Judicial Appointments

NOMINATION MEMO

Priscilla Owen

Nominated: May 9, 2001

<u>Position:</u> U.S. Court of Appeals for the Fifth Circuit (Texas, Louisiana, Mississippi)

• Court Stats: 17 full-time positions, 4 vacancies, 3 nominees (1 confirmed, 1 defeated in

Judiciary Committee)

Urgency: This vacancy is a *judicial emergency*, open since January 23, 1997

<u>Current Job:</u> Justice, Texas Supreme Court (elected 1994, re-elected w/out opposition 2000)

<u>Background:</u> Private practice in Houston (1978-94)

ABA Rating: Unanimously well-qualified

Support: Texas Senators Phil Gramm (R) and Kay Bailey Hutchison (R) support Owen

The Judicial Job Description

An effective hiring process starts with an accurate job description. Similarly, the judicial selection process must start with the right judicial job description. Because the contending sides use different job descriptions, the debate is often divisive, confusing, and even misleading. When he nominated Justice Priscilla Owen on May 9, 2001, President Bush provided the right job description:

"Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench."

A judge's job is important, but limited. She must decide legal disputes by applying the law that the people give her; she does not have the power to make the law she applies in order to achieve certain results. The power to make law, to run the country and define the culture, belongs to the people, not to judges.

Supporting this system is easy as long as it produces what we like. The challenge comes when the people make law we do not like. Should we praise judges who abuse their power by making law, so long as we like the law they make? Should we condemn judges who follow the law but produce unfavorable results?

The political ends do not justify the judicial means. No matter what the results, judges must stick to interpreting, but not making, law. The people can change the law if the results are unacceptable, but they must retain the power to govern themselves, run the country, and define the culture.

CONCERNED WOMEN FOR AMERICA

The Judicial Selection Process

The Constitution establishes the hiring process for federal judges, giving to the president the power to nominate and, with the Senate's consent, appoint them.² The proper job description must guide that process, from interviewing the right candidates, asking the right questions, and considering the right information to applying the right criteria and finally making the right decision.

President Bush is using the right job description in choosing his nominees. Their judicial philosophy is called *judicial restraint* because they are restrained by the law. In a basketball game, the referee must fairly apply the rules. He cannot change the rules mid-game so that his preferred team wins. Similarly, judges must fairly apply the law. They cannot change the law to produce their preferred result.

Unfortunately, it appears that a different view may be operating in the confirmation phase of the process. Many Senators, and certainly most left-wing interest groups, seem to care more about politically correct ends than judicially correct means. To them, winners and losers are more important than how the game is played. Decisions are good or bad based on whether the results favor certain political interests, not on whether judges follow the law. This view is dangerous because *judicial activism*, or judges making law, takes the power to run the country and define the culture away from the people.

Senate Democrats, led by Sen. Charles Schumer of New York, insist that confirmation of President Bush's nominees should depend on their "ideology," that is, on the results they will deliver in their judicial decisions. Thus Senators actively employ ideological litmus tests, demanding to know how nominees would rule on certain issues in future cases. Since activist judges essentially translate their personal views into judicial decisions, advocates of judicial activism must determine a nominee's personal views to predict what she will do as a judge. This very dangerous approach undermines judicial independence and ultimately destroys the power of the people to govern themselves.

An effective hiring process starts with an accurate job description. This brief overview provides the frame of reference for understanding the current, increasingly divisive, debate over judicial appointments. The desire for a politicized, activist judiciary willing to deliver the liberal agenda drives the overall obstruction of President Bush's judicial nominees, as well as the particularly aggressive assault on individual nominees such as Justice Priscilla Owen.

<u>Justice Priscilla Owen</u>

When Justice Owen ran for re-election to the Texas Supreme Court in 2000, *every major Texas newspaper endorsed her* and 84% of Texans voted for her. She was only the second woman elected to the court and its first member elected to a full term without major party opposition.³

- The *Houston Chronicle* praised her "proper balance of judicial experience, solid legal scholarship and real-world know-how."
- And the *Dallas Morning News* said she "has brought impressive legal scope to the bench and has provided thoughtful opinions."⁵

Texas Supreme Court Chief Justice Top Phillips has said that Justice Owen "is what [President] Bush said: she tries to follow the legislative will in every case and apply the law, not invent it." Similarly, the analysts at the Free Congress Foundation's Judicial Selection Monitoring Project reviewed Justice Owen's

record and concluded that she is "a judge who interprets the law, rather than one who makes the law." Former White House Counsel C. Boyden Gray found after his analysis that "Justice Owen has stressed that the function of a court in interpreting legal text is to give effect to the intent of the lawgiver." Justice Owen fits the appropriate job description and is the kind of judge America needs.

