Press Release

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Lawyers' Committee for Civil Rights Urges Senate Not to Confirm John Roberts Until Satisfied He Will Not be Hostile to Civil Rights

Senate Urged to Conduct Thorough Inquiry During Confirmation Hearing

(Washington, DC) – The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is highly troubled by John Roberts's existing record on civil rights issues which reveal a disturbing hostility towards core civil rights legal principles. In a statement released today, the Lawyers' Committee strongly urged the Senate Judiciary Committee to thoroughly question Judge Roberts during next week's confirmation hearing in order to determine whether he would alter the balance of the Supreme Court in a direction adverse to civil rights.

The Lawyers' Committee's statement expresses serious concerns about Roberts's publicly released records from the 1980s, which "consistently endorse, in several contexts, restrictive views on the protection of civil rights." For example, Roberts's writings "favored the more demanding intent test instead of the effects test in voting rights cases; opposed busing for school desegregation; attacked affirmative action as "quotas;" and favored relief only for individual victims of discrimination instead of relief for the classes of victims."

"Judge Roberts's memoranda consistently embrace narrow interpretations of civil rights laws and exhibit strong support for limiting the remedies available to victims of unlawful discrimination," said Barbara R. Arnwine, Executive Director of the Lawyers' Committee. For instance:

- Roberts opposed the Justice Department's efforts to protect Black job applicants from **racial discrimination in an employment case** involving a local school district that refused to hire Blacks.
- Roberts opposed critical amendments to the **Voting Rights Act and the Fair Housing Act** that have been instrumental in providing electoral success and equal housing opportunities for many Americans.
- Roberts opposed **school busing** plans as a remedy for segregated school districts and instead supported court stripping legislation as a means to eliminate busing and white flight.
- Roberts argued in favor of rolling back the scope of **affirmative action** policies to include only recruitment programs.

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In light of the anti-civil rights positions expressed in these writings, the statement concludes that had Judge Roberts's "views prevailed, much of the racial progress that our nation celebrates in voting, employment, housing, and educational diversity would not have been achieved."

The Lawyers' Committee request that the Senate Judiciary Committee "obtain from Judge Roberts the information necessary to determine whether, with his confirmation, Justice O'Connor's deciding vote on an otherwise evenly-balanced Court would be replaced by a vote for cutting back on civil rights protections."

The Lawyers' Committee urges the Judiciary Committee to exercise its full authority during the confirmation hearing by directing questions to Judge Roberts that address, if and how, and in what capacity, the views he expressed in his earlier writings would shape his consideration of civil rights as a member of the Supreme Court.

The full text of the Lawyers' Committee's statement of concern can be found at www.lawyerscommittee.org

The Lawyers' Committee is a nonpartisan, nonprofit civil rights legal organization, formed in 1963 at the request of President John F. Kennedy to provide legal services to address racial discrimination.

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STATEMENT

ON THE NOMINATION OF

JUDGE JOHN G. ROBERTS, JR.

AS AN

ASSOCIATE JUSTICE OF

THE SUPREME COURT OF THE UNITED STATES

August 30, 2005

Lawyers' Committee for Civil Rights Under Law Statement on the Nomination of John G. Roberts, Jr. as an Associate Justice of the Supreme Court of the United States

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August 30, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy,

We enclose the Statement of the Lawyers' Committee for Civil Rights Under Law on the nomination of Hon. John G. Roberts, Jr. for the position of Associate Justice of the Supreme Court of the United States.

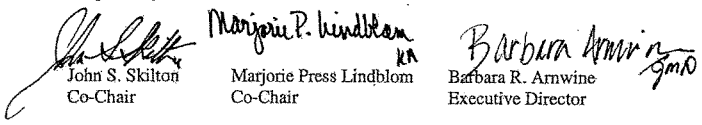
The Lawyers' Committee for Civil Rights Under Law is a national, nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law.

