

The Department of Justice has averred that Judge Breyer's "career reflects a deep-seated commitment to fairness * * * so that all government and law may work better for all people * * * (and) that courts and law * * * be accessible to all citizens."¹

Vernon Jordan has written: "Judge Breyer's decisions reflect his strong commitment to protecting the rights of all Americans and ensuring the vindication of our civil rights. He will be a champion of fairness and justice on the bench."²

Robert Pitofsky, a former dean of Georgetown University asserts: "He understands that Government regulation is often necessary to ensure not just efficiency but fairness * * *"³

All of these laudatory assertions begin heaped upon Judge Breyer, however, constitute no more than mere statements about the potential of a Justice Breyer.

As we all know, however, potential simply means that the thing has not yet manifested itself, and more realistically, justices do change.

Yet, the Coalition of Bar Associations of Color, remains hopeful that Justice Breyer's commitment to fairness will extend to encompass issues such as affirmative action: Discriminatory application of the death penalty; reflect a sensitivity on immigration issues; adequate due process protection for death penalty appeals; environmental justice; minority and women business set-aside programs; insurance, mortgage and commercial redlining; selective prosecution of doctors of color on Medicaid fraud charges and as amazing as it may seem, the Voting Rights Act, which is being steadily undermined by the regressive trend of voting rights decisions emanating from the court during the past several years.

We have read with interest the assertions that Judge Breyer is "pro-business". Hopefully, if such a propensity exists, Justice Breyer will extend this "pro-business" attitude to supporting tribal sovereignty and Native Americans in their effort to support economic development in Indian country. We are also hopeful that a Justice Breyer will be forceful and influential on cases involving the Civil Rights Act, which still regrettably provides an exemption to the Asian-American workers in the *Ward's Cove* case.

Though our rights are under attack from more than one source, people or color across the nation have not yet all become pessimistically cynical.

In hopes of preventing such an occurrence, the Coalition of Bar Associations of People of Color will be closely watching to see whether Judge Breyer manifests his fullest potential for fairness once he assumes his role as Justice Breyer and if so, what impact it has on the entire Court.

For people of color, the time for potential has passed. As it has been said, words are wonderful. But deeds are divine.

The Coalition of National Bar Associations of Color looks forward to Justice Breyer's deeds of fairness and, hopefully, those of the entire Court during the 1995 term and beyond.

Thank you.

CBAC.

National Bar Association.

National Hispanic Bar Association.

Native American Bar Association.

National Asian-Pacific American Bar Association.

Senator KENNEDY. Thank you, Mr. Brown.

Mr. Sun.

STATEMENT OF BRIAN SUN

Mr. SUN. Thank you, Senator Kennedy, for allowing me to speak on behalf of my organization here today on Judge Breyer's nomination. NAPABA, as my organization is known, was formed basically for the same reasons that the NBA, the HNBA and NABA were formed, as a response to a historical pattern, a long historical pattern of discrimination, denial of access to political and social insti-

¹Judge Stephen Breyer, nominee for the U.S. Supreme Court, at 1 (1994) (alteration in original) (emphasis added) (Publication of the U.S. Department of Justice).

²Id.

³Id. (Alteration in original).

tutions, as a reaction to hate crimes that were racially motivated and, in general, a response to prejudice and injustice.

The historical events that affect Asian-Pacific Americans are well-known even in our current history books. I don't think I need to go into detail in terms of recalling the anti-Chinese immigrant exclusion laws of the 1920's, the Supreme Court's decision in the *Koramatsu* case which all of us in law school read about in constitutional law that justified the relocation camps, and the hate crime murders that have directly led to the formation of my bar organization in the 1980's of Asian-Pacific Americans.

NAPABA comes here today, Senator, with the other members of the CBAC coalition to speak out on Judge Breyer's nomination, which I believe you yesterday indicated, I think, at the end of yesterday's testimony is one of the most important things this body, the Senate, and, in particular, this committee, can perform among its many important legislative functions, to review, assess, evaluate, and approve nominees to the Supreme Court.

I also join with Senator Biden in his comments yesterday that these hearings give us an opportunity, perhaps our only opportunity, as he said, to get a glimpse at what potential and what background and history a nominee brings to the Supreme Court.

In the written testimony that CBAC has submitted to you, Senator, we represent over 50,000 attorneys of color in this country, and I don't know all the statistics, but I believe we can agree that there are probably in excess of 60 million Americans of color who are affected by the judicial process, and for these reasons we feel that we have to speak out forcefully and vocally on the issues surrounding Judge Breyer's nomination.

The two issues I wish to speak about briefly here this afternoon, Senator, are issues that cannot be overlooked, and to some extent I believe have not been addressed that closely in these hearings, and that is the issue of diversity on the U.S. Supreme Court, the balance that Senator Specter talked about this morning, and, second, the need for a jurist on the Supreme Court who can stand in the tradition of Thurgood Marshall and William Brennan and Harry Blackmun on issues defending the individual liberties and the civil rights of all people in this country and, most importantly, the people of color who have experienced historical discrimination.

With respect to these two issues, NAPABA does not take the view that Judge Breyer is not a qualified jurist. He, in fact, does come to this hearing and these set of hearings with a strong background. His record on civil rights is one that we have found encouraging. However, on the issue of diversity, it is obvious that that issue is significant to the members of CBAC and to NAPABA, in particular, because it sends a message to persons of color that once again we have been denied an opportunity to have a voice through a person of color on the Supreme Court.

