

citizens will have to worry about the personal politics of the judge before whom they come for justice. I say judiciousness, why?

Like other Senators this year faced with the question of what is required by the Constitution's mandate that the Senate give the President advice and consent, I have turned for guidance to the Founding Fathers and especially to the father of the independent judiciary, John Adams, to find that correct standard by which we give advice and consent on a judicial nominee.

President Adams, the father of our independent judiciary, memorialized for us what the standards should be for confirming our judges. He wrote that they should be "men [and women] of experience on the laws, of exemplary morals, invincible patience, unruffled calmness, and indefatigable application who will be appointed for life and subservient to none."

President Adams understood well enough the challenge of being judicious despite one's opinions and even in the face of unpopular opinion. Few people remember it was John Adams who defended the British soldiers who, on March 5, 1770, shot into a crowd on the streets of Boston. Our children study this episode today as the Boston massacre. It is a history lesson we can learn from in our work and on judicial nominations.

John Adams defended the British soldiers before a Boston court with angry mobs in the street.

I will close in a second. I will speak on leader time for the next minute.

I have to wonder, Mr. President, if today John Adams would be obstructed by filibuster because an out-of-touch minority, urged on by special interest groups, questions John Adams' qualifications based on his past advocacy simply for being a good lawyer defending a client, however politically unpopular.

In a few minutes, the filibustering minority will have another opportunity to stand in the light of the Senate floor and do the right thing. I say to the minority: Give these nominees a vote. Vote them up or vote them down, but just give them an honest up-or-down vote.

The PRESIDING OFFICER. The Democratic leader.

Mr. DASCHLE. Mr. President, I will use leader time first to engage in a brief colloquy with the distinguished majority leader with regard to the schedule for the remainder of the day. I wonder if he can inform us as to what his intentions are with regard to schedule.

Mr. FRIST. Mr. President, I will be happy to talk during the votes with the leadership on the other side. My intent would be to have these three consecutive cloture votes and then after that have no other votes today. Before saying that with definitiveness, I would like to have a discussion with the minority leader, if there is other business he would like to bring to the floor as well.

We likely will have other business following that. Again, I expect no roll-call votes after these three votes.

Mr. DASCHLE. I thank the majority leader.

Mr. President, I also note at the end of this period of time, we have been here now for about 40 hours. It is probably not accurate to say we have all been here for 40 hours. Some of us had the luxury of coming and going, but there have been a lot of staff on the Senate floor, in our cloakrooms, in the Sergeant at Arms Office, our Capitol Police, all of our clerks—the extraordinary effort that they have made in these last 40 hours should be recognized.

I know I speak for all of our colleagues on both sides of the aisle in expressing our heartfelt gratitude to all of them. Once again, they have exceeded our expectations, and we are grateful for their dedication and professionalism during these difficult days.

I yield the floor.

NOMINATION OF PRISCILLA RICHMAN OWEN, TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit.

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call is waived.

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit, shall be brought to a close? The yeas and nays are mandatory under the rule. The clerk will call the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. CARPER), the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. CARPER) and the Senator from Massachusetts (Mr. KERRY) would each vote "nay."

The PRESIDING OFFICER (Mr. CHAFEE). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 53, nays 42, as follows:

The result was announced—yeas 53, nays 42, as follows:

[Rollcall Vote No. 450 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Thomas
Crapo	McCain	Voinovich
DeWine	McConnell	Warner

NAYS—42

Akaka	Dodd	Leahy
Baucus	Dorgan	Levin
Bayh	Durbin	Lieberman
Biden	Feingold	Lincoln
Bingaman	Feinstein	Mikulski
Boxer	Graham (FL)	Murray
Breaux	Harkin	Pryor
Byrd	Hollings	Reed
Cantwell	Jeffords	Reid
Clinton	Johnson	Rockefeller
Conrad	Kennedy	Sarbanes
Corzine	Kohl	Schumer
Daschle	Landrieu	Stabenow
Dayton	Lautenberg	Wyden

NOT VOTING—5

Carper	Inouye	Nelson (FL)
Edwards	Kerry	

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 42. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to.

NOMINATION OF CAROLYN B. KUHL TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit.

Bill Frist, Orrin G. Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. LEAHY. Mr. President, I want to commend the Senators from California for their leadership in connection with this matter.

Today, the Senate is considering the nomination of California Judge Carolyn Kuhl to the U.S. Court of Appeals

for the Ninth Circuit. In accordance with Republican practices during the period 1995–2000, this nominee would have never come to the Judiciary Committee for a hearing in the first place and would never have been voted upon by the Judiciary Committee. This consideration on the Senate floor today underscores the President's refusal effectively to consult with the home-State Senators from California, both of whom oppose this nomination. In fact, this vote is the culmination of a year in which the President's disregard for home-State Senators and the Republican majority's disregard of past practices to achieve their partisan political objectives could not be more calculated.

Judge Kuhl's appearance before the Judiciary Committee, despite the clearly stated opposition of Senator BOXER, was only one in a string of transparently partisan actions taken by the Senate's Republican majority since the beginning of this Congress. In each of these actions, Republicans have done something they never did while in the majority from 1995 to 2000. Throughout the course of this year, they have continued to ratchet up their unprecedented partisanship and the use of judicial nominees for partisan political purposes.

The Republican majority took a step on the nomination of Judge Kuhl that was unprecedented for this Chairman. They scheduled a hearing for a nominee who did not have approval from both of her home-State Senators, a nominee for whom both blue slips were not returned positively. There is not a single example from 1995 through 2000, when the President was a Democratic President, and when Republican Senators were objecting, when the Judiciary Committee held a hearing on a judicial nominee over the objection of a home-state Senator.

