

OPPOSITION—BROWN'S RULINGS ON CRIMINAL
LAW

Justice Brown has demonstrated her respect of Fourth Amendment rights and has argued for reversing verdicts or sentences for capital defendants

In addition to the dissent in *People v. McKay* that I cited, she wrote the court's opinion in *In re Brown* reversing a verdict and death sentence in a case where the prosecutor deprived the defendant of a fair trial by failing to discover and disclose an arguably exculpatory blood test.

In *In re Visciotti*, she dissented from the majority opinion, arguing that a defendant's death sentence should be set aside on grounds of ineffective assistance of counsel.

Mr. SPECTER. I ask unanimous consent that quotations from certain of Justice Brown's supporters be printed in the RECORD.

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

QUOTES FROM SUPPORTERS—WHAT THOSE
WHO KNOW HER BEST ARE SAYING ABOUT
JUSTICE BROWN

Letter from a bi-partisan group of 12 of Justice Brown's current and former judicial colleagues (including all of her former colleagues on the Court of Appeal, Third Appellate District and four current members of the California Supreme Court) to the Honorable Orrin G. Hatch, October 16, 2003:

"Much has been written about Justice Brown's humble beginnings, and the story of her rise to the California Supreme Court is truly compelling. But that alone would not be enough to gain our endorsement for a seat on the federal bench. We believe that Justice Brown is qualified because she is a superb judge. We who have worked with her on a daily basis know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor, without bias, and with an even hand."

Statement of former senator and governor Pete Wilson, for whom Justice Brown served between 1991 and 1994:

"She served as my legal affairs secretary for three years because a number of excellent lawyers in the state, whose judgment I trust, said, 'You will not do better.' They were right. She was not only a legal scholar—so that I could rely upon her judgment as to what the law was—she was an excellent guide when I was trying to decide what the law ought to be. . . . I would simply say to you that, by intellect and by character, by experience, by capability, Justice Brown deserves not only a vote, but deserves a seat on the District Court of Appeals, where I predict she will, if seated, be a brilliant addition."

Letter from a bi-partisan group of 15 California law professors to the Honorable Orrin G. Hatch, October 15, 2003:

"We know Justice Brown to be a person of high intelligence, unquestioned integrity, and even-handedness. Since we are of differing political beliefs and perspectives, Democratic, Republican and Independent, we wish especially to emphasize what we believe is Justice Brown's strongest credential for appointment to this important seat on the D.C. Circuit: her open-minded and thorough appraisal of legal argumentation, even when her personal views may conflict with those arguments."

Letter from 18 members of the California delegation in the House of Representatives to the Chairman and Ranking Member of this committee, April 14, 2005:

"Janice Rogers Brown is an outstanding jurist with more than eight years of experi-

ence on the California appellate bench. She is well-regarded by her colleagues and known to be a person of great intellect, integrity and dedication. Moreover, Justice Brown is a first-rate judge respected by many for her even-handed and unbiased application of the law."

Letter from Ellis Horvitz, a Democrat and one of the deans of the appellate bar in California, to the Honorable Orrin G. Hatch, September 29, 2003:

"In my opinion, Justice Brown [possesses] those qualities an appellate justice should have. She is extremely intelligent, very conscientious and hard working, refreshingly articulate, and possessing great common sense and integrity. She is courteous and gracious to the litigants and counsel who appear before her."

Undated Letter from Regis Lane, Director of Minorities in Law Enforcement, a coalition of ethnic minority law enforcement officers in California, to Chairman Orrin G. Hatch.

"We recommend the confirmation of Justice Brown based on her broad range of experience, personal integrity, good standing in the community and dedication to public service. . . . In many conversations with Justice Brown, I have discovered that she is very passionate about the plight of racial minorities in America, based on her upbringing in the south. Justice Brown's views that all individuals who desire the American dream, regardless of their race or creed, can and should succeed in this country are consistent with MILE's mission to ensure brighter futures for disadvantaged youth of color."

Mr. SPECTER. One of the cases which I studied in law school was the famous dissent by Justice Oliver Wendell Holmes, who argued for dissent and for freedom of speech, saying what I think is, if not the most famous quotation in Supreme Court history—that is pretty hard to categorize—certainly one of the most famous where he said that "time has upset many fighting faiths."

