARDS: Yes?

SEN. FEINSTEIN: Not only is your time up, but just so everybody knows, I'm really going to be strict on the time limit because we have two other judges to go. It is 10 minutes after 4:00, and we're going to adjourn at 5:00.

SEN. EDWARDS: Can I just get an answer to this question? Sure. That's fine.

Let me get an answer to this question. In these cases, all of which you dissented in favor and -- against individuals, in favor of the manufacturers' defendants -- companies, against individuals -- and in some of these cases, at least, there were some pretty sharp criticism of your decision -- your dissent, I should say -- as there were in some of the other cases that have been mentioned in the course of the day -- I just wondered if you can point us to any cases where you have been criticized by your colleagues on the court for having gone too far in favor of an individual, child, a family who brought a case against a defendant, a manufacturer or a corporation.

And if you don't know -- and in fairness to you, I know you can remember everything, sitting here today -- if you can tell me of any today, I would appreciate that. If you can't, I'll give you a chance to provide that information to us, because I would like to see it.

MS. OWEN: One case that comes to mind -- and I -- let me talk about it for a minute -- is the Sands v. Fidelity -- I don't want to say it's Guaranty. I'm not sure. It's Fidelity-something. It was a worker's compensation case. And the plaintiff ended up settling with the worker's comp carrier. And she later contended that she had been defrauded into entering that settlement, and she sued for bad faith. And the court, a majority of the court ended up saying for various reasons that she didn't have a bad faith cause of action. I agreed with that, but I dissented from the case because I said she's established fraud. And under the law, she's entitled to rescind that worker's comp decision and go back and claim her benefits and start all over again. And a majority of the court disagreed with me and said no, she does not get to rescind, she does not get to go back and start all over. And I've certainly ruled for -- you've named four cases; I can name cases where I've ruled in favor of workers, consumers --

SEN. EDWARDS: Can -- can I interrupt you just a -- I want to be very specific about --

SEN. FEINSTEIN: Senator --

SEN. EDWARDS: I'm asking her to provide something very specific, cases where you have, in fact, been criticized -- these are -- some of these cases are cases where you've been criticized by your colleagues for going too far on one side of the equation.

MS. OWEN: Well, I --

SEN. EDWARDS: I'm just asking now whether you can point us to cases where -- you've just indicated one case, where I believe you actually ruled with the majority against the jury verdict, if I remember correctly: the Sands case. And --

MS. OWEN: That's correct. But I thought she should get a remand and be able to set aside the agreement and proceed with her cause of action. If I --

SEN. EDWARDS: Let me ask you, if you can't -- I know my time is up, and we need to let other people ask questions. If you have cases such as that, I would actually like to see them. I think all of us would like to see them.

MS. OWEN: You -- you want me to find cases where my colleagues have criticized me, even if I -- you don't care about the cases where I --

SEN. EDWARDS: Or disagreed with you. Disagreed with you is also okay.

MS. OWEN: So -- is there -- you just want cases -- you don't care if I rule for the consumer, as long as -- it has to be a case where I was criticized doing so. Is that the same question?

SEN. EDWARDS: No, ma'am. You have -- there are a series of cases where your colleagues on the court have been critical and strongly disagreed with what you did, where you ruled for one side, some of the ones I've mentioned today and some of the ones that have mentioned by others. I'm asking you whether there -- are there cases on the other side of that equation?

MS. OWEN: Well, there are certainly cases where I have ruled large verdicts for injured people. And I -- I guess -- I don't remember if people criticized that or not, but we've upheld -- and I've been part of it -- upheld holding rules of law in verdicts for plaintiffs of significant rules of law: statute of limitations areas, independent contractor areas. I don't remember if there were dissents, I don't remember if I was criticized for doing it, but I have certainly --
SEN. FEINSTEIN: What you're asking is that she send those cases to us in writing --

SEN. EDWARDS: Right. That's correct.

SEN. FEINSTEIN: -- if you would.

And thank you very much, Senator Edwards.

