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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Recommendation Letter] - To: Dianna Feinstein - From: Jack Hightower	1	08/20/2002	P6/b6;
002	Letter	Confirmation of the Honorable Priscilla R. Owen [page 1] - To: Patrick Leahy - From: Lor R.E. Ploeger	1	06/27/2002	P6/b6;

COLLECTION TITLE:
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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MIGUEL ESTRADA

NOMINEE TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Biographical Information –

- Estrada is currently a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher, LLP, where he is a member of the firm's Appellate and Constitutional Law Practice Group and the Business Crimes and Investigations Practice Group.
- The ABA unanimously rated Estrada "Well Qualified."
- If confirmed, Estrada would be the first Hispanic ever to sit on the U.S. Court of Appeals for the D.C. Circuit, which many consider to be the second most important federal court in the United States after the Supreme Court.
- Estrada has argued 15 cases before the U.S. Supreme Court and is widely regarded as one of the country's best appellate lawyers.
- Estrada received his J.D. *magna cum laude* from Harvard Law School where was editor of the Harvard Law Review.
- Estrada served as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court in 1988-89.
- Estrada has performed significant *pro bono* service, including representation of a death row inmate before the Supreme Court – a case to which he dedicated approximately 400 hours.

Controversial Issues –

- Because Estrada has no judicial experience, he should not be confirmed.
- The Administration has refused to produce memoranda that Estrada wrote when he was an Assistant to the Solicitor General.
- Estrada does not have support in the Hispanic Community.
- Estrada did not answer questions on critical issues.

Responses –

- Five of the eight judges currently serving on the D.C. Circuit had no previous judicial experience, including President Clinton's nominees, Merrick Garland and David Tatel.. Judge Harry Edwards, appointed by President Carter, also had no judicial experience when appointed, and was younger than Estrada. Two Supreme Court Justices had no judicial experience when appointed to the Supreme Court: Byron White and Chief Justice Rehnquist.
- These confidential attorney-client memos were not requested for the seven previous nominees to the Courts of Appeals who had worked in the Solicitor General's office. In addition, every living former Solicitor General—both Democrat and Republican—signed a joint letter to the Committee, stating that this request would have a debilitating effect on the ability of the DOJ to represent the U.S. before the Supreme Court.
- Estrada has overwhelming support among Hispanic organizations and in the Hispanic community. For example, the League of United Latin American Citizens, the Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, the Hispanic Business Roundtable, the Latino Coalition, and many other Latino organizations strongly support Estrada.
- Estrada properly refused to say how he would rule on specific matters or cases that might come before him as a judge, which is both traditional and appropriate for a judicial nominee. He testified that he would "follow binding case law in ever case" even when he may disagree with that precedent.

TABLE OF CONTENTS: MIGUEL ESTRADA

MIGUEL ESTRADA
NOMINEE TO U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT
(Nominated May 9, 2001)

Summary

Miguel Estrada is an American success story who represents the mainstream of American law and American values. He came to this country at age 17 as an immigrant from Honduras speaking little English. He has risen to the top of the legal profession – a *magna cum laude* graduate of Harvard Law School, law clerk to Supreme Court Justice Anthony Kennedy, federal prosecutor in New York, Assistant Solicitor General of the United States for one year in the Bush Administration and for four years in the Clinton Administration, and leading appellate lawyer at a national law firm. Miguel Estrada has argued 15 cases before the Supreme Court of the United States, including one case in which he represented a death row inmate *pro bono*. He has strong bipartisan support from prominent Democrats, including from many high-ranking officials in the Clinton Administration such as Ron Klain, Seth Waxman, Bob Litt, and Randy Moss. The American Bar Association *unanimously* rated Miguel Estrada "well-qualified," its highest possible ranking. Miguel Estrada has strong support in the Hispanic community, including from LULAC, the Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, and numerous other Hispanic organizations. This is an historic appointment: If confirmed, Estrada would be the first Hispanic ever to serve on the D.C. Circuit, which many consider to be the second most important federal court in America. Miguel Estrada's nomination has been pending since May 9, 2001. The Senate should confirm him promptly.

BIOGRAPHICAL INFORMATION ON MIGUEL ESTRADA

- Estrada is currently a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, where he is a member of the firm's Appellate and Constitutional Law Practice Group and the Business Crimes and Investigations Practice Group.

- The American Bar Association unanimously rated Estrada "Well Qualified," its highest possible rating.

- Estrada was born and raised in Honduras, and came to the United States at age 17. If confirmed, Estrada would be the first Hispanic ever to sit on the U.S. Court of Appeals for the D.C. Circuit, which many consider to be the second most important federal court in the United States after the Supreme Court.

- Estrada has extensive appellate experience and is widely regarded as one of the country's best appellate lawyers. He has argued 15 cases before the U.S. Supreme Court.

    - From 1992 until 1997, Estrada served as Assistant to the Solicitor General of the United States under both President Clinton and President George H.W. Bush.

    - From 1990 to 1992, Estrada served as Assistant U.S. Attorney and Deputy Chief of the Appellate Section, U.S. Attorney's Office, Southern District of New York, where he argued appeals before the Second Circuit and tried cases in federal district court.

    - Estrada served as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court in 1988-89, and to Judge Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit in 1986-87.

- Estrada received a J.D. degree *magna cum laude* in 1986 from Harvard Law School, where he was editor of the Harvard Law Review. Estrada graduated with a bachelor's degree *magna cum laude* and Phi Beta Kappa in 1983 from Columbia College.

- Estrada has performed significant *pro bono* service, including representation of a death row inmate before the Supreme Court – a case to which he dedicated approximately 400 hours.

SELECT HISPANIC COMMUNITY SUPPORT FOR MIGUEL ESTRADA

The following groups, among others, have announced their support for Estrada:

- League of United Latin American Citizens (LULAC) (nation's oldest and largest Hispanic civil rights organization)
- U.S. Hispanic Chamber of Commerce
- Hispanic National Bar Association
- Hispanic Business Roundtable
- The Latino Coalition
- National Association of Small Disadvantaged Businesses
- Mexican American Grocers Association
- Phoenix Construction Services
- Hispanic Chamber of Commerce of Greater Kansas City
- eHEBC Hispanic Engineers Business Corporation
- Hispano Chamber of Commerce de Las Cruces
- Casa Del Sinaloense
- Republican National Hispanic Assembly
- Hispanic Engineers Business Corporation
- Hispanic Contractors of America, Inc.
- Charo - Community Development Corporation

STATEMENTS BY SELECT SUPPORTERS OF MIGUEL ESTRADA

League of United Latin American Citizens, Rick Dovalina, National President

"On behalf of the League of United Latin American Citizens (LULAC), the nation's oldest and largest Hispanic civil rights organization, I write to express our strong support for the confirmation of Mr. Miguel A. Estrada. . . . Few Hispanic attorneys have as strong educational credentials as Mr. Estrada who graduated magna cum laude and Phi Beta Kappa from Columbia and magna cum laude from Harvard Law School, where he was editor of the Harvard Law Review. He also served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court making him one of a handful of Hispanic attorneys to have had this opportunity. He is truly one of the rising stars in the Hispanic community and a role model for our youth." *(Excerpt from Letter to Senator Leahy, July 3, 2001.)*

The Latino Coalition, Robert Deposada, President

"To deny Latinos, the nation's largest minority, the opportunity to have one of our own serve on this court in our nation's capital is unforgivable." (*April 10, 2002, press release.*)

United States Hispanic Chamber of Commerce, Elizabeth Lisboa-Farrow, President

"We unanimously endorse this nominee and strongly urge you to move on the confirmation of Miguel Estrada. As a judge, he will be a credit to the federal judiciary, the President, Hispanics, and all Americans." (*Excerpt from Letter to Senator Leahy, October 23, 2001)*

Hispanic National Bar Association, Rafael A. Santiago, National President

"The Hispanic National Bar Association, national voice of over 25,000 Hispanic lawyers in the United States, issues its endorsement ... Mr. Estrada's confirmation will break new ground for Hispanics in the judiciary. The time has come to move on Mr. Estrada's nomination. I urge the Senate Committee on the Judiciary to schedule a hearing on Mr. Estrada's nomination and the U.S. Senate to bring this highly qualified nominee to a vote." *(Excerpt from HBNA Press Release, October 12, 2001).*

National Association of Small Disadvantaged Businesses, Henry T. Wilfong, Jr., President

"The NASDB would like to add our support . . . for Miguel Estrada's nomination as United States Court of Appeals Judge for the District of Columbia Circuit. Mr. Estrada is a brilliantly talented and accomplished attorney who will make an outstanding addition to the prestigious D.C. Circuit. . . . While we do not dwell on symbolism, we feel that Mr. Estrada's appointment as the first Hispanic member of the DC Circuit will be of benefit to us in further illustrating the wide range of talent in the minority communities, just waiting to be effectively and fully used." (*Excerpt from Letter to Senator Leahy, July 12,* *2001.)*

Hispanic Business Roundtable, Mario Rodriguez, President

"From his humble beginnings as an immigrant from Honduras who achieved a stellar academic career at Columbia University and Harvard Law School, to his varied and impressive achievements in the Justice Department and private firms, Mr. Estrada has shown himself to be of superior talents and accomplishments. . . . I am confident that this first Hispanic member of the DC Circuit will continue to lead a distinguished career with thoughtful and fair decisions." *(Excerpt from Letter to Senator Leahy, July 17, 2001.)*

Barbara Hartung, co-counsel with Estrada in pro bono case representing death row inmate

"Miguel's respect for the Constitution and the law may explain why he took on Mr. Strickler's case [the death row inmate], which at bottom concerned the fundamental fairness of a capital trial and death sentence. One would not expect the defense of a death row inmate to become the legal mission of a strong political conservative." (*Excerpt from Letter to Senator Leahy, September 10, 2002.*)

Herman Badillo, former Congressman from New York

"When confirmed by the Senate, Miguel Estrada, a brilliant lawyer with extraordinary credentials, will be the first Hispanic on the second most prestigious court in the land. He will be a role model not just for Hispanics, but for all immigrants and their children. His is the great American success story. . . . This treatment of Mr. Estrada is demeaning and unfair." (*Wall Street Journal, January 30, 2003*)

Seth Waxman, former Solicitor General to President Clinton

"During the time Mr. Estrada and I worked together, he was a model of professionalism and competence. . . . I greatly enjoyed working with Miguel, profited from our interactions, and was genuinely sorry when he decided to leave the office in favor of private practice. . . . I have great respect both for Mr. Estrada's intellect and for his integrity. . . . In no way did I ever discern that the recommendations Mr. Estrada made or the views he propounded were colored in any way by his personal views – or indeed that they reflected anything other than the long-term interests of the United States." (*Excerpt from Letter to Senator Leahy, September 17, 2001.)*

Ronald Klain, former Counselor to Vice President Al Gore

"Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. . . . Miguel will rule justly toward all, without showing favor to any group or individual. . . . the challenges he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need." (*Excerpt from Letter to Senator Leahy, January 16, 2002.*)

Bipartisan group of 14 former colleagues in the Office of the Solicitor General at U.S. Department of Justice

"Miguel is a brilliant lawyer, with an extraordinary capacity for articulate and incisive legal analysis and a commanding knowledge and appreciation for the law. Moreover, he is a person whose conduct is characterized by the utmost integrity and scrupulous fairness, as befits a nominee to the federal bench. In addition, Miguel has a deep and abiding love for his adopted country and the principles for which it stands, and in particular the rule of law. We hold varying ideological views and affiliations that range across the political spectrum, but we are unanimous in our conviction that Miguel would be a fair and honest judge who would decide cases in accordance with the applicable legal principles and precedents, not on the basis of personal preferences or political viewpoints." *(Excerpt from Letter to Senator Leahy, September 19, 2002.)*

Randolph Moss, former Assistant Attorney General for the Office of Legal Counsel for President Clinton

"I write to express my strong support for the nomination of Miguel Estrada to the United States Court of Appeals for the District of Columbia ... Although I am a Democrat and Miguel and I do not see eye-to-eye on every issue, I hold Miguel in the highest regard, and I urge the Committee to give favorable consideration to his nomination." *(Excerpt from Letter to the Senate Judiciary Committee, May 18, 2001).*

"Randolph Moss, who clerked for Justice John Paul Stevens while Estrada clerked for Kennedy, says he 'did not find Estrada at all divisive. He was always an extremely principled guy, very honest and ethical. I worked amicably with him.'" *(Legal Times, June 25, 2001.)*

Leonard F. Joy, Attorney-in-Charge, Federal Defender Division, Legal Aid Society of New York

"Over Miguel's tenure in the United States Attorney's Office, we became good friends and frequently had lunch together. He has a good sense of humor and never had an ivory tower approach to life. It is fair to say that all the lawyers in my office liked him. Many of them are liberal in their politics and it is a credit to Miguel that he was able to get along with people who may have had different views than he. I think Miguel would make an excellent Circuit Court Judge. He is as fine a lawyer as I have met and, on top of all his intellectual abilities and judgment he would bring to bear, he would bring a desirable diversity to the Court. I heartily recommend him." *(Excerpt of Letter to Senator Leahy, September 16, 2002.)*

Robert S. Litt, Deputy Assistant Attorney General for President Clinton

"I disagreed with Mr. Estrada on a number of the issues that we faced, but I have no doubt that his positions were sincerely held and honestly advocated. . . . I never felt that the arguments he made were in any way outside the scope of legitimate legal analysis. . . . While I may disagree with some aspects of Mr. Estrada's legal philosophy, I believe that he is eminently qualified to serve on the Court of Appeals." (*Excerpt from Letter to Senator Leahy, August 28, 2002.*)

***Washington Post* Editorial, September 29, 2002**

"Democrats have suggested opposing him because of general concerns about the partisan 'balance' on the D.C. Circuit or because they don't know enough about his views to trust him. They also continue to fish for dirt on him. Sen. Charles E. Schumer (D-N.Y.) grilled him at his hearing about questions that have been raised anonymously concerning his aid to Justice Anthony M. Kennedy in picking clerks. And Democrats are still pushing to see confidential memos Mr. Estrada wrote in the solicitor general's office and trumpeting criticism of him by a single supervisor in that office -- criticism that has been discredited by that same colleague's written evaluations. Seeking Mr. Estrada's work product as a government lawyer is beyond any reasonable inquiry into what sort of judge he would be. Nor is it fair to reject someone as a judge because that person's decision to practice law, rather than write articles or engage in politics, makes his views more opaque. And it is terribly wrong to demand that Mr. Estrada answer charges to which nobody is willing to attach his or her name. . . . **At the end of the day, Mr. Estrada must be considered on his merits. His confirmation is an easy call.**"

MIGUEL ESTRADA
Responses to False Allegations

ALLEGATION: Because Estrada has no judicial experience, he should not be confirmed.

FACTS:

- Those making this claim are employing a double standard.
  - Five of the eight judges currently serving on the D.C. Circuit had no previous judicial experience. That includes two of President Clinton's nominees, Merrick Garland, whose Justice Department record was quite similar to that of Miguel Estrada, and David Tatel. That also includes Judge Harry Edwards, who was appointed by President Carter in 1980 (when Edwards was younger than Estrada currently is).
    - Indeed, two recent *Supreme Court Justices* – Byron White, nominated by President Kennedy, and William Rehnquist, currently the Chief Justice -- had no prior judicial experience when appointed to *the Supreme Court*.
  - The American Bar Association, which Democrat Senators Leahy and Schumer have referred to as the "gold standard," *unanimously* rated Estrada "well qualified" for the D.C. Circuit, the ABA's highest possible rating.
  - Estrada has argued 15 cases before the Supreme Court and was a member of the Solicitor General's office in both the Bush and Clinton Administrations. He also has been a highly respected federal prosecutor in New York.

ALLEGATION: The Administration has refused to produce memoranda that Estrada wrote when he was an Assistant to the Solicitor General.

FACTS:

- Again, a double standard is being applied to Miguel Estrada. These confidential attorney-client memos were not requested for the seven previous nominees to the Courts of Appeals who had worked in the Solicitor General's office.
- In addition, every living former Solicitor General – Democrat and Republican – signed a joint letter to the Committee, stating that this request would have a debilitating effect on the ability of the Department of Justice to represent the United States before the Supreme Court. The letter was signed by Democrats Archibald Cox, Seth Waxman, Drew Days, and Walter Dellinger.

ALLEGATION: Estrada's memoranda would be particularly important in light of a critical comment about him made by former Clinton Administration Deputy Solicitor General Paul Bender.

FACTS:

- Estrada received an "outstanding" rating in every performance category in the years that he worked in the Solicitor General's office. In the two years when Mr. Bender and Mr. Estrada worked together, the reviews were signed *by Mr. Bender*. (All ratings during those years were then reviewed and approved by Solicitor General Days.)
    - In the contemporaneous performance reviews, Mr. Bender stated the following about Mr. Estrada to support his judgment that Mr. Estrada's performance was "outstanding."
        - "states the operative facts and applicable law completely and persuasively, with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity, and conciseness."
        - "[i]s extremely knowledgeable about resource materials and uses them expertly; acting independently, goes directly to the point of the matter and gives reliable, accurate, responsive information in communicating position to others."
        - "[a]ll dealings, oral, and written, with the courts, clients, and others are conducted in a diplomatic, cooperative, and candid manner."
        - "[a]ll briefs, motions or memoranda reviewed consistently reflect no policies at variance with Departmental or Governmental policies, or fails to discuss and analyze relevant authorities."
        - "constantly sought for advice and counsel [and] inspires co-workers by example."
- Estrada's superiors and colleagues have stated that Estrada's work in the Solicitor General's office was superb and that he was a well-respected colleague.
    - Seth Waxman, who was President Clinton's Solicitor General, wrote that Estrada is a "model of professionalism and competence" and that he has "great respect both for Mr. Estrada's intellect and for his integrity." He continued: "In no way did I ever discern that the recommendations Mr. Estrada made or the views he propounded were colored in any way by his personal views – or indeed that they reflected anything other than the long-term interests of the United States."
    - A bipartisan group of 14 colleagues from the Office of Solicitor General wrote to the Committee that Estrada "would be a fair and honest judge who would decide cases in accordance with applicable legal principles and precedents."

ALLEGATION: In private practice, Estrada defended anti-loitering laws that civil rights groups have attacked.

FACTS:

- In private practice, Estrada's primary *pro bono* work was to defend a death row inmate in the Supreme Court seeking to overturn the death sentence.

- Estrada was retained to defend the constitutionality of anti-gang ordinances, which were enacted in Chicago with the strong public support of Democrat Mayor Daley, after Estrada was contacted by the Democrat City Solicitor of Chicago.

ALLEGATION: Estrada does not have support in the Hispanic community.

FACTS:

- Estrada has overwhelming support among Hispanic organizations and in the Hispanic community. For example, the League of United Latin American Citizens (which is the country's oldest Hispanic civil rights organization), the Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, the Hispanic Business Roundtable, the Latino Coalition, and many other Latino organizations strongly support Estrada.

ALLEGATION: Estrada did not answer questions on critical issues.

FACTS:

- Estrada testified at his hearing that he would "follow binding case law in every case" even when he may disagree with that precedent. He also stated that he recognized that "the Supreme Court has said in numerous occasions in the area of privacy and elsewhere that there are unenumerated rights in the Constitution. And I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the Court."

- Estrada properly refused to say how he would rule on specific matters or cases that might come before him as a judge, which is both traditional and appropriate for a judicial nominee. He also refused to say how he might have ruled in certain past cases given that he had not read the briefs, heard oral arguments, and taken the other steps that are necessary before any good and neutral judge would or could indicate how he or she would rule.

- Lloyd Cutler, who served as Counsel to President Carter and President Clinton, has stated that "candidates should decline to reply when efforts are made to find out how they would decide a particular case."

No More Stalling; It's time for the Senate to confirm Miguel Estrada.
By Alberto R. Gonzales, Counsel to the President
***Washington Post*, September 26, 2002**

After 16 months of delay, the Senate Judiciary Committee will hold a hearing today on Miguel Estrada, one of President Bush's nominees to the U.S. Court of Appeals for the D.C. Circuit. Estrada is superbly qualified for the job and would be the first Hispanic to serve on that court, which some consider to be the second-most-important federal court in America after the Supreme Court.

His extraordinary intellect, experience, integrity and support normally would mean a swift Senate confirmation -- particularly given the historic nature of the nomination. But some Senate Democrats have deemed Estrada controversial and are apparently threatening to block his confirmation. Sen. Charles E. Schumer (D-N.Y.) stated last April: "From my perusal of the record, [Estrada] is way out of the mainstream." I do not know what record Schumer could have been referring to. Estrada has not been the author of controversial opinions or articles, nor has he spoken out on divisive issues. He is not a politician or an interest-group leader who has sought to make policy. What he has done is serve, in a variety of public and private capacities, as a brilliant and careful lawyer devoted to the courts and the law.