Senate Republicans should remember that when the nomination of Ronnie White of Missouri was finally voted upon in 1999, all Republicans, in an unprecedented party-line vote, defeated that nomination. Several Republican Senators who had voted in favor of Justice White when he was considered by the Committee changed their positions and voted against his confirmation. The facts are that, at the time of his hearing, the senior Senator from Missouri supported the nomination and endorsed him at his hearing, and the junior Senator did not object to the hearing. Senator Ashcroft then chose to vote against the nomination. On the eve of the vote on the nomination, Senator BOND changed his position and decided to join Senator Ashcroft in opposing the nomination.

In connection with that vote, Senator HATCH said that if both home-State Senators had opposed the nomination earlier, it would never have proceeded. He told the Senate: "[H]ad both home-State Senators been opposed to Judge White in committee, Judge White would never have come to the

floor under our rules. I have to say, that would be true whether they are Democrat Senators or Republican Senators. That has just been the way the Judiciary Committee has been."

The Ronnie White nomination is not an example of a previous time that the Committee and the Senate proceeded over the objections of home-state Senators. To the contrary, it is precisely the opposition, a clear precedent the other way.

While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways, some to maintain unfairness, and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy—that is, until the Kuhl hearing. That was the first time that this Chairman ever convened a hearing for a judicial nominee who did not have two blue slips acceding to a hearing.

This Republican President's choice of Carolyn Kuhl for a vacancy on the Ninth Circuit is a divisive and political choice. As a lawyer in the Reagan Administration, a lawyer in private practice, and as a state court judge, Judge Kuhl has demonstrated an extreme philosophy that threatens the rights and interests of Americans, particularly women's rights, other civil rights, and access to justice. Among other significant cases, Judge Kuhl spearheaded an effort to reverse the Reagan Administration's policy on tax-exempt status for racially discriminatory private schools, including Bob Jones University. She has also consistently advocated against women's rights and reproductive rights—from aggressively pushing the Justice Department to argue for a reversal of *Roe v. Wade*, to arguing for limits on the reach of sexual harassment laws, to rulings as a judge which raise concerns about her commitment to privacy rights.

This nomination has generated widespread opposition and requests that the Senate not consent to her confirmation. Among the many membership organizations that have written in opposition are: Seven members of the California Assembly Committee on the Judiciary, California Women Lawyers, the Japanese American Citizens League, the Leadership Conference on Civil Rights, People for the American Way, Planned Parenthood Federation of America, Taxpayers Against Fraud and many, many more.

I suspect we will hear these groups, and the others who oppose the President's nomination of Judge Kuhl, vilified as members of some left-wing conspiracy, intent on sinking each and every nominee, no matter what their views. But I would like to remind those who would raise that argument, as I have before, that these organizations represent millions of citizens with legitimate concerns about the direction of the judiciary in this country. I appreciate their willingness to participate in the process and their refusal to be intimidated into silence. The Wash-

ington Times has conceded that "President Bush has seen more of his appeals court nominees confirmed by the Senate at this point in his term than any other president since at least the 1970s." When I was Chairman of the Judiciary Committee during the 107th Congress, the Senate confirmed 100 of this President's nominees. So far this year, the Senate has confirmed 68 additional judges nominated by President Bush. The Senate has now confirmed 168 of the Bush judicial nominees. That is more confirmations than in all of President Reagan's first term and more judges in one year than were confirmed during all of 2000, 1999, 1998, 1997, 1996 or 1995.

Among those 168 confirmations are 29 circuit judges. That is more circuit judges at this point in his presidency than were confirmed for President Reagan, President Bush or President Clinton. So far this year the Senate has confirmed 12 circuit court judges. In the comparable year of 1999, Republicans allowed only 7 circuit court judges to be confirmed all year.

Four of President Bush's nominees to the Ninth Circuit Court of Appeals have already been confirmed. Richard Clifton was given a hearing and confirmed under Democratic leadership. Just this year, the Senate has confirmed two additional Ninth Circuit nominees, one of whom, Jay Bybee, was quite controversial. Just before the Memorial Day recess, Democratic Senators expedited and encouraged the Majority Leader to allow a vote on the nomination of Judge Consuelo Maria Callahan, a consensus nominee with support from both home-State Senators. And, in September, Democratic Senators supported the nomination of Judge Carlos Bea, another nominee with support from both home-State Senators.

Unlike the divisive nomination of Judge Kuhl, both home-state Senators supported the nominations of Judge Callahan and Judge Bea. Rather than disregarding time-honored rules and Senate practices, my friends on the other side of the aisle should help us fill more judicial vacancies more quickly by bringing those nominations that have bipartisan support to the front of the line for Committee hearings and floor votes.

Republican Senators have been claiming that there have never been filibusters of nominees before and arguing that every nominee always gets a Senate up or down vote. That was certainly not the case for 63 of President Clinton's judicial nominees and for hundreds of his Executive Branch nominees. Such a claim is so contrary to history it is breathtaking in its boldness. On a single day in 2000, the Senate had to invoke cloture to stop Republican filibusters of the nominations of Judge Richard Paez and Marsha Berzon. Republicans also unsuccessfully filibustered Judge Rosemary Barkett and Judge H. Lee Sarokin in

1994. They successfully filibustered Executive Branch nominees such as ambassadorial nominees and the nomination of a Surgeon General, and the list goes on and on. I have spoken about them before.