That is why we encourage independent thought. That is why we encourage dissent. There are many dissents which have become the law of the land. *Dred Scott* was overturned. *Plessy v. Ferguson* on segregation was overturned. *Brown v. Mississippi* established the rule of due process of law for State court criminal proceedings, and dissenting opinions of Brandeis and Holmes and Cardozo have become the law of the land.

So when one sees someone who might not conform exactly to the kind of thought or might be a little more colorful in phraseology, it is not necessarily something to be discouraged. If one takes a close reading as to what Justice Brown has had to say, she is worthy of confirmation by this Senate. As we analyze nominees for the Federal court, as we analyze nominees for any important position, we ought not to discourage individualism, independence, and free thought. The phrase that "time has upset many fighting faiths," encouraging independence and free thought has been a great bulwark for the progress of this country.

I yield the floor, and in the absence of any other Senators seeking recognition, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BURR). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. FRIST. Mr. President, we are in the midst of debate on Janice Rogers Brown. I know we have the time divided from 3 to about 6 tonight. I ask to speak for about 7 minutes as in morning business.

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

The majority leader is recognized.

FIRST ANNIVERSARY OF RONALD REAGAN'S
DEATH

Mr. FRIST. Mr. President, yesterday marked the first anniversary of the passing of President Ronald Wilson Reagan, the 40th President of the United States. I will take a moment to reflect very briefly on his extraordinary life and on his leadership that changed history.

Ronald Reagan was raised in a small town, and it was those small-town roots that never, ever left him. As he explained when he grew up in a small town, reflecting on those small-town roots, in his words:

You get to know people as individuals, not as blocs or members of special interest groups. You discover that despite their differences, most people have a lot in common: . . . [W]e all want freedom and liberty, peace, love and security, a good home, and a chance to worship God in our own way; we all want the chance to get ahead and make our children's lives better than our own.

Ronald Reagan believed that the Government should serve the people. He believed that America's strength came from creativity, ingenuity, and productivity of the people, not the plans of Government bureaucrats or the theories of intellectual elites. This core belief guided everything he did, everything he said.

When he came to office, the American economy was in shambles. Inflation was in double digits. Interest rates were soaring. The American worker was demoralized. He set about slashing Federal income taxes and cutting burdensome regulations. It was his mission to free the American worker and unleash the American entrepreneur. His sweeping tax reforms overhauled the Tax Code and removed 6 million taxpayers from the tax rolls. By the time he left, it was morning in America. President Reagan believed in the aspirations and dignity of the individual. As he said in his second inaugural address, there are no limits to growth in human progress when men and women are free to follow their dreams.

He reminded the American people that economic liberty and human freedom were two sides of the same coin. He reminded the world that freedom is the birthright of all peoples. Some call it the Reagan Revolution. Others call

it the Reagan Restoration. I prefer the latter.

The man from Dixon—lifeguard, radio announcer, actor, Governor, father, adoring husband, President of the United States—restored not only our confidence but our fundamental understanding of the source of America's greatness: each and every one of us striving to realize the American dream.

In his 1982 State of the Union Address, President Reagan told the Nation:

We do not have to turn to our history books for heroes. They're all around us.

To the freedom fighters in the former Soviet Union to his fellow citizens here at home, Ronald Wilson Reagan was one of those real life heroes who brought hope, freedom, and opportunity to millions.

I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. WYDEN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

I ask unanimous consent to speak in morning business for up to 20 minutes.

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

REAUTHORIZING THE USA-PATRIOT ACT

Mr. WYDEN. Mr. President, tomorrow the Senate Select Committee on Intelligence gets back on the national security high wire as the committee continues to work on legislation reauthorizing the USA PATRIOT Act. I described this process as a high-wire act because success means striking a balance, an equilibrium, between fiercely protecting our country from terrorism while still preserving the privacy and civil liberties that make our democracy so precious.

Chairman PAT ROBERTS, to his credit, has held several open hearings on this issue. I gladly participated because I believed the open hearings would help to address some of the skepticism about why the PATRIOT Act has almost totally been debated in secret.

Unfortunately, the most important part of the debate, the part where the committee must actually discuss how to walk that high wire, is still going to be done behind closed doors. In my view, this secrecy in going forward will undermine any public confidence that open hearings helped to create.