But in the current political atmosphere, some nominees are not being assessed by the traditional standards of quality and ability to follow the law as a judge, but rather are being delayed or outright blocked because of distorted analyses of their perceived policy or personal views. As the president, the chief justice and the American Bar Association have stated, every judicial nominee deserves a prompt hearing and fair vote -- no matter who is president or which party controls the Senate. In the words of the ABA, "Vote them up or down, but don't hang them out to dry." It is past time for the Senate to act on a bipartisan basis to institute a fair and timely judicial confirmation process that will endure well into the future.

The problems in the judicial confirmation process have gone beyond mere delay, however. Even after hearings, for example, the Senate Judiciary Committee has refused to allow full Senate votes on well-qualified nominees -- despite the fact that the president's nominees would be confirmed if they received a full Senate vote. Single-issue Washington interest groups have played an unfortunate role in the process, moreover, by distorting records, leveling unfair charges and ignoring bipartisan support for the president's nominees.

That Estrada could be seen as controversial is an example of this regrettable trend. By any reasonable standard, he is an American success story. He came to this country as a teenager from Honduras speaking little English. He attended Columbia College and Harvard Law School, graduating with honors from both. He clerked for Justice Anthony M. Kennedy on the Supreme Court, served as an assistant U.S. attorney in the Southern District of New York and has worked at leading law firms in New York and Washington. He spent five years -- four during the Clinton administration -- in the U.S. solicitor general's office, which represents the United States before the Supreme Court. Estrada has argued 15 cases before the high court and is well known for his written and oral advocacy.

While in private practice, he devoted hundreds of hours -- for free -- to the representation of a death row inmate before the Supreme Court. Estrada's co-counsel in that case has written to the Senate that "[o]ne would not expect the defense of a death row inmate to become the legal mission of a strong political conservative." Estrada's decision to involve himself in that case demonstrates his devotion to the rule of law.

Estrada also has tremendous bipartisan support. He received a unanimous "well qualified" rating -- the highest possible -- from the ABA, which Schumer and Democratic Sen. Patrick J. Leahy (Vt.) have referred to as the "gold standard" for evaluating judicial nominees. A number of prominent Hispanic organizations have supported Estrada and urged the Senate to treat him fairly. He is supported by leading Democratic lawyers, including Ron Klain, who served as chief of staff to Vice President Al Gore, and by high-level officials of the Clinton Justice Department.

Former colleagues in the solicitor general's office also have publicly praised Estrada. Seth Waxman, solicitor general under President Clinton, has written to the Senate that he has "great respect both for Mr. Estrada's intellect and for his integrity" and that he is "a model of professionalism and competence." A bipartisan group of 14 former colleagues who served with Estrada in that office wrote to the Senate that Estrada "would be a fair and honest judge who would decide cases in accordance with applicable legal principles and precedents."

Few lawyers in the United States have the combination of intellect and experience that Miguel Estrada will bring to the D.C. Circuit. A mainstream nominee who has exhibited throughout his career the integrity and temperament to be a superb appeals court judge, a Hispanic immigrant who has risen to the peak of the legal profession, Miguel Estrada is an inspiration to Hispanics and to all Americans. The Senate should confirm him promptly.

WILLIAM JAMES HAYNES II
Nominee to the U.S. Court of Appeals for the Fourth Circuit

- **Jim Haynes, the current General Counsel for the Department of Defense, is a highly respected attorney with bipartisan support. He received a "Well Qualified" rating from the ABA.**

  ✓ Mr. Haynes is nominated to the 4th Circuit, which hears appeals from the district courts of Virginia, Maryland, West Virginia, North Carolina, and South Carolina.

  ✓ He has the strong support of both of his home state senators, Senator Warner and Senator Allen. He also has the support of prominent Democrats, including Floyd Abrams and Newt Minow.

  T The U.S. Senate unanimously confirmed Mr. Haynes as General Counsel for the Department of Defense in May of 2001.

- **Jim Haynes has dedicated the majority of his career to serving his country.**

  T As the chief legal officer of the Department of Defense and the legal adviser to the Secretary of Defense, Mr. Haynes provides oversight, guidance, and direction regarding legal advice on all matters arising within DoD. He oversees legal services delivered by the military and civilian attorneys in all DoD components.

  T In March of 1990, Mr. Haynes was nominated by President George H.W. Bush, and confirmed by the U.S. Senate, to the position of General Counsel of the Department of the Army, a position he served in until January of 1993. Prior to this service, Mr. Haynes had been a Special Assistant to the General Counsel of the Department of Defense since November of 1989.

  T Mr. Haynes served at the Department of Defense as Counsel to the Transition from January through April of 1989.

  T From 1984 through 1989, Mr. Haynes served on active duty in the U.S. Army, attaining the rank of Captain before his honorable discharge in January of 1989.

- **In addition to his public service, Mr. Haynes has considerable experience in the private sector.**

  T Mr. Haynes was a partner in the Washington, D.C. office of Jenner & Block from 1993 through 1996, and then again from 1999 through 2001, where his practice focused, among other things, on regulatory law, business law, and civil litigation/arbitration.

  T From July of 1996 through January of 1999, Mr. Haynes served as Associate General Counsel and Staff Vice President for General Dynamics Corporation. He also served as General Counsel of General Dynamics Corporation's Marine Group from 1997 through 1998. Mr. Haynes' practice with General Dynamics focused on corporate law, antitrust, labor law, and environmental law.

T Mr. Haynes served as an associate in the Washington, D.C. firm of Sutherland, Asbill & Brennan where he handled matters dealing with antitrust regulation.

➢ **Mr. Haynes has impeccable educational credentials and a record of hard work.**

T He attended Davidson College on an Army ROTC Scholarship and the Lunsford-Richardson Honor Scholarship.

T Mr. Haynes received his B.A. from Davidson in 1980 and graduated Phi Beta Kappa and Omicron Delta Kappa.

T Mr. Haynes attended Harvard Law School and received his juris doctor in 1983.

T Upon graduating from law school, Mr. Haynes obtained a federal clerkship, serving for the Honorable James B. McMillan of the U.S. District Court for the Western District of North Carolina.

➢ **Throughout his career, Mr. Haynes has engaged in volunteer work to help those that are less fortunate.**

T In 1999, Mr. Haynes served in Kazakhstan as a volunteer consultant for Mercy Corps International, a non-governmental relief organization.

T While at Jenner & Block as a partner, Mr. Haynes served as pro bono counsel to indigent clients accused of crimes in D.C. Superior Court.

T In his second year of law school, Mr. Haynes was a member of the Harvard Legal Aid Bureau where he provided pro bono legal services for indigent clients needing help with landlord-tenant, child custody, and social security disability matters.

➢ **Mr. Haynes has received a number of awards for his public and military service, including:**

T The Distinguished Public Service Award from the Department of the Navy in 2003;

T An Honorary Doctor of Laws from Stetson University in 1999;

T The Meritorious Civilian Service Medal from the Department of the Army in 1992; and

T The Army Meritorious Service Medal (Oak Leaf Cluster) in 1986 and 1998.

Statements from Select Supporters of Jim Haynes

Floyd Abrams, noted First Amendment Expert and partner at Cahill, Gordon & Reindel

Jim has attended and participated actively in a number of our meetings [of the Technology and Privacy Advisory Committee] and I have had occasion to speak with him on a number of occasions about the difficult task of balancing national security interests with those of a variety of civil liberties' interests including privacy. I have found him to be unusually able, easy to work with and deeply sensitive to the need to accommodate civil libertarian interests even as we seek to prevent new acts of terrorism against us.... I urge favorable consideration of his nomination. Letter to Chairman Hatch, Nov. 18, 2003.

Newton N. Minow, former Chairman of the FCC under President Kennedy,

Having practiced law for more than 53 years, I can recognize a good lawyer. In my opinion, Jim Haynes is an excellent lawyer, deeply committed to protecting each citizen's right under our constitution. He is sensitive to the importance of preserving our civil liberties. The project we are working on requires us to examine the balance of national security and civil liberties. Jim Haynes brings to our task an enduring understanding of the necessity of maintaining our civil liberties and our civil rights, even at a time of national danger.

I am a Democrat. I am confident that he will be a fair, moderate, thoughtful and respected judge. Letter to Chairman Hatch, Nov. 17, 2003.

The Honorable William H. Webster, former Judge of the U.S. Court of Appeals for the Eighth Circuit and Director of the FBI

Having served myself as a judge of the United States District Court for the Eastern District of Missouri (three years) and as a judge of the Eighth Circuit (five years), I think I can recognize judicial temperament when I see it. I believe Jim Haynes to be an able lawyer and one who would work every day to provide equal justice under the law. Moreover, I believe that he would be a positive and constructive member of the Court to which he has been nominated.

Finally, I believe Jim Haynes to be a man of exceptional integrity and character. I sincerely hope that the Committee will act favorably and soon to confirm his nomination. Letter to Chairman Hatch, Nov. 18, 2003.

The Honorable John O. Marsh, Jr., former Secretary of the Army, National Security Advisor to President Ford, and Congressman from Virginia

Having known [Jim Haynes] for a number of years, and observed his performance in different posts, I can vouch for his ability, dedication to Country, and sterling character. In my view, he would make an outstanding jurist. Letter to Chairman Hatch, Nov. 14, 2003.

Myth: Jim Haynes lacks the relevant legal experience necessary for a seat on the 4th Circuit Court of Appeals.

Facts:

- The ABA, the "Gold Standard" according to many Democrats, determined that Mr. Haynes was "Well Qualified" for the position as a judge on the U.S. Court of Appeals for the 4th Circuit.

- Mr. Haynes is a well-respected attorney with experience in many different areas of law.

    - ✓ He serves as General Counsel for the Department of Defense, an organization with a budget of hundreds of billions of dollars and with more than two million military and civilian personnel, including thousands of lawyers. Earlier in his career, he served as the General Counsel for the Department of the Army.

        - Mr. Haynes provides legal advice on a broad range of issues ranging from the conduct of warfare, to the establishment of government in occupied territories, to the operation of industrial facilities, to the compliance with environmental laws, and to the development of legislative proposals.

        - Mr. Haynes oversees litigation conducted by and against the Department of Defense and manages the legal resources of the Department.

    - ✓ Mr. Haynes was a partner at Jenner & Block, a prominent law firm in Washington, D.C. His practice consisted of matters involving administrative/regulatory law, business law, telecommunications law, government contracts, as well as civil litigation.

        - Mr. Haynes personally handled several civil matters in district court and in administrative proceedings.

    - ✓ Mr. Haynes served as an Associate General Counsel at large corporation, General Dynamics. He handled matters related to corporate law, administrative law, transactional law, antitrust, business law, labor law, environmental law, government contracts, as well as oversight of litigation.

- Mr. Haynes has been responsible, both as corporate counsel and as General Counsel at the Department of Defense, for supervising the conduct of litigation, including many appellate matters. His role includes developing litigation strategy and reviewing pleadings and briefs filed on behalf of his client.

Myth: Mr. Haynes refuses to commit to recuse himself from specific issues that he worked on while at the Department of Defense.

Facts:

- ➢ Mr. Haynes has committed, if confirmed, to following all applicable statutes, court decisions, policies and ethical rules pertaining to recusal. He cannot be expected to blindly promise to recuse himself in hypothetical cases that have not yet been brought.

  - ✓ Mr. Haynes has affirmatively stated that he would recuse himself from any proceeding in which he had "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. 455(b)(3).

  - ✓ Mr. Haynes also has committed to recusing himself in cases in which he had "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. 455(b)(1).

- ➢ Mr. Haynes has stated that, "deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." Responses to Senator Feingold, Feb. 16, 2004. If confirmed, he has committed to recusing himself in cases where is impartiality might reasonably be questioned.

Myth: Mr. Haynes, as General Counsel for the Department of Defense, is responsible for the Administration's policy on enemy combatants and the deprivation of the rights of the detainees at Guantanamo Bay.

Facts:

- ➢ Mr. Haynes is the chief legal officer for the Department of Defense – he does not make policy. He advises the Secretary of Defense and other senior civilian and military officials on legal issues.

- ➢ In matters in litigation involving the conduct of the war on terrorism – or individuals detained pursuant to the war – Mr. Haynes is obligated to make the best legal arguments possible on behalf of his client.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

- All of the positions taken by the Department of Defense with regard to enemy combatants are grounded in law and precedent.

  - ✓ There are currently two cases pending before the Supreme Court relating to the status of American citizen enemy combatants.

  - ✓ The government has relied upon well-established Supreme Court precedent in making its arguments. For example, in *Ex parte Quirin*, 317 U.S. 1 (1942), the Court stated:

    > "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."

  - ✓ The 4th Circuit in the *Hamdi* case held that Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." (citing Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a)). The court stated: "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for 'the maintenance, pay and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined ... to be similar to prisoners of war.'" 10 U.S.C. § 956(5) (2002).

  - ✓ Presently, there is no U.S. citizen being held without access to counsel. On February 3, 2004, Yaser Hamdi, an American citizen captured in Afghanistan and detained in Charleston, S.C., met with counsel. On March 3, 2004, Jose Padilla, also an American citizen, met with counsel.

HOLMES

ESTRADA

<u>LEON HOLMES</u>

NOMINEE FOR THE #TH CIRCUIT COURT OF APPEALS

Biographical Information

- Leon Holmes has practiced commercial litigation at the trial and appellate level in state and federal court for many years, and has acquired significant courtroom experience. He is currently a partner at Quattlebaum, Grooms, Tull & Barrow in Little Rock, Arkansas.
- The ABA gave Holmes a "Well-Qualified" rating.
- Both Democrat home-state senators, Senator Blanche Lincoln and Senator Mark Pryor, support Leon Holmes's nomination.
- On two occasions Leon Holmes has been appointed to serve as a special judge of the Arkansas Supreme Court, a great honor for a practicing attorney. The justices praised his service in those cases, and more than one has encouraged him to run for a seat on the Arkansas Supreme Court.
- Leon Holmes has served as director of the Florence Crittendon Home of Little Rock in 1986-1987, helping young women cope with teen pregnancy.

Controversial Issues

- Some have stated that Leon Holmes's views on gender equality and gay rights cast into doubt his ability to provide equal justice to women and gays and lesbians who would appear before him.
- Some have stated that Leon Holmes' views about abortion raise serious questions about his fitness for a lifetime appointment to the federal bench.

Responses

- Leon Holmes is a member of the Roman Catholic Church. Support for male-only ordination and distinctions between the sexes are among the religious teachings of the Church. Membership in the Catholic Church, and faithful adherence to its traditional teachings in one's personal life, cannot be a disqualifying factor in the selection of a federal judge.
- Leon Holmes supports a Human Life Amendment to the U.S. Constitution. This support indicates that he respects precedent. Holmes's support for a constitutional amendment simply demonstrates his understanding that *Roe v. Wade* and *Casey v. Planned Parenthood* are settled law that would have to be overturned by constitutional amendment. His view that abortion deserves the same response that slavery got in this country simply means that he believes abortion should be ended by constitutional amendment, just as slavery was.

Leon Holmes

- The Arkansas Democrat-Gazette, Holmes' hometown paper that knows his record best, strongly supports his candidacy. The paper, writing while his candidacy was being considered, indicated that Holmes was a well qualified, mainstream nominee:

  ✓ "What distinguishes Mr. Holmes is the rare blend of qualities he brings to the law—intellect, scholarship, conviction, and detachment. A reverence not just for the law but for ideas, for the life of the mind. All of that would shine through the clutter of argument that awaits any judge . . . . He would not only bring distinction to the bench but promise. . . . In choosing Leon Holmes, [the President] could bequeath a promise of greatness." Editorial, *Name on a List in a Field of Seven, One Stands Out*, ARKANSAS DEMOCRAT GAZETTE, Dec. 1, 2002, at 86.

- Leon Holmes has practiced commercial litigation at the trial and appellate level in state and federal court for many years, and has acquired significant courtroom experience. He is currently a partner at Quattlebaum, Grooms, Tull & Barrow in Little Rock, Arkansas.

- The American Bar Association gave Holmes a "well-qualified" rating.

- Both Democrat home-state senators, Senator Blanche Lincoln and Senator Mark Pryor, support Leon Holmes's nomination.

- Leon Holmes knows the value of hard work. He came from humble roots and is the only one among his seven siblings to attend college. He worked his way through college, and finished law school at night while working a full-time day job in order to support his family.

- Leon Holmes is an accomplished scholar, and has taken the time out of his law practice to teach a variety of legal classes.

  ✓ Mr. Holmes finished law school at the top of his class, was inducted into Phi Beta Kappa while a doctoral student at Duke University, and was named Outstanding Political Science Student upon graduation from college.

  ✓ During the academic years from 1990-1992, Holmes taught a variety of courses at Thomas Aquinas College in California. He also taught law at the University of Arkansas during the year that he clerked for Justice Holt on the Arkansas Supreme Court.

  ✓ Mr. Holmes has displayed a wide-ranging academic interest. His doctoral dissertation discusses the political philosophies of W.E.B. DuBois and Booker T. Washington, and it analyzes the effort Dr. Martin Luther King, Jr. made to reconcile their divergent views. He has also written substantial essays dealing with subjects in law, political philosophy, and theology.

- Mr. Holmes has been an active participant in the Arkansas Bar:

  - ✓ Holmes has taught continuing legal education courses to the bar on numerous occasions. He has been awarded the state bar's "Best CLE" award four times.
  - ✓ Holmes sits on the Board of Advisors to the Arkansas Bar Association's magazine.
  - ✓ Holmes chaired the editorial board for the bar's publication of *Handling Appeals in Arkansas*.
  - ✓ Holmes sits on the judicial nominations committee for the Arkansas state courts, which recommends attorneys to the Governor for judicial appointment in supreme court cases where one or more justices must recuse themselves.

- Leon Holmes is one of the top handful of appellate lawyers in Arkansas. In 2001, the Arkansas Bar Association bestowed its "Writing Excellence" award on Holmes.

- On two occasions Leon Holmes has been appointed to serve as a special judge of the Arkansas Supreme Court, a great honor for a practicing attorney. The justices praised his service in those cases, and more than one has encouraged him to run for a seat on the Arkansas Supreme Court.

- Leon Holmes is very well respected by the plaintiffs' bar in Arkansas. Holmes is currently defending on appeal the largest jury verdict ever awarded in Arkansas's history, in the case of a nursing home resident who allegedly died from neglect. On account of his outstanding reputation, Holmes was retained to handle the appeal.

- Mr. Holmes believes in giving back to the community, and has generously provided his services on a pro bono basis.

  - ✓ Holmes was *habeas* counsel for death-row inmate Ricky Ray Rector, the mentally retarded man whose execution then-Governor Clinton refused to commute during the 1992 Presidential election. Holmes helped to prepare the case for the evidentiary hearing in federal district court after the *habeas* petition had already been filed.

  - ✓ Holmes represented a Laotian immigrant woman suffering from terminal liver disease when Medicaid refused to cover treatment for a liver transplant.

  - ✓ Holmes represented a woman who lost custody of her children to her ex-husband and could not afford counsel for an appeal.

  - ✓ Holmes represented an indigent man with a methamphetamine felony history in connection with some traffic misdemeanors.

- Leon Holmes has given back to his community in areas outside the law as well. He was a houseparent for the Elon Home for Children while a graduate student in North Carolina.

He also served as the director of the Florence Crittenton Home of Little Rock in 1986-87, helping young women cope with teen pregnancy.

- Leon Holmes's former law partner Philip Anderson (of Williams & Anderson) is a recent past President of the American Bar Association. He strongly supports Holmes.

Leon Holmes: Response to Alliance for Justice Letter

Allegations: Leon Holmes's "zealous advocacy for doing away with … a fundamental right [to abortion], along with extreme statements he has made about the separation of church and state, gay rights, and gender equality, raises serious questions about his fitness for a lifetime appointment to the federal bench." Alliance for Justice letter to Sens. Hatch and Leahy, March 25, 2003.

Facts:

Abortion

- Holmes's support for a Human Life Amendment to the U.S. Constitution indicates that he respects precedent.

  ✓ Holmes's support for a constitutional amendment simply demonstrates his understanding that *Roe v. Wade* and *Casey v. Planned Parenthood* are settled law that would have to be overturned by constitutional amendment.

  ✓ Holmes's view that abortion deserves the same response that slavery got in this country simply means that he believes abortion should be ended by constitutional amendment, just as slavery was.

  ✓ Holmes has written that if a constitutional amendment were passed under which Arkansas could determine its own abortion policy, abortion would most likely be permitted in certain cases.

- Holmes has been a member of the National Lawyers Association (NLA), but he has also been a member of the American Bar Association (ABA).

  ✓ The NLA was formed in part to provide lawyers the opportunity to join a professional organization in which all members would have the opportunity to vote on socio-political issues. The ABA, in contrast, allows its 539-member House of Delegates to decide political questions on behalf of its 370,000 members, such as the controversial decision in 1992 to support abortion rights.

  ✓ Philip Anderson, a recent President of the ABA, was a long-time law partner of Leon Holmes and has written the Senate Judiciary Committee in support of him:

  "I believe that [Leon Holmes] is superbly qualified for the position for which he has been nominated. He is a scholar first, and he has had broad experience in federal court. He is a person of rock-solid integrity and sterling character. He is compassionate and even-handed. He has an innate sense of fairness. He is temperamentally suited for the bench. He works with dispatch. In short, he has all of the qualities that one would hope to find in a federal judge, and seldom are they found in a person so amiable and with his degree of genuine humility."
  -letter from Philip Anderson to Sen. Hatch on March 25, 2003.

