TESTIMONY OF
THE HONORABLE NATHANIEL R. JONES
REGARDING THE NOMINATION
OF JOHN G. ROBERTS, JR. TO THE U.S. SUPREME COURT
Senate Committee on the Judiciary
Thursday, September 15, 2005

Chairman Specter, Senator Leahy, esteemed members of this Committee—I am honored to have this opportunity to appear before you today to assist you to more effectively evaluate the fitness of Judge John G. Roberts, Jr. to be confirmed as Chief Justice of the United States.

My acceptance of your invitation to appear and offer testimony is prompted by conscience and driven by a profound obligation to introduce into the record an historical perspective on race and civil rights remedies.

You are confronted with a serious constitutional and moral responsibility. I pray that you will not shirk your duty. You are considering, under the Constitution's Advice and Consent clause, the fitness of a Supreme Court nominee who has, in the past, argued against the use of federal judicial power to eradicate the vestiges of slavery and badges of servitude. This record triggers serious questions and demands straight answers.

While I appear in my own right, more importantly, I am invoking the voices of distinguished legal giants on whose shoulders I stand and whose voices have been stilled by time: Dean Charles Hamilton Houston, Justice Thurgood Marshall, Judge William H. Hastie, Clarence Mitchell, James A. Nabrit, Judge Spottswood Robinson, Judge A. Leon Higginbotham, Jr., and many others who have my deep and enduring respect. These individuals believed in the Constitution, and fashioned a strategy for using the law and courts to attack racial segregation. They set the stage for the development of remedies to remove the stain of racial segregation that law imposed on this land.

You may ask why I invoke the names of and purport to speak in the voice of these towering legal giants and hold up their contributions to the advancement of civil rights jurisprudence. My reason is twofold.

First, my professional and personal experiences qualify me to do so.

Second, since he was nominated by the President, serious questions have been raised concerning Judge Roberts' views about the relevance and legality of remedies aimed at ending racial discrimination. Unfortunately, very few Americans know the history of the myriad ways the positive law—legislatures and courts—reinforced and perpetuated racial discrimination in America. It is up to this Committee, therefore, to assure that, at the very least, the next Chief Justice of the United States understands that history and most importantly, why remedial action was and continues to be necessary.

Given the gravity of the concerns raised about the nominee's views on racial remedies, views which, if acted upon, would result in nothing less than a virtual dismantling of those

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remedies—remedies that saved the soul of the nation—this Committee has a heavy and unavoidable burden to probe deeply into his current views.

The nominee's participation in the strategy to strip Federal courts of jurisdiction to issue school desegregation remedial decrees, and to raise the standard of scrutiny with regard to remedies that involved race, requires careful scrutiny. So extreme and radical were those proposals attributed to the nominee that the then-president of the American Bar Association, David Brink, condemned them as a "legislative threat to our nation…" The Conference of Chief Justices of the States called "court stripping" "a hazardous experiment with the vulnerable fabric of the nation's judicial system." You must seek the "why" of his involvement in light of the pervasiveness of segregation laws and their enforcement by courts, and whether those positions remain with him.

One's fitness to be the Chief Justice transcends what so many have thus far focused upon—stellar academic achievements and a degree of unquestioned professional competence. The nominee's views and his unquestionably activist attempts to thwart the federal courts' efforts to dismantle the segregation schemes it had erected and sustained, bring into play something much more fundamental than technical competence, given that he is being considered for a lifetime seat on the nation's highest court. The critical question before you is one of values, not competence.

To understand why this is true, one need only consider the most wretched decision the Supreme Court ever handed down on the question of human rights, *Dred Scott v. Sanford.* The author of that decision, Chief Justice Roger B. Taney was undoubtedly highly qualified from a technical and professional standpoint, having been appointed by President Andrew Jackson after his service as Secretary of Treasury. Yet, when faced with the fundamental question of whether a one-time slave, Dred Scott, had standing to sue to retain his newly acquired free status, Justice Taney wrote that black people—slaves—were not persons within the contemplation of the framers of the Constitution and were therefore powerless to sue. Had Chief Justice Taney been imbued with a different scale of values, our national history on race might have been considerably different.

Similarly, had those charged with wielding awesome judicial power at the time of the *Plessy v. Ferguson* case in 1896 understood that the 14th Amendment's guarantees were intended to include black people, America would have been spared a horrible chapter. Instead, Justice Henry Billings Brown and the Supreme Court majority stood the 14th Amendment on its head, thereby constitutionalizing and legitimizing racial discrimination. The author of the majority opinion had all of the professional and academic equipment one customarily looks to in measuring one's fitness for service on the Supreme Court—academic credentials and prior judicial experience. Justice Brown had served on the Sixth Circuit Court of Appeals and was the holder of degrees from both Harvard and Yale. Yet he lacked the values that sensitized him to understand why the 13th, 14th and 15th Amendments had to become a part of the Constitution. That responsibility fell to the lone dissenter, John Marshall Harlan, the son of Kentucky slave owners, a graduate of Centre College and Transylvania University. Justice Harlan offered an eloquent prophecy that the court and the nation would regret the doctrine it had imposed on the nation. At first glance, Justice Brown's academic and career credentials may have appeared more impressive than Justice Harlan's. But in the final analysis, it was Justice Harlan, with his

superior values, who was unquestionably the finer judge. Clearly, if Justice Harlan's dissent had been the majority view, we would not be faced with the continuing struggles over race. Had Justice Harlan prevailed, we would have been a much more fair, unified and harmonious country over the last half century.

