



October 21, 2003

★ Justice  
★ Independence  
★ Dignity  
★ Security

Honorable Orrin Hatch, Chair  
Honorable Patrick Leahy, Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Senators Hatch and Leahy:

As organizations dedicated to promoting and protecting the interests of senior citizens, we are writing to express our opposition to the nomination of Janice R. Brown, currently an Associate Justice on the Supreme Court of California, to the United States Court of Appeals for the District of Columbia Circuit.

Based on her extensive record, once confirmed to the powerful D.C. Circuit, Justice Brown could threaten the enforceability and even the viability of the senior safety net – the network of major, long-standing programs on which older Americans depend, such as Medicare, Medicaid, the Age Discrimination Act of 1967, the Nursing Home Reform Act, the Americans with Disabilities Act, the Food Drug and Cosmetic Act, and many other vital protections.

Justice Brown has emphatically proclaimed her deep and strong opposition to the framework for humanitarian government established by President Franklin D. Roosevelt and implemented by all administrations since that time, Republican and Democratic. Specifically, she has stated that the Supreme Court's decisions upholding major New Deal legislation – what she calls the "Revolution of 1937" – constituted a "disaster of epic proportions." Prominent among these 1937 decisions, to which she objects so strongly, was the Court's landmark determination in *Steward Machine Company v. Davis* to affirm the constitutionality of the Social Security Act.

For nearly three quarters of a century, the Social Security Act has been the bedrock of economic security for the nation. It is dismaying that serious consideration could be given to entrusting a life-tenured seat on the court that is the federal government's principal regulatory overseer to someone who scorns the validity of this and other such fundamental guarantees. Regrettably, Justice Brown's record on the California Supreme Court, marked by numerous lone dissents, indicates her readiness to promote her idiosyncratic policy and political views with novel legal claims that contravene statutory and judicial authority. For example:

- In one such lone dissent, Justice Brown contended that rectifying age discrimination neither "inures to the benefit of the public," nor is it a "fundamental and substantial" public policy" of the state – since age discrimination simply reflects the "unavoidable consequence of that universal leveler: time." The Court majority pointed out that both the California legislature and the Court's own precedents had made a contrary judgment, which Justice Brown was inappropriately "second-guessing." *Stevenson v. Superior Court & Huntington Memorial Hospital*, 941 P.2d 1157, 1172, 1177 (Cal. 1997)
- Another lone dissent urged that any regulation constitutes a regulatory "taking" – hence requiring compensation – if it "benefit[s] one class of citizens" [in this case, low income tenants] at the expense of another [in this case, landlords]." *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 126 (2002) Under this approach, nursing home safety standards might be held to benefit elderly nursing home residents "at the expense of" nursing home owners, thereby requiring compensation – and paralyzing the Federal nursing home reform program.
- More troublesome than Justice Brown's opinions in particular cases is her frequently reiterated hostility *in principle* to democratically determined measures that distribute benefits to needy groups. In her *San Remo Hotel* dissent she asserted that such policies turn "democracy into kleptocracy." With respect specifically to benefits for older Americans, she has said:

"Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system permits them to extract."

It may be difficult for many senior citizens, and their grandchildren as well, to understand how elected representatives could vote to confirm anyone with such views to a position as responsible as the D.C. Circuit Court of Appeals.

In light of her aversion to the post-1937 constitutional regime undergirding modern government, and her readiness to displace precedent with such extreme personal views, we hope and trust that you and your colleagues will recognize that the Federal judiciary is not the right place for Justice Brown.

Sincerely,

Edward C. King  
Executive Director,  
National Senior Citizens Law Center

For:  
National Senior Citizens Law Center  
National Committee to Preserve  
Social Security & Medicare  
Alliance of Retired Americans  
Families USA  
AFSCME Retirees Program  
Gray Panthers  
Center for Medicare Advocacy  
National Health Law Program