- Holmes's representation of Arkansas Right to Life in 2001 as *amicus curiae* in the *Aka v. Jefferson Hosp. Ass'n* case was entirely appropriate, and the Arkansas Supreme Court agreed with him.

  ✓ Gross negligence in that case on the part of the hospital and the attending physicians led to the needless death of a pregnant woman and her unborn full-term child. The woman needed a caesarean section, but the doctors who were qualified to perform it did not come to the hospital in time, and the residents in charge of the woman's care were not qualified to perform the procedure.
  ✓ The father brought a wrongful death suit on behalf of his deceased wife's estate and his deceased unborn son's estate. The hospital and doctors defended in part by challenging the father's ability to sue on behalf of his unborn son's estate.
  ✓ The Arkansas Supreme Court ruled in favor of the position supported by Holmes's client, holding that a viable fetus was a "person" for the purposes of Arkansas's wrongful death statute, and that the plaintiff-father could bring suit under that statute on behalf of his unborn son's estate.

- Holmes's representation of the defendant in *Pursley v. Arkansas* in 1987 was entirely appropriate.

  ✓ Dow Richard Pursley was a therapist in Springdale, Arkansas. In his professional counseling practice, he had counseled a number of women who suffered serious psychological harm as a result of having had an abortion. Several of these women had attempted suicide. One patient of his had a daughter who was so traumatized by having had an abortion that she could not live with herself and committed suicide.
  ✓ Pursley became distraught that women were not being told the possible psychological consequences of getting an abortion, and he went to a clinic in Fayetteville where he thought abortions were being performed with the intention of warning women about the psychological consequences they might suffer if they underwent an abortion.
  ✓ Pursley stationed himself on a public sidewalk near the clinic. As women went into the clinic, he followed them onto the private sidewalk to warn them of psychological risks of abortion and offer them alternatives. The clinic was a stand-alone facility with a separate parking lot, so it was not possible to approach the women entering the clinic without venturing onto private property. Pursley persisted in entering the private property "despite repeatedly being told not to do so." He never entered the front porch of the clinic or the clinic building itself.
  ✓ Pursley was arrested and charged on a misdemeanor trespassing count. He retained Leon Holmes to defend him at trial and on appeal.
  ✓ The trial court found Pursley guilty and imposed a $300 fine and 15-day suspended jail sentence. On appeal, Holmes argued that the trial court erred in excluding evidence that Pursley had observed instances of abortion's harmful psychological results in his professional counseling practice. Holmes also argued that the trial court erred in refusing to give a "choice of evils" instruction to the

jury, which is a statutory defense in Arkansas whereby an ordinarily criminal act may be excused in light of extraordinary attendant circumstances.

- ✓ Every criminal defendant is entitled to competent defense counsel, which Holmes provided Pursley. Because Pursley freely admitted that he had entered the private property, the choice of evils defense was the only one available to Pursley that Holmes could make.
- ✓ The court of appeals ruled that the trial court did not err in refusing to give the "choice of evils" defense, because Pursley put himself near the clinic, there was no proof of imminent danger to the women, and there was no evidence that any of the women were pregnant or had come to the clinic for an abortion. The court of appeals did not reach the question of whether the psychological harm evidence was properly excluded.
- ✓ Pursley was only charged with trespassing. He approached the women in a conversational tone, and did not obstruct their entrance to the clinic. He was not charged with threatening behavior of any kind. Pursley was thus a very different defendant than Paul Jennings Hill, the man who was denied the choice of evils defense in his 1994 Florida murder trial for killing an abortion doctor and his two escorts.

Separation of Church and State

- The Alliance for Justice letter falsely claims that Leon Holmes questioned the separation of church and state in a speech to the Society of Catholic Social Scientists. To level this pernicious accusation, the Alliance for Justice letter lifts a quote from that speech entirely out of context. Any fair reading would construe Holmes's remarks to reach the conclusion that Christianity and political authority have separate spheres of jurisdiction, which is the exact opposite of the Alliance for Justice's claim that Holmes questions the separation of church and state.

  - ✓ When Holmes states that, "Christianity, in principle, cannot accept subordination to the political authorities," Holmes is explicitly contrasting Christianity with the pagan religions about which Aristotle wrote. Aristotle, according to Holmes, "stated that in a properly constituted polity, appointment of the priests and custodians of the temples, as well as the management of public sacrifices, are political concerns." Holmes makes the obvious point that the appointment of priests and the like is not the business of modern public authorities. <u>In other words, unlike the control the state exerted over religion in Aristotle's day, Holmes recognizes that there is a separation of church and state in America today</u>.

  - ✓ Taken in context, it is patently obvious that the quote used by the Alliance for Justice is simply one of the four theoretical possibilities that Holmes discusses. He does not endorse it. In fact, he argues that when political rulers have tried to subordinate Christianity to their political authority, "the results have been disastrous," regardless of whether the political authorities were seeking to help or hinder it.

✓ Holmes notes that there are four possibilities for the proper relationship between Christianity and the political order:

✓ <u>The only possibility Holmes sees as realistic is the fourth, "that Christianity and political authority would be assigned separate spheres of jurisdiction."</u> Holmes describes this in shorthand as a "[g]ive to Caesar what is Caesar's and to God what is God's" way of doing things, and he notes that separate spheres of jurisdiction is the approach favored by modern liberalism—including John Locke, Thomas Jefferson, and Alexis de Tocqueville—and the modern Catholic Church.

✓ <u>Holmes comes down squarely on the side of supporting this separation of religion and politics</u>. For Tocqueville, "Christianity and the political order are assigned separate spheres, separate jurisdictions: to politics is assigned jurisdiction over the material interests of men; to religion is assigned concern for their spiritual well-being." Holmes raises some questions about Tocqueville's reasoning, but he notes that "[t]he Church has come to a teaching that is akin to that of Tocqueville." Under the Church's version, however, church and state must be separate because Adam's original sin separated human nature and original justice. Holmes espouses this view, thereby offering the Catholic social scientists theological grounds for the separation of church and state, as well as political ones.

Summaries of Editorials and Letters to the Editor

- "Embryo Is a Living Human," *Arkansas Democrat Gazette,* August 22, 1996, p. 9B. Holmes discussed the testimony of a doctor who performed the abortion that "created the Medicaid crisis," and noted that the doctor indicated that at that time the abortion is commenced, "the womb contains a member of the human species, a human embryo, with arms and legs, hands and feet." Holmes concludes from this description that "the unborn is a living human who is killed by abortion."

- "Generation Faces Major Questions Over Nation's Soul," *Arkansas Democrat Gazette*, July 4, 1992, p. 6D. Holmes argues that abortion is the most important issue of our time—as was slavery more than a century ago—and that failing to stop it will poison the spiritual soul of the nation and reduce the commitment to life and liberty. In passing, Holmes says "[b]easts are intended to be governed by us for our purposes, and we violate no principle of right when we take their lives for some legitimate purpose of our own, including to use for food."

- "Anti-abortion Movement Has Only One Goal: Life," *Arkansas Democrat*, June 24, 1987, p. 7B. Written while Holmes was President of Arkansas Right to Life, Holmes argues that political views of pro-lifers on other issues are irrelevant and that pro-life liberals can form their own groups. He rejects those who say they agree with pro-lifers but won't join them because pro-lifers have "bad attitudes." Such critics don't really "believe taking innocent life is wrong," according to Holmes. He discusses the Declaration of Independence as a document that liberals today reject and conservatives endorse. He asks, "if our school children can recite the declaration, which acknowledges God as creator, why can they not lift up a prayer thanking him for the rights we enjoy?"

- Letter to the Editor, *Arkansas Democrat Gazette*, December 13, 1986. Holmes points out that the newspaper recently reported that a local television station had removed ads containing pictures of the aftermath of abortion because they were termed offensive and obscene. He made the point that nobody asserted that the pictures were inaccurate, and that in fact, some people after viewing such pictures are moved to "stop abortion."

- "Should We Protect the 'Unborn Child,'" *Arkansas Gazette*, October 18, 1984. Holmes defends the wording of the Unborn Child Amendment to the Arkansas Constitution, and argues that the ACLU wants to force taxpayers to fund abortion. He discusses an incident in Pine Bluff the previous year where "one abortionist sent an infant girl, who had survived the abortion, home with the mother in a garbage bag with the assurance that the bag would quit moving after awhile," and he advocated passing a law to protect children who survive abortions. Finally, Holmes labels as "silly" the argument that the term "unborn child" is misleading.

- "Lincoln-Douglas Debates: The Jury is Not Yet In," *Arkansas Gazette*, February 12, 1984, p. 15B. Holmes argues that fetuses have a right to life that must be recognized, just as slaves had a right to be free. Although, as Lincoln recognized, "freedom of choice in most matters is and must be the rule in the American order," when it comes to fundamental life and liberty as it does in the cases of slavery and abortion, choice must be restricted. According to Holmes, the right to life of the unborn must be respected and slavery prohibited, because one person may not choose to take the life or liberty of another.

- "The Scary New Argument for Abortion," *Arkansas Gazette*, September 28, 1982, p. 9A. Holmes laments a trend in recent pro-choice articles toward admitting that abortion is murder, but endorsing it anyway. He says that the trend clears away a pseudo issue, but that it frightens him with its low regard for life. He discusses recent cases of abortion and infanticide of Down's Syndrome babies as further signs of the low regard for life. He takes particular issue with the argument that abortion prevents child abuse: "It is a strange argument to say that child abuse can be prevented by killing children. By like reasoning, we could prevent rape by killing women." The article ends with an unflattering comparison to Nazi Germany: "The proabortionists counsel us to respond to [great social] problems by abandoning what little morality our society still recognizes. This was attempted by one highly sophisticated, historically Christian nation in our century—Nazi Germany. Unlike Nero, who fiddled while Rome burned, the proabortionists rush to throw gasoline on the flames."

- Letter to Editor, *Daily Dispatch*, Dec. 24, 1980. Holmes writes that the Human Life Amendment would not affect contraception and that pro-life opponents of it should offer an alternative to it rather than merely criticize it, which smacks of dishonestly "perpetuat[ing] the status quo." He calls the concern for denying abortions to rape victims a red herring, "because conceptions from rape occur with approximately the same frequency as snowfall in Miami." He concludes by saying that "the abortion issue is the simplest issue this country has faced since slavery was made unconstitutional. And it deserves the same response."

- Letter to Editor, *Christian Science Monitor*, December 23, 1980, p. 22. Holmes writes in response to a Nina Totenberg piece entitled "Did America vote for this, too?" Totenberg apparently assailed cultural changes in store in the wake of Reagan's election as not being democratically chosen. Holmes takes issue with Supreme Court rulings for abortion and forced busing, and against prayer in school, and he notes that an unelected Supreme Court brought about each.

- Letter to Editor, *Daily Dispatch*, Dec. 4, 1980, p. 4. Holmes writes as (at that date) a non-Catholic and non-member of the New Right, but as one "committed to terminating the slaughter of unborn children." He argues that the morality of abortion does not turn on who supports or opposes it, and that those who rail against the Catholic Church and the New Right sidetrack the public discussion of abortion from the merits of the dispute. He terms opposition to abortion coupled with opposition to a Constitutional Amendment against abortion "a dishonest copout," because the only reason to oppose abortion is if one views the unborn child as human and an Amendment would simply extend Constitutional protection to such humans. He also argues that the New Right's support for voluntary prayer in schools and capital punishment, and its opposition to abortion and forced busing, "need not be feared as a step towards fascism" because they were the existing public policy in a non-fascist U.S. a very short time ago.

- "Abortion Without Natural Affection," TV Program on local Arkansas station, 1990. Mr. Holmes appears at a couple of places in the program. He notes that the unelected Supreme Court made the *Roe* decision. He predicts that the votes are there to overturn *Roe* in the right case. He also predicts that if the decision were returned to the states Arkansas would permit abortion in cases of rape, incest, and jeopardy to the physical health of the mother. He characterizes those exceptions as not being a consistent pro-life position, because they still deny the sanctity of life. He refers to an Indiana case where a court permitted the parents of a Down's Syndrome child to withhold food and water as a case of infanticide.

- "Challenge," TV program on Newscenter 4, Little Rock, 1986. Mr. Holmes debated a local doctor about the effects of Amendment 65, which proposed to eliminate state funding of abortion and protect the unborn child to the maximum extent permissible under federal law. At one point in the program, after the doctor says fetuses look like fish, Holmes holds up a picture of a several week old fetus to make the point that even young fetuses are fully human.

Leon Holmes: Gender Equality and Gay Rights

Allegation: Leon Holmes's "views on gender equality and gay rights cast into doubt his ability to provide equal justice to women and gays and lesbians who would appear before him."
Alliance for Justice, Letter to Chairman Hatch and Senator Leahy, March 25, 2003.

Facts:

- Leon Holmes and his wife Susan co-authored an article in an effort to explain the "historic Catholic teaching regarding the relation between male and female." The article was written in a Catholic magazine, for other Catholics, and it should be understood in the full context of explicating Catholic theology. *See* "Gender Neutral Language," *Arkansas Catholic*, April 12, 1997, p. 10.

- The article fully supports the equality of men and women:

  ✓ "All of us, male and female, are equally sons of God and therefore brothers of one another."
  ✓ "[T]he distinction between male and female in ordination ... has nothing to do with the dignity or worth of male compared to female."
  ✓ [M]en and women are equal in their dignity and value."

- Leon and Susan Holmes share an orthodox view of marriage in the Catholic Church. The statements that "the wife is to subordinate herself to the husband" and that "the woman is to place herself under the authority of the man" express the church's teachings, to which they, as Catholics, subscribe. That view of marriage does not mean that Mr. Holmes or his wife think that all women must subordinate themselves to all men.

- Leon Holmes is a member of the Roman Catholic Church. Support for male-only ordination and distinctions between the sexes, as well as opposition to gender-neutral language in the liturgy and homosexual marriage, are among the religious teachings of the Church. Membership in the Catholic Church, and faithful adherence to its traditional teachings in one's personal life, cannot be a disqualifying factor in the selection of a federal judge.

- Holmes and his wife discussed in the article gay marriage as a matter of Catholic theology. His point was that, as a matter of Catholic theology, male-only ordination and the refusal to recognize homosexual marriage are both consistent with maintaining distinctions between the sexes.

- Leon Holmes has spoken in favor of the separation of politics and religion. In a speech entitled "From Aristotle to Tocqueville on Church and State," Holmes endorsed Tocqueville's view that "Christianity and the political order are assigned separate spheres, separate jurisdictions: to politics is assigned jurisdiction over the material interests of men; to religion is assigned concern for their spiritual well-being."

- Leon Holmes has practiced law at firms with a large percentage of female partners and associates. His female colleagues in the Arkansas bar support his nomination to this position.

  ✓ "I am a female attorney in Little Rock, Arkansas. I am a life-long democrat and am also pro-choice . . . I commend Mr. Holmes to you. He is a brilliant man, a great lawyer and a fine person."
  Eileen Woods Harrison, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I heartily recommend Mr. Holmes to you. He is an outstanding lawyer and a fine person. While he and I differ dramatically on the pro-choice/pro-life issue, I am fully confident he will do his duty as the law and facts of a given case require."
  Cathleen V. Compton, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I support Leon Holmes because he is not only a bright legal mind, but also because he is a good person who believes that our nation will be judged by the care it affords to the least and the littlest in our society. I am not troubled that he is personally opposed to abortion. Mr. Holmes is shot through with integrity. He will, I believe, uphold and apply the law with the utmost care and diligence."
  Beth M. Deere, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

- The editorial board of the *Arkansas Democrat-Gazette* supports Mr. Holmes's nomination: "What distinguishes Mr. Holmes is the rare blend of qualities he brings to the law—intellect, scholarship, conviction, and detachment. A reverence not just for the law but for ideas, for the life of the mind. All of that would shine through the clutter of argument that awaits any judge . . . . He would not only bring distinction to the bench but . . . a promise of greatness."

Leon Holmes: Abortion

Allegation: Leon Holmes, a past president of Arkansas Right-to-Life, holds extreme pro-life views, and he would not be able to judge fairly any cases touching on the abortion issue.

Facts:

- Leon Holmes enjoys support from a number of pro-choice attorneys throughout Arkansas, who strongly believe that he will fairly adjudicate any abortion cases that come before him. These supporters include Kent Rubens, who led the fight to strike down Arkansas's abortion laws in the wake of *Roe v. Wade.*

  ✓ "I cannot think of anyone who is better qualified to serve. . . . As someone who has represented the pro-choice view, I ask that you urge your members to support his confirmation."
  Kent Rubens, Letter to Chairman Hatch and Senator Leahy, March 21, 2003.

  ✓ "I am a female attorney in Little Rock, Arkansas. I am a life-long democrat and am also pro-choice . . . I commend Mr. Holmes to you. He is a brilliant man, a great lawyer and a fine person."
  Eileen Woods Harrison, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I heartily recommend Mr. Holmes to you. He is an outstanding lawyer and a fine person. While he and I differ dramatically on the pro-choice/pro-life issue, I am fully confident he will do his duty as the law and facts of a given case require."
  Cathleen V. Compton, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ " I am proud to be a Democrat. I am also proud to recommend Leon Holmes as a federal district judge for the Eastern District of Arkansas, even though he and I disagree on issues, including a woman's right to choose whether to bear a child . . . . I support Leon Holmes because he is not only a bright legal mind, but also because he is a good person who believes that our nation will be judged by the care it affords to the least and the littlest in our society. I am not troubled that he is personally opposed to abortion. Mr. Holmes is shot through with integrity. He will, I believe, uphold and apply the law with the utmost care and diligence."
  Beth M. Deere, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

  ✓ "I heartily commend Mr. Holmes to you. He is an outstanding lawyer and a man of excellent character. Leon Holmes and I differ on political and personal issues such as pro-choice/anti-abortion. I am a past board member of our local Planned Parenthood chapter and have been a trial lawyer in Arkansas for over twenty-five years. Regardless of our personal differences on some issue[s], I am confident that Leon Holmes will do his duty as the law and facts of any given case require."
  Stephen Engstrom, Letter to Chairman Hatch and Senator Leahy, March 24, 2003.

- Both Senator Lincoln and Senator Pryor of Arkansas support the nomination of Mr. Holmes.

- Regardless of any personal views, Mr. Holmes will abide by the rule of law. He understands that his personal views play no role in his duty as a judge to honor *stare decisis* and faithfully follow the precedent of the Supreme Court and Eighth Circuit.

  ✓ Holmes has spoken in support of separating religion and politics. In a speech entitled "From Aristotle to Tocqueville on Church and State," Holmes argued that "Christianity and the political order are assigned separate spheres, separate jurisdictions: to politics is assigned jurisdiction over the material interests of men; to religion is assigned concern for their spiritual well-being."

- The *Arkansas Democrat-Gazette*, Holmes's hometown paper that knows his record best, strongly supports his candidacy. The paper, writing while his candidacy was being considered, indicated that Holmes was a well-qualified, mainstream nominee:

  ✓ "What distinguishes Mr. Holmes is the rare blend of qualities he brings to the law—intellect, scholarship, conviction, and detachment. A reverence not just for the law but for ideas, for the life of the mind. All of that would shine through the clutter of argument that awaits any judge . . . . He would not only bring distinction to the bench but promise. . . . In choosing Leon Holmes, [the President] could bequeath a promise of greatness." Editorial, *Name on a List in a Field of Seven, One Stands Out*, ARKANSAS DEMOCRAT GAZETTE, Dec. 1, 2002, at 86.

- Prominent liberal politicians, including recent presidential candidates and members of the Judiciary Committee, have supported measures to extend legal protections to unborn children. Under the litmus test currently applied by some Democrats, Al Gore and Dick Gephardt never could be confirmed to the federal bench.

  - Congressman Al Gore voted to amend the Civil Rights Act to <u>define a "person" to include an "unborn child[] from the moment of conception."</u> This would have statutorily prohibited abortion. *Vote 269, H. Amdt. 942 to H.R. 5490 (Civil Rights Act of 1984), 93d Cong., 2d Sess. (1984)*.

  - Congressman Dick Gephardt issued a press release that read as follows: "Mr. Gephardt pledged in a campaign position paper entitled, 'Justice, Your Congressman and the Abortion Issue' released September 5, 1976, that <u>he would sponsor and work for a Constitutional Amendment to prohibit any abortion except to save the life of the mother.</u>"

  - Senator Ted Kennedy wrote a letter that stated: "<u>I am opposed to abortion on demand. This opposition is based on my deep personal, moral and religious beliefs.</u>" *Letter of Oct. 5, 1979.* In an earlier letter, Kennedy further explained that "Wanted or unwanted, I believe that human life, even at its earliest stages, has certain rights which must be recognized—the right to be born, the right to love, the right to grow old." "But once life has begun, no matter at what stage of growth, it is my belief that termination should not be decided merely by desire." *Letter of Aug. 3, 1971*

- Senator Dick Durbin argued that "the right to abortion is not guaranteed by the U.S. Constitution." He therefore supported a constitutional amendment to overrule *Roe v. Wade*. "The effect of this Amendment will be to return us to the legal environment which existed before *Roe v. Wade* in 1973. States would be allowed to regulate the practice of abortion under their power to legislate in areas of health and safety." *Letter of May 12, 1983.*

- Mr. Holmes is a member of the Roman Catholic Church. Opposition to abortion is among the religious teachings supported by the Church. Membership in the Catholic Church, and faithful adherence to its teachings, cannot be a disqualifying factor in the selection of a federal judge.