<u>Justice Owen's Opposition</u>

Justice Owen's opponents are the same political forces that have attacked previous Bush nominees to judicial and executive branch positions. Their tactics are familiar and their purpose is clear: to keep off the bench judges they perceive as unlikely to deliver results favorable to their political interests and to dissuade President Bush from nominating such a judge to the Supreme Court in the future.

Curiously, they now use the language of "judicial activism" and "judicial restraint." When President Clinton was appointing judges, these same forces claimed that "judicial activism" either did not exist or the label meant nothing more than an undesirable judicial decision. The *New York Times* dismissed the label "judicial activism" as nothing but a "hazy slur." Left-wing law professor David Kairys wrote that judicial activism "is in the eye of the beholder." When public debate about judicial activism included congressional hearings in 1997, left-wing groups echoed U.S. Circuit Judge Jon Newman's assertion that critics of judicial activism attach the label to "any decision [they do] not like."

Now, perhaps admitting that judicial activism is indefensible, the far-left is trying to highjack the label, change its meaning, and use it to their advantage. They behave very much like the activist judges they favor, judges who change the meaning of statutes and the Constitution for their own ends.

Abortion is driving the opposition to many of President Bush's judicial nominees. Three-quarters of Americans would ban most or all abortions and large majorities would require such things as informed consent, spousal notification, parental consent, and waiting periods, and would ban partial-birth abortion.¹³ The American people have never chosen abortion-on-demand for themselves, and judges who respect the people's decisions about such issues are not likely to force it upon them. Instead, the current national policy of abortion-on-demand was established, and can only be maintained or extended, through activist judges.

Abortion extremists care only whether a particular judge or judicial nominee will, in the end, contribute to the incidence of abortion and the expansion of abortion "rights." As such, they look only at the results of Justice Owen's votes or written opinions in abortion-related cases, do the math, and decide whether those results contribute to their abortion agenda. They acknowledge no balance of any other rights or interests, ignore the facts and issues in these cases, and never ask whether judges rather than the people should decide such matters at all. Abortion is all that matters.

One abortion extremist has said that Justice Owen "exemplifies the most extreme hostility to reproductive rights of any of the nominees that President Bush has named." This claim is baffling since the Texas Supreme Court has not considered a case raising the issue of reproductive "rights" during Justice Owen's tenure. As such, abortion extremists have distorted Justice Owen's record to create an image they hope will be more politically potent.

Top 11 Distortions of Justice Owen's Record

A Texas statute requires minor girls to notify at least one parent before getting an abortion.¹⁵ It does not require parental consent or even notification of both parents. **This statute requires the least parental involvement possible and does not itself prohibit a single abortion**. It then dilutes this minimal parental involvement by creating three exceptions. Young girls can bypass their parents altogether if a judge concludes they are "mature and sufficiently well informed" to make the decision on their own; that "notification would not be in [their] best interest"; or that "notification may lead to…abuse."¹⁶

The legislature did not define these terms or set standards for applying them. Instead, the Texas Supreme Court had to determine what girls must prove to fit within these exceptions and bypass their parents. The court decided 12 cases, eleven in 2000 and one in 2002. The girl in each case seeking to bypass her parents is identified only as Jane Doe and the cases are sequentially identified as *In re Jane Doe 1*, *In re Jane Doe 2*, and so on. Two of the cases, *Jane Doe 1* and *Jane Doe 4*, returned to the Texas Supreme Court and the second ruling in each case is identified with (II).¹⁷

Though other abortion extremists parrot similar claims, the National Abortion Federation (NAF) has led the assault on Justice Owen's record in this area. This memo examines and answers their distortions.

Distortion #1

"in thirteen out of fourteen ... abortion cases...she has voted against abortion rights" 18

The issue of "abortion rights" was not raised in a single case before Justice Owen. Neither these parental notification cases, nor the statute they interpreted and applied, addressed any "right" to abortion at all. In fact, it might be said that the statute, at least tacitly, assumed a "right" to abortion and dealt only with the circumstances under which minor girls could exercise that "right."

The legislation's Senate sponsor, however, supports abortion "rights." In a July 15, 2002, letter to U.S. Senate Judiciary Committee Chairman Patrick Leahy, Texas state Sen. Florence Shapiro wrote that the law "is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. The Act nowhere presents the question of whether the Constitution guarantees the right to abortion or the scope of such a right; in fact, it recognizes that a girl may have an abortion." ¹⁹

It also may come as a shock to NAF that the U.S. Supreme Court, which invented the so-called "right" to abortion in the first place, held quite clearly that this "right" is neither absolute nor unlimited. In Roe v. Wade²⁰ itself, the Supreme Court responded to the argument that

"the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. *With this we do not agree.* Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are *unpersuasive*."

So it is with these cases that involve minors, not adults; a requirement of notification, not consent; and notice to just one parent, not two. To insist that requiring a child merely to tell one parent before having an abortion is an assault on "abortion rights" is hyperbole in the extreme. It may make for effective fund-raising letters or help motivate some political activists, but it bears no relationship to the truth.