SEN. EDWARDS: Thank you, Madame Chairman.

SEN. FEINSTEIN: Senator Brownback?

SEN. SAM BROWNBACK (R-KS): Thank you, Madame Chairman.

And thank you as well, Justice Owen, for appearing here.

And you've waited a long time for the hearing -- 14 months to be able to get in front of the committee. So I'm delighted that we're holding the hearing and going to be able to talk with you today about your qualifications, your background and your service on the circuit court, which I hope we're able to affirm and move forward with.

If I could point out one thing, just in listening to the last discussion on the case -- I believe that was GTE versus Bruce, the case you were talking about -- I believe in that case you joined the unanimous court ruling on the court in affirming the $275,000 jury verdict for the female employees that had been sexually harassed. Is that correct?

JUSTICE OWEN: I did. I did.

SEN. BROWNBACK: So we're talking about a unanimous opinion by the court. You wrote a concurring opinion on that that did hold for the female employees. Is that correct?

JUSTICE OWEN: Yes, and the reason I wrote the concurring opinion again is, we had just recently issued in the last few years on the Hill -- right in front of this case -- cases involving intentional infliction of emotional distress in the workplace. And I was concerned that people would pick up GTE versus Bruce, pick up our prior decisions and say, "There's an inconsistency here. How could you have said in these cases it's not intentional infliction of emotional distress and then list the things that I listed and say that is?" And I wanted to try to square --

SEN. BROWNBACK: You didn't want to redefine the common-law tort. You didn't want to try to redefine that.

JUSTICE OWEN: I did not. I was just trying to make sure that I was explaining how I could square our prior decisions -- again, which were fairly recent -- in the employment context with the specific evidence that was in this case.

SEN. BROWNBACK: I just didn't want anybody to get the impression that you ruled against the female employees or held against their case. You held for their case.

JUSTICE OWEN: I did, absolutely.

SEN. BROWNBACK: You upheld a $275,000 verdict in the case by the plaintiffs against the defendant. Is that correct?

JUSTICE OWEN: That's correct.

SEN. BROWNBACK: Okay. I think that's important, because we sometimes lose it in the factual setting that somehow you didn't find this bad behavior; you did, and you agreed with the court

that this is illegal, wrongful behavior and that the jury verdict should be upheld. And I think that's important for us to get clear.

Another thing I want to go to -- because a lot of the outside groups that really -- trying to derail nominations in this town and pick apart people's records who are very well qualified -- and you certainly are well qualified for this position -- is the parental- notification Texas law. And we visited this a couple of times today, but I just -- I went to make sure that I'm clear and that we're all clear on this. The only cases that got applied on up to the Texas Supreme Court were those where the judicial review had been denied. In other words, the easier cases were taken at the lower court, and at the lower court, if a girl had come forward, wanted an abortion, wanted not to have her parents informed, the court had already ruled yes, you can do that. The only cases that were appealed were the ones where that had been denied. Is that correct?

JUSTICE OWEN: That's correct. If either the trial court of the intermediate court granted the bypass, that was the end of it.

SEN. BROWNBACK: Okay. So if the judicial bypass was granted, abortion's granted, it moves on forward.

And if I understand your numbers correctly, about 600 of those were done at the lower court level in the time period we've been talking about on your service in the Texas supreme court.

JUSTICE OWEN: We know that at least 650 bypass proceedings have occurred. There may be a lot more. We just don't know. But we know at least that many bypass proceedings have occurred.

SEN. BROWNBACK: Where the court ruled that the girl did not have to inform her parents to obtain the abortion, is that correct?
JUSTICE OWEN: Well, we don't know because they're confidential, so we don't know the outcome. We -- out of the 650, only 10 girls have appealed to my court.

SEN. BROWNBACK: Okay.

JUSTICE OWEN: So --

SEN. BROWNBACK: So, somewhere in there. But out of 650, 10 were appealed to the Texas supreme court where judicial bypass had been denied.

JUSTICE OWEN: That's correct.