- Abortion-rights groups have a poor track record of predicting how judicial nominees will vote, particularly on matters involving abortion and sex-based discrimination, after they are confirmed.

  ✓ During Justice Souter's 1990 confirmation hearings, NOW's president testified that confirming him would mean "ending freedom for women in this country." *Washington Post* (Sept. 30, 1990). "I tremble for this country if you confirm David Souter." *Austin-American Statesman* (Sept. 26, 1990). She further described Souter as "almost Neanderthal," and warned that "women's lives are at stake." *U.S. News & World Report* (Sept. 24, 1990).

  ➢ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justice Souter co-authored the plurality opinion that reaffirmed the central holding of *Roe v. Wade*—that the Constitution protects a woman's right to procure an abortion.

  ➢ In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), Justice Souter ruled that an employer was subject to vicarious liability under Title VII to an employee who suffered sexual harassment at the hands of her supervisor, since the employer had failed to exercise reasonable care to prevent the harassment.

  ➢ In *United States v. Lanier*, 520 U.S. 259 (1997), Justice Souter held that a state judge who sexually assaulted five women in his chambers could be prosecuted under 18 U.S.C. § 242, which makes it a crime for persons acting under color of state law to deprive persons of their constitutional rights.

  ✓ When Justice Stevens was nominated to the Supreme Court in 1975, Nan Aron—then the president of the Women's Legal Defense Fund—testified in opposition to him on the ground that he had shown "blatant insensitivity to discrimination against women." She further faulted him for having a "predisposition to rule adversely in cases which women bring under the Equal Protection Clause." 94th Cong. 227 (1975).

- In *Hill v. Colorado*, 530 U.S. 703 (2000), Justice Stevens held that a state law that prohibited any person from approaching another person near an abortion clinic, for the purposes of distributing literature or engaging in oral protest, was consistent with the First Amendment.

- In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), Justice Stevens ruled that a state law requiring that both parents be notified of their minor daughter's decision to procure an abortion was unconstitutional.

- In *Gannon v. University of Chicago*, 441 U.S. 667 (1979), Justice Stevens held that the plaintiff had a right under Title IX of the 1972 Education Amendments to pursue a private cause of action against medical schools at two private universities, which allegedly discriminated against her on account of her sex.

- In *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), Justice Stevens ruled that the department's requirement that female employees make larger contributions to its pension fund than male employees violated both the language and policy of Title VII.

Gender Neutral Language
by Leon and Susan Holmes

Our whole life as husband and wife, as father and mother to our children, and as Catholic Christians, is based the historic Catholic teaching regarding the relation between male and female, so when that teaching is rejected, the rejection pierces the heart of who we are as persons, as family, and as Catholic Christians. Nothing causes us greater grief than the fact that the historic and scriptural teaching on the relationship between male and female is widely unpopular in the Church today. We have studied these teachings, prayed about them, and struggled to live them for the largest part of the almost twenty-five years we have been married; and we ask your indulgence and patience as we attempt to share the fruits of our reflection and struggle with you.

The historic teachings of the Catholic Church are grand, elegant, and beautiful. When they are unpopular among Catholics, it us usually because they are not understood; and so it is, we think, with respect to the teaching of the Church regarding the relationship between male and female. The passages of Scripture that call Christians "sons of God" and "brothers" are offensive only if they are misunderstood. The teaching that only males can be ordained to the priesthood and the diaconate is offensive only if it is misunderstood. Far from being offensive, these teachings are elegant and beautiful; and true for this age, as for every age, because truth is eternal.

Catholic theology is essentially sacramental, which is to say that it's teaching is permeated by and flows from the notion that there is an unseen reality that is symbolized by visible, external signs. We believe, for instance, that Christ was incarnate as a male because His masculinity is the most fitting sign of the unseen reality of His place in the Holy Trinity, who is revealed to us as Father, Son, and Holy Spirit. Our relationship to God is a part of this unseen reality, and it is two-fold. In one aspect, we are related to God as individuals; in another aspect, we are related to God as a community. Individually, we are adopted into the same relationship to the God the Father as Christ enjoys, which is to say, we are all sons of God the Father and brothers of Christ. All of us, male and female, are equally sons of God and therefore brothers of one another. The equality of our relationship is destroyed when some of us are called sons but others are called daughters, some are called brothers but others are called sisters. Daughters have not the same relationship to their father as sons have. Daughters cannot be like their father to the same extent as can sons. Sisters have not the same relationship to brothers as brothers have to one another. Sisters cannot be like brothers to same extent as brothers can be like one another. Hence, Scripture refers to all Christians--Jew and Greek, male and female, slave and free--as sons of God (Gal. 3:26) and brothers of one another to signify the equality, the sameness of our spiritual relationship in its unseen reality to God.

As a community, as Church, we also have a relationship to God as the bride of Christ. This relationship is an unseen reality that is signified in the visible world by the relationship between male and female and especially by the relationship between husband and wife. Hence, the husband is to love his wife as Christ loves the Church; and as the Church subordinates herself to Christ, in that manner the wife is to subordinate herself to her husband. The verb used in Ephesians 5:24 is hupotassetai, which means to place one's self under. The Church is to place herself under the protection of Christ and ipso facto place herself under His authority. Likewise, the woman is to place herself under the authority of the man and ipso facto place herself under his authority. Both the man and the woman are to live so that their relationship is a visible sign of an unseen reality, the relationship between Christ and the Church. Distorting the relationship between male and female is as sacrilegious as profaning any of the other sacraments that by which God symbolizes a divine, unseen reality through tangible symbols.

The use of male and female to symbolize the relationship between Christ and the Church is pervasive in Scripture. In Leviticus, for instance, whenever a sacrificial animal was to stand for Christ, a priest, or a leader, the animal was required to be male; whereas, whenever a sacrificial animal was to stand for the common man or for the community, the animal was required to be a female. In the Gospels, Christ always forgave and never condemned women, though he sometimes condemned men. Women were always forgiven because the Church will always be forgiven. Men could be condemned for their sins because Christ was condemned for our sins.

If we were to use "gender neutral" language to describe the relationship between Christ and the Church, we would destroy an essential element of our faith. To be true to the reality of the relationship, we must recognize Christ as the groom and the Church as the bride. Christ cannot be the bride; the Church cannot be the groom; nor can Christ and the Church both be groom or both be bride.

This unseen reality is signified once again by an outward sign within the Church, which ordains only males to those positions in the Church that represent Christ among us, the priesthood and the diaconate. Ignoring the distinction between male and female in ordination is like ignoring the distinction between male and female in marriage. It has nothing to do with the dignity or worth of male compared to female. When a woman chooses to marry a man, it is not because she thinks men have more dignity or value than women. The suggestion that male-only ordination implies a devaluation of women is as silly as the suggestion that a woman devalues women when she looks exclusively among men for a husband. The assertion that males and females both should be ordained without regard to their sex is akin to the assertion that same-sex relationships should be regarded as having equal legitimacy with heterosexual marriage.

The demand of some women to be ordained is pre-figured in the Old Testament when Korah and two hundred fifty "well-known men" claimed the right to offer sacrifice equally with Moses and Aaron because "all the congregation are holy, every one of them, and the Lord is among them." Numbers 16:3. It is true that all the congregation are holy and the Lord is among them; but it does not follow that all are entitled to offer sacrifice. By the same token, it is true that men and women are equal in their dignity and value; but it does not follow that all are entitled to be ordained. Ordination does not signify the intrinsic worth or holiness of the one ordained; it signifies that the one ordained is to be another Christ to the Church, which is to say another groom to the bride. A woman cannot be ordained, not because she is inferior in dignity to a man, but because she cannot be a husband to the Church, which is the bride of Christ.

In a way that we cannot understand, the relationship between the unseen reality and the visible signs is reciprocal. St. Paul says he was made a minister "to make all men see what is the plan of the mystery hidden for ages in God who created all things; that through the church the manifold wisdom of God might now be made known to the principalities and powers in the heavenly places." Eph. 3:10. He also says the apostles have been made a spectacle "to the world, to angels and to men." I Cor. 4:9. In the same vein, he says a woman should have a veil on her head [as a sign of authority] "because of the angels." It is an awesome thought that what we do somehow signifies the reality of the unseen world; but it is even a more awesome thought that God calls us to make known the reality of the unseen world to the unseen world.

In the biological sphere, life depends on the relationship between male and female. In this respect, the biological sphere is a visible sign of the unseen reality of the spiritual realm in which life depends on the relationship of Christ and the Church. Sexuality is a "great mystery . . . in reference to Christ and the Church." Ephesians 5:32.

All of this is why denominations whose theology is not essentially sacramental have been quick to endorse artificial contraception, divorce, and the ordination of women; and it is why they are much more open to the legitimation of homosexual relationships. Churches whose theology is essentially sacramental, which is to say the Catholic Church and the Orthodox Churches, cannot accommodate the spirit of the age with respect to these matters no matter how overwhelming the social pressure because to do so would be to repudiate the essence (in the strictest Thomistic sense of the word) of our whole theology. Apart from sacramental theology, sexuality is just another physical function, and the distinction between the sexes is no more significant than the distinction between right-handed persons and left-handed ones. When we treat the distinction between the sexes as of no consequence, we are parting from sacramental theology, which is to say we are parting from Catholicism, which is to say we are parting from Christianity.

It is not coincidental that this culture of death in which we live is a culture that seeks to eliminate the distinctions between male and female. It is not coincidental that the feminist movement brought with it artificial contraception and abortion on demand, with recognition of homosexual liasons soon to follow. The project of eliminating the distinction between the sexes is inimical to the transmission of life, which is the raison d'etre of that distinction in both the biological and spiritual realms. No matter how often we condemn abortion, to the extent we adopt the feminist principle that the distinction between the sexes is of no consequence and should be disregarded in the organization of society and the Church, we are contributing to the culture of death.

As Church, we are the bride of Christ. We are to submit to Him. This means in part that we are to take on the mind of Christ rather than adopt whatever paradigm prevails in the age in which we live. As you said in January when talking about abortion, "I do not want a Church that is right when the world is right. I want a Church that is right when the whole world is wrong."

We write in a spirit of friendship, not of animosity. When we express concern about the use of "gender neutral" language in place of what the Word of the Lord actually says, or about the abandonment of a 4000 year old tradition that only males may serve at the altar, or about the other ways in which the practice of the Church seems more consistent with feminism than with Catholic tradition, we do so because we believe that a great deal is at stake; and we want our shepherds and fellow Catholics to appreciate our concerns. We have brought all five of our children into the Catholic Church. It is no exaggeration to say we have bet their eternal lives on the Church. At the same time, we have built our whole family life on the traditional and now unpopular teachings about the relationship between male and female. What are we to do when we see these two pillars of our life start to separate and pull apart? How do we stand on both? How can we stand on only one?

KAVANAUGH

<u>BRETT M. KAVANAUGH</u>
NOMINEE TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Biographical Information

- Mr. Kavanaugh has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.
- Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal
- Mr. Kanavaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.
- Prior to his Supreme Court clerkship, Mr. Kanavaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States.
- The ABA has rated Mr. Kavanaugh "Well Qualified."
- Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

Controversial Issues

- It has been stated that Brett Kavanaugh is too young to be a federal appellate judge as he's only 39 years old.
- While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233 which limits public access to presidential records. Such a start inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.
- In *Good News Club v. Milford Central School,* Mr. Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Responses

- Mr. Kavanaugh has a broad range of experience. His legal work ranges from service as associate counsel to the President to appellate lawyer in private practice, to experience as a prosecutor. All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. Justice Kennedy was 38 years old, Judge Kozinski was 35 years old and Judge Stapleton was 35 years old.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.
- The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.

Brett Kavanaugh – Age

Allegation: Brett Kavanaugh is too young to be a federal appellate judge – he's only 39 years old.

Facts:

➢ Mr. Kavanaugh would bring a broad range of experience to the court.

✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.

✓ Mr. Kavanaugh has clerked at two of the U.S. Courts of Appeal, the Third and Ninth Circuits, and at the Supreme Court. He would bring to the D.C. Circuit his experience with those courts.

✓ In private practice and during his service as a prosecutor, Mr. Kavanaugh participated in appellate matters in a number of the federal courts of appeal.

➢ All three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39. All have been recognized as distinguished jurists.

✓ Justice Kennedy was appointed to the 9th Circuit when he was 38 years old.

✓ Judge Kozinski was appointed to the 9th Circuit when he was 35 years old.

✓ Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.

➢ There are many examples of judges who were appointed to the bench at a young age and have had illustrious careers.

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3rd	40
Judge J. Michael Luttig	4th	37
Judge Karen Williams	4th	40
Judge J. Harvie Wilkinson	4th	39
Judge Edith Jones	5th	35
Judge Frank Easterbrook	7th	36
Judge Donald Lay	8th	40
Judge Steven Colloton	8th	40
Judge Anthony Kennedy (later	9th	38

appointed to the Supreme Court)		
Judge Mary Schroeder	9th	38
Judge Alex Kozinski	9th	35
Judge Deanell Tacha	10th	39
Judge Stephanie Seymour	10th	39
Judge J.L. Edmondson	11th	39

- Age should not be a measure of a person's experience. Many distinguished senators began their service at a young age.

  - ✓ Senators Biden and Kennedy were elected to the Senate at the age of 30, and Senator Leahy was elected at 34.

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

➢ Mr. Kavanaugh was asked to represent, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court.

➢ The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

- ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he were returned.

- ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States… may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

- ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

➢ The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

> "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which <u>reasonable people can disagree</u>." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

> "The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate

human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

➢ **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**

- ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.

- ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.

- ✓ The federal courts of appeals agreed with Mr. Kavanaugh's position in those cases.

- ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**

➢ Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**

- ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges.** *See* Section 2(b).

- ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.

- ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings."

Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2171 (1998).

➢ **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**

✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.

✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**

- **The ABA, the Democrat's "Gold Standard," has rated him "Well Qualified" to serve as a judge on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.

  - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 11 years, to public service.

- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**

  - ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.

  - ✓ In private practice Mr. Kavanaugh focused on appellate matters and as part of his practice, he filed amicus briefs on behalf of clients with the U.S. Supreme Court.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.

  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

➢ **Only 3 of the 19 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**

✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

➢ In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."

✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.

✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.

✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

➢ **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	**Circuit**	**Confirmed**
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996

Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997
Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney's energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

➢ **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**

✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).

✓

➢ **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**

✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.

✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that "it may well be absolute in civil, congressional, and FOIA proceedings." Mr. Kavanaugh clarified that "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.* at 2171.

✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena**. There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.

➢ **Mr. Kavanaugh's article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.

- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.

- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanuagh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Brett Kavanaugh – *Good News Club v. Milford Central School*

<u>Allegation:</u> In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

<u>Facts:</u>

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations**. It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the unsuccessful nominations of Miguel Estrada and Priscilla Owen.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

Setting the Facts Straight on Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

Brett Kavanaugh is a highly respected attorney with a broad background in both government service and private practice. His legal experience makes him uniquely suited to serve on the D.C. Circuit. Over the course of his career, Mr. Kavanaugh has served as a federal appellate law clerk, a federal prosecutor, an appellate lawyer representing both private clients and the United States, and a senior advisor to the President. While Mr. Kavanaugh's record has been mischaracterized by some, the facts point to a well-qualified nominee who deserves to be confirmed by the Senate.

Myth: Brett Kavanaugh does not have enough experience to be a judge on the D.C. Circuit – he's never tried a case.

Facts on Experience:

➢ The ABA rated Mr. Kavanaugh "Well Qualified" for a position on the U.S. Court of Appeals for the D.C. Circuit. A rating of Well Qualified means:

> "To merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

➢ Mr. Kavanaugh would bring a broad range of experience to the D.C. Circuit. He has substantial experience in the appellate courts, both as an attorney and clerk. From his work in the executive branch, he brings a wealth of knowledge about the inner workings of the federal government.

- ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit; Ninth Circuit Judge Alex Kozinski of the U.S. Court of Appeals; and, U.S. Supreme Court Justice Anthony Kennedy.

- ✓ Mr. Kavanaugh's legal work ranges from service as associate counsel to the President, to appellate lawyer in private practice, to experience as a prosecutor.

➢ Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.

➢ Mr. Kavanaugh's legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.

Myth: Mr. Kavanaugh's legal career has consisted largely of partisan activities, making him unsuited to the federal bench.

Facts on Suitability for the Bench:

- Mark Tuohey, a Democrat and former President of the D.C. Bar, worked with Mr. Kavanaugh in the Office of Independent Counsel. He wrote: "Mr. Kavanaugh exhibited the highest qualities of integrity and professionalism in his work. These traits consistently exemplify Mr. Kavanaugh's approach to the practice of law, and will exemplify his tenure as a federal appellate judge. His approach to important questions of law will be professional, not partisan." Letter to Chairman Hatch, April 26, 2004.

- Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.

  - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.

  - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy

- As every lawyer is required to do, Mr. Kavanaugh has zealously represented his clients' positions and made the best arguments on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

Myth: Mr. Kavanaugh was deeply involved in the Bush Administration's selection of highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts on the Judicial Nominations Process:

- The President selects judicial nominees. Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats' "Gold Standard." One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

➢ The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.

Myth: Mr. Kavanaugh is out of the mainstream because he publicly praised Miguel Estrada and Priscilla Owen, along with the rest of President Bush's first 11 nominees to the U.S. Courts of Appeal.

Facts about President Bush's Nominees:

➢ At the time of their nomination, Democrat senators had positive things to say about President Bush's first group of nominees.

✓ Senator Leahy said that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work." *NPR: All Things Considered* (Radio Broadcast May 9, 2001).

✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations." Amy Goldstein and Helen Dewar, *11 Judicial Nominees Named*, Wash. Post, May 10, 2001, at A2.

➢ Miguel Estrada and Priscilla Owen, both unanimously rated "Well Qualified" by the ABA, enjoyed widespread bipartisan support and would have been confirmed if given an up-or-down vote by the full Senate.

➢ Each of the first 11 nominees was rated "Well Qualified" or "Qualified" by the ABA – the Democrats' "Gold Standard."

Myth: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts about the Starr Report:

➢ The section of the Independent Counsel's report Mr. Kavanaugh co-authored – grounds for impeachment – was required by law.

✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- ➢ The Independent Counsel's report did not conclude that President Clinton should have been impeached. Rather, it simply indicated that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.

  - ✓ The House of Representatives determined that the evidence presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- ➢ Democrat senators agreed with the Independent Counsel that President Clinton gave false or misleading testimony.

  - ✓ Senator Feinstein introduced a censure resolution that stated President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." Senators Durbin, Kennedy, Kohl, Schumer, Daschle, and Kerry co-sponsored the resolution. S.Res. 44, 106th Cong. (1999).

  - ✓ Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ➢ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

  - ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

- ➢ The U.S. Senate already has confirmed judicial and executive branch nominees who worked for Independent Counsel Ken Starr. If the work these nominees performed for the Office of Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.

  - ✓ Individuals confirmed to judicial positions include: Steven Colloton – 8th Circuit; John Bates – D.C. District Court; Amy St. Eve – Northern District of Illinois.

Myth: Mr. Kavanaugh returned to the Office of Independent Counsel ("OIC") when the Monica Lewinsky scandal broke because he wanted to participate in the investigation.

Facts about Mr. Kavanaugh's Return to the OIC:

- Mr. Kavanaugh came back to the OIC to handle a Supreme Court argument regarding privilege, which he had worked on before returning to private practice.

  - ✓ From the May 8, 1998 Washington Post: Washington lawyer Brett M. Kavanaugh has left private practice at Kirkland & Ellis for another temporary stint at the office of Whitewater independent counsel Kenneth W. Starr, also a Kirkland & Ellis lawyer. Kavanaugh is working on the Vincent Foster attorney-client privilege case to be argued at the Supreme Court June 8.

Myth: Brett Kavanaugh has praised Independent Counsel Starr despite Starr's partisan tactics, including his release of the entire report on President Clinton with a description of wide array of questionable facts that were highly offensive.

Facts about the Release of the Report and Support of Judge Starr:

- The House of Representatives, not the OIC, publicly released the Independent Counsel's Report.

- Mr. Kavanaugh criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

- Judge Starr was unfairly criticized for his work as independent counsel. Even the Washington Post editorial page acknowledged that much of the criticism was unwarranted:

  - "Yet the sum of Mr. Starr's faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right." Editorial, Wash. Post, Oct. 20, 1999, at A28.