We urge each member of the Committee, before casting a vote to send Judge Roberts's nomination to the full Senate, to be convinced that, as an Associate Justice, Judge Roberts would not alter the balance of the Supreme Court in a direction hostile to civil rights.

We request the opportunity to testify at the Senate Judiciary Committee hearing.

We hope the Statement is of assistance to the Judiciary Committee. We will be monitoring the hearings on the nomination and, if warranted, we will submit an additional written statement on the nomination.

Respectfully,



John S. Skilton
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Barbara R. Arnwine
Executive Director

Statement of the Lawyers' Committee for Civil Rights Under Law On the Nomination of Hon. John G. Roberts, Jr. as an Associate Justice of the Supreme Court of the United States

INTRODUCTION

The Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States since its creation in 1963 at the urging of President John F. Kennedy. Because of the critical importance of the Supreme Court of the United States to the protection of civil rights under our Constitution and laws, the Senate's duty of advice and consent as to the appointment of Justices requires Senators to understand any nominee's attitudes and convictions on issues affecting civil rights. To carry out its duty in this case, the Senate depends on the Judiciary Committee to examine Judge Roberts about his views on the existence and manifestation of invidious discrimination in our society, and on the nation's progress, commitment, and resolve toward elimination of such discrimination and its effects.

We acknowledge Judge Roberts' impressive credentials and his years of public service. Indeed, the years he spent in private practice were with a law firm that has supported the Lawyers' Committee for Civil Rights Under Law and its affiliated local Lawyers' Committees with substantial pro bono work, including work by Judge Roberts himself. However, professional credentials are not the end of the inquiry. It is imperative for the Senate Judiciary Committee, as part of the Senate's constitutional "advice and consent" obligation, to explore whether a nominee's legal thinking is outside the mainstream of established jurisprudence or is manifestly hostile to core civil rights legal principles.

Judge Roberts's writings as a lawyer in the Reagan Administration in the 1980s include statements and positions relating to civil rights that are troubling and must be the subject of further inquiry. We do not know whether the views disclosed were his own or tracked the views of others for whom he was then working; nor do we know, if they were his own views, whether he now holds them and if they would shape his consideration of civil rights questions as a member of the Supreme Court. Although there is less information available about his personal views on civil rights jurisprudence in subsequent

years, the nominee has made statements, in interviews and elsewhere, that reinforce our concerns.

The views expressed in many of the memoranda that Mr. Roberts wrote in the 1980s opposed established civil rights precedents and policies. They demonstrated hostility towards vigorous civil rights enforcement. He wrote in terms that reflected a narrow interpretation of the civil rights laws, and that supported severe limitations on remedies available to redress unlawful discrimination, including stripping the courts of jurisdiction to prevent consideration of critical civil rights issues. His writings favored the more demanding discriminatory intent test instead of the discriminatory effects test in voting rights cases; opposed busing for school desegregation (including cases of *de jure* segregation); attacked affirmative action as "quotas"; and favored relief only for individual victims of discrimination instead of relief for the classes of victims such as racial minorities and women.

During this same period, the Lawyers' Committee for Civil Rights Under Law actively opposed these positions in court cases and in the legislative arena. Fortunately, the viewpoints expressed in Mr. Roberts's memoranda on many of these issues were rejected by Congress and the courts. Had his views prevailed, much of the racial progress that our nation celebrates in voting, employment, housing and educational diversity would not have been achieved. For these reasons, explained in greater detail below, Mr. Roberts's nomination requires the most careful scrutiny by the Senate Judiciary Committee.

OVERVIEW OF JUDGE ROBERTS'S CIVIL RIGHTS RECORD

Mr. Roberts worked in the federal government in the early to mid-1980s first as Special Assistant to Attorney General William French Smith at the Department of Justice and then as Associate Counsel in the office of the White House Counsel, Fred Fielding. He had civil rights issues as a part of his portfolio, and in the process dealt with the issues on which the Reagan Administration sought to reverse decisions about civil rights issues that had been made by prior administrations, Republican as well as Democratic. These included anti-busing legislation, the Civil Rights Restoration law then under

consideration following the *Grove City College v. Bell*[1] decision, reauthorization of the Voting Rights Act of 1982 and the amendments to the Fair Housing Act of 1968. Mr. Roberts's available writings address a number of sensitive issues, as discussed below.