I have repeatedly and vigorously opposed making these decisions out of public view. Holding the decision-making process in secret is a mistake because it makes it harder for citizens to hold elected officials accountable. Holding the decisionmaking process in secret is unnecessary because it is not difficult for the committee to go behind closed doors, certainly, briefly, when necessary, to discuss any PATRIOT Act-related issue that requires secrecy. Holding the decisionmaking process in secret gratuitously feeds the cynicism that citizens have about the

Government's true intentions with respect to this law. Keeping these proceedings secret fuels concerns that the committee is making choices that will not stand up to public scrutiny—deciding, for example, that you can only have security if you sacrifice privacy. In my view, that is a false choice. I simply do not believe that protecting our country from terrorism and securing the privacy rights of our citizens are mutually exclusive objectives.

So here is my bottom line: Give law enforcement and intelligence officials the tools they need to protect our country, but stay away from the fishing expeditions. I do not think anybody will argue with me when I say that Congress passed the PATRIOT Act shortly after September 11, 2001, because it was necessary to move in a hurry. It was clear no one could have conceived of the way in which our country was exposed to attack. It was clear that the Federal Government needed to make major changes in how it fought terrorism, and those were needed immediately.

The best parts of the law tore down the unnecessary walls that had grown up between law enforcement and the intelligence agencies. Today, if you go out to the National Counterterrorism Center, the people on the ground there will tell you that those walls have been torn down, and they have stayed down. So the men and women on the front lines in the fight against terror are, in my view, more effective than they were.

However, other provisions of the law have sparked serious concerns. Giving Federal authorities broad powers of investigation has raised the specter that the rights of law-abiding citizens might be severely compromised, accidentally or even intentionally. In moving forward, I want to make sure that the right of our citizens to privacy is certainly not compromised intentionally.

I am not suggesting our national intelligence or law enforcement agencies are currently being misused the way they have been during our history—such as in the Watergate scandal. But it is important for us to make sure that appropriate safeguards are in place to prevent unintentional abuses and prevent future even darker episodes in our country's history.

In my view, a proposed addition to the PATRIOT Act, one that certainly warrants open debate, is the administrative subpoena which, in my view, raises the risk of real abuse. I want to make it clear on this subject today, I believe reauthorization of the PATRIOT Act should simply not include new administrative subpoena authority for the FBI.

I am opposed to giving the FBI this authority to write their own administrative subpoenas for foreign intelligence investigations for a number of reasons. Doing so would give the FBI the authority to demand just about anything from just about anybody, with no independent check, simply by

claiming that it is relevant to a national security investigation. The FBI already has access to the waterfront of personal information through the FISA warrant process. All they have to do is go before a judge and explain why it is relevant in the most general terms. By giving the FBI the authority to write their own administrative subpoenas, the Congress would be removing this even last modest safeguard.

Administrative subpoenas are currently used by many Federal agencies in many contexts. But, except in a very few limited cases, they are not used for national security investigations. National security investigations are simply different than criminal investigations. They, of course, are conducted in secret and do not require evidence of a crime. This is why there are different rules for the two types of investigations. It is not enough, in my view, to say what is good for the goose is good for the gander. The question here is, What is good for the American people? The answer is not administrative subpoenas.

As proposed, these subpoenas would be extraordinarily broad in their scope. They could be used to gain access to your credit records, your video rentals, your medical records, your gun purchases. They could be used to obtain just about anything. These subpoenas would only be seen by a judge if the recipient of the subpoena decided to challenge it. Even if the recipient was properly notified of his or her right to challenge, they might not be in the position to have the time or the resources to even make that challenge.

For example, there are 56 FBI field offices, one in just about every major American city. The head of the local field office could issue an administrative subpoena to a hospital director and ask for all the hospital's medical records simply by claiming they were relevant to an investigation. If the hospital director was busy or did not have the resources to make a challenge, then no judge—no judge would ever see this administrative subpoena. The patients would not even know that their records had been seized. They would be totally in the dark.

Even the FBI acknowledges that the agency can get all the information they could possibly need with the investigative powers they currently have. The only reason they have suggested for supporting this judge-free administrative subpoena is speed. They say that the FISA warrant process is simply too slow for time-sensitive, emergency situations.

This afternoon I would like to propose on the floor of the Senate an alternative. In this year's reauthorization of the PATRIOT Act, Congress can balance protection for the public with the right of privacy by creating an emergency use provision to the FISA business records authority. This way, under the proposal I make today, if the FBI needs information right away, the FBI could notify a judge that they