Diversity is something that can be broken up in this context into both the symbolic significance of diversity as well as the substantive significance—symbolic because persons of color in this country have long felt, even to this day, that they have been denied equal access to the courts. In fact, even the American Bar Association recently, through commissions that have studied the equal access to courts for minorities and women and the disadvantaged,

has concluded that diversity amongst the Federal and State benches and the U.S. Supreme Court is necessary to help dispel the symbolic perception that persons of color have about the lack of equal access to justice that they have in the courts.

Just to end on that particular issue, Senator, it cannot escape us all the recent media attention that has been given in the last decade or so to whether or not minorities or persons of color could get a fair trial in this country. Unfortunately, it has been the focus of perhaps some cases in the media that bring this out.

But in any event, I think it is pretty clear that persons of color wonder whether the system can be fair to African Americans or other persons of color who are accused of crimes that get the kind of publicity of the *Rodney King*, the *O.J. Simpson* case, and to some extent the *Vincent Chin* case in Michigan.

With respect to the substantive issues that are raised by Judge Breyer's nomination—that is to say whether or not he possesses the qualities and the background that would lead him to be committed toward protecting the civil rights of all American citizens—let me say that we are looking for jurists, again, in the tradition of Justice Marshall and Justice Brennan.

Already, from a historical development standpoint, we have had some judges in the Federal district and circuit courts who have been appointed who are persons of color whose contribution has been not just symbolic from the diversity standpoint, but from the fact that they have made meaningful contributions to the development of the law, such as Judge Higginbotham out of the Third Circuit, Judge Tang out of the Ninth Circuit, and many, many others.

I think that we need to just keep in mind when we focus on these issues of diversity that the President has made a commitment that he wants a Supreme Court that is representative of the diversity of America, and we are hopeful, and believe, that Judge Breyer, at least as to this second issue relating to the protection of civil rights, will stand committed, in the tradition of Justice Marshall and Justice Brennan, to stand up and—the words I often like to say are stand up to the plate and boldly deal with the issues that come up in the civil rights context. We are encouraged by the fact that Vernon Jordan, Duval Patrick, and others have supported this nomination.

In conclusion, Senator, NAPABA believes this issue is important and Supreme Court nominations are important because of our historical setbacks we have suffered in the Supreme Court, and you more than any Senator, I believe, on this committee are aware of our experiences in the *Ward's Cove* case, which led, in part, to the Civil Rights Act of 1991 that you were also a big part of, and also to the problem of the special exemption that was created in that case that deprived the Asian workers in *Ward's Cove* of the rights and benefits of the Civil Rights Act. We appreciate you and many Senators of this committee cosponsoring legislation that would set aside that special interest exemption that we found to be shameful and totally inappropriate. We applaud that, but the fact that the *Ward's Cove* case had to cause us to go to the Congress and seek civil rights legislation, we believe, highlights the need for strong Supreme Court Justices who can address these issues.

Finally, I would like to say something personally, Senator, and that is this. I look forward to a day when my organization and the members of the CBAC coalition don't have to come before this tribunal or this committee and say to this committee, we need more diversity on the Supreme Court. I look forward to a day when there will be an Asian-Pacific American on the Supreme Court.

I look forward to the fact and hope that my sons don't have to come back here 10, 20, 30 years from now and sit here and make the same statements that I have had to make here today. I do look forward to that day, and until then I think we have to focus again on Judge Breyer's nomination in terms of the impact it has on the persons of color around the country.

I want to thank you and the chairman, and particularly the staff, for allowing us to be heard this afternoon.

Senator KENNEDY. Thank you very much.

Mr. Monet.

STATEMENT OF RICHARD MONET

Mr. MONET. Good afternoon, Senator. On behalf of the Native American Bar Association, I also thank you for the opportunity to present our views on this matter today.

The Native American Bar generally agrees with the sentiments shared by this coalition. Like other racial minorities in our society, Native American people daily confront the effects of racial prejudice and discrimination. However, the Native American Bar has certain concerns that are somewhat distinct from those affecting the other groups in this coalition, and I would like to share just one of those with you today.

As you know, Native Americans not only constitute a distinct race in American society, but as members of tribes they also constitute distinct political entities recognized as such by the United States. Some of our most pressing issues and concerns arise in that capacity. Unfortunately, we know very little of Judge Breyer's sentiments on these matters.

As you also know, the relationship between tribes and the United States flows from solemn treaties made early in the Nation's history. Remarking upon one of those Indian treaties, Justice Hugo Black once wrote, "Great Nations, like great men, should keep their word."

In an early interpretation of another one of those treaties, Justice McKenna penned a sentence of perhaps singular clarity and importance to tribes and the development of Federal law dealing with tribes. He wrote, "Treaties are to be construed as a grant of rights from the Indians, not to them, and a reservation of those not granted."

We ask the committee and the nominee to note how Justice McKenna's wording and logic reflect the words and logic of the 10th amendment to the U.S. Constitution that what is not granted to the Union is reserved to the States or to the people. In other words, like the States and their people, the tribes and their people are the source of their respective tribes' sovereignty; that whatever sovereignty may have transferred in those treaties came from the tribes, so that the tribes were the grantors and thus the reservers of sovereignty. In other words, treaties with tribes, like the 10th