Narrow Scope of Civil Rights Protections: In 1981, while at the Department of Justice, Mr. Roberts criticized the Civil Rights Division's position in employment discrimination lawsuits against two school districts[2] where the Division advocated for relief for those who applied but were discriminatorily rejected; Mr. Roberts disagreed, saying "[a] school board with a blanket policy of rejecting all blacks simply because they were blacks, for example, would be discriminatorily rejecting black applicants, but unless the applicants were more qualified than white applicants who were hired, the fact of discriminatory rejection would not give rise to a claim for relief under Title VII."[3] Mr. Roberts took this position notwithstanding Supreme Court precedent holding that, after the plaintiff has proven a pattern or practice of discrimination, there is a presumption of entitlement to relief, and the plaintiff "need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination."[4] Mr. Roberts's view would have required individualized determinations of liability, effectively eliminating the utility of class actions for such cases, and substantially foreclosing access to the courts for victims of discrimination to redress their claims.

In a White House memorandum in 1983, Mr. Roberts listed *Bob Jones University v. United States*[5] among "instances in which the Administration has refused to interpret statutes in a broad manner beyond the discernable intent of the enacting Congress."[6] The Reagan Administration had taken the position, contrary to its predecessors, that a statute denying tax-exempt status to charitable entities whose conduct violates public policy was

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[1] 465 U.S. 555 (1984) (receipt of federal educational grants by some students does not trigger institutional-wide coverage under Title IX of the Education Amendments of 1972).
[2] Memorandum from John Roberts, Special Assistant to the Attorney General, to William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, re; *Employment Discrimination Suits Against Clayton and Gwinnett Counties*, (Oct. 26, 1981). (All unpublished memoranda by Mr. Roberts and other unpublished materials referenced in the footnotes are attached to this document in an appendix).
[3] *Id.*
[4] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 (1976).
[5] 461 U.S. 574 (1983).
[6] Memorandum from John Roberts to Richard A. Hauser, re: *Brookings Institution Remarks* (Dec. 5, 1983).

not sufficient authority for the IRS to deny tax-exempt status to an institution that engaged in racially discriminatory practices. Reversing the government's position in the lower courts, the Administration supported the private institution before the Supreme Court on the ground that without a specific statutory disapproval of race discrimination, the IRS could not deny the tax exemption.[7] Eight Justices of the Supreme Court held that the public policy against such discrimination was ample authority for the IRS action. Six months later, Mr. Roberts wrote that "[w]e did not distort our reading of the legislation to fit our policy preferences." Such a grudging attitude toward the scope of authority available to government agencies to implement even the basic, constitutional guarantee against race discrimination would, in a Supreme Court Justice, portend the narrowing of our nation's civil rights protections in the future.

In a memorandum dated July 24, 1985, Mr. Roberts discussed a pending Senate bill that was intended to reverse the effect of the Supreme Court's holding in *Grove City College v. Bell* that Title IX's proscription against sex discrimination in education applied only to the specific program that benefited from federal assistance.[8] Mr. Roberts said the bill would "radically expand the civil rights laws to areas of private conduct never before considered covered."[9] To the contrary, as the Lawyers' Committee pointed out in its *amicus curiae* brief in *Grove City College*, the Department of Health, Education & Welfare and the Department of Education had always interpreted Title IX to apply to the entire institution receiving federal funds, consistent with the legislative history of the Civil Rights Act.[10] The proposed bill was enacted in March 1988 over President Reagan's veto and confirmed the application of anti-discrimination provisions to any entity that received federal funding, not merely to the program the federal government was funding.[11]

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[7] It is not clear what role, if any, Mr. Roberts had in the formulation of the Administration's position. Among a number of documents that have not yet been disclosed are materials from the "Bob Jones" file he maintained; and an administrative appeal to obtain their release has not yet been decided.

