

**SETTING THE RECORD STRAIGHT: THE
NOMINATION OF JUSTICE PRISCILLA OWEN**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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Chairman HATCH. Well, thank you, Senator.

Senator KENNEDY. I appreciate the fact that you brought that up at the start of this hearing.

Chairman HATCH. Well, that means a lot to me, and as usual, your compassion comes through, and our friendship is intact in spite of the fact that we occasionally disagree.

Senator KENNEDY. Well, don't want to go too far at the opening of this hearing.

[Laughter.]

Senator KENNEDY. Judge Owens, I want to welcome you back.

Justice OWEN. Thank you.

Senator KENNEDY. Owen, Owen—excuse me—to the committee and thank you for the willingness to take on the responsibility for service on the courts, and thank you for your willingness to respond to these questions. I think as you well understand, all of us have a responsibility in these considerations, and we want to try and ensure, as I am sure you do, that we are going to have people, men and women on the courts, that are going to insist that the courts are going to be available and accessible to listen to all sides and to evaluate all of the information that comes before the courts and give a fair and balanced judgment on these cases.

And my concerns, as I think you remember from the last time, is to what kind of—whether the plaintiffs are representing workers, the disadvantaged, those that are left out and left behind, individuals that have been injured or hurt in circumstances, whether they will be able to get a fair hearing in the courts. And so we look at your background in these areas to try and draw some conclusions. And I want to just again sort of mention these and hear you out once more on this.

As I mentioned, one of my major concerns is the way that you reinterpret the law to achieve currently the result that you want. Your decision consist of support for the businesses and employers over the rights of the plaintiffs, and I believe often stretch the law to do so. You are among the most frequent dissenters on the Texas Supreme Court with more than 20 dissents in cases involving the rights of employees, consumers and many others in the last 5 years.

The Texas Supreme Court is notoriously business oriented, but you stand out as being to the right of most of the judges on the court. You have repeatedly been criticized your colleagues in the majority for putting your own views above the law. In the *Jane Doe* cases you were criticized by your colleagues, including Alberto Gonzales, who is now President Bush's counsel in the White House, for insisting on reading your own views into the Parental Notification Statute on abortion. Judge Gonzales called your interpretation "an unconscionable act of judicial activism."

Numerous examples occur in other cases involving labor protections, consumer protections and environmental protections. In one case the private landowners tried to obtain an exemption from the environmental regulations, and the court majority specifically criticized your harsh dissent, saying it was nothing more than inflammatory rhetoric which merits no response.

In a case involving whether an insurance company had acted in bad faith, you joined a partial dissent that would have limited the

rights of jury trials for litigants, and this dissent was criticized by other judges as a judicial slight of hand to circumvent the constraints of the Texas Constitution.

In another case a worker's arm had been partially amputated as he inspected a chopping machine. Your dissent would have severely limited the ability of injured individuals to obtain compensation from product manufacturers. The majority criticized your dissent for imposing a test more broad than any holding in this area so far.

And even when you have joined the majority in favor of a plaintiff, you have announced views hostile to workers' rights, the *GTE Southwest v. Bruce*. You concurred with an otherwise unanimous court decision in favor of the three female employees, but you went out of your way to make it clear that in your view not all of the supervisor's behaviors amounted to intentional infliction of emotional distress. The supervisor's behavior included yelling, cursing, frequently at the employees, repeatedly threatening employees verbally, assaulting employees by physically charging and lunging at them, and ordering a female employee to scrub a carpet on her hands and knees.

Because of such cases—and these are just a few examples—how can we have confidence that you will fairly interpret the law and fairly consider the claims of workers, victims of discrimination or other injured individuals, and how can we have the confidence that you will review the cases with an open mind?

In the hearing last fall I asked you whether with all your dissents in favor of businesses, insurance companies and employers, you had dissented in any case where the majority of the court favored those interests. You mentioned a single case, 1996, the *Saenz v. Fidelity Guaranty Insurance Underwriters*. After reviewing that case—and I hardly think it offsets your anti-plaintiff record—you did not write a dissent in the case. You joined an opinion written by another justice, concurring in part and dissenting in part. You actually agreed with the majority that a jury verdict for the plaintiff should be overturned. In fact, another dissent in the case would have upheld the jury verdict.

So while you agree that there was a claim in that case that you would have allowed the plaintiff to pursue, but your long record of ruling against the plaintiffs. Is that the only case in which you dissented in favor of the plaintiffs in a workers' rights, consumer rights or a civil rights case?

Justice OWEN. Senator Kennedy, there's a lot in your question, so let me try to go back and parse through some of the things that are in that question and that proceeded it in some of your statements.

Senator KENNEDY. OK.

Justice OWEN. First of all, Senator Kennedy, I can assure you that I do not ever try to achieve a result, and I don't look at whether I want one side to win or the other side or one segment of our population to be favored over another. That is not my job. And I certainly don't keep score and say, "OK, you know, 50 percent of—this side has to win 50 percent of the time and this side has to win 50 percent of the time, and every 6 months or so we've got to even the score here." I mean that is not what judging is about. That is not what I do.