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STATEMENT OF UTAH STATE BAR PRESIDENT

STEPHEN W. OWENS

TO THE UTAH STATE SENATE JUDICIARY COMMITTEE

IN OPPOSITION TO S.B. 109

**(CHIEF JUSTICE OF THE UTAH SUPREME COURT
APPOINTMENT)**

February 2, 2010

Mr. Chairman and Members of the Committee, my name is Stephen Owens and I am President of the Utah State Bar. I thank you for giving me a few minutes of your valuable and limited time. I have a tremendous and genuine respect for what you do and salute you and your families for your sacrifices to serve our special state.

I come to you to address Senate Bill 109 entitled, "Chief Justice of the Utah Supreme Court Appointment."

Yesterday, the Board of Bar Commission, the elected governing body of the Utah State Bar representing Utah's 10,000 statewide lawyers, voted unanimously in opposition to this bill and asked me to appear at this hearing to let you know our concerns about this bill.

I do not come here representing the state courts, but in our own right as the lawyers who every day represent clients who expect their rights to be fairly and impartially adjudicated, free from political influence.

At our Bar convention last July, former U.S. Supreme Court Justice Sandra Day O'Connor spoke to a standing room only group of

over 600 lawyers and family members and paid tribute to Utah's independent judiciary. She strongly advised us to oppose any efforts that would weaken our fair and impartial courts or otherwise interject politics into judicial decision-making.

We ask you to oppose this bill because it is bad policy that infringes upon the separation of powers and because the current system is not broken and does not need repair.

The foundation of our democratic government is the balance of powers between the three co-equal branches of government. Before we throw out any statute, we should look at its history. Since statehood in 1896, over one hundred years, the Chief Justice has been selected from within the Supreme Court. The proposed dramatic change would allow the executive branch to choose the constitutional, presiding officer of a separate governmental branch.

The Utah Constitution states that no branch of government may exercise any powers or functions properly belonging to another branch of government "except in certain cases expressly directed or permitted." Article 5, Sec. 1.

While the Constitution allows for the appointment of the Chief Justice to be governed by statute (Article 8, Sec. 2), it does not follow that the statute should alter the historical balance of power to grant to the Executive branch the power to appoint the Chief Justice and consequently the head of the Judicial Council.

Historically, the Executive branch exercises its power to appoint the members of the judiciary, including members of the Supreme Court. However, the Judicial Branch should choose its own leader. Just as we would not allow the Governor to choose the leaders of the legislative branch, we should not allow the Governor to choose the leader of the judicial branch.

The Chief Justice is not just a member of the Supreme Court. "The Chief," as the chief justice was lovingly called when I clerked at the Court, runs the entire judicial branch. The position carries with it significant administrative powers and responsibilities to oversee the entire judicial branch. (Article 8, Sec. 12)

Altering the selection process in this manner would necessarily create an imbalance of power by politicizing the appointment. Pretend for a minute I am a Supreme Court Justice and that I want to be the Chief Justice. If this change goes into effect, I would have a conscious or unconscious desire to please the Governor,

and certainly would not want to upset him or her. To do otherwise would be to risk my promotion.

Now pretend that I am currently the Chief Justice and that I wish to remain Chief Justice. If this change goes into effect, I would again have the desire to please the Governor, and not to upset him or her. Otherwise, I would risk being demoted.

It is bad policy for a judge--any judge--to want to please a politician--any politician. We want impartial decisions made on the facts and law before the judge, subject to an impartial appeal if a mistake is made.

This change, if it goes into effect, creates the potential for the Governor to use the appointment power to influence either substantive decisions by the Court or policies for the administration of the Judicial Branch of government.

The Chief Justice, the head of one of the three co-equal branches of government, would be subject to the whims of the Governor. If the Governor is unhappy with a decision or the administration of this separate branch of government, the Governor could then broker the position to achieve his or her political agenda. No other branch of government has a similar right or power to insert itself into the administrative decisions of another branch or appoint the head of that other branch of government. This imbalance of power would be unprecedented in Utah.

This institutional principle transcends any current individuals. In other words, we must not focus on the current Governor or the current chief justice or the current make-up of the Court, or what might happen immediately if the bill passes. These individuals will come and go--we want to get the process right.

The current process is not broken and should not be fixed. The members of the Supreme Court are in the best position for assessing the qualities of who would best lead the body and the court system. They are also in the best position to recognize who is ill-suited to be or continue in that role. If someone who is ill-suited for the job is imposed upon them, the internal operations will bog down and be disrupted.


Finally, let me address the argument that Utah would merely be adopting the "federal" model. As our Governor recently pointed out in his State of the State address, Utah does not look to the federal government to see how things should be

run. Nevertheless, it is true that our country's president appoints the Chief Justice of the United States Supreme Court. However, the important distinction is that the U.S. Chief Justice is a lifetime appointment. That means that while politics may enter into the initial appointment, politics is then permanently removed from the process. The Chief Justice does not have to worry about whether a certain ruling will upset the President because the President does not retain power over the Chief Justice. That would not be so if this bill passes. Thus we cannot state that this bill implements the federal model.

Please vote against S.B. 109. You have been very kind to listen to me. Thank you for your time. If you have any questions, I will try to answer them.

Respectfully submitted,

UTAH STATE BAR

A handwritten signature in black ink, appearing to read "Stephen W. Owens". The signature is written in a cursive style with a large initial "S".

STEPHEN W. OWENS