[8] Section 901 (a) of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), prohibits sex discrimination in "any education program or activity receiving federal financial assistance," with certain enumerated exceptions.

[9] Memorandum to Fred F. Fielding from John Roberts, re: *Correspondence from T.H. Bell on Grove City Legislation* (Jul. 24, 1985).

[10] Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in *Grove City College v. Bell*.

[11] *See* 20 U.S.C. §1687 (2005).

Restrictive Views of the Voting Rights Act: When he served as a Special Assistant to Attorney General Smith in 1981 and 1982, Mr. Roberts assisted in developing arguments in support of the Reagan administration's position on reauthorization of the Voting Rights Act. The position Mr. Roberts articulated was that the Act should be extended but without the key provision overturning the ruling in *City of Mobile v. Bolden*,[12] which held that a plaintiff seeking to establish a violation of Section 2 of the Act must prove intentional discrimination.[13] The Lawyers' Committee testified in the Senate that the "effects test" that preceded *Bolden* was necessary to "effectuate the purposes of the Fourteenth and Fifteenth Amendments and the Voting Rights Act — to eliminate invidious discrimination affecting the right to vote."[14] Mr. Roberts wrote that Voting Rights Act violations should not be established upon a showing of discriminatory effects because to base liability upon such proof, standing alone, would be tantamount to the use of "quotas" and "proportional representation."[15] Applying the "quota" label to evidence of voting outcomes that cannot be explained in race-neutral terms and that are the product of years of suppression of minority voters ignores the extraordinary difficulty of obtaining evidence of actual discriminatory intent. It also reflects, at best, an excessively narrow reading of the Voting Rights Act and a willingness to accommodate governments whose electoral systems were originally designed to and still do exclude minority voters. Mr. Roberts's views did not prevail in the extension ultimately enacted. The views Mr. Roberts expressed embody a refusal to recognize the evidence of discrimination that continues to this day. Congress's 1982 affirmation of the effects or results test, which Mr. Roberts opposed, enabled literally hundreds of at-large voting system cases commenced by advocates for minority voting rights to succeed when they could not have proven a Voting Rights Act violation in the terms Mr. Roberts proposed. These victories have generated what is generally lauded as "a quiet revolution" of robust minority representation in local, county, state, and federal government.

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[12] 446 U.S. 55 (1980) (proof of intent required in vote dilution cases).
[13] Memorandum from John Roberts to the Attorney General, re: *Talking Points for White House Meeting on Voting Rights Act* (Jan. 26, 1982).
[14] Statement of Frank Parker, Director, Voting Rights Project of the Lawyers' Committee for Civil Rights under Law (Feb. 11, 1982).
[15] Memorandum from John Roberts to the Attorney General, re: *Voting Rights Act: Section* 2 and statement attached (Dec. 22, 1981).

Opposition to Fair Housing Act Amendments: In January 1983, when Mr. Roberts served in the White House Counsel's office, he recommended that the Administration "go slowly" on legislation that would amend and strengthen the 1968 Fair Housing Act.[16] As with the Voting Rights Act, Mr. Roberts objected to an "effects" test, stating that "[g]overnment intrusion (though [sic] an 'effects test') quite literally hits much closer to home in this area than in any other civil rights area."[17] He also opposed amending the Act to create a "national administrative remedy."[18] Eventually, in 1988, legislation was enacted amending the Fair Housing Act, which, contrary to Mr. Roberts's 1983 advice, did not weaken the effects test under existing precedent and included new national enforcement authority to overcome the major weakness at the Department of Housing and Urban Development.[19] That authority has been used to vindicate the rights of thousands of citizens whose complaints would either have gone completely unredressed or have been handled in a much less efficient and effective way if Mr. Roberts's views had prevailed. For example, in fiscal year 2004 alone, HUD reported that resolutions of complaints filed pursuant to the Act, as amended in 1988, provided over $11 million in monetary relief to victims of housing discrimination.[20]