SEN. BROWNBACK: And that was a requirement that it had to have been denied. So, you had 10 cases that got in front of you of 650, so you're looking at, you know, a small percentage. You're looking at less than 2 percent of the cases that get to the Texas supreme court. And in those 10 cases, how did you rule? What was your opinion on the 10? Do you recall how you split on those?

JUSTICE OWEN: Yes, I do. The first Jane Doe came to our court twice, Jane Doe 1. The first time that she came, I agreed with the majority of the court. Everybody on the court actually agreed that she did not meet the statutory standard, but I agreed with the majority of the court, was because mature and sufficiently well- informed was such a loose definition, and trial courts could apply it -- that could mean so many different things to so many different trial courts that we needed to put some parameters on it. And because she didn't have the benefit of that, she should be remanded to the trial court and have another hearing. So, if the trial court had granted her a bypass on the remand, I would never have seen the case again. The trial court denied the bypass again, the court of appeals again denied it. And the second go-round, I said it was a close call, but I looked at the record, and under our evidentiary standards, I said there's some evidence to support what the trial court did, so I would have denied it, and the majority granted it.

Doe 2, I voted with the majority to remand it for the same types of reasons, only this time it was a best interest issue. We don't know what happened to Doe 2. We never heard from her again. Doe 3, I voted to deny the bypass. Doe 4, I agreed with the majority of the court that she did not meet the statutory standard. Let me -- and then Doe 10, which was the last Doe to come to our court, I agreed unanimously -- or the court did, that she was entitled to the bypass as a matter of law.

And I think I've mentioned this before today, but there were five other Does that came in between Doe 4 and Doe 10, where the court did not write an opinion.

We affirmed the lower judgment of the court. And as I explained, it takes at least six votes to do that. No dissents were published or were noted. If they had been noted, we would have had to have wound up and said who voted which way.
But I think it's a fair inference, given our opinions on either side of those five Doe cases, that these probably weren't close cases or somebody would have written something.

SEN. BROWNBACK: Because of the 10 cases, these were already 10 cases who -- where two courts, the trial court and the appellate court, had already voted, already ruled to deny judicial bypass. So they had said no, you cannot bypass your parents. Two courts had already ruled that in these 10 cases, is that correct? In all of the 10 cases?

JUSTICE OWEN: Correct. In all of them, yes.

SEN. BROWNBACK: And then in these -- the 10 that came to you, and on the Texas Supreme Court, you and the court split on some of these cases and voted to remand to the lower court to look at again to see if they should grant the judicial bypass. And in a majority of cases, you agreed with the lower two courts, in essence, that a judicial bypass should not be granted. Would that be a correct characterization of the --

JUSTICE OWEN: That's correct. And I believe that out of the 12 cases, I was -- had a different view of the judgment than the majority did in three cases. So I was with the majority, I guess that

means nine out of 12 times in terms of the judgment.

SEN. BROWNBACK: I just -- it seems to me to make something about this in your record as being outside the philosophical mainstream is really a far stretch. You've got 600-some cases; 10 that have been ruled against a judicial bypass at two lower courts, and then it comes in front of you and the court splits and you vote with the majority most of the time, and some of the cases are remanded for this reconsideration; others are not. It just seems to me striking that this would somehow say that you should be set apart on the issue of abortion when you're interpreting the law in tough cases, is what these cases amounted to.

And I would hope that my colleagues would look at the factual setting here and how you've ruled. I think very common sense and very broad-based and non-ideologically in these cases. Some cases you voted to remand, for it to be looked at again for judicial bypass; other cases, not. I think that's a very fair-minded way on your part.

Let me just say, Justice, I thank you for putting yourself through this process. You are extraordinarily qualified for this position. And to wait for the 14 months that you have and then go through having narrow points on cases picked apart and your record maligned, abused, and then trying to somehow point you out as an ideologue in any instance is totally unfair to you and something you didn't need to go through, and could have remained absent from. But yet you've gone ahead and submitted yourself to this process to be able to serve the public.