This White House has been the most aggressive in recent history in its efforts to pack the federal courts and tilt it sharply toward a narrow ideology. The most extreme of the Administration's nominees are not being approved. We are seeking to maintain the independence of the Federal judiciary and to protect the rights of Americans in so doing. The Administration and its supporters have taken to using these nominations as partisan matters and to drive wedges between Americans. I have urged that the President be a uniter rather than a divider on this important lifetime nominations, but my voice has been ignored.

The provocative steps taken by the White House and Senate Republicans have broken new grounds in politicizing the Federal judiciary. The Republican majority has shown a corrosive and raw-edged willingness to change, bend and even break the very same rules that they took advantage of when the judicial nominees involved were a Democratic President's choices.

One of Carolyn Kuhl's most notorious decisions as a lawyer in the Reagan Justice Department is among her most troubling. As a political appointee serving directly under the Attorney General of the United States, she spearheaded an effort in the Reagan Administration to reverse position in the Bob Jones University case. This was the case challenging IRS rules denying tax-exempt status to schools that racially discriminate.

In 1981, the IRS rules were challenged by Bob Jones University, which wanted to keep avoiding their tax responsibilities despite a policy prohibited interracial dating. When the school took this issue to the Supreme Court in 1981, the Reagan Justice Department was prepared to defend the rules, as is its duty. But in January 1982, the government suddenly changed its position, and argued that the IRS had no legal authority to deny tax-exempt status and agreed to give Bob Jones, despite its blatant policies of racial discrimination, the tax exemption.

Then-Congressman TRENT LOTT, supported by Senator Strom Thurmond, was pivotal in the lobbying effort to change the government's position, and then-Special Assistant to the Attorney General Carolyn Kuhl concurred. This decision was so outrageous that more than 200 career lawyers in the Justice Department's Civil Rights Division objected to the change of position in a letter to their Assistant Attorney General.

According to records of Congressional hearings on the topic and a New York Times article written at the time, Carolyn Kuhl was one of three people characterized as "a band of young zealots" at work as political ap-

pointees at the Department of Justice, and part of the "Bob Jones team" who opposed the overwhelming sentiment and "pressed for the legal switch to give Bob Jones its tax exemption." Indeed, Carolyn Kuhl and Charles Cooper, then-Special Assistant to Attorney General William French Smith, co-authored a 40-page memorandum to Civil Rights Division Head William Bradford Reynolds strenuously arguing that "the [IRS] Commissioner's Ruling denying tax-exempt status to racially discriminatory private educational institutions is supported by neither the language nor the legislative history of Section 501(c)(3)" and that the IRS should therefore "reverse its position" in the case and "accord tax-exempt status" to Bob Jones.

The Supreme Court, in an 8-1 ruling, repudiated Carolyn Kuhl's position and denied the school tax-exempt status. Chief Justice Warren Burger wrote for the majority, "[a]n unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."

It is interesting to note that the reason we know so much about Judge Kuhl's advocacy on behalf of schools like Bob Jones is because of internal Justice Department documents turned over to the Senate Finance Committee in February of 1982. At that time, in the wake of the Reagan Administration's switch in position, the Committee held a hearing to consider a legislative fix to the problem. A number of Justice Department memoranda as well as communications between high-level officials were turned over to the Committee in connection with the hearing, just months after the documents were first written. The House Ways and Means Committee held a similar hearing on February 4, 1982. Among the documents turned over to these Congressional committees was a memo written by Carolyn Kuhl on December 8, 1981 to Ken Starr noting Reagan/Bush campaign statements on private schools and a memorandum written by Carolyn Kuhl and Charles Cooper, one of the other members of the "Bob Jones team," to Civil Rights Division Head Reynolds regarding the Bob Jones case.

At her hearing, Judge Kuhl conveniently told us that she regretted having taken the position she did at the time. Although it was the first time she had ever said so publicly, at her hearing, she claimed that in 1982 she had been concerned about the implications the Bob Jones policy would have on all-girls' schools. This concern was not reflected in her memos at the time, and has not been heard in any other context. But, taking her at her word that this was truly a concern, the explanation she gave at her hearing is still very interesting. She said, and I'll quote her, "I had attended an all-girls' school and I did not want to see a

precedent created that would have meant that tax exemptions could be taken away from all-girls' schools because they discriminated against men." In other words, she advocated helping a school that was racially discriminatory because of her personal affinity for her alma mater. Either way, whether or not you believe her newly articulated explanation, her responses on this issue raise as many questions as they answer.

Judge Kuhl also contended at her hearing that her advocacy on behalf of Bob Jones University should be excused because of her relative youth and inexperience. This too seems a convenient explanation. She describes herself as someone two and a half, maybe three years out of law school with no decision making authority, painting the picture of a naive young attorney with no influence over such important decisions. But this was 1982, five years after her graduation from law school, and she had proven herself enough to have landed one of the most prized jobs for a political appointee with a law degree: Special Assistant to the Attorney General of the United States. She doubtless had daily personal contact with the nation's highest law enforcement officer, and as his protégé represented his position to the very influential people serving under him, including Solicitor General Charles Fried and Head of the Civil Rights Division William Bradford Reynolds. While I accept the contention that she was not the final decision maker on the Bob Jones matter, the facts lead me to believe that her arguments were taken seriously and held more than a little weight. I think Judge Kuhl underestimated the esteem in which her legal abilities were held. Indeed, only a few years later, she became the Deputy Assistant Attorney General in the Civil Rights Division, with managerial responsibilities for hundreds of attorneys.

I would argue that Judge Kuhl's participation in this case exceeded an attorney's obligation to be a zealous advocate. Rather, her aggressive involvement surely helped build momentum behind the drastic change in position the Justice Department would take. But the substantive weakness of her argument in the face of legal precedent only underscores how political and results-oriented it was. So thin was her case that it caused the New York Times to wonder "How could any president be given such incompetent legal advice? How could lawyers for the U.S. Government stray so far from the mainstream of the Country's understanding on the racial issue? How could a president at this stage in our history play with the issue for political reasons?" Judge Kuhl cannot so easily explain this away.