Justice Owen shows more balance than her opponents in suggesting that the U.S. Supreme Court might not approve certain abortion restrictions they have not yet reviewed. The Court has, for example, required a bypass provision in parental consent,²² but not parental notification, statutes. Nonetheless, Justice Owen acknowledged that those parental consent decisions "suggest that the United States Supreme Court might hold that bypass procedures are necessary in notification statutes." In addition, though the U.S. Supreme Court has upheld a single-parent notification requirement, Justice Owen acknowledged that "[t]he constitutionality of requiring a minor to notify *both* parents is questionable." The NAF gives her no credit.

Abortion extremists can perhaps be expected to misrepresent Justice Owen's votes and decisions in these cases, but some of the news media also fail to be balanced or accurate. Anthony Lewis reported in the *New York Times*, for example, that "Justice Owen is an opponent of abortion rights for minors without their parents' permission." This statement is patently false in at least three ways. First, the cases to which it refers involved a parental **notification**, not a parental **permission**, statute. Second, as explained above, the issue of "abortion rights" was never before the court. Third, Justice Owen has never indicated her own view of abortion rights, in a court decision or anywhere else.

Distortion #2

Justice Owen "voted against abortion rights" in 11 of 12 parental notification cases²⁶

Perhaps NAF believes no one will actually check the record, but this accusation is completely false. For those who tabulate results, the picture looks like this:

- The Texas Supreme Court required notification six times²⁷ and facilitated bypass six times.²⁸
- Justice Owen was in the majority in nine cases²⁹ and dissented in three cases.³⁰
- Justice Owen voted to require notification in nine cases³¹ and to facilitate bypass in three cases.³²
- Justice Owen dissented from the majority to vote for notification in just three cases.³³

It is important to understand how these cases proceed through the Texas judicial system. Texas law does not allow appeal from a decision granting a bypass. Therefore, in every case reaching the Texas Supreme Court, two other courts have already denied a bypass and required notification.³⁴ Under these procedural conditions, and considering its standard of review,³⁵ the Texas Supreme Court can be expected to require notification in a substantial percentage of cases.

The NAF makes a particularly offensive suggestion that Justice Owen voted against notification in the most recent case because she had been nominated to the U.S. Court of Appeals.³⁶ While, as already noted, NAF is simply wrong that this was the only case in which Justice Owen voted to facilitate bypass, her vote in that case proves exactly the opposite of NAF's perverse innuendo. The court's decision in *Jane Doe 10* was based on some language in an earlier decision from which Justice Owen had dissented.³⁷ In *Jane Doe 10*, however, she acknowledged that the prior precedent applied and, though she had disagreed with it, was willing to be bound by it. This is the mark of a restrained, not an activist, judge.

Abortion extremists insist that, regardless of the law, a judge who does not permit (or takes a position even potentially discouraging) an abortion in a particular case is "hostile to abortion rights." Such a ridiculous statement is made even worse when the issue of "abortion rights" is not before the judge in the first place. This sort of rhetoric distorts the role of judges, misrepresents the facts and issues of individual cases, and misleads the public about judicial selection.

Distortion #3

"Owen Misrepresents Legislative Intent Of Bypass Provision" 38

Abortion extremists such as the NAF refer to this legislation as a "bypass statute"³⁹ and actually claim it was intended to "assist" minor girls "in their attempt to obtain abortions."⁴⁰ That spin is not only factually false, it is totally absurd. Prior to this legislation, minor girls could get an abortion without telling their parents; its enactment alone clearly shows the legislature wanted to discourage rather than assist young girls getting abortions without parental knowledge.

- The legislation's House sponsor, Rep. Dianne White Delisi, stated that girls would be able to bypass their parents only in "rare cases."
- Rep. Phil King said that notification should happen in the "vast, vast majority of cases."
- The legislation's Senate sponsor, pro-choice Sen. Florence Shapiro, wrote that, under the statute, parental notification would be the rule "except in very limited circumstances."

Distortion #4

"Owen Chastised By Colleagues For 'Unconscionable Judicial Activism" "41

In *Jane Doe 1*,⁴² the court concluded that the girl had not shown she was mature and sufficiently well informed to make the abortion decision without her parents' knowledge. After establishing new standards for applying this notification exception, the court sent the case back for re-consideration. The trial and lower appellate court again denied the girl's application for a bypass and the case returned to the Texas Supreme Court.⁴³ This time, the court granted the bypass application. Justices Hecht,⁴⁴ Owen,⁴⁵ and Abbott⁴⁶ wrote individual dissenting opinions.

Justice Alberto Gonzalez, now Counsel to President Bush, wrote a concurring opinion responding to Justice Hecht's dissent in a previous notification case.⁴⁷ There, Justice Hecht wrote that the court had granted bypasses based on "the majority's deep-seated ideology."⁴⁸ It was the "force of that ideology" and the court's "ideological motivations"⁴⁹ he argued, that drove the majority's decision.