Myth: Mr. Kavanaugh is willing to twist legal theories to best serve his own partisan interests. The best example of this is his flip-flop on executive branch privilege from his arguments against the Clinton Administration's assertions of privilege to his drafting of the Bush Administration's Executive Order 13233, which gives both sitting and former presidents authority to claim privilege over records.

Facts about Mr. Kavanaugh's Work on Executive Branch Privilege:

- ➢ Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.

  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.

  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

  - ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.

  - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.

- ➢ Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.

  - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).

- ➢ While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.

  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.

  - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Myth: Mr. Kavanaugh has argued extreme right wing positions on behalf of clients. For instance, he submitted an amicus brief in a school prayer case.

Facts about Mr. Kavanaugh's Work on First Amendment Issues:

- In the amicus brief Mr. Kavanaugh filed on behalf of his clients in *Santa Fe Independent School District*, he acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.

- However, Mr. Kavanaugh argued that a school district's policy that permitted high school students to choose whether a statement would be delivered before football games and who would give that statement did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement.

- Mr. Kavanaugh's brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."

- Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

- As an attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the DC Circuit

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh "Well Qualified" to serve on the DC Circuit.**

  - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.

  - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality." Delaware Law Weekly, May 22, 2002.

  - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, "Brett is a lawyer of great competency, and he will be a force in this town for some time to come." News Conference with James Hamilton, Federal News Service, June 25, 1998.

  - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**

  - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.

  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.

  - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**

  - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.

  - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.

➢ **Mr. Kavanaugh believes in giving back to his community.**

✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.

✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

➢ **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**

- ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.

- ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**

- ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."

- ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**

➢ **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

➢ **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

- ➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

  - ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

- ➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**

  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.

  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.

  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents.**

  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools.** A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."

- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).

- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**

- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, <u>regardless</u> of whether they were religious or nonsectarian.**

✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

➢ **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**

➢ **Mr. Kavanuagh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.

➢ **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).

- ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.

➢ **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that <u>may</u> constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

- ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.

- ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.

- ✓ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings."** S.Res. 44, 106th Cong. (1999).

  - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).

  - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for "giving false, misleading, and evasive answers that were designed to obstruct the judicial process" in Paula Jones's sexual harassment lawsuit and ordered him to pay a fine of $90,000.

- ✓ In January 2001, President Clinton admitted to giving "evasive and misleading answers, in violation of Judge Wright's discovery's orders" during his deposition in Paula Jones's sexual harassment lawsuit. As a result, he agreed to pay a $25,000 fine and give up his law license for five years.

➢ **The U.S. Senate already has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees' work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.

- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002 by a voice vote.

- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.

- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.

- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

Brett M. Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

I. Background
1. Experience

II. Office of Independent Counsel
1. Starr Report
2. Vince Foster Investigation
3. Executive Privilege Article
4. Executive Order 13233
5. Defense of Ken Starr

III. Elian Gonzalez

IV. Separation of Church and State
1. Good News Club
2. Santa Fe Independent School District
3. Florida School Vouchers

V. Race

VI. Product Liability Cases
1. Lewis
2. Geier
3. Green

VII. Judicial Nominations

Brett Kavanaugh and Executive Privilege

<u>Allegation:</u> When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

<u>Facts:</u>

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of <u>a criminal investigation</u>. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.

- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

  ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the <u>crimes</u> at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).

  ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.

- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.

  ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."

- ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977).

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

- With respect to the issuance of Executive Order 13233 concerning executive privilege, the President makes the decision on all matters regarding the scope and exercise of executive privilege. The decision is not made by his staff or anyone else in his Administration.

- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

OWEN

Priscilla R. Owen

Nominee to the U.S. Court of Appeals for the Fifth Circuit

Biographical Information

- Unanimously rated "Well Qualified" by the ABA.
- Has served as a respected and distinguished Justice on the Supreme Court of Texas since 1995
- Before joining the Texas Supreme Court, Justice Owen was a partner with the well-respected law firm of Andrews & Kurth. She practiced commercial litigation for 17 years.
- Justice Owen is a member of the American Law Institute, the American Judicature Society, the American Bar Association, and a Fellow of the American and Houston Bar Associations.
- Justice Owen earned a B.A. *cum laude* from Baylor University and graduated *cum laude* from Baylor Law School in 1977. She was a member of the Baylor Law Review and has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna.
- Justice Owen earned the highest score in the state on the December 1977 Texas Bar Exam.

Controversial Issues

- Justice Owen has been an activist in cases involving interpretation of Texas' parental notice statute.
- Justice Owen has favored corporations over consumers.
- Justice Owen received campaign contributions from Enron and ruled on cases involving that corporation.

Responses

- Justice Owen has not questioned *Roe v. Wade* in her decisions, and she has testified that, as a lower-court judge, she would adhere to and strictly follow *Roe v. Wade*. Just last year she joined a majority of the Texas Supreme Court in rejecting the argument that the state statute barring wrongful death actions on behalf of unborn children violated the Equal Protection Clause, reasoning that unborn children do not enjoy the protections of that clause because the U.S. Supreme Court held in *Roe* that an unborn child is not a person under the Fourteenth Amendment.
- Justice Owen has joined or authored a number of opinions that advanced the interests of consumers. To take only a few examples, she has supported the right of medical malpractice victims to recover from physicians who injured them, upheld the right of policyholders to recover from insurance companies, held that manufacturers had a legal duty to make a product child resistant, and upheld a $5 million punitive damages verdict in a construction accident case.
- In the 1994 election cycle, Justice Owen's campaign committee received approximately $1.2 million in contributions from more than 3,000 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed less than 1% of the total contributions to her committee. In the 2000 election cycle, her campaign committee received no contributions from Enron affiliates or employees.

Priscilla R. Owen

Nominee to the Fifth Circuit

Provided by the White House
Office of Legislative Affairs

TABLE OF CONTENTS: JUSTICE PRISCILLA OWEN

JUSTICE PRISCILLA OWEN
Nominee to U.S. Court of Appeals for the Fifth Circuit (Texas)
Nominated May 9, 2001
Renominated January 7, 2003 & February 14, 2005

- Since 1995, Justice Priscilla Owen has served as a distinguished and respected Justice on the Supreme Court of Texas.
  - The American Bar Association *unanimously* rated Justice Owen "Well Qualified," its highest possible rating.
  - Justice Owen has significant bipartisan support, including three former *Democrat* judges on the Texas Supreme Court and a bipartisan group of 15 past Presidents of the State Bar of Texas.
  - The seat to which Justice Owen has been nominated has been designated a "judicial emergency" by the Judicial Conference of the United States. Nonetheless, she has been forced to wait since May 2001 for a Senate vote.
- In 1994, Justice Owen was first elected to the Texas Supreme Court. In 2000, she overwhelmingly won a second term, with 84% of the vote.
  - During Justice Owen's 2000 re-election bid, every major newspaper in Texas endorsed her.
- Before joining the Texas Supreme Court, Justice Owen was a partner with the well-respected Texas law firm of Andrews & Kurth. She practiced commercial litigation for 17 years.
- Justice Owen is a member of the American Law Institute, the American Judicature Society, the American Bar Association, and a Fellow of the American and Houston Bar Associations.
- Justice Owen has engaged in significant pro bono and community activity.
  - Justice Owen has served as the liaison to the Texas Supreme Court's Mediation Task Force and to statewide committees on providing legal services to the poor and *pro bono* legal services. She was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars per year in additional funds for providers of legal services to the poor. Justice Owen also serves as a member of the board of the A.A. White Dispute Resolution Institute.
  - Justice Owen was instrumental in organizing a group known as Family Law 2000, which seeks to find ways to educate parents about the effect that the dissolution of

a marriage can have on their children and to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

- Justice Owen serves on the board of Texas Hearing & Service Dogs. Additionally, she is a member of St. Barnabas Episcopal Mission in Austin, Texas, where she teaches Sunday School and serves as the head of the altar guild.

- Some interest groups have criticized Justice Owen's rulings in a small number of cases interpreting a Texas parental notice abortion statute. Importantly, by law, the Texas Supreme Court hears cases arising under this law only rarely – namely, when *both* lower courts have required parental notice and not granted an exception. In some of those cases, Justice Owen agreed with the lower courts and voted to require notice to a parent; on other occasions, she voted to grant an exception to the parental notice requirement or to remand based on the facts of the case. She thus has voted to grant a judicial bypass *more* readily than the lower-court judges in these cases. Justice Owen was in the majority in 11 of the 14 cases. Her decisions in all instances have been based on her interpretation of the requirements of the ambiguous Texas statute in light of governing U.S. Supreme Court precedent, as her decisions explain.

    - Justice Owen has not questioned *Roe v. Wade* in her decisions, and she has testified that, as a lower-court judge, she would adhere to and strictly follow *Roe v. Wade*. In fact, she recently joined her colleagues in faithfully applying *Roe*'s holding that an unborn child is not a "person" within the meaning of the Fourteenth Amendment.

- Justice Owen earned a B.A. *cum laude* from Baylor University and graduated *cum laude* from Baylor Law School in 1977. She was a member of the Baylor Law Review, and has been honored as Baylor Young Lawyer of the Year and as a Baylor University Outstanding Young Alumna.

- After graduating from law school, Justice Owen earned the highest score in the state on the December 1977 Texas Bar Exam.

STATEMENTS BY SELECT SUPPORTERS OF JUSTICE PRISCILLA OWEN

Raul Gonzalez, Former Democrat Justice on the Supreme Court of Texas

"I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation." (*Letter to Sen. Leahy*, July 19, 2002).

John L. Hill, Former Democrat Chief Justice on the Supreme Court of Texas

"After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. . . . I know personally just how impeccable Justice Owen's credentials are." (*Letter to Sen. Leahy*, July 19, 2002).

Jack Hightower, Former Democrat Justice on the Supreme Court of Texas

"I am a Democrat and my political philosophy is Democratic, but I have tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same." (*Letter to Sen. Feinstein*, August 20, 2002).

Bipartisan Group of 15 Former Presidents of the State Bar of Texas

"Although we profess different party affiliations and span the spectrum of views of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate for appointment to the Fifth Circuit. . . . The status of our profession in Texas has been significantly enhanced by Justice Owen's advocacy of pro bono service and leadership for the membership of the State Bar of Texas. Justice Owen has served on committees regarding legal services to the poor and diligently worked with others to obtain legislation that provides substantial resources for those delivering legal services to the poor. Justice Owen also has been a long-time advocate for an updated and reformed system of judicial retention in Texas." (*Letter to Sen. Leahy*, July 15, 2002).

Senator Kay Bailey Hutchison

"Priscilla Owen is an experienced jurist of integrity who embodies the qualities we seek in our federal judges. Despite an exemplary public record, Priscilla Owen has been targeted by special interest groups, her views mischaracterized and her opinions distorted. . . . She has endured baseless criticism and empty charges with poise, validating her even more as an outstanding, qualified nominee who should be confirmed by the United States Senate." (*Press Release*, March 27, 2003).

Attorney General Alberto Gonzales, Former Counsel to President Bush and Former Texas Supreme Court Justice

"As someone who had the privilege of serving with Priscilla Owen on the Texas Supreme Court, I can say without hesitation that she is extraordinarily well qualified to serve as a judge on the federal appeals court. Some have questioned Justice Owen's qualifications because she and I disagreed on the interpretation of a new Texas parental notification statute in 2000. As all judges know, cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous. The fact that Justice Owen and I disagreed in some cases is unremarkable. . . . She is an outstanding jurist and will perform superbly as a federal appeals court judge." (*Dallas Morning News*, July 16, 2002).

Hector De Leon, Past President of Legal Aid

"As the immediate past president of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit." (*Letter to Sen. Leahy*, June 26, 2002).

Senator Florence Shapiro, chief author of Senate bill, Texas Parental Notification Act

"I am shocked and saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth. Her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. . . . The Parental Notification Act is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. . . . Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench – an experienced jurist who follows the law and uses common sense." (*Letter to Sen. Leahy*, July 15, 2002).

Ann Stone, Republicans for Choice

"I worry that if we in the pro-choice movement attack even those judicial nominees who are responsible and acclaimed jurists that we will appear like the 'boy who cried wolf' when really bad nominees come forward." (*Press Release*, July 23, 2002).

Mary O'Reilly, Life-time Member of the NAACP and Democrat

"I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force. . . . I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. . . . In the almost eight years I have known Justice Owen, she has always been refined, approachable, even-tempered and intellectually honest." (*Letter to Sen. Feinstein*, August 14, 2002).

Lori Ploeger, Former Law Clerk to Justice Owen

"During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly. . . . Justice Owen is a role model for me and for other women attorneys in Texas." (*Letter to Sen. Leahy*, June 27, 2002).

Victor Schwartz, Tort Law Professor and Co-author of the most widely used torts textbook in United States

"This past weekend, I reviewed most of [Justice Owen's] principal opinions in tort law. My review of Justice Owen's opinions indicates that any characterization of Justice Owen as pro-plaintiff or pro-defendant is untrue. Those who have attacked her as being pro-defendant have engaged in selective review of her opinions, and have mischaracterized her fundamental approach to tort law. Justice Owen's fundamental approach to tort law is to make it stable. . . . My fundamental point is that in the area of tort law, Justice Owen is a moderate jurist; she is neither a trailblazer for plaintiffs nor a captive of corporate interests." (*Letter to Sen. Leahy*, July 18, 2002).

Editorial Board, Dallas Morning News

"Justice Owen's lifelong record is one of accomplishment and integrity. She is one of the few judicial nominees to receive a unanimous 'well qualified' rating from the American Bar Association." (February 10, 2002).

Editorial Board, Washington Post

"She should be confirmed. Justice Owen is indisputably well qualified. . . . Liberals will no doubt disagree with some opinions she would write on the 5th Circuit, but this is not the standard by which a president's lower-court nominees should be judged." (July 24, 2002).

Texas Supreme Court Chief Justice, Tom Phillips

"She's what Bush said (in nominating her): She tries to follow the legislative will in every case and apply the law, not invent it." (*Houston Chronicle*, May 10, 2001).

Herbert Reynolds, Baylor University President and Chancellor Emeritus; Former Chair, Texas Commission on Judicial Efficiency

"Justice Owen is a superlative individual in every way. She is extremely bright, she possesses great integrity and is equipped with the character and moral virtues necessary for the high office she holds as well as the high office for which she has been nominated. . . . Based on my knowledge of Justice Owen for the past 30 years, I believe that you simply cannot make a more solid choice for the 5th U.S. Circuit Court of Appeals." (*Letter to Senate Judiciary Committee*, March 25, 2002).

PRISCILLA OWEN
Responses to False Allegations

ALLEGATION: Justice Owen has been an activist in cases involving interpretation of Texas' parental notice statute.

RESPONSES:

- The cases in question involved the Texas parental notice statute. Justice Owen has not questioned *Roe v. Wade* in her decisions, and she has testified that, as a lower-court judge, she would adhere to and strictly follow *Roe v. Wade*. Indeed, just last year, she joined a majority of the Texas Supreme Court in rejecting the argument that the state statute barring wrongful death actions on behalf of unborn children violated the Equal Protection Clause, reasoning that unborn children do not enjoy the protections of that clause because the U.S. Supreme Court held in *Roe* that an unborn child is not a person under the Fourteenth Amendment.

- The Texas law enacted in 1999 requires notice to a parent when a minor woman seeks an abortion, but allows exceptions when the trial court judge concludes (i) that the minor is mature and sufficiently well informed to make the decision without notification to a parent, (ii) that notification would not be in the best interest of the minor, or (iii) that notification may lead to physical, sexual, or emotional abuse of the minor.

    - The Texas statute is a parental *notice* statute, not a parental consent statute. It does not prevent the minor from having an abortion or require the consent of a parent. The law requires notice to a parent absent one of the exceptions.

    - More than 40 States have laws requiring parental consent or notice when a minor woman seeks an abortion.

- Justice Owen has interpreted the exceptions in the Texas parental notice statute fairly and neutrally in accord with United States Supreme Court precedent. She has expressly relied on U.S. Supreme Court cases addressing similar laws to interpret the statutory exceptions.

    - The cases of 12 girls seeking an exception to the parental notice requirement have reached the Texas Supreme Court in 14 separate cases. (The cases of two girls reached the Supreme Court on more than one occasion after remands to the lower court.)

        - Under Texas law, the only parental notice cases that reach the Texas Supreme Court are those in which *both* lower courts (the trial court and the intermediate appeals court) have denied the claimed exception and thus required notice to a parent.

- Justice Owen agreed with the lower courts and voted to require parental notice in 10 of the 14 cases. She voted to reverse the lower court and grant the exception outright in 2 cases and voted to remand for further trial court proceedings in 2 cases. Her decisions therefore have allowed exceptions to the parental notice requirement *more readily* than the lower-court judges in these cases.
- Justice Owen was in the majority of the Texas Supreme Court in 11 of these 14 cases. The full Court voted to require parental notice in 7 cases, to grant the exception outright in 3 cases, and to remand in 4 cases.

- Florence Shapiro, the chief author of the Senate bill that led to the Texas Parental Notification Act, wrote to the U.S. Senate that "Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the governing U.S. Supreme Court precedent upon which the language of the statute was based, to determine what the Legislature intended the Act to do." She concluded that "Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench – an experienced jurist who follows the law and uses common sense."

ALLEGATION: Justice Owen was accused by her colleague, Justice Alberto Gonzales, of engaging in an "unconscionable act of judicial activism" in one parental notice case.

- The allegation is inaccurate, as Justice Owen explained at her hearing. Justice Gonzales' concurring opinion explained that it would be an unconscionable act of judicial activism for any judge to bend the statute to advance his or her own personal views even though "the ramifications of such a law and the results of the Court's decision here may be personally troubling to me as a parent." Justice Gonzales *expressly* stated that "*every member of this Court* agrees that the duty of a judge is to follow the law as written by the Legislature."

- Justice Gonzales' concurring opinion never cited Justice Owen's dissenting opinion. It did expressly refer twice, however, to the separate dissenting opinion of Justice Hecht. (Justice Owen did not join Justice Hecht's separate dissent).

    - As Justice Gonzales' opinion explained, Justice Hecht's dissenting opinion had claimed that "the Court's decisions [were] motivated by personal ideology." Justice Gonzales responded that this suggestion was "simply wrong." Justice Gonzales stated: "Justice Hecht charges that our decision demonstrates the Court's determination to construe the Parental Notification Act as the Court believes the Act should be construed and not as the Legislature intended. I respectfully disagree. This decision demonstrates the Court's determination to see to it that we discharge our responsibilities as judges, and that personal ideology is subordinated to the public will that is reflected in the words of the Parental Notification Act, including the provisions allowing a judicial bypass."

- Justice Gonzales, who is now the Attorney General of the United States and previously served as Counsel to the President, has made clear his strong support for Justice Owen's confirmation. His 2002 op-ed in the *Dallas Morning News* stated emphatically that

Justice Owen is "extraordinarily well qualified," is "an outstanding jurist," and will perform "superbly as a federal appeals court judge." He noted that "[t]he fact that Justice Owen and I disagreed in some cases is unremarkable" and that "cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous."

ALLEGATION: Justice Owen has favored corporations over consumers.

- Justice Owen has interpreted the law as a judge fairly and neutrally. She is supported by three former Democrat Justices who served with her on the Texas Supreme Court and by 15 past Presidents of the State Bar of Texas. She received a *unanimous* "well-qualified" rating from the American Bar Association, the highest possible rating.

- Justice Owen has joined or authored a number of opinions that advanced the interests of consumers. To take only a few examples, she has supported the right of medical malpractice victims to recover from physicians who injured them, upheld the right of policyholders to recover from insurance companies, held that manufacturers had a legal duty to make a product child resistant, and upheld a $5 million punitive damages verdict in a construction accident case. She has decided cases regardless of the parties to the case.

ALLEGATION: Justice Owen received campaign contributions from Enron and ruled on cases involving that corporation.

- Article 5 of the Texas Constitution provides that candidates for the state judiciary run in contested elections, and Canon 4D(1) of the Texas Code of Judicial Conduct provides that the candidates may solicit and accept campaign funds.

    - Justice Owen has long advocated reform and a system of appointed rather than elected state judges.

    - Some notable Fifth Circuit judges appointed by President Clinton were state judges who had run and been elected in contested elections – Judge Benavides and Judge Dennis, for example.

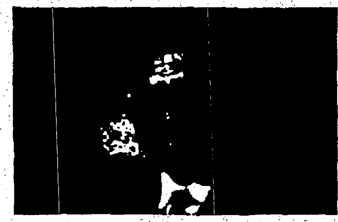
- In the 1994 election cycle, Justice Owen's campaign committee received approximately $1.2 million in contributions from more than 3,000 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed *less than* 1% of the total contributions to her committee. In the 2000 election cycle, her campaign committee received no contributions from Enron affiliates or employees.

- Judicial recusal is neither necessary nor appropriate in cases involving parties or counsel who contributed to that judge's campaign committee. Otherwise, parties could game the system by contributing to judges they did not like and thereby triggering future recusals.