When she was Deputy Solicitor General in the Reagan Justice Department, Carolyn Kuhl tried to persuade the U.S. Supreme Court to eliminate its "associational standing" doctrine in

United Automobile Workers Union v. Brock, 477 U.S. 274 (1986). In this case, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) challenged the Secretary of Labor's interpretation of provisions of the Trade Act which would have deprived the union members of certain benefits—benefits available to assist workers laid off because of competition from imports. The issue on appeal to the U.S. Supreme Court was whether the UAW had standing to sue in federal court on behalf of its affected members.

Although Judge Kuhl stated at her hearing that she was not on the brief in this case, she later revised her testimony in written answers, saying that she had confused this case with another. Although she was still not completely forthcoming in her responses, I discovered that she was in fact one of five high level officials on the brief and that she argued the case before the U.S. Supreme Court in March 1986.

In her arguments, she urged the Supreme Court to eliminate the doctrine of representative standing in favor of requiring organizations to meet the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure. But, she then also admitted that the government would oppose a request for class certification in this case. She stated in her brief that the Supreme Court should "reconsider the doctrine in light of the practical and analytical difficulties it presents", and that the doctrine was not of that "longstanding effect." A significant portion of her brief was devoted to the more far-reaching arguments of why the doctrine of representative standing should "not be recognized" and why the class action provisions should be applied instead.

The majority of the Supreme Court rejected her arguments and concluded that the government's presentation "has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing." *Id.* at 290.

The doctrine of representative standing allows unions, environmental organizations, business groups, and others to protect the interests of their members in court. Elimination of the doctrine would greatly impede the ability of organizations to represent their members. For this reason, a diverse group of organizations, including the U.S. Chamber of Commerce and the AFL-CIO filed an amicus brief opposing Kuhl's position in the case.

Judge Kuhl's arguments in this case raise concerns about whether she would protect the rights of working men and women or curtail access to the courts for such individuals. In addition to this case, as a judge on the state court, she has issued troubling decisions with regard to the rights of working Americans and access to justice, such as a case in which she found that a woman target of a SLAPP (Stra-

tegic Lawsuit Against Public Participation) suit was not entitled to recover attorneys' fees for successfully defending against the suit—a decision which was unanimously reversed by the appellate court.

Other cases in which Judge Kuhl was involved with while at Justice demonstrate that on issues related to privacy and women's rights she clearly has an ideological agenda. As Deputy Solicitor General, Kuhl co-authored the Reagan Administration's amicus brief in *Thornburgh v. American College of Obstetricians and Gynecologists*, urging the Supreme Court to uphold Pennsylvania's severe restrictions on abortion, including prosecution of doctors. Her view on the matter is documented not only in the brief, but also by her boss at the time, Charles Fried, then-Solicitor General, who recounts in his memoirs that, "[t]he most aggressive memo [about *Roe v. Wade*] came from my friends Richard Willard and Carolyn Kuhl, who recommended that we urge outright reversal of *Roe*."

In that brief, Kuhl argued that the courts below placed too much emphasis on the woman's right to privacy. Moreover, the brief discusses issues beyond the merits of the particular case and urged the Supreme Court to abandon its principles of *stare decisis* and overturn settled law. In a 6-3 decision, the Supreme Court also rejected that call.

As Deputy Solicitor General, Carolyn Kuhl argued for an extremely narrow legal definition of sexual harassment in the landmark case of *Meritor Savings Bank v. Vinson*. A female employee, Mechelle Vinson, filed suit against her supervisor and the bank that employed her, alleging that the supervisor had sexually harassed her and that she had been terminated when she refused him, violating her rights under Title VII of the Civil Rights Act. Kuhl's brief for the Reagan Administration argued that Ms. Vinson's claim should be dismissed because her conduct had been found by the trial court to be voluntary. The Supreme Court found the opposite, and held that the claim could go forward no matter the characterization of Ms. Vinson's conduct, as long as the sexual attention she was getting, described by the court as "appalling" and "especially egregious," was unwelcome.

It would have been bad enough that Judge Kuhl had taken this position as a political lawyer at the Justice Department, trying to narrow the rights of victims of sexual harassment as part of the Reagan agenda, but even worse and more puzzling, was her explanation of the case at her hearing.

Just as she articulated a never-before heard explanation for her position in the *Bob Jones* case, Judge Kuhl told us at her hearing that she was "very happy" with the decision, and that the Supreme Court's reasoning "tracked" the brief she wrote. She dismissed Senator FEINSTEIN's concerns that the Justice Department had declined to accept

the unwelcomeness standard adopted by the Supreme Court, brushing her off with a vague mention of the question of the voluntary nature of Ms. Vinson's behavior. This explanation is mystifying, and sounds to me like an attempt to put a positive spin on an issue she knew Democratic Senators would view with suspicion. She knew that those of us concerned with allowing victims of discrimination an opportunity for redress would have problems with her brief in *Meritor Savings*, and she fudged an answer to try to look like she agreed with us. Such obfuscation should not be allowed to succeed. I would have preferred it if she had been up front with us about her brief and its relationship to the Court's decision.