Justice Gonzalez was part of the majority that Justice Hecht had criticized. In his *Jane Doe 1(II)* concurrence, after citing Justice Hecht's criticism, Justice Gonzalez wrote: "The dissenting opinions suggest that the exceptions to the general rule of notification should be very rare and require a high standard of proof....Thus, to construe the [statute] 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." He concluded his concurrence by responding to Justice Hecht's additional criticism in the present case: "Justice Hecht charges that our decision demonstrates the Court's determination to construe the [statute] as the Court believes [it] should be construed and not as the Legislature intended....I respectfully disagree."

Abortion extremists must have jumped for joy when they read those words, quickly claiming Justice Gonzalez had accused Justice Owen of "unconscionable judicial activism." They must have assumed no one would actually read the relevant opinions in these cases. The only colleague Justice Gonzalez named – not once, but twice – was Justice Hecht. He did not name Justice Owen at all. In addition, Justice Gonzalez attached that label to his characterization of a position, not to one necessarily taken by any of the dissenters. In fact, it can reasonably be argued that none of the dissenters' positions was "to eliminate bypasses."

Some abortion extremists make multiple errors in their rush to attribute this criticism directly to Justice Owen. People for the American Way, for example, claims that Justice Gonzalez "criticized a dissent joined by Owen in one case as 'an unconscionable act of judicial activism." Not only did Justice Gonzalez not criticize Justice Owen's dissent at all, Justice Owen did not join the one he did criticize.

Distortion #5

"Owen Misrepresents U.S. Supreme Court Decision"⁵⁴

In Jane Doe 2,⁵⁵ the Texas Supreme Court set standards for applying the statute's second exception, that girls can bypass their parents if notification "would not be in the best interest of the minor." In this case, Justice Owen agreed with the majority to send the case back for re-consideration and wrote a concurring opinion to explain further what factors the trial court should consider.

The statutory language here was drawn from the U.S. Supreme Court's decision in *Lambert v. Wicklund*,⁵⁷ which evaluated an identical Montana parental notification statute. This "best interest" standard is a two-sided coin. Judges must determine whether notification would not be in the minor's best interest but also whether an abortion without notification would be in her best interest.

In *Lambert*, the Court said that "a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interest." The Court said plainly that nothing in this "best interest" standard "permits a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion (without notification) is in the minor's best interest."

Justice John Paul Stevens' concurrence in *Lambert* is also instructive. He criticized the majority's holding that "a young women must demonstrate both that abortion is in her best interest and that notification is not." That criticism is inexplicable if the Court in *Lambert* had held that a girl need only show that notification is not in her best interest and not that abortion without notification is in her best interest.

In Jane Doe 2, Justice Owen urged what the U.S. Supreme Court required in Lambert. In fact, the Texas Supreme Court itself later adopted this position. In Jane Doe 4(II), the Court unanimously required notification after evaluating whether "notifying her parents could cause harm to their family structure" (notification is not in her best interest) and whether "her physical needs and the potential dangers may weigh in favor of involving her parents" (abortion without notification is not in her best interest).

Distortion #6

"Owen Redefines 'Maturity' As Not Seeking Judicial Bypass At All" 63

The NAF claims that Justice Owen made pursuit of a bypass itself evidence that a minor is not mature enough to get one. In another mischaracterization of the statute and Justice Owen's position, the NAF claims that "Justice Owen declared the girl too immature to be allowed an abortion." The statute, and the court's decisions interpreting and applying it, determines not whether a girl can get an abortion, but whether she can get an abortion without notifying her parents. Requiring parental notification does not determine whether an abortion takes place.

The NAF claims Justice Owen presented the view that pursuit of a bypass is evidence of immaturity in *Jane Doe 1(II)*.⁶⁵ Again, the NAF must assume no one will actually read the opinions in these cases. This allegation is simply fabricated out of thin air. Justice Owen never, anywhere, even suggested that a girl's attempt to obtain a judicial bypass was evidence, let alone proof, of immaturity.

The trial court in *Jane Doe 1(II)* concluded the girl was not sufficiently well informed, but made no finding about her maturity. Under Texas law, an appellate court presumes that evidence supports both a trial court's express findings and its "omitted findings which are necessary to support the judgment." Justice Owen not only did not make her own determination of the girl's immaturity, she explicitly **denied** that the Texas Supreme Court should independently re-weigh evidence the trial court had examined and make factual determinations on its own. "The question in this case," she wrote, "is not whether this Court would have ruled differently when confronted with all the evidence that the trial court heard. The question is whether legally sufficient evidence supports the trial court's judgment. The answer to this latter question is yes."