- The decisions of the Texas Supreme Court since Justice Owen took her seat in proceedings involving Enron have been ordinary. Of the 14 proceedings in which Enron was a party, Justice Owen's vote can be characterized as favorable to Enron in six of the cases and adverse in five cases. With respect to the three remaining cases, one case cannot be characterized either way, one was dismissed by agreement of the parties, and in one she did not participate.

From my experience, I know she is a jurist of integrity

ALBERTO GONZALES



Both the president and the Senate have constitutionally assigned roles in the appointment of federal judges. President Bush has fulfilled his responsibility by submitting highly qualified nominees who will be common-sense federal judges, such as Priscilla Owen, my former colleague on the Texas Supreme Court who has been nominated to the 5th U.S. Circuit Court of Appeals.

Justice Owen will receive her Senate Judiciary Committee hearing on Thursday, which regrettably is more than 14 months after the president submitted her nomination to the Senate. Although the Senate has made progress in confirming federal trial court judges, it has failed to act promptly on the president's appeals court nominees, as illustrated by its delay in considering Justice Owen's nomination. Indeed, 23 of the president's 32 appeals court nominees still haven't received Senate votes, and 11 of the president's appeals court nominees, including Justice Owen, have been forced to wait more than a year just for hearings.

As a result of those delays, our courts of appeals are nearly 20 percent vacant, and many of the vacancies, including the 5th Circuit vacancy in Texas, have been classified as emergencies by the Judicial Conference of the United States. Chief Justice William Rehnquist recently labeled the situation "alarming" and echoed Mr. Bush's call for the Senate to grant prompt hearings and up-or-down votes for all judicial nominees.

Now that she finally is receiving her hearing, Justice Owen should be promptly confirmed by the Senate. She possesses exceptional integrity, character and intellect; extensive experience as a judge and lawyer in private practice; and the strong support of both senators from Texas. She has served with distinction on the Texas Supreme Court since 1995 (where I served with her).

Texas holds elections for judges: Priscilla Owen was re-elected in 2000 by an overwhelming majority, and every major newspaper in Texas endorsed her. Before becoming a judge, Justice Owen practiced law at a leading firm in Texas for 17 years. Her academic credentials are impeccable, having graduated with honors from Baylor Law School. She received the highest grade on the Texas Bar Exam. The American Bar Association unanimously rated her "well qualified," its highest possible rating.

Justice Owen also has used her talents to benefit others. She served as the Texas Supreme Court liaison to statewide committees regarding legal services to the poor and pro bono legal services. She worked on a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars in additional funds for providers of legal services to the poor. She helped organize a group that seeks to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As someone who had the privilege of serving with Priscilla Owen on the Texas Supreme Court, I can say without hesitation that she is extraordinarily well qualified to serve as a judge on the federal appeals court. Some have questioned Justice Owen's qualifications because she and I disagreed at times on the interpretation of a new Texas parental notification statute in 2000. As all judges know, cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous.

The fact that Justice Owen and I disagreed in some cases is unremarkable. My experience serving with Justice Owen squares with the combined judgment of the president, Sen. Phil Gramm, Sen. Kay Bailey Hutchison, the American Bar Association and many others: She is an outstanding jurist and will perform superbly as a federal appeals court judge.

The Senate should confirm Justice Owen promptly and then move quickly to schedule hearings and votes for all of the president's other long-pending nominees.

Alberto R. Gonzales is counsel to the president.

THE DALLAS MORNING NEWS, February 10, 2002

DallasNews.com

The Dallas Morning News

February 10, 2002, Sunday SECOND EDITION

SECTION: EDITORIALS; Pg. 2J; EDITORIALS

LENGTH: 336 words

HEADLINE: Stop the Payback;
Senate needs to move on judicial nominees

BODY:
Same song, different verse.

Senate Republicans confirmed only 14 of President Bill Clinton's 34 appellate judge nominees in his last Congress. Now, with Democrats controlling the Senate, they have confirmed only six of President Bush's remaining 29 appellate judge nominees. (Nine appointees withdrew.) With an election year upon us, some believe Democratic feet will drag even slower.

What a shame. For both parties.

Politics always has surrounded presidential nominees. But the Senate seems to have increasingly moved away from the constitutional "advise and consent" role to outright power plays, especially with judicial nominees. If a court appointee doesn't fit one party's philosophy, then the traps come out. That's true for Republicans as well as Democrats.

One trap being laid now is for **Priscilla Owen,** a Texas Supreme Court justice whom Mr. Bush nominated for the Fifth Circuit Court of Appeals last year. Opponents raise questions about Justice Owen because she accepted a 1994 campaign contribution from Enron, today's leper colony of donors. Two years later, she authored a court opinion on an arcane tax matter that directly benefited Enron.

But here's the other part of the equation. Every Texas Supreme Court justice agreed with her about the constitutionality of the law. The Texas House and Senate also passed the measure with only one dissenting vote. The position she took was in concert with her colleagues and the Legislature.

Besides, Justice Owen's lifelong record is one of accomplishment and integrity. She is one of the few judicial nominees to receive a unanimous "well qualified" rating from the American Bar Association.

If the Senate wants to have a debate about Ms. Owen's conservative philosophy, then say so. But even there, a president deserves the edge in getting his judges appointed.

The gamesmanship could go on forever. But enough with the traps. The Senate needs to move speedily in approving the president's judicial nominees. Stop the payback.

The Dallas Morning News

14 A Thursday, July 11, 2002

EDITORIALS

Justices Denied

Attacks on Judge Owen are unwarranted

There's a great saying about how everyone is entitled to one's own opinion, but not to one's own facts. Those intent on undermining President Bush's nominees to the federal judiciary need to remember that. In this free country, they are entitled to voice their concerns. And if they do so in a mature and constructive way, the nomination process and the country will be better off for it. Unfortunately, these days, that rarely happens.

It is not so surprising that the Senate confirmation process has, in the last two decades, gotten so destructive, hyper-partisan and downright nasty. It is terribly disconcerting.

Some say this whole trend started back in 1986 when Democrats savaged Robert Bork, President Reagan's nominee to the Supreme Court. Soon after, the word "Borking" made its way into the political lexicon. The shorthand definition: to do personal damage to the other guy's nominee for political gain. Both parties do it. Slander passing for political dissent.

It has to end, and now seems a good time to do it. After all, we have a popular chief executive halfway through his first four-year term and still the Democratic Senate continues to play childish games and hold up consideration of many of President Bush's nominees to the federal bench. They won't even give many a hearing, but their stalling tactics have served to give the left just enough time to devise the vile and shameful smear campaigns.

The latest target is Texas' Supreme Court Justice Priscilla Owen. A nominee to the 5th Circuit Court of Appeals, Ms. Owen is a well-liked and highly respected jurist. Her legal colleagues, in both parties, call her fair, reasonable and "smart as a whip."

A coalition of liberal groups reportedly planning a caravan to Washington say she is a judicial activist who is — in their words — anti-consumer, pro-business and hostile to civil rights. If any of that were true, one suspects Texans might have caught wind of it during Ms. Owen's eight years on the Texas Supreme Court. Those who know her record best say she is being unfairly subjected to partisan mudslinging and misinformation

A typical example of distortion: Critics claim her opinion as a state high court justice in favor of Enron showed bias because of a campaign contribution from the Houston company. In truth, the ruling involved a technicality and the entire Texas Supreme Court concurred. The contribution had been made years before when she was a district judge.

For all this abuse, Ms. Owen has not even been given the courtesy of having a hearing date set. That is unacceptable. She should get a hearing at once. And her critics should hold their tongues until the president's nominee gets a chance to be heard.

The Dallas Morning News

July 25, 2002, 18A

Owen Nomination; Critics Are Distorting Texan's Record

After hearing U.S. Court of Appeals candidate Priscilla Owen vilified in recent weeks - called everything from racist to nti-abortion to (gasp!) pro-business - the members of the Senate Judiciary Committee got the chance Tuesday to see for themselves what all the fuss is about. And, after a year in the deep freeze, the 47-year-old Texas Supreme Court justice finally got he chance to defend herself against liberal critics who have distorted her record and character in a bare-knuckled attempt to keepher off the 5th Circuit Court of Appeals.

One of the biggest distortions is that Justice Owen is a "judicial activist" intent on bending and twisting statutes to fit a rigid political agenda. That is the view of Sen. Richard Durbin, a Democrat from Illinois, who tore into Justice Owen for what he said was a tendency to "expand and embellish" in her written opinions. Democratic Sen. Dianne Feinstein of California was more polite but just as direct when she asked Justice Owen point-blank if she was, in fact, a "judicial activist." Justice Owen's response suggests that the Baylor Law School graduate is absolutely clear on what position she is applying for. She has no desire to legislate from the bench, she told Sen. Feinstein. If confirmed, she said, she would do only what the job calls for: interpret the law as written.

Justice Owen can be trusted to do exactly that, say those in Texas legal circles who know her best. Her supporters include Republicans and Democrats alike, and their vote of confidence should count for something - especially when weighed against the smear campaign engaged by the lobbies of the left.

As for Justice Owen's personal views on abortion, or on any issue, they remain totally irrelevant. By all accounts, she has spent the last eight years on the Texas high court doing precisely what she this week promised the Judiciary Committee she would continue to do at the federal level.

Those who oppose a judicial nominee have every right to challenge the nominee. But they do not have the right to - in legal terms - "assume facts not in evidence." For all their political games, grandstanding and name-calling, the assembled critics of Priscilla Owen have presented nothing to discredit her.

The committee should do its best to rectify this situation by scheduling a vote without further delay and approving Justice Owen's nomination. ------------------------

The Washington Post

AN INDEPENDENT NEWSPAPER

The Owen Nomination

THE NOMINATION of Priscilla Owen to the 5th Circuit Court of Appeals creates understandable anxiety among many liberal activists and senators. The Texas Supreme Court justice, who had a hearing yesterday before the Senate Judiciary Committee, is part of the right flank of the conservative court on which she serves. Her opinions have a certain ideological consistency that might cause some senators to vote against her on those grounds. But our own sense is that the case against her is not strong enough to warrant her rejection by the Senate. Justice Owen's nomination may be a close call, but she should be confirmed.

Justice Owen is indisputably well qualified, having served on a state supreme court for seven years and, prior to her election, having had a well-regarded law practice. So rather than attacking her qualifications, opponents have sought to portray her as a conservative judicial activist—that is, to accuse her of substituting her own views for those of policymakers and legislators. In support of this charge, they cite cases in which other Texas justices, including then-Justice Alberto Gonzales—now President Bush's White House Counsel—appear to suggest as much. But the cases they cite, by and large, posed legitimately difficult questions. While some of Justice Owen's opinions—particularly on matters related to abortion—seem rather aggressive, none seems to us beyond the range of reasonable judicial disagreement. And Mr. Gonzales, whatever disagreements they might have had, supports her nomination enthusiastically. Liberals will no doubt disagree with some opinions she would write on the 5th Circuit, but this is not the standard by which a president's lower-court nominees should be judged.

Nor is it reasonable to reject her because of campaign contributions she accepted, including those from people associated with Enron Corp. Texas has a particularly ugly system of judicial elections that taints all who participate in it. State rules permit judges to sit on cases in which parties or lawyers have also been donors—as Justice Owen did with Enron. Judicial elections are a bad idea, and letting judges hear cases from people who have given them money is wrong. But Justice Owen didn't write the rules and has supported a more reasonable system.

Justice Owen was one of President Bush's initial crop of 11 appeals court nominees, sent to the Senate in May of last year. Of these, only three have been confirmed so far, and six have not even had the courtesy of a hearing. The fact that President Clinton's nominees were subjected to similar mistreatment does not excuse it. In Justice Owen's case, the long wait has produced no great surprise. She is still a conservative. And that is still not a good reason to vote her down.

KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510-4304

March 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am dismayed to see the Wall Street Journal report today that some members of the Senate may "target" the nomination of Justice Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. I urge that the Committee on the Judiciary take swift and positive action on her nomination, particularly in light of the fact that Judge Priscilla Owen was among the group of original 11 federal judicial nominees announced by President Bush on May 9, 2001.

Justice Owen's stellar academic achievements and professional experience are remarkable. She earned a cum laude bachelor of arts degree from Baylor University and graduated cum laude from Baylor Law School in 1977. Thereafter, she earned the highest score on the Texas Bar Exam. Prior to her election to the Supreme Court of Texas in 1994, she was a partner in the Texas law firm of Andrews & Kurth LLP where she practiced commercial litigation for seventeen years.

Justice Owen has delivered exemplary service on the Texas Supreme Court, as affirmed by her receiving positive endorsements from every major newspaper in Texas during her successful re-election bid in 2000. Justice Owen enjoys bipartisan support and, in connection with her nomination, the American Bar Association Standing Committee on the Federal Judiciary has *unanimously* voted Justice Owen "Well Qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

I thank you and look forward to continuing to work with you and the other members of the Committee to ensure that Justice Owen is carefully and efficiently considered for appointment to the federal bench.

Sincerely,

Kay

Kay Bailey Hutchison

I hope you will give her a fair hearing soon

http://hutchison.senate.gov

John L. Hill
JP Morgan Chase Tower
600 Travis Street, Suite 3400
Houston, Texas 77002
(713) 226-1230

July 19, 2002

Via Facsimile (202) 224-9516
and First Class Mail

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D. C. 20510

Dear Chairman:

President Bush honored impeccable integrity, character, and scholarship when he nominated to the U.S. Court of Appeals for the Fifth Circuit a leading voice for reform in the Texas judiciary: Priscilla Owen.

I came to know Justice Owen several years ago during her service on the Texas Supreme Court, where I had previously served as Chief Justice. Then and now, Justice Owen has distinguished herself as a forceful advocate for reforming Texas's system for selecting judges. Under the state Constitution, for more than 125 years, Texas has selected its judges through contested elections, and the law therefore permits judicial candidates to receive campaign contributions. The system has positive aspects, but one of the downsides is that it invites speculation about whether judges should preside in cases where their contributors appear as attorneys or parties. That's why Justice Owen tirelessly has fought to minimize the influence of campaign contributions in judicial elections.

Reflecting her early commitment to the integrity of the courts, Justice Owen signed a judicial reform pledge during her first campaign in 1994. She has championed several proposed constitutional amendments, including an option for judges to run in non-partisan retention elections. She has written to members of the bench and bar, urging them to back reform. She has argued that the judiciary should be above the influence of partisan politics. And in a unique combination of symbolism and substance, Justice Owen *returned* over a third of her campaign contributions after not drawing a Democrat or Republican opponent during her 2000 re-election campaign.

Justice Owen and I would be the first to admit that the Texas judicial-selection system is in need of reform. But some special interest groups confuse flaws in our system with flaws in our judges. These groups insist on denouncing individual members of the judiciary, when reform of the laws they dislike can only come from amending the Texas Constitution, which Justice Owen strongly supports.

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 make no effort to assess whether her decisions are legally sound, and instead are content to fall back on the canard of an "appearance of impropriety." Nor have they so much as acknowledged Justice Owen's unswerving leadership in seeking reform—reforms of which they presumably approve. The groups lack credibility when they attack Justice Owen for participating in a system that has been in place longer than a century, is mandated by the Texas Constitution, and is not within her ability to change by herself. I know Texas politics and can clearly say that these assaults on Justice Owen's record are false, misleading, and deliberate distortions.

After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. I echo the American Bar Association's *unanimous* conclusion that she is "well qualified" for the federal bench—the highest rating possible. United States Senators from both sides of the aisle have called the ABA's rating the "gold standard" of a nominee's fitness for the federal bench, and I agree with them. I know personally just how impeccable Justice Owen's credentials are.

After graduating in 1977 from Baylor Law School with honors at the top of her class, Justice Owen earned the highest score on the Texas bar exam. Her academic excellence foreshadowed the exceptional career to follow. Elected twice by the people of Texas, Justice Owen has served with distinction on the Texas Supreme Court for more than seven years. In 2000, every major Texas newspaper endorsed Justice Owen during her successful re-election bid.

President Bush and both Senators from Texas strongly support Justice Owen. I join them and many, many others – of all political stripes – in calling on the U.S. Senate to give this intelligent, ethical, and gifted woman a fair hearing and swift Senate confirmation.

Very truly yours,

John L. Hill

John L. Hill

JLH:br

cc: *Via Facsimile (202) 228-1698*
and First Class Mail
The Honorable Orrin Hatch
United States Senate
152 Dirksen, Senate Office Building
Washington, D. C. 20510

JACK HIGHTOWER

(b)(6)

August 20, 2002

Via Facsimile 202-228-3954

The Honorable Dianna Feinstein
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

It was my privilege to serve as a member of the Supreme Court of Texas with Justice Priscilla Owen for two years prior to my retirement from the bench January 1, 1996. I had not known her personally prior to that time. I knew that she had graduated from my alma mater with honor and was a valued member of the Andrews & Kurth law firm in Houston.

When Justice Owen joined the court she impressed me as being a very quick study because although she had no previous judicial experience she seemed to be able to quickly grasp the issues and frame them into judicial questions with great clarity.

In my opinion she was unbiased and wanted to find the core legal issue in each case.

When she joined the court I knew, of course, that Priscilla was a Republican. She ran and was elected on the Republican ticket. I am convinced that he political philosophy is honestly Republican. That is as it should be. I am a Democrat and my political philosophy is Democratic, but I tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same.

I am also of the opinion that the people are not well served by the partisan election of judges. I have not always been of this opinion, but after two statewide elections for the court, and after raising and spending millions of dollars, I believe that there must be a better way.

Yours truly,

Jack Hightower

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July 19, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Via Facsimile at 202-224-9516 and U.S. Mail

Dear Mr. Chairman:

Last Sunday, the Austin American-Statesman printed an article regarding Justice Priscilla Owen's nomination to the Fifth Circuit Court of Appeals (see attached). I found the article to be inaccurate, one-sided and unfair. I write to encourage you and the members of the Judiciary Committee to read the article with caution.

The case referenced in the article is *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998). A copy of the opinion is attached. The litigation arose out of an automobile accident that occurred in Dallas County, Texas in April, 1993. Willie Searcy was riding in a Ford pickup being driven by his step-father, Kenneth Miles, when the pickup collided head-on with another vehicle. Willie was severely injured. The pickup in which Willie was riding had been purchased from a Dallas Ford dealer.

Willie's mother and step-father sued Ford Motor Co. and the Ford dealer, alleging that a defective seat-belt mechanism caused Willie's injuries. The lawsuit was filed in Rusk County, Texas about a year after the accident. It is undisputed that Rusk County had *no relationship* to the accident or the pickup. The plaintiffs asserted that venue was proper in Rusk County because there were two Ford dealerships in the county and the plaintiffs alleged those dealerships were Ford's "agents" for purposes of the venue statute. Ford asserted that venue was not proper in Rusk County. Ford sought to move the lawsuit to Dallas County because the accident occurred in Dallas County, the pickup was purchased and serviced in Dallas County, and Ford's regional headquarters was located in Dallas County. The trial court overruled Ford's motion to transfer venue.

A trial on the merits resulted in a sizeable judgment in favor of the plaintiffs ($30 million in actual damages and $10 million in punitive damages). Both sides appealed. The court of appeals affirmed in part and reversed in part. *See Miles v. Ford Motor Co.*, 922 S.W.2d 572 (Tex. App.—Texarkana 1996), *reversed* 967 S.W.2d 377 (Tex. 1998). A copy of the court of appeals' opinion is attached. It is important to note that the first substantive issue addressed by the court of appeals was

Ford's assertion that the trial court erred in refusing to transfer the case to Dallas County. The court of appeals affirmed the trial court's refusal to transfer the case and affirmed the actual damages awarded by the judgment, but reversed the trial court's finding of gross negligence and malice as a basis for awarding punitive damages.

Ford then appealed to the Supreme Court of Texas. As you can see from the attached docket sheet, Ford filed its "application for writ of error" with the Texarkana Court of Appeals on July 22, 1996. The court of appeals forwarded the application for writ of error and the appellate record to the Supreme Court of Texas, where it was received on September 5, 1996. Thus, the papers necessary for an appeal to the Supreme Court of Texas actually reached the Court on September 5, 1996.

The Supreme Court of Texas, in an opinion authored by Justice Priscilla Owen and handed down on March 19, 1998, reversed the court of appeals' judgment on the ground that venue was not proper in Rusk County. Reversal was required by Texas law, which mandates a reversal of any case tried in an improper county. I concurred in the Court's opinion and judgment.

With this background, let me turn to the Austin American-Statesman article. There are several misstatements which should be pointed out. First, the article states that the case "sat undecided" in the Supreme Court of Texas for "more than two years." That is not true. The record and application for writ of error were received by the Supreme Court of Texas on September 5, 1996, and an opinion was handed down on March 19, 1998, about a year and a half later. While a year and a half is still too long, it does not give the American Statesman license to distort the facts.