Judge Kuhl's record on the state bench offers another example of her troubling views on privacy. In the recent case of *Sanchez-Scott v. Alza Pharmaceuticals, et al.*, Judge Kuhl's decision to dismiss a claim for invasion of privacy brought by a cancer patient against her doctor and a pharmaceutical company was reversed by the appellate court. The plaintiff, a patient undergoing chemotherapy for breast cancer, was examined by her oncologist, Dr. Monty Polonsky, in the presence of an unidentified man who turned out to be a representative of a pharmaceutical company.

The complaint stated that the doctor introduced the man, a Mr. Martinez, as, "a person . . . who was looking at Dr. Polonsky's work," but no further details about his identity were provided. During the course of the physical, Ms. Sanchez-Scott felt warm and began to use a pocket fan to cool herself. The doctor took the fan from the plaintiff and gave it to Mr. Martinez so he could fan the plaintiff because, as he told her, "[i]t would give him something to do." Then, the doctor and Mr. Martinez began to laugh at the plaintiff, who became very uncomfortable and asked for the fan back, saying she could fan herself. Mr. Martinez refused and continued to fan her. Dr. Polonsky examined Ms. Sanchez-Scott while she was undressed from the waist up, while Mr. Martinez sat beside the examining table and watched. Only when she went to the reception desk after her exam was over did Ms. Sanchez-Scott learn that Mr. Martinez was a drug salesman, and not a trained medical professional. Ms. Sanchez-Scott explained that she felt uncomfortable and embarrassed and cried from shame and anger once she left the doctor's office.

Judge Kuhl found that the plaintiff could not sustain an action for an invasion of privacy against the doctor because what happened to her did not meet the test of being "highly offensive to a reasonable person." She reasoned that Ms. Sanchez-Scott had been introduced to Mr. Martinez, knew he was there and could have made further inquiry about who he was or object to his presence. She also found relevant that there was no touching, and that

nobody else found out about the presence of the drug salesman in the exam room. She also explained that because the patient would not have a reasonable expectation that a medical procedure would only be observed by a doctor, there could be no expectation of privacy. The appellate court ridiculed her reasoning and allowed the plaintiff to continue with her invasion of privacy claims against her doctor.

Again, at her hearing, Judge Kuhl's answers were misleading. When questioned about this case by Senator DURBIN, Judge Kuhl tried to make herself seem sympathetic to Ms. Sanchez-Scott's plight. She told Senator DURBIN that she could understand why the plaintiff was upset, that she had good reason to be upset. But Judge Kuhl misstated crucial facts about the case that would have shed a clearer light on her legal ruling. She told Senator DURBIN that the plaintiff's claim for invasion of privacy against the doctor was permitted to go forward, an assertion that is simply not true. Later, in a letter to Senator HATCH, she did correct herself, but the impression she tried to leave at the hearing was contrary to the facts. If her ruling in the Sanchez-Scott case had been allowed to stand, the case against the doctor for an invasion of privacy would not have been able to go forward. I know this sounds like nitpicking about a minor procedural issue, but it is more than that. It is about her sensitivity to privacy issues, her ability to follow the law, and her pattern of trying to spin her negative positions to her benefit at her hearing.

Ms. Sanchez-Scott does not see it as nitpicking either. In a letter she wrote to the Committee about her experience in Judge Kuhl's court, she expresses her opposition to rewarding the judge with a promotion to the federal court. She tells us that, "[a]s a cancer survivor, I trusted that my doctor would make decisions in my best interest . . . I was . . . shocked and dismayed that Judge Kuhl determined that I, not the doctor, had the obligation to protect my privacy in his exam room."

This President talked about being a uniter, not a divider, yet he has failed to work with all home-State Senators to identify qualified candidates who can be supported by both sides. A recent opinion piece in the Washington Post had it right when it said that rather than promoting "bipartisanship," which this President said he wanted, he has instead promoted "hyper-partisanship." I hope—for the sake of our country and the independence of the judiciary—that the White House and the Senate majority decide to work with Democratic Senators to identify qualified, mainstream nominees who can be supported by all sides and to abandon their quest to pack the circuit courts with activists and ideologues.

I ask unanimous consent that several letters in opposition be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CALIFORNIA LEGISLATURE,
Sacramento, CA, February 11, 2003.

Re Oppose the nomination of Carolyn Kuhl to the Ninth Circuit Court of Appeals.

Hon. DIANNE FEINSTEIN,
U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: We are writing as members of the Judiciary Committee of the California Assembly to urge you to oppose the nomination of Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals. We believe that Judge Kuhl's record indicates that her opinions would potentially threaten laws protecting California's environment and civil rights, and the rights of our citizens to privacy and reproductive choice. As part of President Bush's effort to nominate numerous ultra conservative judges to lifetime positions on the federal bench, this nomination represents an unacceptable risk to our state and the nation.

Judge Kuhl's nomination is opposed by more than 40 organizations representing civil rights, religious, environmental, reproductive rights and labor organizations, including the Sierra Club, National Organization for Women, California Abortion Rights Action League, National Women's Law Center, People for the American Way, and the Alliance for Justice among others. Their concerns run the gamut from Judge Kuhl attempting to close off access to the courts by overturning the doctrine of associational standing (the right of organizations to file suit on behalf of their members), to convincing the Reagan administration during her tenure with the Justice Department of attempt overturning *Roe v. Wade*. As a private attorney she argued in support of regulations prohibiting doctors and health care professionals at federally-funded clinics from counseling women about abortion, or even informing them that abortion was a legal medical option.

Still other of Judge Kuhl's positions show just how far she is from the mainstream of legal thought on issues of concern to most Californians. For example, Judge Kuhl was one of two Justice Department officials who convinced the Attorney General to reinstate the tax exempt status for the segregationist Bob Jones University. This position was opposed—in writing by more than 200 lawyers in the Justice Department's civil rights division, and was even opposed by President Reagan's Solicitor General, Ted Olson.