Distortion #7

"Owen Equates The Seeking of a Bypass With 'Deceit" 68

Whether the NAF likes it or not, the right of parents to direct the upbringing of their children is not only profoundly important, but well-established in Texas law and U.S. Supreme Court precedent. Texas law allows parents to stop financially supporting their children once they turn 18 and graduate from high school.⁶⁹

In Jane Doe 4,⁷⁰ the girl claimed her parents would stop supporting her if she told them she was pregnant because they had done so when her sister became pregnant. There was no evidence, however, whether the sister was 17 or 18, when her parents could terminate support. There was no evidence whether the parents had done so because of the pregnancy. There was no evidence that the girl was in the same situation, with the same family relationship, as her sister. Significantly, when this case came back to the Texas Supreme Court after re-evaluation, the court unanimously required notification.⁷¹

The NAF accuses Justice Owen of disregarding the impact of notification on family relationships. In doing so, they simply misquote her words. Compare NAF's quotation with what Justice Owen actually wrote:

| NAF Report quotation of Justice Owen | Justice Owen dissent in Jane Doe 4 |
|---|---|
| neither the trial court nor this Court may properly | Because the Legislature has drawn a clear line as |
| consider whether Jane Doe 4's parents would | to when parental obligations of support end, |

withdraw their emotional or financial support after she turns eighteen and graduates from high school if they were notified of her intent to have an abortion while she is a minor... I cannot countenance a rule of law that would permit a minor to deceive her parents in order to avoid their expression of disapproval....⁷²

neither the trial court nor this Court may properly consider whether Jane Doe 4's parents would withdraw their emotional or financial support after she turns eighteen and graduates from high school if they were notified of her intent to have an abortion while she is a minor. Jane Doe 4 has no legal entitlement to her parents' support once she reaches eighteen years of age and receives her high school diploma. Conversely, her parents would be within their legal rights to express their disapproval of her conduct by withdrawing further support once she is considered an adult. I cannot countenance a rule of law that would permit a minor to deceive her parents in order to avoid their expression of disapproval when those acts of disapproval are wholly within the parents' rights.73

Quite contrary to the NAF's claim, Justice Owen was indicating her intent to follow a legal rule laid down by the Texas legislature, which chose to allow parents to terminate financial support for their adult children. The rule of law Justice Owen could not countenance was the majority's holding that interfered with parents' established legal rights. This false and deceptive claim by NAF amounts to a deliberate attempt to deceive the Senate and the American people about Justice Owen's record. Their inserted ellipses completely changed Justice Owen's position.

Had the NAF done this in a brief in federal court, they might have been subjected to sanctions under the Federal Rules of Civil Procedure. One court, for example, chastised an attorney for "the manipulative use of ellipses and omissions" and said that misrepresentation of a court's opinion "clearly provides the basis for sanctions under Fed.R.Civ.P. 11." Another court said that "[e]llipses in quotes from opposing parties' briefs that completely distort the original are inappropriate" and told the attorney to stop "attempting to gain an advantage in argument by mischaracterizing the positions of opposing parties."

Distortion #8

"Owen Unsympathetic To Health Risks Of Young Women" 76

By now it should come as no surprise that Justice Owen stated exactly the *opposite* of what the NAF charges. Rather than saying that "even health risks should not be taken into account" in parental notification cases, Justice Owen has explicitly said that courts must do so. In *Jane Doe 1*,78 for example, Justice Owen agreed that "[t]he Court properly requires a minor to consult a health-care provider about the general risks of an abortion." She repeatedly stated that the "medical, emotional, and psychological consequences of an abortion" should be considered.⁸⁰

The NAF accuses Justice Owen of "a lack of compassion." Significantly, the American Bar Association, which has itself been accused of liberal bias, unanimously gave Justice Owen its highest "well qualified" rating. This is significant for three reasons.

First, the ABA's comprehensive investigation examines a nominee's answers to the U.S. Senate Judiciary Committee's questionnaire as well as the nominee's legal writing. Its investigator interviews both the nominee and many people who have information about her qualifications. Second, the ABA has consistently and publicly favored abortion rights for 30 years. In fact, in 1990 the ABA adopted a resolution, by a nearly three-to-one margin, opposing any requirement of parental notification before minor girls can obtain abortions. Third, the ABA's published evaluation criteria include "the nominee's compassion...open-mindedness...freedom from bias and commitment to equal justice under the law."

If the ABA, despite its support of abortion rights, finds Justice Owen well qualified after a thorough investigation of her entire record, the NAF, because of its support of abortion rights, must base its opposition on a cursory review of part of her record.

Distortion #9

"Owen Unsympathetic To Physical And Mental Abuse Of Teenaged Girls" 86

The NAF's claim that Justice Owen lacks sympathy for abused children has absolutely no evidence to support it. Under the statute's third exception, a girl may bypass her parents if she proves that notification may lead to abuse. The NAF cites *Jane Doe 2*⁸⁷ for Justice Owen's lack of sympathy, yet the court in this case considered the statute's "best interest" exception, not the "abuse" exception. And in *Jane Doe 2*, Justice Owen voted to send the case back to the trial court so the girl could have another chance at bypassing her parents.