Support for Jurisdiction-Stripping Legislation: While in the Justice Department in 1982, Mr. Roberts argued (apparently at the request of Kenneth Starr to outline the "pro" position) that Congress has the power under the "exceptions clause" (Article III, Section 2, Clause 2 of the Constitution) to strip the Supreme Court of its jurisdiction over any class of cases it deems appropriate, subject only to the guarantees of due process and equal protection.[21] Mr. Roberts argued that these guarantees would not prevent Congress from divesting the Supreme Court — indeed, all federal courts — of

[16] Memorandum to Fred F. Fielding from John Roberts, re: *Fair Housing* (Jan. 31, 1983).
[17] *Id.*
[18] *Id.*
[19] *See* 42 U.S.C. §3610 (2005).
[20] *2005 State of Fair Housing Report*, U.S. Department of Housing and Urban Development, 1 (2005).
[21] Mr. Roberts's twenty-seven page memorandum is entitled, *Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments*, copied to the Attorney General, Deputy Attorney General Edward C. Schmults, Assistant Attorney for the Office of Legal Counsel Theodore B. Olson, and Counselor to the Attorney General Kenneth W. Starr (undated). The memo is in response to a memorandum to the Attorney General from Assistant Attorney General Olson, *Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases* (Ap. 12, 1982).

jurisdiction over school desegregation cases.[22] This was a position on the proposed jurisdiction-limiting legislation that then-Assistant Attorney General Theodore Olson urged the Reagan Administration to oppose.

While employed in the White House in February 1984, Mr. Roberts addressed an anti-busing bill that would have prohibited lower federal courts from ordering busing to desegregate public schools. As before, although Theodore Olson had concluded that the bill would exceed Congress's authority, Mr. Roberts argued that a decade of experience with busing established that "busing promotes segregation rather than remedying it, by precipitating white flight," and that Congress could properly find that legislation prohibiting busing was necessary under the Equal Protection Clause to prevent racial discrimination.[23] Despite the absence of any judicial support for the position (Congress has never tried to exercise any such power, so the issue has never been litigated), he wrote without qualification that Section 5 of the Fourteenth Amendment gives Congress the power to strip the courts of jurisdiction based on a Congressional finding disapproving the overall effects of court-ordered remedies. This position would mean that Congress alone would determine the scope of protection offered by the Fourteenth Amendment, depriving the federal courts of their independent power and obligation to enforce that Amendment's crucial provisions.[24]

Favoring Limitations on Affirmative Action: In 1981, Mr. Roberts argued for changing the Department of Labor's implementation of President Nixon's Executive Order on equal employment opportunity obligations of government contractors because of the Department of Justice's opposition to any consideration of race or gender in hiring decisions absent "specific proof of discrimination." His proposal was to limit affirmative action to recruitment efforts, "enforcing color and sex blindness in actual decisions but accepting 'affirmative action' programs which increase the pool of applicants or compel the employer to consider a wider group with more blacks and women."[25] In 1981,

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[22] *Id.*

[23] Memorandum to Fred F. Fielding from John Roberts (Feb. 15, 1984).

[24] This position is distinct from the position taken by civil rights advocates, that Congress has the power to make its own findings that discrimination exists, and on that basis to enact remedial legislation. Judicial challenges to such legislation would still be available, with appropriate respect by each branch of government for the powers held by the others.

[25] Memorandum to the Attorney General from John Roberts, re: *Meeting with Secretary Donovan on Affirmative Action* (Dec. 2, 1981).

