TESTIMONY OF THE NATIONAL BAR ASSOCIATION

BY ITS PRESIDENT, REGINALD M. TURNER, JR.

BEFORE THE

U.S. SENATE JUDICIARY COMMITTEE

IN THE CONFIRMATION HEARINGS OF

JUDGE JOHN G. ROBERTS, JR. (D.C. CIR.)

ON HIS NOMINATION TO THE

UNITED STATES SUPREME COURT

SEPTEMBER 15, 2005

SALUTATION

Mr. Chairman and other distinguished Members of the United States Senate Judiciary Committee,

Good morning.

I am Reginald M. Turner, Jr., and I am the 63rd President of the National Bar Association.

It is an extraordinary honor and privilege to testify on behalf of the National Bar Association before this Committee during the Confirmation Hearings of Judge John Roberts regarding his nomination to serve as the Chief Justice of the United States Supreme Court.

The National Bar Association

The National Bar Association (NBA) was organized in 1925. With a network of more than 20,000 members and 80 bar affiliates, the NBA is the oldest and largest association of African American and minority attorneys, jurists, legal scholars, and law students in the world. When the NBA was organized in 1925, lawyers of color were prohibited from belonging to many other bar associations. At the time, there were fewer than 1,000 African American lawyers in the nation, and less than 120 of them belonged to the Association. Over the past 75 years, the NBA has grown enormously in size and influence. The objectives of the NBA are "... to advance the science of jurisprudence; improve the administration of justice; preserve the independence of the judiciary and to

uphold the honor and integrity of the legal profession; to promote professional and social exchange among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammeled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States."

The NBA thanks the Chairman, ranking Democratic member Senator Leahy and this Committee for the opportunity to participate in this confirmation hearing, notwithstanding that it has come after the worst natural disaster in our history and the passing of United States Supreme Court Chief Justice William H. Rehnquist.

The NBA expresses its condolences to the family, friends and colleagues of the late Chief Justice William H. Rehnquist of the United States Supreme Court. Chief Justice Rehnquist spoke eloquently of the need for an independent judiciary to protect the constitutional values we cherish as a Nation. He was also a strong advocate for adequate resources for the federal judiciary. The NBA joined Chief Justice Rehnquist in these efforts, and his leadership in this arena will be missed.

The National Bar Association offers its deepest condolences, and its assistance, to the victims and survivors of Hurricane Katrina. Our prayers are extended to the hundreds of thousands of people suffering from its destruction and devastating aftermath, and to those NBA members residing in the affected region.

Many victims and survivors were people of color and defenseless: poor, elderly, disabled, or young. Regrettably, many lives and substantial property were perhaps

needlessly lost. The NBA is outraged and saddened by the slow and seemingly indifferent response of certain federal, state, and local officials to a long-predicted tragedy. The devastation was exacerbated because no one seemed to want to accept the responsibility for responding to this disaster in our own backyard. This great and powerful democratic Nation, which is often the first to respond to a crisis elsewhere, failed its own people when they needed it the most. This democracy exists for the common good of all Americans – regardless of their race, gender, economic portfolio, educational achievement, or social background. Members of Congress, the NBA, the NAACP Legal Defense and Education Fund, the Republican and Democratic Parties, and many others have contributed to the creation and protection of the fundamental rights and privileges people residing in the United States enjoy.

Sadly, this Nation was founded on principles and laws that denied many rights and privileges – including the right to vote and of citizenship - to African Americans and women. True to its mission, the NBA will not be silent, while others work to retard further progress on these basic rights and privileges for those who have been discriminated against since our Nation's founding. As the Honorable Senator Edward Kennedy stated during this hearing, the devastation of Katrina exposed America's continued racial inequities and economic disparities. There is still much work to be done.

America's most vulnerable citizens need a strong and responsive national government in times of severe crisis. The Senate must be satisfied that Judge John Roberts appreciates the significance of, and necessity for, strong a federal government and the appropriate congressional power to delegate the proper resources adequately and

fairly to all people. Moreover, the Senate must be certain that Judge Roberts understands that there are significant constitutional limits on presidential power, even during periods of national crises, while appreciating that as an elected body, Congress must have the authority to reach across state borders to address concerns with national implications. At a minimum, the Senate must ensure that Judge Roberts unquestionably supports constitutionally-mandated congressional oversight power to insure that federal officials fulfill their responsibilities to the people. The residents of the Gulf States learned first hand what happens when territorial infighting and unspoken prejudices impede humanitarian relief and a nation's obligations to its own citizens.