And I appreciate you doing that. You didn't have to do that. A lot of people don't like going through these sort of process, and I don't blame them. But thank you for staying in here and staying in the process. And I think you're going to make an outstanding circuit court judge. I hope we can move this on to the committee process and through the floor.

Thank you, Madame Chairman.

SEN. FEINSTEIN: Thank you, Senator.

Senator Cantwell.

SEN. MARIA CANTWELL (D-WA): Thank you, Madame Chair. And thank you, Justice Owen, for your time today and patience in answering these many questions.

I think several of my colleagues have brought up the specific issues relating to some of your decisions around parental consent, and I think some of my colleagues have asked a little bit broader questions as it relates to the issue of privacy, but I'm hoping that I can expound a little bit on and understand your judicial philosophy on these important issues that I think are growing in magnitude as they face our country. I think privacy, whether it's government intrusion in personal decisions, or nowadays government acquiring information about activities of American citizens, or businesses handling some of your most personal information, this issue is just growing in magnitude. So, understanding your broad philosophy on this is, I think, very helpful

for this committee and for the Congress.

My first issue is really your general thoughts on the right to privacy, and whether you believe that that right exists in the Constitution, and where you think that right to privacy does exist in the Constitution.

JUSTICE OWENS: Well, of course I'm guided by the U.S. Supreme Court cases that have recognized the right to privacy. I think Griswold is one we discussed earlier that clearly recognizes that. And there are cases from my court that construe the Texas Constitution as having a right to privacy.

SEN. CANTWELL: I'm asking you whether -- I mean, because we've had lots of nominees come before the committee who have recited the same things about "We'll follow precedent and the recognition in various decisions." but, after being confirmed, have not followed those exact decisions or interpretations. So that's why I'm asking the broader question of whether you believe that the Constitution guarantees a right to privacy.

JUSTICE OWEN: Well, I think that's the law of the land. And there's nothing in my personal beliefs at all that would keep me from understanding and applying that law.

SEN. CANTWELL: And where do you think that exists within the Constitution?

JUSTICE OWEN: Well, I wish I -- because I do not want to misstep here. I'd like to have of the U.S. Supreme Court precedent in front of me on that particular issue because that's just -- I don't want to -- that's not a question I would answer as a judge off the cuff if I were deciding a case. I would certainly go pull the U.S. Supreme Court precedent, I would pull the Constitution, I would sit down and read it and then give an answer. But I --

SEN. FEINSTEN: Senator, if you'll excuse me just for a moment, wasn't your question, does the Supreme Court guarantee a right to privacy?

SEN. CANTWELL: The Constitution, I asked --

SEN. FEINSTEIN: I mean the Constitution, guarantee a right to privacy?

SEN. CANTWELL: Yes.

SEN. FEINSTEIN: You can't answer that yes or no?

JUSTICE OWEN: Well, yes, clearly it does. The U.S. Supreme Court has said it does. That's been the law for a long, long time. I thought that she was asking me specifically can you tell me where that is derived from, the specific language.

SEN. CANTWELL: Whether you believed that there existed such a right, because in interpreting

these cases -- and I think when we get to follow up on some of your other cases and comments, I mean, that the issue. We're trying to find out whether you will follow precedent. And obviously, in a variety of cases, you've dissented, and dissented in such a way that it's left a question mark, at least in my mind and, I think, perhaps some of my colleagues, as to why you dissented and some of the issues that you brought into the dissent. And so this particular issue, it's not -- we've had other people who have said that they believe in upholding a woman's right to choose, and then when it came to major decisions, went in an opposite direction, obviously because they saw something within the case. And that's why I'm trying to understand your personal belief in that right.