Mr. Roberts wrote to Attorney General Smith about a report from the United States Civil Rights Commission describing the use of affirmative action programs to remedy discrimination. Mr. Roberts wrote that the report failed to note the "inherent flaws" in such programs: "There is no recognition of the obvious reason for failure: the affirmative action program required the recruiting of inadequately prepared candidates."[26] In 1990, Mr. Roberts filed a brief as Acting Solicitor General arguing that the Federal Communication Commission's affirmative action program concerning the licensing of minority-controlled firms violated equal protection and was not justified under a diversity rationale.[27] The effects of this position are still being felt, with minority ownership of broadcast media a shadow of what it would have been had this program not been dismantled. In 2003, responding to a written question about his role in enforcing the Reagan Administration's policy of "color blindness" with regard to addressing problems of discrimination and segregation, Mr. Roberts said that "race certainly may be taken into account in devising remedies for de jure segregation," which, given the limited number of instances of de jure segregation now that we are more than 125 years after the Civil War amendments that were designed to outlaw them, suggests a view that race-conscious programs are appropriate only in the most limited circumstances.[28] Mr. Roberts stated in a 1995 television interview that to "give benefits on the basis of race . . . violates equal protection."[29]

We are concerned that Judge Roberts may be convinced that, aside from relief for specific victims who prove injuries caused by intentional discrimination, the goals of remedying conditions caused by past discrimination, rectifying racially-disparate adverse impact, and enhancing diversity cannot justify consideration of race or gender in making decisions such as hiring, contracting, and admission into schools.[30] This would

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[26] Memorandum to the Attorney General from John Roberts, re: Meeting with Secretary of State Donovan on Affirmative Action (Dec. 22, 1981).

[27] *See* Brief for United States, *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 549 (1990).

[28] *See* written response to question, *Confirmation Hearing on Federal Appointments*, 108th Cong. 135, Pt. 1 at 413.

[29] Transcript of the McNeil-Lehrer NewsHour, National Public Radio (Jun. 12, 1995).

[30] During his 2003 confirmation hearing for the D.C. Circuit Court of Appeals, Mr. Roberts characterized more recent work he did in representing the interests of indigenous Hawaiians in *Rice v. Cayetano*, 528 U.S. 495 (2000), as a defense of affirmative action. But in arguing that case, he expressly

be inconsistent with positions taken by a majority of the Supreme Court in, for example, *Grutter v. Bollinger*.[31]

"Judicial Restraint," "Judicial Activism" and Civil Rights Enforcement: Mr. Roberts argued that the Attorney General should not intervene on behalf of female inmates in a sex discrimination case involving job training because it would be inconsistent with the administration's belief in judicial restraint and that, if equal treatment of male and female prisoners were required, "the end result in this time of state prison budgets may be no programs for anyone."[32] This advice countered the recommendation of William Bradford Reynolds, then head of the Justice Department's Civil Rights Division, who endorsed the rights of the female inmates. In another White House memorandum, Mr. Roberts wrote that workload issues in the federal courts could be addressed, in part, by the courts "abdicating the role of fourth or fifth guesser in death penalty cases," and reforming habeas corpus to avoid "judicial activism," which he identified as the basic cause of the litigation burden on the federal courts.[33] Experience has shown that judicial review is essential to the just administration of capital punishment, allowing exploration of issues of discrimination in the administration of the system and avoiding in many (but not all) cases the execution of those who are innocent and those whose crimes do not fit within the categories the legislature has prescribed for death.

We recognize that Judge Roberts expressed the views noted above many years ago, when he was an advocate participating in debates within the Executive Branch. Those views may differ from the attitudes and convictions that would influence his judicial decisions as a member of the Supreme Court. The records from the 1980s and other subsequent statements nevertheless consistently endorse, in several contexts, restrictive views on civil rights protections, such as the view that permissible policies cannot take race or ethnicity into account except as remedies for the individual victims of

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distinguished his arguments for special treatment of indigenous Hawaiians from arguments about the scope of relief in civil rights cases involving African Americans.

[31] 539 U.S. 306 (2003).

[32] Memorandum to the Attorney General from John Roberts, February 12, 1982 re: *Proposed Intervention in Canterino v. Wilson* (Feb. 12, 1982).