Second, I take exception to the article's reliance on information gained from a former Supreme Court of Texas briefing attorney. In fact, I was disappointed to read the comments attributed to the former briefing attorney, Ms. Hays, regarding the internal operations of the court and conversations among staff about a case, given that these matters are strictly confidential. As Ms. Hays knows, there are *numerous* reasons why it may take a substantial amount of time to render a decision in a particular case. For example, once a proposed majority opinion garners five votes, those justices who are concurring or dissenting are given additional time to write their opinions. Thus, in my opinion, it was inappropriate for Ms. Hays to lay all the blame for the delay at the feet of Justice Owen. Finally, at the very least, the article should have disclosed that Ms. Hays is not just "a Dallas attorney," but is the chairperson of the Dallas County Democratic Party.

Third, the delay in the ultimate resolution of the lawsuit, at least in part, was attributable to the plaintiffs and their attorneys. The plaintiffs' attorneys made a strategic decision to pursue the lawsuit in a county that had no relationship to the case. That decision, consciously made by plaintiff's attorneys, resulted in a reversal by the Supreme Court of Texas. The American-Statesman's article should have pointed out that plaintiffs often shop for a favorable forum, knowing that they risk reversal if they guess wrong about the appropriateness of the chosen forum.

Fourth, according to the article, the court decided the case on "a question that was not among the issues the Supreme Court had agreed to hear when it accepted the case," implying that the court decided the case on an issue not presented. At best, the statement is misleading. As any experienced practitioner before the court knows, once a case is before the court, the whole case is before the court. The court has the right and ability to decide the case on any ground preserved for review and presented in the briefs. In this case, the venue issue was vigorously contested in the trial court, in the court of appeals, and in the briefs before the Supreme Court. It was an issue that was preserved for review and properly presented in the briefs. It, therefore, was appropriate for the court to decide the case on that issue.

Finally, it troubles me that the Austin American-Statesman would accuse a jurist of causing an individual's death under these circumstances. Frankly, I find it both offensive and beyond the bounds of appropriate journalism. Priscilla Owen no more caused the death of Willie Searcy than his attorneys who chose the wrong court to bring the lawsuit. His death was caused by an unfortunate accident. A judge of a court should not allow the bad facts such as these, to result in bad law. Justice Owen did her job as a member of the Supreme Court of Texas by writing a well-reasoned opinion that I believe reached the correct result in a heart-wrenching case. By any objective standard, this should not disqualify her from serving on the Fifth Circuit.

In closing, I served with Justice Owen for a number of years on the Supreme Court of Texas. I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation.

Cordially,

Raul A. Gonzalez

Raul A. Gonzalez
Justice, Supreme Court of Texas (retired)

RAG/glp

cc: The Honorable Orrin Hatch (*Via Facsimile at 202-228-1698 and U.S. Mail)*

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July 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

As past presidents of the State Bar of Texas, we join in this letter to strongly recommend an affirmative vote by the Judiciary Committee and confirmation by the full Senate for Justice Priscilla Owen, nominee to the United States Court of Appeals for the Fifth Circuit.

Although we profess different party affiliations and span the spectrum of views of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate for appointment to the Fifth Circuit. Based on her superb integrity, competence and judicial temperament, Justice Owen earned her *Well Qualified* rating unanimously from the American Bar Association Standing Committee on the Federal Judiciary – the highest rating possible. A fair and bipartisan review of Justice Owen's qualifications by the Judiciary Committee certainly would reach the same conclusion.

Justice Owen's stellar academic achievements include graduating *cum laude* from both Baylor University and Baylor Law School, thereafter earning the highest score on the Texas Bar Exam in November 1977. Her career accomplishments are also remarkable. Prior to her election to the Supreme Court of Texas in 1994, for 17 years she practiced law specializing in commercial litigation in both the federal and state courts. Since January 1995, Justice Owen has delivered exemplary service on the Texas Supreme Court, as reflected by her receiving endorsements from every major newspaper in Texas during her successful re-election bid in 2000.

The status of our profession in Texas has been significantly enhanced by Justice Owen's advocacy of *pro bono* service and leadership for the membership of the State Bar of Texas. Justice Owen has served on committees regarding legal services to the poor and diligently worked with others to obtain legislation that provides substantial resources for those delivering legal services to the poor.

Austin | Dallas | San Francisco

Justice Owen also has been a long-time advocate for an updated and reformed system of judicial selection in Texas. Seeking to remove any perception of a threat to judicial impartiality, Justice Owen has encouraged the reform debate and suggested positive changes that would enhance and improve our state judicial branch of government.

While the Fifth Circuit has one of the highest per judge caseloads of any circuit in the country, there are presently two vacancies on the Fifth Circuit bench. Both vacancies have been declared "judicial emergencies" by the Administrative Office of the U. S. Courts. Justice Owen's service on the Fifth Circuit is critically important to the administration of justice.

Given her extraordinary legal skills and record of service in Texas, Justice Owen deserves prompt and favorable consideration by the Judiciary Committee. We thank you and look forward to Justice Owen's swift approval.

Sincerely,

Darrell E. Jordan

On behalf of former Presidents of the State Bar of Texas

Blake Tartt
James B. Sales
Hon. Tom B. Ramey, Jr.
Lonny D. Morrison
Charles R. Dunn
Richard Pena
Charles L. Smith
Jim D. Bowmer
Travis D. Shelton
M. Colleen McHugh
Lynne Liberato
Gibson Gayle, Jr.
David J. Beck
Cullen Smith

cc: The Honorable Orrin G. Hatch
Office of Legal Policy U. S. Justice Department

DE LEON, BOGGINS & ICENOGLE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
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CIVIL TRIAL LAW
TEXAS BOARD OF
LEGAL SPECIALIZATION

June 26, 2002

<u>Via Fax 202/224-9516</u>
<u>And Regular Mail</u>

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington D.C. 20510

RE: Nomination of the Honorable Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

This correspondence is sent to you in support of the nomination by President Bush of Texas Supreme Court Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

As the immediate past President of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

Additionally, Justice Owen played a major role in organizing a group known as Family Law 2000 which seeks to educate parents about the effect the dissolution of a marriage can have on their children. Family Law 2000 seeks to lessen the adversarial nature of legal proceedings surrounding marriage dissolution. The Fifth Circuit would be well served by having someone with a background in family law serving on the bench.

Justice Owen has also found time to involve herself in community service. Currently Justice Owen serves on the Board of Texas Hearing and Service Dogs. Justice Owen also teaches Sunday School at her Church, St. Barnabas Episcopal Mission in Austin, Texas. In addition to teaching Sunday School Justice Owen serves as head of the altar guild.

Justice Owen is recognized as a well rounded legal scholar. She is a member of the American Law Institute, the American Judicature Society, The American Bar Association, and a Fellow of the American and Houston Bar Foundations. Her stature as a member of the Texas Supreme Court was recognized in 2000 when every major newspaper in Texas endorsed Justice Owen in her bid for re-election to the Texas Supreme Court.

It has been my privilege to have been personally acquainted with various members of the U.S. Court of Appeals for the Fifth Circuit. The late Justice Jerry Williams was my administrative law professor in law school and later became a personal friend. Justice Reavley has been a friend over the years. Justice Johnson is also a friend. In my opinion, Justice Owen will bring to the Fifth Circuit the same intellectual ability and integrity that those gentlemen brought to the Court.

I earnestly solicit your favorable vote on the nomination of Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

Thank you for your attention to this correspondence.

Very truly yours,

Hector De Leon

cc:	The Honorable Orrin Hatch United States Senate 152 Dirksen Senate Office Building Washington, D.C. 20510	Via Fax 202/228-1698 and Regular Mail
cc:	The Honorable Alberto R. Gonzales	Via Fax 202-456-6279
cc:	Viet D Dinh	Via Fax 202-514-2424

SENATOR FLORENCE SHAPIRO
DISTRICT 8

COMMITTEES:
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Education
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The State of Texas

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July 15, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy,

I am writing to express, in the strongest possible terms, my unequivocal support for Justice Priscilla Owen's nomination to the U.S. Court of Appeals for the Fifth Circuit.

It is difficult to overstate Justice Owen's extraordinary academic and professional qualifications, as the American Bar Association recognized when it honored her with its highest possible rating: "unanimous well-qualified". I have known Justice Owen for several years and have always been impressed with her extraordinary intelligence and integrity. Her legal career has been marked by accomplishment. Not only has she worked to improve access to legal services for the poor and fought to increase the funding of such programs, she has also helped organize a group known as Family Law 2000, which seeks to educate parents about the effects of dissolving a marriage on children and to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As a Senator in the Texas Legislature, the manner in which the Texas courts review and interpret our laws is extremely important to me. Justice Owen's opinions consistently demonstrate that she faithfully interprets the law as it is written, and as the Legislature intended, not based on her subjective idea of what the law should be. I am shocked and saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth.

Her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. I was the chief author of the Senate bill, and followed very closely the Texas Supreme Court's opinions regarding the statute. Although some might try to hold up the Texas Parental Notification Act as a litmus test on abortion, they simply cannot make the case. The Parental Notification Act 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. Therefore, when the Texas Supreme Court heard the Jane Doe cases, it was merely interpreting a newly-enacted procedural statute -- passed with overwhelming bipartisan support -- that recognized the legitimate role of parents in such weighty decisions, not the underlying right to an abortion. I appreciated that Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the governing U.S. Supreme Court precedent upon which the language of the statute was based, to determine what the Legislature intended the Act to do.

I, along with many of my colleagues -- Democrats and Republicans alike -- filed a bipartisan amicus curiae brief with the Texas Supreme Court explaining that the language of the Act was crafted in order to promote, except in very limited circumstances, parental involvement. We recognized that there should be exceptions under certain conditions, and allowed a girl three opportunities to demonstrate to a court that she fell within those exceptions. It is important to note that the Texas Supreme Court does not even have an opportunity to hear a case under the Act unless both a trial court and an intermediate appellate court have both already considered the evidence and ruled that a girl does not satisfy the exceptions and must notify one parent prior to having an abortion.

Prior to the passage of the Act, a child could go to a doctor and have an extremely invasive procedure without even notifying one of her parents. At the same time, school nurses were not even permitted to give aspirin to a child without parental consent. Like legislators in dozens of states across America, we realized that something needed to be done to respect the role of parents -- that at least one parent should be involved in a major medical decision impacting their minor daughter. Because this was not an "abortion" bill but a "parental involvement" bill supported by lawmakers on both sides of the abortion debate, we were able to pass a bipartisan law that promotes the relationship between parents and their minor daughters and is exceedingly popular with the people of Texas.

Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench - an experienced jurist who follows the law and uses common sense. I strongly urge the Committee to reject the politics of personal destruction pushed by Justice Owen's extremist critics and vote positively on her nomination. She merits immediate confirmation.

Very truly yours,

Florence Shapiro

Florence Shapiro

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

Republicans for Choice Press Release

For immediate release

July 23,2002 | **Contact:** Ann Stone 703 960 9882

"Not the right fight", Chairman of Republicans for Choice endorses the nomination of Priscilla Owen

Washington, D.C.- Today Ann E.W.Stone, National Chairman of Republicans for Choice PAC stepped forward to ask her colleagues in the pro-choice movement to cease their attacks on Priscilla Owen and let her nomination go forward.

"*This nomination is not the right fight*" said Stone, "*Owen has not shown herself to be a judicial activist dedicated to the overturn of Roe. The cases cited in news reports appear to have been taken out of context and in no instance represent an attempt to deny abortion rights. In fact they are about parental notification by one parent only. Further,her rulings were in line with the intent set out by the legislature.*"

" *From the extensive documentation I have read and the people I have consulted who know her well, as well as pro-choice activist lawyers whom I trust and who have gone over her record, I have no problem departing from many of my friends in the movement to support her.*" Stone added. "*The last time I parted company with them on a judicial nomination was over David Souter. We were right about that appointment...they were not.*"

" *I know my pro-choice colleagues are alarmed as am I at the attempts by those who oppose a woman's right to choose to chip away and use stealth tactics to damage this right. But there is no evidence that convinces me that this is one of those cases. I worry that if we in the pro-choice movement attack even those judicial nominees who are responsible and acclaimed jurists that we will appear like the 'boy who cried wolf' when the really bad nominees come forward. We need to pick our fights and this should not be one of them.*" Stone continued.

" *Judge Owen was endorsed by 15 previous Texas Bar Association Presidents and received the National Bar Association's highest rating. In looking at the complete record I can not see any reason to oppose her....*" concluded Stone. "*More of my reasons are set out in the letter that I sent to Senators Leahy and Hatch.*"

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LORI R.E. PLOEGER

(b)(6)

JUNE 27, 2002

VIA FACSIMILE AND U.S. MAIL

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Re: Confirmation of the Honorable Priscilla R. Owen

Dear Mr. Chairman:

I am writing to express my unequivocal support for the nomination of the Honorable Priscilla R. Owen, Associate Justice of the Supreme Court of Texas, as a Judge for the United States Court of Appeals for the Fifth Circuit. It was my privilege to serve as Justice Owen's briefing attorney from January to August 1995.

As Justice Owen's briefing attorney, I had the opportunity to observe Justice Owen carrying out her responsibilities on a daily basis. During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly. Justice Owen works indefatigably, reading and analyzing the parties' briefs and the relevant legal authorities, often into the wee hours of the night. In addition to her impeccable work ethic, Justice Owen also brings to the bench a keen legal intellect, which is reflected in well-written opinions that are well-grounded in precedent.

Justice Owen is a role model for me and for other women attorneys in Texas. She attended law school in the mid-1970s, at a time when the ratio of women-to-men was still one in ten at best. She not only attended law school, she excelled, graduating third in her class and serving on the *Baylor Law Review*. Shortly thereafter, she again distinguished herself by obtaining the highest score on the Texas Bar Examination. Her stellar performance continued in her career as a practicing attorney. At age 30, she was made partner of a major Houston law firm when female partners were a rarity. During her 17 years at the firm, she earned the admiration, respect, and friendship of her colleagues. Now in her second term on the Texas Supreme Court, Justice Owen continues to demonstrate the outstanding qualities that have consistently distinguished her as a leader in the legal profession.

June 27, 2002
Page Two

I know that she will bring the same intelligence, diligence, and strength of character to her position as a Circuit Judge for the Fifth Circuit. I strongly urge you and the other members of the Senate Judiciary Committee to support her confirmation.

Sincerely,

Lori R.E. Ploeger

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

Priority: Normal
Topic:
Sent: 3/25/02
From: Emeritus, President
To: dick@durbin.senate.gov; info@kyl.senate.gov; russell_feingold@feingold.s...; sam_brownback@brownback.sen...; senator@biden.senate.gov; senator@feinstein.senate.gov; senator@kennedy.senate.gov; senator@mcconnell.senate.gov; senator@sessions.senate.gov; senator@thurmond.senate.gov; senator_hatch@hatch.senate.gov; senator_kohl@kohl.senate.gov; senator_leahy@leahy.senate.gov
CC:

March 25, 2002

Dear Senators:

I write to support the nomination of the Honorable Priscilla Owen for the 5th U.S. Circuit Court of Appeals.

Justice Owen is well-known to me, both from her undergraduate and Law School days at Baylor University, where I served for 20 years as President and Chancellor, as well as during the two year period from 1995-1997 when I served as Chair, Texas State Commission on Judicial Efficiency.

Justice Owen is a superlative individual in every way. She is extremely bright, she possesses great integrity and is equipped with the character or moral virtues necessary for the high office she holds as well as the high office for which she has been nominated.

During the work of the Commission I had frequent contact with Chief Justice Thomas Phillips and most of the Associate Justices. I found that Chief Justice Phillips and Justice Owen were most supportive of the Commission's recommendation that judges in the State of Texas should not be elected and, therefore, subject to the possible conflicts that are perceived to be present. We recommended to the State Legislature, and Justice Owen concurred, that judges be appointed to their first term and then would have to run for office after the first term in retentive nonpartisan elections. This appoint/elect/retain system would reduce campaign contributions dramatically.

Based on my knowledge of Justice Owen for the past 30 years I believe that you simply cannot make a more solid choice for the 5th U.S. Circuit Court of Appeals.

Respectfully yours,

Herbert H. Reynolds
President and Chancellor Emeritus
Baylor University
Waco, Texas 76798

I give my name and position but under University guidelines I speak for myself only.

Copies faxed to: Senator Charles Schumer, Senator Charles Grassley, Senator John Edwards, Senator Arlen Specter, Senator Maria Cantwell and Senator Mike DeWine

Mary Sean O'Reilly

The Conciliation Institute: Mediation and Arbitration
3000 Weslayan, Suite 110
Houston, Texas 77027-5753
Telephone: 713.621.6225 Telefax: 713.621.6204 Toll Free: 1.877.262.02211

August 14, 2002

Dear Senator Feinstein

As a devout and genetic Democrat since the age of twelve, and a participant in the Democratic Party for decades, I write to ask that you support the confirmation of Justice Priscilla Owen to the Fifth Circuit Court of Appeals.

I was a member of an order of Catholic Sisters, the Sisters of Saint Mary of Namur for sixteen years. I am still on the Financial Advisory Committee of our Sisters, and the Dominican Sisters of Texas. I work closely with the Sisters on domestic social justice issues and with our Sisters in Rwanda and Congo. I graduated from University of Houston School of Law in 1977, while in the Order, and worked with abused women and children as a Legal Service trial attorney in family law for six years before being appointed as an associate judge in the Tarrant County, Texas, family courts for seven years. I have subsequently served in various family courts in Texas, always as a Democrat.

From this perspective, I can credibly register my dismay at the attacks against Justice Priscilla Owen. Some news media and interest groups have portrayed her as cold and uncaring, out to help the powerful at the expense of the people. My experience with Justice Owen is the opposite. She is an extremely compassionate, caring woman, who time and again has used her influence on behalf of noble causes.

I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force, a working group dedicated to promoting equality for women involved in the Texas legal system. I had given written and oral testimony at the state-wide hearings in various Texas cities as the original Gender Bias Task Force was preparing the State's first comprehensive Gender Bias Report. Justice Owen was one of the three editors of the final Gender Neutral Handbook that is now available to all attorneys and judges in Texas.

Later, in the years 1996 through 1999, I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. Some of the main beneficiaries of this project were the children who are too often ensnared in the legal system. The committee was comprised of judges, lawyers and psychologist, working throughout the state, to review and implement systemic change in family law and civil procedure regulations. The goal of Family Law 2000 was to make the court system practical, more helpful and affordable for Texas families. We achieved some important goals, including changes in our rules of Civil Procedure, in part due to the tireless efforts and collaboration of Justice Owen with other members of the Supreme Court of Texas.

On another occasion, Justice Owen worked in support of the *Amicus Curie* brief that went to the United States Supreme Court in support of IOLTA funds being available for legal services to indigents in Texas. There have been at least two occasions where Justice Owen and I have had long and comprehensive discussions about the need for quality legal services for families that live in poverty, and I am convinced of her dedication to ensuring that the poor have access to the courts.

Political affiliations and preferences have never gotten in the way of my professional collaborations with Justice Owen. I am a life-time member of the NAACP and have served on the national board of NETWORK, a well-respected Catholic social justice lobby in Washington, D.C. from 1978 through 1984. I have contributed to Emily's List, the Southern Poverty Law Center, The Carter Center, Habitat for Humanity, Democratic US Senate Committees and several Democratic Presidential, House of Representative, State and County Democratic elections for many years, including the presidential campaign of Al Gore and (through Emily's List) to your Senate campaign. I am a pro-choice Democrat.

Notwithstanding our political and philosophic differences in some important areas, I consider Justice Owen to be a long-standing professional colleague of the highest caliber. In the almost eight years I have known Justice Owen, she has always been refined, approachable, even-tempered and intellectually honest. Although we are not close personal friends, we have shared stories of our families, women's issues and some of the challenges that face jurists. She has demonstrated her compassion toward women, families, and the poor. She has used her extremely high level of legal ability and skill for the betterment of her community. I trust Justice Priscilla Owen's sense of the role of the judiciary in the federal and state systems implicitly. I believe Justice Owen to be highly qualified for the federal bench and I know that she will act with great care and independence if given the opportunity to serve our Nation in this capacity. I urge you to reject the absurd attacks that have been made against her and vote to confirm Justice Owen.

Very sincerely,

Mary Sean O'Reilly

Mary Sean O'Reilly

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

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Victor E. Schwartz
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July 18, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: <u>Nomination of Texas Supreme Court Justice Priscilla Owen</u>

Dear Mr. Chairman:

Throughout the past three decades, many members of your Committee have been kind enough to ask my views about tort law. I have taught in law school, and practiced on behalf of plaintiffs in the 1970s. I currently practice in the defense firm of Shook, Hardy & Bacon, L.L.P. and represent the American Tort Reform Association. You have appreciated that when I share my views with you, I try my utmost to be objective. Because almost anyone's views on judges are likely to be seen as having bias, I have refrained from commenting on any judicial nominee.

I am now writing you about Texas Supreme Court Justice Priscilla Owen because she has been attacked as being unfair in the very area of my expertise, tort or liability law. Since 1976, I have been co-author of the most widely used torts textbook in the United States, *Prosser, Wade & Schwartz's Cases and Materials on Torts*. I have also served on the three principal American Law Institute Advisory Committees on the new *Restatement of Torts (Third)*. The study of tort law has been the love of my professional life.