INTRODUCTION

Confirmation of the Chief Justice

As has been stated during this hearing, the Senate Judiciary Committee has an enormous Constitutionally mandated responsibility to "Advise and Consent" to a nomination of an Article III federal judge. The significance of the confirmation of the Chief Justice of the U.S. Supreme Court cannot be overstated. The Senate Judiciary Committee must insure that the nominee is extraordinarily qualified to serve as Chief Justice. Bluntly stated, there is no room for error. The Chief Justice is the leader of the third branch of our national government, co-equal to the Executive and Legislative branches. The Chief Justice leads the branch of government that ultimately interprets the law. The Chief Justice must lead this branch of government upon which African Americans and the NBA have come to rely upon to protect their civil rights and personal liberties.

Throughout our Nation's history, the United States Supreme Court has played a crucial role in shaping the progress of African-Americans. For the last century, from the regrettable rulings in *Dred Scott* and *Plessy v. Ferguson*, to the renewed hope offered in *Brown v Board of Education* and *Grutter v. Bollinger*, the Supreme Court has defined the status of, and the opportunities available for, African-Americans in a way that perhaps is unduplicated with respect to any other people in the United States, including other people of color. During the last two decades, especially, the Supreme Court has decided almost every major civil rights case involving issues of race by razor thin margins, most

typically 5-4. The stakes in this appointment could not be higher, and the NBA welcomes this opportunity to appear here before you today to discuss our concerns.

National Bar Association Evaluation of Judicial Nominees

The NBA has established a process for evaluating judicial nominees and established criteria. The NBA takes a position on a nomination only after a complete and exhaustive evaluation of the nominee's record. Judge Roberts was evaluated consistent with this process and these criteria. The NBA reviewed Judge Roberts' entire record, including his professional and educational background and the available records of his years as a government lawyer. The record is complex and troubling, and most importantly, incomplete. Judge Roberts has impressive educational credentials and a distinguished employment history. However, these credentials, alone, are not sufficient to qualify a lawyer or judge to become a Justice of the United States Supreme Court, let alone Chief Justice. Unfortunately, the available record evidences a clear hostility to civil rights and personal liberties by Judge Roberts.

In this country, race and the treatment of racial issues by the judiciary profoundly affect every aspect of American life and play critical roles in the formulation of American social, economic, and political agendas.[1] Accordingly, the NBA has adopted a standard that determines whether a federal judicial nominee will interpret the Constitution and laws to effectuate racial equality and eliminate oppression. This standard is defined as "a

[1] "Evaluation of the Current Judicial Nominations Process and Proposed Standards for the Congressional Black Caucus/ National Bar Association Task Force on Judicial Nominations." Alfreda Robinson: Chair, Standing Committee on Judicial Selection National Bar Association.

contextual and historical jurisprudential approach, to judicial adjudication, in order to achieve equal justice under the law." Our standard examines not only the professional qualification of nominees, but also scrutinizes whether the nominee has the ability to judge fairly, to conduct matters with judicial temperance, and to advance and seek equal justice under the law. The standard challenges unconstitutional and illegal oppression on the basis of race, gender, and class. Moreover, our standard is vital to ensuring that groups that have been historically marginalized by the legal system obtain the American mandate of equal justice under the law.

Despite the claims of neutrality and equality, the legal system is not as colorblind as it pretends to be. In *Grutter v. Bollinger*, which upheld the use of affirmative action in the admissions process at educational institutions, Supreme Court Justice Sandra Day O'Connor acknowledged that: ". . . in a society, like our own . . . race unfortunately still matters."[2] Moreover, due to the fact that our judicial system has historically marginalized women and people of color, it is imperative that the law be viewed through a historical and contextual lens. A judicial nominee should be able to articulate support for Constitutional principals, statutes, and legal doctrines that serve to extend the blessings of liberty and equality to all Americans, including people of color.