JUSTICE OWEN: Well, again, I don't let my personal views get into it, but I very clearly pointed out at several junctures, particularly my Doe 1 case, that there is a right to choose recognized by the U.S. Supreme Court. It applies to minors, that you cannot prevent a minor from going to court without the knowledge of her parents to get a judicial bypass. I pointed out that I had concerns about some of the Texas Family Code provisions in the divorce context when a minor -- a parent would be required to notify another parent under a divorce decree, if that might lead to some of the problems under sexual, physical, emotional abuse. I said that that would probably be unconstitutional. I think I clearly demonstrated that I have thought about the U.S. Supreme Court decisions and how they apply in this context and also how they might apply under other Texas laws that impact this area, and that I am willing and able to follow it.

SEN. CANTWELL: Well, let's -- let's go specifically to that. And I'm sorry I don't know exactly -- I know -- I have what your statement was earlier on the Doe case; I'm not sure which one, whether it was Doe I or Doe II. But you found that a woman seeking a judicial bypass should demonstrate that she has considered philosophical, social, moral and religious arguments that can be brought to bear when considering abortion, and that you were following the decision of the Supreme Court in Casey (sp). However, in Casey (sp) the court ruled that states can enact rules designed to encourage her to know that there are philosophical and social arguments of great weight that can be brought to bear in considering an abortion, but there is never any mention of religious implications.

MS. OWEN: That's in H.L. v. Matheson (sp). That -- the reference to religion is in H.L. v. Matheson (sp). I think they said -- I can give you the cite, but they talked about -- see if I can read it here for you. But that was a factor that they said, that there are religious concerns. People -- let's see: "As a general proposition that such consultations" --

SEN. CANTWELL: That's not -- that's not in Casey (sp).

MS. OWEN: It's in the U.S. Supreme Court decision H.L. v. Matheson (sp). In my opinion, these were -- as you -- I hope you understand, were drafted fairly quickly. I did cite H.L.-Matheson (sp) in my Doe I decision, not on this point. I cited Casey (sp), and I cited the second decision in City of Akron. And I cited Matheson (sp) on another point. But in Matheson (sp) they talk about that for some, people raise profound moral and religious concerns, and they're talking about the desirability or the state's interest in these kinds of considerations in making an informed decision.

They don't say you have to have religious beliefs, and I don't for a minute advocate that. The only point I was making --

SEN. CANTWELL: I think there was -- I think there was detail in there that basically said that you didn't think that the physician would be the person who could give that kind of input or advice. And so I think you can our concern, obviously. And I want to get back to the broader question. But our concern is, you know, you're dissenting in these decisions about a major issue of privacy. And in this particular issue, you're injecting in, where, obviously, the others on the court didn't, this issue of religious -- religion and pulling it out. And so, I don't know -- I don't know the right example. I think on parental notification. I mean, these laws have been thought and passed by legislatures because they want to think of the extreme cases. And I'm obviously -- we've talked about the abuse issues and various things. But now we're saying to a young woman that she has to sit down not with her doctor, but some religious leader and have an explanation about this issue before she's going to have the ability to get this approval.

JUSTICE OWEN: Well, let me make sure that we're talking about the same thing. If there's abuse, this all goes out the window. It's a separate ground. You don't --

SEN. CANTWELL: Say it's two 18-year-old cousins.

JUSTICE OWEN: I'm sorry?
SEN. CANTWELL: Say it's two 18-year-old cousins.

JUSTICE OWEN: Well, 18-year-olds aren't covered by the statute -- oh, you mean that she's consulting? Again, the U.S. Supreme Court has talked about getting counseling from a qualified source. And it was not me but Justice White --

SEN. CANTWELL: What if I'm not religious?

JUSTICE OWEN: I'm sorry?

SEN. CANTWELL: What if I'm --

JUSTICE OWEN: That's -- I'm not saying you have to get religious counseling. I never advocated that.

SEN. CANTWELL: Well who delivers the religious counseling?

JUSTICE OWEN: I never advocated that you have to have religious counseling. What the U.S. Supreme Court said, and what I followed, what I agreed was part of the definition of information, that it's not just information about the physical impact on the girl or the physical risks. And what Justice O'Connor wrote for the court was that there are "profound" -- and that's her word, not mine -- philosophical and moral and other considerations that go into an informed choice. And in the --

SEN. CANTWELL: That's exactly right. And that's where in your dissent -- again, your dissent from your colleagues -- threw in the word "religious consideration." So I'm trying to figure out -- you're telling me where you --

JUSTICE OWEN: And that came from H.L. versus Matheson (sp).