The NAF similarly misrepresents Justice Owen's position in *Jane Doe 3*. 88 The girl in this case testified that her father had never abused her, that she no idea how her father would react upon learning of her pregnancy, and that he would probably be more upset learning she had an abortion without his knowledge. 89

When defining "abuse," Justice Owen followed a traditional approach to statutory construction by looking to other provisions of the Texas Family Code using the same word. Section 261 defines abuse as "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." Justice Owen applied this definition and concluded there was no evidence to meet it. The NAF offers not a shred of evidence to the contrary.

Distortion #10

"Owen's Attempted Imposition of Religious Counseling Requirement" 92

This claim again exposes the NAF's extremism and dishonesty. In *Jane Doe 1*, ⁹³ Justice Owen concluded that the statute requires girls seeking to bypass their parents to be exposed to the "profound philosophic arguments surrounding abortion." She drew guidance from the U.S. Supreme Court's decision in *Planned Parenthood v. Casey.* The Court, while affirming *Roe v. Wade*, held that "the state may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children."

Justice Owen's position here was exactly the opposite of what NAF claims. She specifically rejected the proposition that courts can encourage girls to adopt a particular viewpoint, including a religious one. She wrote: "A court cannot, of course, require a minor to adopt or adhere to any particular philosophy or to

profess any religious beliefs." Knowing this, the NAF again deliberately misrepresents Justice Owen's position. Compare the following:

NAF Report quotation of Justice Owen

She should also indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion...[R]equiring a minor to exhibit an awareness that there are issues, including religious ones, surround [sic] the abortion decision is not prohibited by the Establishment Clause.⁹⁸

Justice Owen's concurrence in Jane Doe 1

She should also indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion....A court cannot, of course, require a minor to adopt or adhere to any particular philosophy or to profess any religious beliefs. But requiring a minor to exhibit an awareness that there are issues, including religious one, surround [sic] the abortion decision is not prohibited by the Establishment clause.⁹⁹

Such deliberate misrepresentation, even of quotations which any researcher could check, casts serious doubt on the NAF's entire analysis.

Distortion #11

"Owen displayed an unwillingness to protect abortion clinics from harassing protesters" 100

The second category of abortion-related cases involves court injunctions restricting pro-life activity. In *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas*, ¹⁰¹ the court reviewed an injunction and issued an order creating so-called "buffer zones" around abortion clinics and abortionists' homes. The court prohibited pro-life activists from:

- Yelling and shouting
- Demonstrating more than two at a time near an abortion clinic
- Providing counseling more than one at a time to potential patients
- Approaching the same potential patient more than once
- Continuing conversation after a potential patient expresses a desire to stop

But the court went even further, affirming an award of more than \$1.2 million in actual and punitive damages against the pro-life activists.

Justice Owen joined, but did not write, the majority opinion. She did not join a separate opinion by Justice Raul Gonzalez arguing that the injunction violated the pro-life activists' First Amendment rights and that abortion itself is immoral.¹⁰²

It's no wonder that Planned Parenthood's vice president called the decision "a complete and total victory" and its attorney called it a "grand slam." Planned Parenthood's own newsletter in the summer of 1998 proclaimed on the front page: "Anti-abortion Protestors Lose in Texas Supreme Court."

Now that a different spin serves their purpose, abortion extremists have changed their tune. What was once hailed as a "grand slam" is now attacked because it "displayed unwillingness to protect abortion clinics from harassing protestors."

The Current Nomination Blockade

This trail of distortion about the record of individual nominees is part of an overall blockade against President Bush's judicial nominees. During the first two-year Congress of the Clinton administration, the Democrat Senate confirmed 128 nominees. During the first two-year Congress of the Bush administration, the Democrat Senate has so far confirmed just 59 nominees. During the last three administrations, the Senate confirmed in the first two years an average of 92% of the appeals court nominees. To date, the Senate has confirmed just 34% of President Bush's appeals court nominees.

Today, 53 judicial nominees remain stalled in the Senate. The previous three presidents saw their first 11 appeals court nominees confirmed in an average of 81 days. Today, 436 days later, seven of President Bush's first group of 11 appeals court nominees have not had a hearing.

America is at a crossroads. The battle over judicial appointments is a battle over whether the people will retain the power to govern themselves, to run the country, and to define the culture.

