



Senator Feinstein Urges Rejection of Brown Nomination June 8, 2005

Washington, DC -- U.S. Senator Dianne Feinstein today urged the rejection of the nomination of California Supreme Court Justice Janice Rogers Brown to the DC Circuit Court of Appeals. The following is the floor statement by Senator Feinstein entered into the Congressional Record:

“Of all the nominations contested in the past few weeks, Justice Brown’s is the clearest cut. Justice Brown has given numerous speeches over the years that express an extreme ideology that is far outside the mainstream of American jurisprudence. In those speeches, Justice Brown used stark hyperbole, and startlingly vitriolic language which has been surprising, especially for a state Supreme Court Justice.

But statements alone would not be enough for me to oppose her nomination. Rather, my concern is that her personal views drive her legal decision-making. On far too many occasions, she has issued legal opinions based on her personal beliefs, rather than existing legal precedent.

I am troubled that Justice Brown is bound by her personal views of what the law should be rather than following the law as written and enacted. This is especially troubling for a candidate who is being nominated to the D.C. Circuit Court of Appeals.

DC Circuit Court of Appeals

The D.C. Circuit is an especially important court in our nation’s judicial system. It is recognized as the most prestigious and powerful appellate court below the Supreme Court because of its exclusive jurisdiction over constitutional rights and government regulations.

Given this exclusive role, the judges serving on this court play a special role in evaluating government actions.

Each year, the Supreme Court routinely reviews fewer than 100 cases. Therefore, circuit courts, like the D.C. Circuit, end up as the forums of last resort for nearly 30,000 cases each year. These cases affect the interpretation of the Constitution as well as statutes intended by Congress to protect the rights of all Americans, such as the right to equal protection of the laws and the right to privacy. Specifically, the DC Circuit Court is the most likely venue where federal regulations and government actions will be upheld or overturned.

Yet, Justice Brown, throughout her career, has demonstrated an open hostility towards government. This hostility is concerning given that, if Justice Brown serves on the D.C. Circuit, she will play a decisive role in evaluating government actions.

For example:

- In a 1999 speech Justice Brown stated: “My thesis is simple. Where government advances B and it advances relentlessly - freedom is imperiled; community impoverished; religion marginalized; and civilization itself marginalized.”
- At a 2000 Federalist Society event, Justice Brown stated: “Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched, culture which finds moral depravity entertaining and virtue contemptible

The Senate should not confirm a judge to this important court who has shown such blatant contempt for the government. Again, to be clear, if it were only hyperbolic statements in speeches then maybe we could look past the rhetoric. However, the extreme views expressed in Justice Brown’s speeches also emerge in the opinions she has rendered as a judge.

In various cases involving even modest government regulations she has issued opinions that ignore the law and established precedent.

One example I would like to discuss involves a property issue in my home city, San Francisco, and it is a case with which I am familiar since the ordinance was enacted during the time I served in San Francisco’s government.

Takings Case: San Remo Hotel v. San Francisco:

The case is *San Remo Hotel v. San Francisco*. In response to a low income housing emergency for elderly residents, San Francisco enacted an ordinance requiring hotels to obtain a permit before converting long-term residential housing into short-term tourist hotel rooms.

To obtain a permit, hotels either had to provide mitigation for the removal of the residential rooms by offering alternative housing, or pay a fee to be used for the relocation of tenants. In *San Remo Hotel v. San Francisco*, the owners of a hotel sued the City of San Francisco, claiming that the ordinance constituted an illegal “taking” of property by the city.

Following U.S. Supreme Court precedent, the California Supreme Court held that the ordinance did not constitute a “taking” of the hotel’s property since the ordinance did not physically “invade” the property and since the ordinance “substantially advance[d] legitimate state interests.”

In contrast, Justice Brown wrote in her dissent in the *San Remo* case that:

“Private property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of majorities that prevail in the political process— or worse, the political powerbrokers who often control the government independently of majoritarian preferences.”

The Majority described Justice Brown's dissenting opinion by saying that she argued, with little citation or support, that "government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties."

If this view were the law it would make it almost impossible for any city, state, or local government to make any policies for the benefit of the community as a whole – no local government could downzone property, no federal agency could prepare a habitat conservation plan. Under Justice Brown's analysis they would all be illegal takings of one kind or another.

The majority decision of the California Supreme Court went on to criticize Justice Brown's for attempting to "impose" her own "personal theory of political economy on the people of a democratic state."