SEN. CANTWELL: And you believe it should be -- if you were the majority, it would have been implemented how?

JUSTICE OWEN: All I'm -- it would have implemented that the girl who is seeking an abortion should indicate to the trial court an awareness that there are arguments and issues. She doesn't have to agree with any of them, she doesn't have to explain what her philosophy is, she doesn't have to rationalize or justify her philosophy or her moral code or her religion, if she has any.

But all that I said was, and what I think is a fair reading of what Justice O'Connor said, is we're talking about awareness that there are arguments out there on both sides, philosophical, moral, and in H.L. versus Matheson (sp) arguments -- religious. If she doesn't have religious beliefs, that's no business of the court's. The only question is, if she does, has she thought about her own beliefs? Is she aware of the philosophical debate, the moral debate, just the issues. She doesn't have to get into does she agree with them and debate it with the judge, but simply is she aware --

SEN. CANTWELL: Is the doctor capable of giving that advice or not?

JUSTICE OWEN: I think it depends. I think it depends. I think it depends on -- and I'm not sure she has to identify where she got -- where she obtained her understanding of the philosophical and other issues. That doesn't necessarily have to be from a counselor, as long as she exhibits an understanding of it.

I think she may need a counselor to give her some help on her options, the physical risks, that sort of thing, but I'm not advocating that she have any particular set of values or morals or religious beliefs.

SEN. CANTWELL: Madam Chairman, I see my time has expired. So I don't know if we're going to -- if we're moving on or --

SEN. FEINSTEIN: Did you have one more question, because this will be the last question before --

SEN. CANTWELL: Well, I just, if I could just -- just quickly, and obviously, if you're confirmed to the Fifth Circuit, you'll be responsible for determining the types of laws that are the undo burden on a woman's right to choose. And so given your record in this area, you know, I have some questions about, you know, recognizing when a statute imposes, particularly given some of the laws that are still on the books in the Fifth Circuit. So I guess I'm asking you, do you believe that you really have the ability to recognize what the Court has recognized in Casey, and that

there are some laws that, you know, can prevent a woman from obtain abortion just as surely if they were outlawed? Do you think you're going to be able to recognize that?

JUSTICE OWEN: Senator, I do. And I would point to you again other places in my Doe 1 decision where I've recognized that in some situations, even a notification statute can amount to a consent statute because of a particular girl's situation, and I quoted the Supreme Court on that. As I pointed out, I expressed concern about the impact, the undo burden on a minor's right to choose that might occur because of particular provisions in our family code that deal with divorce decrees.

So, I've -- yes, I do believe that I can apply Casey and Akron to -- and the other decisions of the U.S. Supreme Court, I believe faithfully.

SEN. CANTWELL: Thank you. Thank you, Madam Chairman.

SEN. FEINSTEIN: Thank you, Senator. Justice Owen, believe it or not, this is going come to an end.
JUSTICE OWEN: (Laughs.)

SEN. FEINSTEIN: And you have held up very well. And I want to say the audience has held up very well. I didn't note anybody going to sleep. And we have two additional judges to do, so I'm going to excuse you and thank you very much.

JUSTICE OWEN: Appreciate it. Thank you.

SEN. FEINSTEIN: And ask the two other judges to please come forward. And those leaving the room, if you could do so quietly, we would be very appreciative.

JUSTICE OWEN: Thank you, Senator Feinstein, very much.

SEN. FEINSTEIN: Thank you, Justice.

SEN. : You did awful well, Judge.

SEN. HATCH: Madam Chairman, can I put some more material in the record.

SEN. FEINSTEIN: Yes, certainly.

SEN. HATCH: Okay, thank you. And others as well.

SEN. FEINSTEIN: Yes. The record will remain open for one week.

END