NOTES

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1 http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html.
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- ⁹ Some far-left groups claim that Justice Owen's judicial philosophy is the opposite of what President Bush has endorsed. See, e.g., People for the American Way, The Dissents Of Priscilla Owen: A Judicial Nominee Who Would Make The Law, Not Interpret It, at 1 (Justice Owen has "a judicial philosophy directly contrary to President Bush's asserted goal of nominating judges who will interpret the law, not make it."). The report is available at http://www.pfaw.org/issues/judiciary/owen/report/. It strains credibility for groups that have fought aggressively against appointment of restrained judges for many years to act as arbiters of what they oppose.
- ¹⁰ "Topics of the Times: The Senate's Judicial Farce," New York Times, February 17, 1998, at A18.
- ¹¹ Kairys, "Clinton's Judicial Retreat: When Naming Judges, He Is Quick to Cave," Washington Post, September 7, 1997, at C1.
- ¹² Newman, "Misdiagnosing Courts' Problems," New York Times, January 6, 1998, at A19.
- ¹³ Saad, "Public Opinion Abourt Abortion—An In-Depth Review," available at http://www.gallup.com/poll/specialReports/pollSummaries/sr020122ii.asp.
- Quoted in Lewis, "More Battles Loom Over Bush's Nominees for Judgeships," New York Times, April 7, 2002, at 24.
- ¹⁵ Texas Family Code, section 33.002(1).
- ¹⁶ Texas Family Code, section 33.003.
- ¹⁷ In re Jane Doe 1, 19 S.W.3d 249 (Texas 2000); In re Jane Doe 1(II), 19 S.W.3d 346 (Texas 2000); In re Jane Doe 2, 19 S.W.3d 278 (Texas 2000); In re Jane Doe 3, 19 S.W.3d 300 (Texas 2000); In re Jane Doe 4, 19 S.W.3d 322 (Texas 2000); In re Jane Doe 4(II), 19 S.W.3d 337 (Texas 2000); In re Jane Doe 10, 45 Tex.Sup.J. 605 (Texas 2002). In the remaining five cases, In re Jane Doe 5-9, the court required notification but did not issue a written opinion.
- ¹⁸ National Abortion Federation Report on Priscilla Owen (undated manuscript) (hereinafter NAF Report), at 1.
- ¹⁹ Letter from Florence Shapiro to Patrick Leahy, July 15, 2002 (emphasis added).
- ²⁰ 410 U.S. 113 (1973).
- ²¹ Id. at 153 (emphasis added).
- ²² See Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439-42 (1983); Bellotti v. Baird, 443 U.S. 622,643 (1979).
- ²³ Jane Doe 1, 19 S.W.3d at 262 (Owen, J., concurring).
- ²⁴ Jane Doe 2, 19 S.W.3d at 287 (Owen, J., concurring).
- ²⁵ Lewis, "More Battles Loom Over Bush's Nominees for Judgeships," New York Times, April 7, 2002, at 24.
- ²⁶ NAF Report at 2-3.
- ²⁷ Jane Doe 4(II), 5-9.
- Jane Doe 1, 1(II), 2, 3, 4, 10.
- ²⁹ Jane Doe 1, 2, 4(II), 5-10. ³⁰ Jane Doe 1(II), 3, 4.
- Jane Doe 1(II), 3, 4, 4(II), 5-9.
- Jane Doe 1, 2, 10.
- ³³ Jane Doe 1(II), 3-4.
- ³⁴ Texas Family Code, section 33.004.
- ³⁵ "Unlike the court of appeals, our Court may only engage in legal sufficiency review." *Jane Doe 1*, 19 S.W.3d 249,253 (Texas 2000).
- ³⁶ NAF Rebort at 3 ("the only case in which Owen did not vote to deny a girl her right to have an abortion without parental notification was a 2002 case decided after Owen was nominated to the 5th Circuit."). That case was Jane Doe 10. Needless to say, had Justice Owen voted to require notification in that case, NAF would simply have added that to the rest of its indictment.
- ³⁷ Jane Doe 1(II), 19 S.W.3d 346 (Texas 2000).
- ³⁸ NAF Report at 4.

² U.S. Constitution, Article II, Section 2.

³ Such widespread support makes baffling the claim by one abortion extremist organization of "widespread criticism in Texas for [Justice Owen's] judicial record." National Women's Law Center, Justice Owen's Record Shows Hostility to Reproductive Rights, at 1, available at http://www.nwlc.org/details.cfm?id=1163§ion=JCWR.

⁴ Editorial, *Houston Chronicle*, September 24, 2000, at 2.

⁵ Editorial, Dallas Morning News, October 26, 2000, at 18A.

⁶ Quoted in Houston Chronicle, May 10, 2001.

⁷ http://www.judicialselection.org/.

⁸ Gray, Priscilla Owen: A Restrained, Principled Jusrist, at 2.