Furthermore, Justice Brown's written opinion was at odds with the current legal precedent of the United States Supreme Court at that time. And, in fact, earlier this year, *Lingle v. Chevron* the U.S. Supreme Court unanimously rejected a takings analysis similar to the one set forth in Brown's dissent in *San Remo*.

Nevertheless, Justice Brown permitted her personal views to overwhelm her obligation as a judge to follow the law. While Justice Brown certainly has a right to private views that may conflict with the law, a judge may not substitute her personal opinions for the law.

Criticized by her colleagues

I also believe it is illuminating to put Justice Brown's views and legal opinion in the context of the court of which she is a member.

Justice Brown often stands on an island by herself as the lone dissenter on a court made up of 6 Republican justices and only one Democratic justice – approximately 1/3 of the cases she has written have been dissents, and in 10 % of those cases, she's been the lone dissenter.

For example, in the 2004 case of *Catholic Charities of Sacramento v. Superior Court of Sacramento County*, Justice Brown cast the sole dissenting vote. She argued against upholding a state statute that requires employers whose insurance covers prescription drugs to include prescription contraceptives in their coverage. In her dissent, she suggested that, if women had a problem with their inequitable treatment, they were free to find "more congenial employment," and stated that because women seeking contraception were a minority of insured employees, striking down the law would have a "negligible effect."

Based on her pattern of taking this contrarian role, she has been widely criticized, even among her Republican colleagues, for her caustic writings. Sources on the court reportedly stated that her fellow justices have privately complained about her "poison pen" and have called Justice Brown a "loose cannon when she has a typewriter in front of her."

Republican Chief Justice Ronald M. George has even taken the unusual step of pulling her aside and asking her to tone down her scathing criticism of majority rulings. (*Los Angeles Times*, July 11, 1998)

In addition to her tone, her legal reasoning has often been criticized by her colleagues. In one example, *Nike v. Kasky*, Nike was accused of providing abusive conditions for their overseas workers including -- forced overtime, exposing workers to health hazards, and subjecting workers to verbal, physical and sexual mistreatment.

Nike denied the mistreatment and made numerous statements touting a positive record and was sued for misrepresenting its labor practices at Asian factories.

The majority of the California Supreme Court determined the statements made by Nike were commercial speech and thus entitled to less constitutional protection.

Justice Brown dissented saying the speech should have been protected even if false. In her dissent, Brown called on the U.S. Supreme Court to overturn a long line of cases which distinguish commercial and noncommercial speech.

Republican Justice Kenard criticized Brown's dissent saying, "Sprinkled with references to a series of children's books about wizardry and sorcery, Justice Brown's dissent itself tries to find the magic formula or incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws."

I am deeply troubled when a Justice's own colleagues express grave concerns about an individual's legal reasoning, and demonstrate a willingness to openly criticize a fellow member of the bench.

Putting Personal Views Above the Law

An overarching principle of both Republicans and Democrats is that the role of a judge is to follow the law, regardless of one's personal ideology. Yet, repeatedly, Justice Brown has allowed her personal opinion to override a fair application of the law and has altered her legal reasoning in order to achieve a desired result. Law school professor, Gerald Uelman, said that Justice Brown's opinions may be interpreted as "motivated by politics rather than the law."

When examining her record, it appears that the thread of logic sewn through her legal opinions is her desire to achieve a predetermined outcome based on her personal views. In case after case, Justice Brown significantly changes her legal reasoning to implement a results-oriented approach based on her view of what the law should be.

Consider the following examples:

- **Double Standard on Following Supreme Court Precedent**

When Justice Brown wanted to limit the explicit right to privacy in the California's Constitution, she argued: "Where, as here, a state constitutional protection was modeled on a federal constitutional right, we should be extremely reticent to disregard U.S. Supreme Court precedent delineating the scope and contours of that right." [*American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (Aug. 1997)].

But when the question of remedies for a violation of constitutional rights arose, she said: “Defaulting to the high court fundamentally disserves the independent force and effect of our Constitution. Rather than enrich the texture of our law, this reliance on federal precedent shortchanges future generations.” [Katzburg v. Regents, 29 Cal 4th 300 (Nov. 2002)].

These cases both involved the role of precedent and following the decisions of previous courts. However, depending on the facts of the case Justice Brown changed her legal opinion about whether judges should follow precedent, in one case she discussed the importance of following precedent, yet in the other she argued that reliance on precedent can be harmful.

- **Double Standard on Trusting Juries**

When examining the role of juries and their ability to evaluate a case, once again, Justice Brown makes conflicting arguments.