As a California state trial court judge, Judge Kuhl has not generally written published decisions. However, several published cases cause us concern about her willingness to protect the basic rights of individuals. For example, in one case Judge Kuhl dismissed a breast cancer patient's claim of invasion of privacy after her doctor brought drug company representative into the room during a breast exam. This ruling was reversed on appeal. In still another controversial decision, Judge Kuhl dismissed a case brought under California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court again reversed Judge Kuhl's decision calling it "a nullification of an important part of California's anti (abusive lawsuit) legislation."

Finally, in her career Judge Kuhl has been aligned with some of the most ideologically intransigent and far-right elements of the Republican Party. She is a member of the Federalist Society, which seeks to establish an ultra-conservative federal bench. We believe that placing Judge Kuhl on the Ninth Circuit Court of Appeals would be a grave

error that would threaten California law and place a relatively young and ultra-conservative jurist in a lifetime position on one of the most important courts (after the Supreme Court) for our state. We urge you to oppose her nomination as forcefully as possible.

I thank you for considering our views.

Sincerely yours,

ELLEN CORBETT,
Chair, Assembly Committee
on Judiciary.

CALIFORNIA WOMEN LAWYERS,
Sacramento, CA, March 26, 2003.

Re opposition—Carolyn Kuhl appointment.

Senator DIANNE FEINSTEIN,
U.S. Senate, Hart Senate Office Building,
Washington, DC.

DEAR SENATOR FEINSTEIN: I am writing on behalf of California Women Lawyers (CWL) to inform you of CWL's opposition to the confirmation of the nomination of Los Angeles Superior Court Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals. As you may know, CWL is a statewide organization of women attorneys dedicated to advancing the interests of women, both in the legal profession, and in society, through education, legislation and advocacy. CWL supports a fair and balanced judicial nominating process and process and opposes an extreme right-wing federal bench engaged in ultra-conservative judicial activism.

CWL supports the appointment of federal judges who are open-minded, view the constitution as a living document and who are committed to the role of federal courts in protecting civil rights and individual liberties, and in guaranteeing due process, equal protection of the law, the right of privacy and access to justice. We believe that Judge Kuhl's record indicates she is unsuited for a position on the Ninth Circuit bench.

Judge Kuhl is a longtime member of The Federalist Society and adheres to the ultra-conservative philosophy espoused by that group. While working at the Department of Justice, Ms. Kuhl vigorously supported tax-exempt status for Bob Jones University, despite its history of racial discrimination. Ms. Kuhl has also argued in favor of overturning *Roe v. Wade*, as well as onerous regulations burdening abortion rights. While on the Superior Court bench, her decisions have been reversed by the California Courts of Appeal for restricting the rights of individuals to sue to protect their privacy and to protect themselves from harassment suits under California law decisions which she based on her narrow interpretation of statutes which clearly favor such individual rights.

Ms. Kuhl's record reveals that she is wedded to an extremist philosophy that is far removed from the beliefs of most Americans. Our nation deserves a federal court pledged to upholding constitutional rights secured through Supreme Court precedents and embodied in civil rights statutes. CWL therefore urges you to not support Ms. Kuhl's nomination.

Sincerely,

ANDREA CARLISE,
CWL President.

LEADERSHIP CONFERENCE
ON CIVIL RIGHTS,
Washington, DC, May 7, 2003.

Re Oppose the confirmation of Carolyn Kuhl.

Hon. ORRIN G. HATCH,
Chair, Senate Judiciary Committee, Hart Senate
Office Building, Washington, DC.

DEAR SENATOR HATCH: On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to

the confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. Our review of Judge Kuhl's record indicates that her positions, opinions, and legal activities in the areas of civil rights and equal opportunity, and the rights of women, workers, and consumers, are troublesome and raise serious questions about her commitment to equal justice and civil rights for all Americans.

First, we are very concerned about Judge Kuhl's record on civil rights and equal opportunity, particularly on the issue of whether the federal government should subsidize institutions that practice racial discrimination. Judge Kuhl was one of three Reagan Justice Department officials who persuaded the Attorney General to reverse prior policy and support the granting of tax-exempt status to Bob Jones University, despite its racially discriminatory policies, in its brief in *Bob Jones University v. United States*, 461 U.S. 574 (1983). More than 200 Justice Department lawyers, the solicitor general, and the Treasury Department general counsel objected to the change of position that Kuhl advocated. According to the *New York Times* (May 1983), Kuhl was one of three characterized as a "band of young zealots" who urged the change in policy. By an 8-1 vote, the Supreme Court rejected Kuhl's position and upheld the IRS denial of tax exempt status to Bob Jones University.

In addition, we are troubled by Judge Kuhl's work urging the Supreme Court to overrule its precedent on "associational standing." In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986), Kuhl not only argued that the requirement for associational standing had not been met in the particular case, but went on to urge the Supreme Court to overturn the doctrine of associational standing altogether, except in the most extraordinary circumstances. This view, if adopted, would have had a catastrophic affect on the ability of civil rights and other groups to file lawsuits on behalf of their members in order to vindicate their legal rights.