Because of my academic and practice obligations, I have had a very deep interest in opinions of law in the field of torts. Naturally, I am familiar with state supreme court judges or justices who are thought to be "pro-plaintiff" or "pro-defendant." In that regard, when I heard about controversies surrounding Justice Owen, I was somewhat puzzled because I had not placed her in either group.

This past weekend, I reviewed most of her principal opinions in tort law. My review of Justice Owen's opinions indicates that any characterization of Justice Owen as "pro-plaintiff" or

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SHOOK, HARDY & BACON L.L.P.

"pro-defendant" is untrue. Those who have attacked her as being "pro-defendant" have engaged in selective review of her opinions, and have mischaracterized her fundamental approach to tort law.

Justice Owen's fundamental approach to tort law is to make it stable. On the one hand, she is not a judge who would be likely to jump to the front of a plaintiffs' lawyers petition to expand the scope of tort law. Furthermore, she would be unlikely to allow claims for brand-new types of damages, such as hedonic damages, or create cutting-edge liability claims (*e.g.*, allowing a lawsuit against a fast food chain, where there was no showing that an individual plaintiff's health was actually harmed by eating at that chain). On the other hand, she would not and has not arbitrarily thwarted the rights of plaintiffs under existing tort law.

Let me give you just a few examples. In *Merrell-Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), a decision for which she was roundly criticized by a group called "Texans for Public Justice," Justice Owen held that the evidence was legally insufficient to establish that a birth defect was caused by exposure to the drug Bendectin.® Bendectin® is the only drug that helps alleviate the severe symptoms of morning sickness. It is still approved by the U.S. Food and Drug Administration and regulatory agencies throughout the world. As Justice Owen recognized, the attempts by plaintiff's counsel to tie the birth defects of the plaintiff's child to Bendectin® in the *Havner* case were insufficient. The Supreme Court of the United States itself recognized, in a case involving that very drug, that judges should act as gatekeepers, and not permit juries to make judgments based on bad science. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

I am not surprised that the Association of Trial Lawyers of America (ATLA), the organized plaintiffs' bar, and those who have empathy with that group criticized Justice Owen for her decision. They also criticized the United States Supreme Court when it rendered the *Daubert* decision. ATLA and its sympathizers believe that judges should not act as gatekeepers; rather, they believe that juries should be permitted to weigh scientific evidence as they choose.

Here is the rather interesting point. In a case decided almost simultaneously with *Havner*, not mentioned by "Texans for Public Justice" or other groups criticizing Justice Owen, she would have allowed an adult to pursue a sexual abuse claim against an alleged abuser who purportedly did the wrongful acts when the plaintiff was a child. In the case *S. V. v. R. V.*, 933 S.W.2d 1 (Tex. 1996), expert testimony indicated that the plaintiff had "repressed memories" that arose when the plaintiff was an adult. The majority held that expert testimony was insufficient to warrant the application of the "discovery rule," which would have tolled the statute of limitations. It required "objectively verifiable" evidence of abuse to apply the discovery rule and toll the statute. Justice Owen noted, however, that such evidence was often unavailable, and the unavailability of the evidence is frequently due to acts done by the alleged abuser. She would have held that the repressed

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memory evidence was sufficient to toll the statute and allow the claim. I recommend that Members of this Committee read this case and note that Justice Owen wrote the sole dissenting opinion in the case.

In a later case, Justice Owen prevented another plaintiff from falling into a statute of limitations trap. A patient brought a malpractice case against a surgeon in his individual capacity. The patient later amended his complaint, and named the surgeon's professional association as a defendant. The association moved to dismiss the case because the statute of limitations had expired by the time the suit was brought against the association. Writing for the Texas Supreme Court, Justice Owen held that the cause of action brought against the surgeon in his individual capacity preserved the potential of the claim against the association. *See Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999).

Justice Owen's views about product liability law strike the same balance. For example, Justice Owen joined in a Supreme Court of Texas opinion that considered a question certified by a federal court as to whether a manufacturer of a product used by adults – a cigarette lighter – might have a duty, in some situations, to childproof the product. Justice Owen joined with the Court in holding that a manufacturer may have such an obligation. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999).

One finds the same sense of "balance" in Justice Owen's opinions in other areas of tort law. In a very interesting opinion, Justice Owen joined with the Texas Supreme Court to strip a defendant business of its defenses based on a plaintiff's fault when that defendant business had decided to opt out of the workers' compensation system. Justice Owen supported the sound public policy that would discourage businesses from opting out of workers' compensation and taking their chance on their vagaries of a tort lawsuit in the workplace. As you and Members of your Committee know, a fundamental reason why workers' compensation was adopted in the first place is so that a worker's fault does not preclude him or her from obtaining compensation for a workplace injury. *See Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000).

I wish to reiterate that I am not suggesting that Justice Owen is a plaintiffs' lawyer's "dream judge." She is not. For example, when the Texas Supreme Court addressed the issue of whether jurors should be told that if they find a plaintiff more than 50% responsible for his or her own injury, the plaintiff might lose, Justice Owen dissented from the majority. The majority found that such information was allowed to go to the jury. Justice Owen believed such action could cause jurors to look more at the effect of the 50% rule than the facts of the case. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998). While not everyone (including myself) would agree with Justice Owen's decision, it is anchored in logical judicial precedent and has a clear public policy basis. *See* Victor Schwartz, *Comparative Negligence*, §17-5(a) (3d Ed. 1994).

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My fundamental point is that in the area of tort law, Justice Owen is a moderate jurist; she is neither a trailblazer for plaintiffs nor a captive of corporate interests.

I would be pleased to answer any questions or inquiries by Members of your Committee, and I value your taking the time to read this statement.

Sincerely,

Victor E. Schwartz

cc: The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary

85555.1

THE WHITE HOUSE

WASHINGTON

April 5, 2002

Dear Chairman Leahy:

In our recent conversations, you suggested that the White House should examine whether contributions Justice Owen received for her campaigns for the Texas Supreme Court raise any legitimate issue with respect to her fitness to serve on the Fifth Circuit. We have done as you have suggested, and I see no basis to question Justice Owen's fitness to serve on the Fifth Circuit. The record reflects that she has at all times acted properly and in complete compliance with both the letter and the spirit of the rules relating to judicial campaign finance.

I am certain you will agree that it was entirely proper for Justice Owen's campaign to receive contributions. Article 5 of the Texas Constitution provides that candidates for the state judiciary run in contested elections, which are partisan under Texas election law, and Canon 4D(1) of the Texas Code of Judicial Conduct provides that the candidates may solicit and accept campaign funds. Like Senators, therefore, candidates for the state judiciary in Texas may receive contributions to finance their campaigns.

To be sure, Justice Owen and many others would prefer a system of appointed rather than elected state judges. In fact, Justice Owen has long advocated appointment of judges (coupled with retention elections). She has written to fellow Texas attorneys on the issue, committed to a new system in League of Women Voters publications, and appeared as a pro-reform witness before the Texas Legislature. She has explained even to partisan groups why judges should be selected on merit. But the people in some states, including Texas, have chosen a system of contested elections for judges. Elected state judges certainly are not barred from future appointment to the federal judiciary; on the contrary, some notable federal appellate judges whom President Clinton nominated and you supported were state judges who had run and been elected in contested elections -- Fortunato Benevides and James Dennis, for example, from the Fifth Circuit.

I am also certain that you would find nothing inappropriate about the sources from which Justice Owen's campaign received contributions. In her 1994 and 2000 elections, Justice Owen's campaign quite properly received contributions from a large number of entities and individuals, with no single contributor predominating. In the 1994 election cycle, her campaign received approximately $1.2 million in contributions from 3,084 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed less than 1% of the total contributions to her campaign. And Justice Owen's campaign, of course, received no corporate contributions from Enron or any Enron-affiliated corporation, as such corporate contributions are not permissible under Texas law. Notably, in the 1994 election, not only did Justice Owen comply with all campaign laws, she went beyond what the law required and voluntarily limited contributions when many other judicial candidates did not do so.

In the 2000 election cycle, Justice Owen's campaign received approximately $300,000 in contributions from 273 different contributors. In that cycle, her campaign received no contributions from Enron or its affiliates, from employees of Enron, or from Enron's political action committee. In addition, Justice Owen ultimately had no Democratic or Republican opponent in the 2000 election cycle, and she closed her campaign office and returned most of her unspent contributions, an act that I believe is unusual in Texas judicial history.

It was entirely proper for Justice Owen's campaign to receive campaign contributions, including the contributions from Enron employees. Indeed, *seven* of the nine current Texas Supreme Court Justices received Enron contributions, and several of them received more than Justice Owen's campaign received. As this record demonstrates, elected judges certainly did not act improperly in the past, before anyone knew about Enron's financial situation, by receiving contributions from employees of Enron – any more than it could be said that Members of Congress acted improperly in the past by receiving contributions from Enron.

If, as is evident from the foregoing discussion, there was nothing amiss with the fact that Justice Owen received donations or with the sources from which she received them, the only other possible area of concern with her conduct relating to campaign contributors would be her decisions from the bench. Texas Code of Judicial Conduct Canon 3(B)(1) provides that a judge "*shall* hear and decide matters assigned to the judges except those in which disqualification is required or recusal is appropriate." And it is well-established that judicial recusal is neither necessary nor appropriate in cases involving parties or counsel who contributed to that judge's campaign. *See Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 215 (5th Cir. 2001); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999), *rev'd on other grounds*, 41 S.W.3d 118 (Tex. 2001); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App. 1990). Indeed, in any state with elected judges, any other rule would be unworkable. The primary protections against inappropriate influence on judges from campaign contributions are disclosure of contributions and adherence to the tradition by which judges explain the reasons for their decisions. If the people of a state deem those protections insufficient, the people may choose a system of appointed judges rather than elected judges, as Justice Owen has advocated for Texas.

Surmising that the concerns you raised would likely focus on her sitting in cases in which Enron had an interest, we have undertaken a review of her decisions in such cases. We have reviewed Texas Supreme Court docket records and Enron's 1994-2000 SEC Form 10Ks to determine the cases in which Enron or affiliates of Enron were parties to proceedings before the Court since January 1995 (when Justice Owen took her seat). The decisions of the Texas Supreme Court since January 1995 in proceedings involving Enron have been ordinary and raise no questions whatsoever.

A judge's decisions are properly assessed by examining their legal reasoning, not by conducting any kind of numerical or statistical calculations. But even those who would attempt to draw conclusions based on such calculations would find nothing in connection with these Enron cases. To begin with, we are aware of no proceeding involving Enron in which Justice Owen cast the deciding vote. In six proceedings in which we know that Enron was a party, Justice Owen's vote can be characterized as favorable to Enron in two cases and adverse in two cases. With respect to the remaining two, one cannot be characterized either way, and she did not participate in the other case because it had been a matter at her law firm when she was a partner. Eight other matters came before the Court in which we know that Enron or an affiliate was a party, but the Court declined to hear them. In those matters, the Court's actions could be characterized as favorable to Enron in four cases, adverse in three cases, and one was dismissed by agreement of the parties. We will supply the Judiciary Committee copies of the cases on request.

There has been some media attention on one case involving Enron in which Justice Owen wrote the opinion for the Court. *See Enron Corp. v. Spring Creek Independent School District*, 922 S.W.2d 931 (Tex. 1996). The issue in that case concerned the constitutionality of an ad valorem tax statute that allowed market value of inventory to be set on one of two different dates. The Court held that the statute did not violate the state constitution -- and the decision was unanimous. I understand that two Democratic Justices who sat on the Court at that time (Justices Raul Gonzalez and Rose Spector) have written to you to explain the case, indicating that Justice Owen's participation in the case was entirely proper. Moreover, the lawyer who represented a party opposing Enron in this case (Robert Mott) recently was quoted as saying that criticism of Justice Owen for her role in this case is "nonsense." *Texas Lawyer* (April 1, 2002). In my judgment, this case raises no legitimate issue with respect to Justice Owen's confirmation.

Finally, I am informed that, if confirmed, Justice Owen will donate all of her unspent campaign contributions to qualifying tax-exempt charitable and educational institutions, as is contemplated under section 254.204(a)(5) of the Texas Election Code.

I trust that the foregoing will resolve all questions concerning the propriety of Justice Owen's activities in relation to financing her campaigns. As you know, I served with Justice Owen, and I am convinced from my work with her that she is a person of exceptional integrity, character, and intellect. Both Senators from Texas strongly support her nomination. The American Bar Association has *unanimously* rated Justice Owen "well qualified," and one factor in that rating process is the nominee's integrity.

Despite her superb qualifications and the "judicial emergency" in the Fifth Circuit declared by the Judicial Conference of the United States, Justice Owen has not received a hearing for nearly 11 months since her May 9, 2001, nomination. We respectfully request that the Committee afford this exceptional nominee a prompt hearing and vote.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

cc: The Honorable Orrin Hatch
The Honorable Phil Gramm
The Honorable Kay Bailey Hutchison

MCKEAGUE

JUDGE DAVID W. MCKEAGUE

NOMINEE TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Biographical Information

- Appointed to the U.S. District Court for the Western District of Michigan in 1992 after being confirmed by unanimous consent of the Senate.
- Rated "Well Qualified" by the ABA to sit on the U.S. Court of Appeals for the Sixth Circuit.
- Judge McKeague has been designated to sit on panels of the Sixth Circuit Court of Appeals on several occasions and has written almost twenty appellate opinions.
- Serves as an adjunct professor at Michigan State University, Detroit College of Law and the Thomas M. Cooley Law School.
- Judge McKeague is a life-long resident of the Lansing, Michigan community and would be the first appointee to the Sixth Circuit from the Lansing area.
- Judge McKeague was appointed by Chief Justice Rehnquist to serve on the Judicial Conference's Committee on Defender Services and is the chair of the Committee's funding subcommittee.
- Judge McKeague served six years in the United States Army Reserve.

Controversial Issues

- No real objections have been raised as to the qualifications of Judge McKeague who is a distinguished and experienced jurist.
- Opponents unreasonably seek to block the nominations of these judges because prior Congresses failed to confirm two of President Clinton's nominees. That grievance does not entitle them to block President Bush's Michigan nominees.
- In the past, both parties have left nominations pending at the end of presidents' terms. The effort to block President Bush's Michigan nominations from the outset of his term is extraordinary and threatens a complete breakdown of the confirmation process.

Judge David W. McKeague
Nominee to the U.S. Court of Appeals for the Sixth Circuit

- **Judge David McKeague is a highly regarded federal district court judge with over a decade of experience on the bench.**

  - ✓ Judge McKeague was appointed to the United States District Court for the Western District of Michigan in 1992 after being confirmed by unanimous consent of the Senate.

  - ✓ The American Bar Association has rated Judge McKeague "Well Qualified" to sit on the U.S. Court of Appeals for the Sixth Circuit.

  - ✓ As a district court judge, McKeague has been designated to sit on panels of the Sixth Circuit Court of Appeals on several occasions and has written almost twenty appellate opinions.

- **Judge McKeague has had a distinguished career as a practicing attorney and law professor in addition to his service on the federal bench.**

  - ✓ Judge McKeague serves as an adjunct professor at Michigan State University, Detroit College of Law and the Thomas M. Cooley Law School.

  - ✓ Prior to his appointment to the federal bench, Judge McKeague practiced law as a partner at the Lansing, Michigan law firm of Foster, Swift, Collins & Smith. He had a diverse practice, handling a variety of matters involving financial transactions and mergers, regulation of public utilities, commercial litigation, and bankruptcy.

  - ✓ Judge McKeague received his J.D. in 1971 and his bachelor's degree in Business Administration in 1968, both from the University of Michigan.

  - ✓ Judge McKeague belongs to the State Bar of Michigan and the District of Columbia Bar Association and is a founding Master and President of the American Inns of Court, Michigan State University, Detroit College of Law.

- **Judge McKeague is a life-long resident of the Lansing, Michigan community. He would be the first appointee to the Sixth Circuit from the Lansing or Mid-Michigan area.**

- **Judge McKeague is dedicated to improving the law and the administration of justice.**

  - ✓ Judge McKeague was appointed by Chief Justice Rehnquist to serve on the Judicial Conference's Committee on Defender Services and is the chair of the Committee's funding subcommittee.

- ✓ Judge McKeague was also appointed by Chief Justice Rehnquist to the District Judges Education Committee of the Federal Judicial Center, which Judge McKeague chairs.

- ✓ Judge McKeague has led his district to a national reputation for innovation in technology. As Chairman of the Automation Committee of the Western District of Michigan, Judge McKeague instituted a pilot civil electronic filing program, which allows attorneys in all civil cases in his district to file case documents electronically. It is the first such program in Michigan, and only the seventh nationwide. He also serves as Chairman of the ADR Committee of the Western District of Michigan.

- ✓ Judge McKeague is a Fellow of the Michigan State Bar Foundation.

➢ **Judge McKeague has served his state and local community in many voluntary capacities.**

- ✓ Judge McKeague served six years in the United States Army Reserve.

- ✓ Judge McKeague served as a member of the National Board of Directors and as Regional Chairman of the University of Michigan Law School Fund.

- ✓ Judge McKeague has served in the community as a member of the boards of directors of Junior Achievement of Mid-Michigan, of Camp Highfields, and of Impression 5 Science Museum. He also sits on the advisory council of Michigan State University's Wharton Center for the Performing Arts.

Statements by Select Supporters of Judge McKeague

Chief Judge Robert Holmes Bell, U.S. District Court for the Western District of Michigan

"He's an excellent choice. He wants to raise the reputation of the 6th Circuit intellectually, and I think he will. He's not a doctrinaire judge. You can't say he's an arch-conservative or he's a liberal. He's reasonably pragmatic in his approach to applying the law. He lets the law and the facts take him where they take him." *GRAND RAPIDS PRESS, Nov. 9, 2001.*

Lori M. Silsbury, Dykema Gossett

"When Judge McKeague has been assigned to one of our client's cases, I am always confident that the client will receive a fair, considered review of the relevant facts and law. In my opinion, Judge McKeague does not decide cases based on political views or with a predisposition toward a plaintiff or a defendant. He meticulously works through the briefs and arguments . . . and is one of the best prepared Judges that I have had the privilege of appearing before. That dedication to the law is but one demonstration of his professionalism and commitment to deliver justice to all that appear before him." *Excerpt from letter to Chairman Hatch, Sept. 26, 2003.*

Webb A. Smith, Foster, Swift, Collins & Smith

"Throughout the 31 years, I have known Judge McKeague to be honest, professional and fair. He demands high standards of performance from those who appear in his Court, without regard to the client one represents or the philosophy one espouses. At the same time, he blends wisdom and reality when making his rulings. He treats all litigants and litigators with courtesy and respect. His rulings are well reasoned with due regard for precedent and the law provided by the Legislative Branch of government." *Excerpt from letter to Chairman Hatch, Oct. 6, 2003.*

Frank Harrison Reynolds, The Reynolds Law Firm

"I am a practicing criminal defense attorney and have been for the majority of my career as an attorney. As I represent clients in the judicial system, I look for fairness, decisiveness, clear legal reasoning and good judicial temperament from the bench. I have been able to observe these qualities in Judge McKeague during jury trials as well as during motions and arguments over the years since his appointment as an Article III District Court Judge." *Excerpt from letter to Chairman Hatch, Oct. 8, 2003.*

John W. Allen, Varnum, Riddering, Schmidt, & Howlett

"I have practiced law in Michigan and in the Sixth Circuit for over thirty years and have known David McKeague all of that time. He is a person of unquestioned honor and integrity. By his example, all the rest of us may set our compasses, in both our professional and personal lives. . . . Most importantly, Judge McKeague's judgments are sound, impartial, and prompt. He has consistently demonstrated that he is a hard worker, and a very productive member of the federal judiciary. The United States Court of Appeals for the Sixth Circuit needs judges like David McKeague." *Excerpt from letter to Chairman Hatch, Oct. 14, 2003.*

James S. Brady, Miller, Johnson, Snell & Cummiskey

"I have been a practicing lawyer in the Federal and State Courts for 34 years. In 1977, President Jimmy Carter appointed me United States Attorney for the Western District of Michigan. . . . Judge McKeague would make an outstanding appellate judge. He would bring to the United States Court of Appeals for the Sixth Circuit the experience of a successful practitioner and trial judge. A judge that knows the law, the demands of the trial bench, the competence and professionalism required of the lawyers appearing before him and a passion for justice. In my opinion, Judge McKeague has all the necessary components to be a successful appellate judge." *Excerpt from letter to Chairman Hatch, Oct. 15, 2003.*

Richard A. Kay, Varnum, Riddering, Schmidt, & Howlett

"By way of background, I have been in practice for 30 years in the Western District of Michigan. . . . Based on my trial experience before Judge McKeague in complex litigation, I found him to be a skilled jurist with the very highest of legal skills. His understanding and application of the law has been superior. His ability to distill complicated matters to their core issues is likewise excellent." *Excerpt from letter to Chairman Hatch, Oct. 15, 2003.*