In order to limit damages against employers in worker discrimination suits, Brown wrote, “When setting punitive damages, a jury does not have the perspective, and the resulting sense of proportionality, that a court has after observing many trials.” [Lane v. Hughes Aircraft Company, 22 Cal. 4th 405 (2000)].

But, when criminal defendants’ cases -- not businesses -- were being evaluated, Justice Brown wrote, “I do not share the majority’s dim view of jurors. Rather, I would presume, as we do in virtually every other context, that jurors are ‘intelligent, capable of understanding instructions and applying them to the facts of the case.’”- [People v. Guian, 18 Cal 4th 558 (July 6, 1998)]

- **Double Standard on Damages**

Justice Brown’s conflicting legal reasoning also appears when her decisions examine the assessment of damages. When the plaintiffs were victims of employment discrimination, Justice Brown supported limits on punitive damages. [Lane v. Hughes Aircraft, 22 Cal. 4th 405 (2000)] But, when the plaintiffs were property owners in a mobile home park who had to previously abide by rent control laws, she opposed any limit on damages. [Galland v. City of Clovis, 24 Cal. 4th 1003 (2001)]

In each of these contrasting examples, Justice Brown has used legal reasoning that has conflicted. It is concerning when a judge seems to alter her legal reasoning based on her personal view of a case, rather than employing consistent legal reasoning regardless of who is making the argument, or who would be impacted by its effect.

Based on this record, parties in a case have no idea whether Justice Brown will rely on precedent or decide it is an impediment, whether she will defer to the legislature or decide its time for her or other judges to make law; whether she will trust the jury to evaluate the case or decide they cannot make the necessary evaluations; or whether she will protect unlimited damages or order that there needs to be limits on damages.

Those who come before a court need to be assured that they are going to be given a fair hearing with an impartial arbiter. Justice Brown record demonstrates that those who come before her court will not have such assurances.

Broad Opposition

Not surprisingly Justice Brown's nomination has ignited strong and far-reaching opposition. Both Senators from her home state and almost two dozen members of California's congressional delegation oppose her nomination.

The Congressional Black Caucus opposes her nomination, as does every major African American organization in the country, including the National Black Chamber of Commerce, NAACP, the National Bar Association, the California Association of Black Lawyers, and the Leadership Conference on Civil Rights.

The California Association of Black Lawyers stated, "We would like to see an African American female be elevated to a higher court." But as the group's president went on to explain, "We do not see how we can support someone who is diametrically opposed to our goals."

In addition, unlikely, conservative commentators have affirmed concerns raised by opponents of Justice Brown's nomination:

- National Review Senior Editor Romesh Ponnuru discussed Brown's troubling statements and her willingness to embrace judicial activism and concluded that "if a liberal nominee to the courts said similar things, conservatives would make quick work of her."
- George Will concluded that Justice Brown is "outside of that mainstream" of conservative jurisprudence ; and
- Conservative columnist Andrew Sullivan wrote: "Whatever else she is, she does not fit the description of a judge who simply applies the law. If she isn't a 'judicial activist,' I don't know who would be."

Conclusion

Evaluating judicial nominations is a very difficult process, and it is one that ignites passionate feelings from all sides. Clearly, Presidents from different parties will choose very different nominees for the federal courts. However, there are basic principles that EVERY nominee must follow regardless of which party is in power.

As Senator Hatch stated in 1996 when opposing the confirmation of Judge H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit and Judge Rosemary Barkett to the U.S. Court of Appeals for the Eleventh Circuit, "Many of these judges are activists who simply cannot understand that their role is to interpret the law, not to make it... I led the fight to oppose the confirmation of these two judges because their judicial records indicated that they would be activists who would legislate from the bench."- Congressional Record (3/29/96).

Legislating from the bench, being an "activist" judge, has been a concern of members of both parties. It is a basic principle used when evaluating nominees – judges must follow the law, not manipulate the law to serve their own political ideology.

As I have discussed today, Janice Rogers Brown is widely opposed by a broad coalition of prominent leaders and organizations, she has been criticized by her Republican colleagues on the court, and she has made astoundingly vitriolic statements about everything from senior citizens to the government.

While each of these concerns raises significant questions about her qualifications to serve on the D.C. Circuit Court of Appeals, for me, most importantly, Janice Rogers Brown does not meet the basic principle used to evaluate judicial nominees by both parties – will they follow the law?

Unfortunately, Janice Rogers Brown's record does not demonstrate that she will be able to put aside her personal views and follow the law.