[33] Memorandum to Fred Fielding from John Roberts, re: *Chief Justice's Proposals*, (Feb. 10, 1983); Memorandum to Fred Fielding from John Roberts, re: Letter to the President from Alabama Attorney General Charles A. Graddick (Ap. 28, 1983).

intentional discrimination. The Judiciary Committee should ask questions and obtain answers from Judge Roberts making his views clear on these still vital issues.

Limits on the Power of Congress: We also think it important that the examination of Judge Roberts's record include analysis of a subject that plays a large role in judicial review of remedial legislation: limitations on the power of Congress to legislate. His judicial opinions have addressed this topic outside the context of civil rights legislation (in environmental regulation, for example, enacted pursuant to the Commerce Clause).[34] In his prior confirmation hearings, Judge Roberts suggested that he viewed the Congressional power to pass civil rights laws pursuant to Section 5 of the Fourteenth Amendment as substantially broader than its power to legislate under the Commerce Clause. The Lawyers' Committee has consistently emphasized how Section 5 provides broad authority for Congressional action. An overly narrow reading of Congress's Commerce Clause authority would threaten civil rights protections because Congressional regulation of private entities derives generally from its Commerce Clause authority. Consequently, on this issue, the record needs to be as clear as it can be, as recent Supreme Court decisions have cut back on Congressional power in unexpected ways. The country deserves to know whether or not Judge Roberts would support curtailing Congressional authority to protect civil rights.

CONCLUSION

Justice Sandra Day O'Connor cast the deciding vote in Supreme Court decisions that have preserved the scope of civil rights laws and interpreted the Constitution to permit the promotion of a more diverse and less discriminatory society. *See, e.g., Grutter v. Bollinger*;[35] *Tennessee v. Lane*;[36] *Hunt v. Cromartie*;[37] *Brentwood Academy v. Tennessee Secondary School Athletic Association*.[38]

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[34] *See Rancho Viejo, LLC v. Norton,* 334 F3rd 1158 (D.C. Cir. 2003) (Roberts, J. dissenting, denial of petition for rehearing en banc).
[35] 539 U.S. 306 (2003) (upholding the University of Michigan Law School's race-conscious admissions policy intended to achieve a diverse student body).
[36] 541 U.S. 509 (2004) (Title II of the Americans with Disabilities Act validly abrogated state sovereign immunity against suits by individuals seeking access to the courts).
[37] 526 U.S. 541 (2001) (reversing grant of summary judgment because a genuine issue of material fact existed as to whether congressional district was the product of unconstitutional racial gerrymandering)
[38] 531 U.S. 288 (2001), recognizing athletic association as a state actor in §1983 civil rights action).

The Judiciary Committee must obtain from Judge Roberts the information necessary to determine whether, with his confirmation, Justice O'Connor's deciding vote on an otherwise evenly-balanced Court would be replaced by a vote for cutting back on civil rights protections.

As additional information becomes public, we will communicate any further views and look forward to the opportunity to do so. In the end, the written record can provide only an incomplete basis for conclusions about Judge Roberts's views. Whether that record is a fair indication of Judge Roberts's current views on these matters can be known only if the Senate Judiciary Committee conducts the most thorough inquiry and Judge Roberts is complete and candid in his testimony and his other communications with the Committee.

As we noted at the outset, there is no more solemn duty than the one the Senate faces in deciding whether to give or withhold its consent to Judge Roberts's nomination. Judge Roberts's record raises very troubling questions on matters of vital importance to the quality of our civil rights protections and therefore to the vitality of the constitutional guarantee of equal justice under the law. We urge each member of the Committee, before casting a vote to send Judge Roberts's nomination to the full Senate, to be convinced that, as an Associate Justice, Judge Roberts would not alter the balance of the Supreme Court in a direction hostile to civil rights.

John S. Skilton Co-Chair	Marjorie Press Lindblom Co-Chair	Barbara R. Arnwine Executive Director