While at the Justice Department, Kuhl was also involved in a troubling effort to limit the reach of sexual harassment doctrine. As Deputy Solicitor General, she co-authored an amicus curiae brief in the landmark sexual harassment case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), asserting a position on sexual harassment which, had it been adopted, would have made it more difficult for women to prove sexual harassment in the workplace. In a unanimous opinion authored by then-Justice William Rehnquist, the Court rejected as incorrect the focus in Kuhl's brief of the "voluntariness" of the alleged sexual conduct, instead making clear that the test is whether the sexual conduct was "unwelcome." Kuhl was also part of the Reagan Administration's effort to restrict the remedies that courts can order in the case of employment-related discrimination in violation of Title VII. In *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421 (1986), Kuhl co-authored a brief on behalf of the EEOC advocating the extreme theory that relief in Title VII cases can be granted only to identifiable victims of discrimination. This theory, rejected by the Supreme Court, would have significantly limited the ability of the courts to provide effective remedies for past and persistent discrimination.

Kuhl's record also reveals a troubling tendency to favor corporate interests, at the expense of workers and consumers. As a lawyer in private practice, Kuhl argued on behalf of two major defense contractors that the qui tam provision of the False Claims Act, which allows private individuals to sue corpora-

tions that committed fraud against federal government programs, was unconstitutional. See *United States ex rel. Rohan v. Litton Industries, Inc.*, No. 92-55546 (9th Cir.). As a judge, she dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court reversed Kuhl's decision in unusually strong terms, calling it "a nullification of an important part of California's anti-[abusive lawsuit] legislation." *Liu v. Moore*, 69 Cal. App. 4th 745, 748 (1999). Kuhl also dismissed a claim brought by a breast cancer patient whose privacy was invaded when a drug salesman who misrepresented his identity participated in her doctor's examination of her breasts. On appeal, the Court of Appeals unanimously found in favor of the plaintiff, reversing Kuhl's decision. See *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365 (2001).

In sum, Judge Carolyn Kuhl's views on important civil rights issues, particularly with regard to equal opportunity and the rights of workers and consumers, are outside the mainstream. Her work as a Justice Department official, in private practice, and as a California judge reflects a lack of commitment to core constitutional values and to upholding equal rights for all Americans. Therefore, we urge the Judiciary Committee to reject the confirmation of Carolyn Kuhl to the Ninth Circuit Court of Appeals. If you have any questions or need further information, please contact Nancy Zirkin, LCCR Deputy Director/Director of Public Policy at (202) 263-2880, or Julie Fernandes, LCCR Senior Policy Analyst, at (202) 263-2856.

Sincerely,

WADE HENDERSON.
Dr. DOROTHY L. HEIGHT.

PLANNED PARENTHOOD FEDERATION OF AMERICA—STATEMENT REGARDING THE NOMINATION OF CAROLYN KUHL TO THE NINTH CIRCUIT COURT OF APPEALS

The Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, has a long-standing history of working to ensure the protection of reproductive rights as well as working to advance the social, economic, and political rights of women. Because lower federal courts exercise enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, PPFA believes that judges appointed to these courts must demonstrate a commitment to safeguarding these fundamental rights. PPFA will oppose confirmation of nominees who fail to do so.

We believe that California Superior Court Judge Carolyn Kuhl's record demonstrates that she is not committed to protecting these rights. Therefore, PPFA opposes her nomination to the United States Court of Appeals for the Ninth Circuit.

Judge Kuhl held various positions in the U.S. Department of Justice during the Reagan administration. From 1982 to 1985, Kuhl held the appointment of Deputy Assistant Attorney General for the Civil Division. During her tenure in that position, the Supreme Court agreed to hear *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), a challenge to several Pennsylvania abortion restrictions. The Reagan administration filed a brief in *Thornburgh* that not only supported the Pennsylvania restrictions, but also called for an outright reversal of *Roe v. Wade*: "Indeed, the textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed, and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it."

The Acting Solicitor General at the time the *Thornburgh* brief was filed, Charles Fried, wrote, in his book, *Order and Law*, that when he was considering what position to take in the case, "[t]he most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of *Roe*."

In addition, when in private practice, Kuhl chose to serve as counsel for the American Academy of Medical Ethics in *Rust v. Sullivan*, 500 U.S. 173 (1991), the case challenging the "gag rule"—federal regulations promulgated by the Bush I administration that prohibited health care professionals at family planning clinics that receive funding from the Title X program from counseling women about abortion—or even providing non-directive counseling that informed them of abortion as an option. Kuhl's brief argued that this prohibition did not violate the rights of the health care providers and their patients.

Given Kuhl's record demonstrating animosity towards reproductive rights, PPFA joins other organizations concerned with women's rights and civil rights in opposing her nomination to the Ninth Circuit Court of Appeals.

TAXPAYERS AGAINST FRAUD,
THE FALSE CLAIMS ACT LEGAL CENTER,
Washington, DC, April 3, 2003.

Re Judge Carolyn Kuhl.

Chairman ORRIN G. HATCH,
Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC

Senator PATRICK J. LEAHY,
Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC

DEAR CHAIRMAN HATCH AND SENATOR LEAHY: Taxpayers Against Fraud, the False Claims Act Legal Center ("TAF"), opposes the appointment of Judge Carolyn Kuhl to a position on the United States Court of Appeals for the Ninth Circuit. TAF's opposition is based on Judge Kuhl's apparent effort to deceive the Ninth Circuit in *U.S. ex rel. Rohan v. Newbert* (No. 92-55546). Judge Kuhl is effect represented to the Court that the Justice Department had questioned the constitutionality of the whistleblower ("qui tam") provisions of the False Claims Act ("FCA"), when in fact this was untrue.

In 1989, a memorandum was prepared in the Office of Legal Counsel of the Department of Justice questioning the constitutionality of the FCA. However, the views are set forth in that memorandum ("OLC Memo") were not adopted by the Department or advanced by the Department in FCA cases.