So pervasive did "separate but equal" become that many whites were freed of moral and legal guilt as they ghettoized blacks, denied them job opportunities, excluded them from places of public accommodation, relegated their children to inferior schools, denied them admission to colleges and universities, and operated a court system on an apartheid basis, with whites in control and blacks under control.

To those who quarrel with the view that the Supreme Court's "separate but equal" doctrine freed white America to harm and repress black Americans, I cite the finding of the Kerner Commission.

> What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.

When Charles Houston launched his strategy to overturn the *Plessy v. Ferguson* decision, American law was firmly supportive of racial segregation. Houston and his colleagues, Thurgood Marshall and William Hastie, went from courtroom to courtroom challenging what they firmly believed to have been a hijacking of the 14th Amendment. Race was at the heart of these efforts because it was race that drove the Supreme Court to inject racism into the tributaries of this nation.

These giants had a profound belief in the Constitution's promise to establish justice, insure domestic tranquility and secure the blessings of liberty. Through the careful building of precedents, with much sacrifice and struggle, the Houston strategy resulted in the 1954 *Brown v. Board of Education* decision. That decision proved to be the launching pad for widespread attacks on racial discrimination.

Many other things operated in tandem with the litigation strategy that targeted the nation's racial affliction. At the beginning of World War II, organizations pressed President Franklin D. Roosevelt to issue an Executive Order that would require defense contractors to cease their discriminatory hiring practices. When he balked, A. Philip Randolph and Walter White of the NAACP threatened a massive march on Washington. On the eve of the planned march, the President relented and issued an order banning discrimination in the defense industry and created a Fair Employment Practices Board. When Harry Truman followed FDR as President, he issued a series of Executive Orders aimed to, among other things, end segregation in the Armed Forces. He broke ground with the appointment of the first black Article III judge, William H. Hastie.

President Eisenhower renewed and extended the Truman orders with respect to government contracting and federal employment. He tapped his vice president, Richard Nixon, to oversee these programs aimed at ending racial discrimination in and by the federal

government. During his administration, the first civil rights bill since Reconstruction was enacted in 1957 designed to deal with the barriers still existing that interfered with the ability of blacks to vote in the South.

Thereafter, John F. Kennedy introduced many other initiatives aimed at making the government more racially inclusive. Foremost among these actions was the appointment of minorities to sub-cabinet positions and, and in keeping with his campaign promise, he appointed a number of blacks as district judges, placed Thurgood Marshall on the Second Circuit, and broke ground by appointing the first two blacks to served as United States Attorneys—Cecil Poole and Merle M. McCurdy in Ohio.

Again, I cite the foregoing to emphasize that race was at the heart of all of these activities. It should come as no surprise, then, that when writings and views of a nominee appear to challenge the use of federal power to address the harmful vestiges of racist governmental policies, questions are raised and answers demanded. It should also come as no surprise that black Americans and those who collaborated with us to effect change, are alarmed and wary that his elevation to the Supreme Court could result in an unraveling of the gains won at such a high price.

There is a tendency among persons who lack a sense of history to dismiss the claims raised by civil rights groups as nothing more than the whining of special interest groups. I'm old enough to know, firsthand, that such accusations are nothing new. In their day, Charles Houston, Thurgood Marshall, Martin Luther King, Medgar Evers and others who are now universally hailed as American heroes, were similarly accused of less-than-honorable motives. Yet, they kept their eyes on the prize and, through great sacrifice and commitment, pulled our nation back from the abyss. Their mission then and that mission now is not a "special interest"—it is the very core of our nation's creed. Mischaracterizing our concerns as irrelevant and cynical is flat-out wrong and an insult to the memory of these great Americans and to me personally.

In urging you to closely scrutinize the nominee's record, I neither wear the hat of a political partisan, nor have a political agenda. The legislative and judicial remedies aimed at ending the scourge of segregation do not belong to any particular party—they were the work of both Republicans and Democrats. The landmark *Brown v. Board of Education* opinion was authored by Chief Justice Earl Warren, a Republican who was appointed by a Republican President, Dwight D. Eisenhower. The most significant legislative accomplishments in the area of civil rights grew out of the leadership of President Kennedy and President Johnson but with the significant collaborative efforts of Republican Senators Everett Dirksen, Jacob Javits, and Edward Brooke, Democratic Majority Leader John McCormack, Congressman Emanuel Celler, and Congressman William McColloch. These bipartisan victories vindicated the faith of black and white Americans, whose efforts were spearheaded by such persons as Clarence Mitchell, Jr. and Joseph Rauh, among others.

Neither political partisanship nor loyalties should override the solemn duty that the Constitution has placed upon you. It will be for history, not your contemporaries, to judge your deeds.