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<sup>39</sup> Id. at 2.
<sup>40</sup> Id. at 4.
<sup>41</sup> Id. at 3.
<sup>42</sup> 19 S.W.3d 249 (Texas 2000).
43 Jane Doe 1(II), 19 S.W.3d 346 (Texas 2000).
<sup>44</sup> Id. at 367.
<sup>45</sup> Id. at 376.
<sup>46</sup> Id. at 383.
<sup>47</sup> Jane Doe 4, 19 S.W.3d 322,327 (Texas 2000) (Hecht, J., dissenting).
<sup>49</sup> Id.
<sup>50</sup> Iane Doe 1(II), 19 S.W.3d at 365-66 (Gonzalez, J., concurring).
   Id. at 366.
<sup>52</sup> See, e.g., NAF Report at 2 ("Alberto Gonzalez...described her opinion as 'an unconscionable act of judicial activism."); National
Abortion Rights Action League. Priscilla Owen: Nominee for United States Court of Appeals For the Fifth Circuit, at 1 (what...Alberto
Gonzalez called an 'unconscionable act of judicial activism.'")(emphasis in original)(hereinafter NARAL Report), available at
http://www.naral.org/mediaresources/fact/pdfs/powen_report.pdf.
<sup>53</sup> PFAW Report at 1.
<sup>54</sup> NAF Report at 5.
<sup>55</sup> 19 S.W.3d 278 (Texas 2000).
<sup>56</sup> Texas Family Code, section 33.001.
<sup>57</sup> 520 U.S. 292 (1997) (per curiam).
<sup>58</sup> Id. at 297 (emphasis added).
<sup>59</sup> Id. at 298.
<sup>60</sup> Id. at 302 (Stevens, J., concurring in the judgment).
61 Iane Doe 4(II), 19 S.W.3d at 340.
<sup>63</sup> NAF Report at 6.
65 19 S.W.3d 346 (Texas 2000).
66 Wisdom v. Smith, 209 S.W.2d 164,166-67 (Texas 1948).
<sup>67</sup> Doe 1(II), 19 S.W.3d 346,383 (Owen, J., dissenting).
<sup>68</sup> NAF Report at 7.
<sup>69</sup> Texas Family Code, section 151.003(b).
<sup>70</sup> 19 S.W.3d 322 (Texas 2000).
<sup>71</sup> Jane Doe 4(II), 19 S.W.3d 337 (Texas 2000).
<sup>72</sup> NAF Report at 7 (emphasis in NAF Report).
<sup>73</sup> Jane Doe 1, 19 S.W.3d at 335 (Owen, J., dissenting)(emphasis added).
74 Napoli v. Sears, Roebuck & Co., 835 F.Supp. 1053,1063 (N.D.Ill. 1993).
<sup>75</sup> Angelico v. Lehigh Valley Hospital Assoc., No.CIV.A 96-2861, 1996 WL 524112, at *4 - *5 (E.D.Penn. Sept. 13, 1996).
<sup>76</sup> NAF Report at 8.
<sup>77</sup> Id. at 9.
<sup>78</sup> 19 S.W.3d 249 (Texas 2000).
<sup>79</sup> Id. at 264 (Owen, L. concurring).
<sup>80</sup> Id.
81 NAF Report at 9.
82 Id. at 5-6.
83 The ABA endorsed the Uniform Abortion Act and the Equal Rights Amendment in 1972, federal and state legislation to finance
abortions for poor women in 1978, and the agenda of the United Nations Women's Conference in Beijing in 1996. See Jipping,
Selecting and Confirming Federal Judges: What Has Gone Wrong? (1997), at 23.
<sup>84</sup> Id.
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85 American Bar Association, The ABA Standing Committee on Federal Judiciary: What It Is and How It Works, at 4-5, available at

http://www.abanet.org/scfedjud/backgrounder.html.

14

⁸⁶ NAF Report at 9.

^{87 19} S.W.3d 278 (Texas 2000).

^{88 19} S.W.3d 300 (Texas 2000).

⁸⁹ See Jane Doe 3, 19 S.W.3d at 312 (Hecht, J., dissenting).

⁹⁰ The U.S. Supreme Court has held that "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Stenberg v. Carhart*, 530 U.S. 914,944 (2000) (citation omitted).

⁹¹ Texas Family Code, section 261.001(1)(A).

 $^{^{92}}$ NAF Report at 10.

^{93 19} S.W.3d 249 (Texas 2000).

⁹⁴ *Id.* at 263 (Owen, J., concurring).

⁹⁵ 505 U.S. 833 (1992).

⁹⁶ *Id.* at 872-73 (plurality opinion).

⁹⁷ Jane Doe 1, 19 S.W.3d at 264 (Owen, J., concurring).

⁹⁸ NAF Report at 10 (emphasis in NAF Report). Other abortion extremist groups make the same accusation, using even more severely edited versions of Justice Owen's actual position. See, e.g., NARAL Report at 2,5.

Jane Doe 1, 19 S.W.3d at 264-65.
 NAF Report at 2.

¹⁰¹ 975 S.W.2d 546 (Texas 1998).

¹⁰² *Id.* at 570.

¹⁰³ Quoted in Austin American-Statesman, July 4, 1998, at B2.

¹⁰⁴ Quoted in *Houston Chronicle*, July 4, 1998, at A1.