Despite the fact that the OLC Memo did not represent the views of the Justice Department, Kuhl, in her capacity as counsel for Litton Systems, Inc., submitted it to the Ninth Circuit, citing it in support of her arguments that the qui tam provisions of the FCA are unconstitutional and implied that the OLC Memo set forth the views of the Justice Department. The Department was not a party in the case, but learned of the misrepresentation of its views and submitted a letter to the Clerk of the Ninth Circuit setting the record straight.

We at TAF are deeply disturbed that Judge Kuhl would attempt to mislead the Ninth Circuit, the court to which she now aspires, about the views of the Department of Justice, regarding the constitutionality of an act of Congress. TAF believes her stunning lack of candor disqualifies her from service on that court.

JAMES W. MOORMAN,
President.

Mr. FRIST. Mr. President, I ask unanimous consent that the next two votes be 10-minute votes.

The PRESIDING OFFICER. Without objection, it is so ordered.

By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit, shall be brought to a close.

The yeas and nays are required under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 53, nays 43, as follows:

[Rollcall Vote No. 451 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—43

Akaka	Dodd	Levin
Baucus	Dorgan	Lieberman
Bayh	Durbin	Lincoln
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (FL)	Pryor
Breaux	Harkin	Reed
Byrd	Hollings	Reid
Cantwell	Jeffords	Rockefeller
Carper	Johnson	Sarbanes
Clinton	Kennedy	Schumer
Conrad	Kohl	Stabenow
Corzine	Landrieu	Wyden
Daschle	Lautenberg	
Dayton	Leahy	

NOT VOTING—4

Edwards	Kerry
Inouye	Nelson (FL)

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 455, the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin G. Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad R. Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. LEAHY. Mr. President, the opposition to Justice Brown for a lifetime position on the D.C. Circuit is deep and wide and is based on her record, both on and off the bench. As anyone who was watching C-SPAN last night and the night before would know, the Republicans are using the judicial nomination process in a manner that divides rather than unites. As the San Francisco Chronicle wrote, "Presidents typically shape the judiciary to reflect their own views. But with Charles Pickering, Priscilla Owens, William Pryor, Miguel Estrada and now Brown, Bush seems bent on stacking the bench with ideologues."

For this particular nominee, Janice Rogers Brown, the White House political operatives and ideologically driven selection staff reached out 3,000 miles to find a nominee who has repeatedly received negative ratings, who has been criticized by her Republican colleagues on the bench, and who has emerged from the Senate Judiciary Committee on a party-line vote. As Justice Brown's home State newspaper, the San Francisco Chronicle, wrote: "naming Janice Rogers Brown to the U.S. Circuit Court of Appeals for the D.C. Circuit, President Bush has again chosen a contrarian with a judicial philosophy that lies well outside the bounds of the mainstream." Even the Washington Post, which has been very sympathetic to this Administration and, in particular, to its court-packing efforts on the D.C. Circuit, has written that Janice Rogers Brown "is one of the most unapologetically ideological nominees" in many years.

As the nominee herself conceded at the end of her confirmation hearing, she was "treated with great courtesy" by the Members of the Judiciary Committee. Thereafter, this was a nomination rushed out of the Committee last week before the ink was dry on non-responsive answers to Senators' questions, and during Senate floor debate on another highly divisive judicial nominee, before a full Committee debate could be held. The District of Columbia Circuit is too important to the rights of all Americans to be left to judges whose ideological bias would lead them to gut the environmental protections, workplace protections, consumer protections and other government regulations authorized by Congress to protect all Americans.

In my statement at the outset of her confirmation hearing less than one month ago, I urged partisans to end the ugly game of contending that any criticism of the record of a Bush judicial nominee had to be motivated by bigotry. I asked that the right-wing tactic of smears and name calling subside and that we not see the race card dealt from the shameful deck of unfounded charges that stalwarts of this President's most extreme nominees have come to rely upon as they further inject partisanship and politics into the appointment of Federal judges. I noted that I expected that those who ultimately decided to support Justice Brown, even though they oppose affirmative action, would do so because they believed she would be a fair Federal judge. I suggested that those who opposed her because they retained serious doubt about her nomination and are concerned that she was selected on ideological grounds, could oppose her nomination for principled reasons having nothing to do with race. I urged that we focus on substance at the hearing and in this process.

My plea went unheeded, so that, first, I must, again, briefly respond to the partisan smears and name-calling that I have been hearing from the other side of the aisle. We have heard the ridiculous charges that we are opposing Justice Brown because of her gender or her race. My opposition to this nominee has nothing to do with her race; it is has nothing to do with her gender. It is about what kind of a lifetime appointment to the District of Columbia Circuit I fear she would be.

If Democrats were making decisions based on the gender of the nominee, would we have confirmed 33 judges nominated by President Bush who are women, including seven to the Courts of Appeal? Would we have worked so hard during the Clinton years to increase gender diversity on the bench and fight for votes for Bonnie Campbell, Elena Kagan and the scores of women nominees who were blocked and delayed by anonymous Republican holds? Would we be urging President Bush to work with us to find outstanding women judges and lawyers to increase gender diversity on the Federal bench? Do our critics really contend that Senators MIKULSKI, FEINSTEIN, BOXER, MURRAY, LANDRIEU, LINCOLN, CANTWELL, CLINTON, and STABENOW are anti-woman, or that Senators KENNEDY, BIDEN, HARKIN, REID or any other Democratic Senators would discriminate against women? This is a smokescreen, intended to obscure this nominee's stark record.

If Democrats were making decisions based on the race of the nominee, why would we have voted to confirm 13 African-American judges nominated by President Bush, including all four of the other African Americans nominated by President Bush to the appellate courts? Would we have confirmed Lavenski Smith to the 8th Circuit? Would we have fought so hard for two