Upon Justice Sandra Day O'Connor's announcement of her retirement from the Supreme Court and the recent passing of Chief Justice William Rehnquist, the NBA urged President Bush to nominate a candidate for the Supreme Court who is not

[2] *Gutter v. Bollinger*, 539 U.S. 306, 333 (2003) (where the Court upheld use of race as a factor in law school admissions).

ideologically rigid and predictable, but who is fair and open-minded, and committed to protecting the advances in civil rights that we as a nation have achieved. The NBA's Judicial Selection Committee has reviewed thousands of pages of documents and engaged in dialogue and correspondence the Alliance for Justice, Lawyers Committee for Civil Rights, Leadership Conference for Civil Rights, NAACP Legal Defense and Educational Fund, and People for the American Way to attempt to determine whether the nominee meets the requisite standard.

Without more evidence to counter the distinctively negative impression left by the incomplete record of Judge Roberts' views important constitutional principals, related Congressional enforcement statutes, executive branch policies, our Nation's civil rights laws, and history more broadly, the record as it now stands precludes the NBA from supporting the nomination of Judge Roberts as Chief Justice to the United States Supreme Court.

The NBA takes this position on the following grounds:

(1) the record in incomplete, as many important documents have been withheld purposefully from the Senate Judiciary Committee and the public;

(2) there are numerous available documents demonstrating that the nominee does not support civil rights, personal liberties, and equal justice under the law;

(3) there are numerous documents evidencing that the nominee's views on the authority of Congress to promulgate legislation for the public good under the Commerce Clause and Section 5 of the 14th Amendment of the Constitution are

inconsistent with well-established jurisprudence, and contrary to the well-being of the public; and,

(4) the nominee's answers to questions during the hearing process thus far have not indicated a willingness to reveal his judicial philosophy in a manner that would allow the Senate and the public to evaluate fully and completely whether he could be fair and impartial while sitting as Chief Justice of the United States Supreme Court.

The NBA is mindful also that there are many other civil rights organizations that have already submitted extensive written comments, which are part of the record. We see no purpose in duplicating their efforts and adding to the panoply of detailed written testimony for you to consider. We therefore submit a written summary of the record and background of Judge Roberts that we consider troubling, and our brief analysis regarding our inability to support his nomination.

ANALYSIS

Civil Rights

Based upon a careful review of the available documents released from the National Archives and the Ronald Reagan Presidential Library, it is now apparent that Judge Roberts played a key role in the governments' retrenchment on civil rights during the most destructive period for civil rights enforcement in the second half of the 20th century.

The period in which Roberts worked as Special Assistant to Attorney General William French Smith was marked by a deep hostility to civil rights enforcement. The Justice Department, specifically the Civil Rights Division, was characterized by a drastic repudiation of civil rights principles that had evolved over the previous four decades.[3] Three years into his tenure, then Assistant Attorney General for Civil Rights William Bradford Reynolds was nominated to be Associate Attorney General. His nomination was defeated, however, by a Republican-led Judiciary Committee based on his antipathy toward civil rights.[4]

In key civil rights areas, Judge Roberts was very active in implementing the Reagan Administration's retreat. These issues run the civil rights gamut, including voting rights, affirmative action, equal educational opportunity/school desegregation, discrimination by federally funded institutions, fair housing and employment, and enforcement of federal statutory rights. In each area, the record shows that Judge Roberts has been a committed advocate for narrowing civil rights laws, and for minimizing the scope and substance of civil rights enforcement, contrary to previous Presidential administrations, slowing our Nation's progress in embracing our wonderful diversity. The resulting upheaval in race relations has polarized our Nation at a time when unity, tolerance of diversity, and equality of opportunity are extremely important to our national security and our continued development as a great nation.

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[3] *See e.g.*, In the Administration, a Pattern Develops on Conservatives' Agenda, The Washington Post, Feb. 2, 1982.
[4] The Senate Judiciary Committee voted down the nomination, 10 to 8. The Washington Post called Reynolds' defeat "a stunning rejection of the chief architect of the Reagan Administration's civil rights policies." Reynolds' Nomination Voted Down, The Washington Post, June 28, 1985.

Voting Rights

Since its enactment, the Voting Rights Act of 1965 has played a critical role in providing equal access to the right to vote to minority citizens and continues to be hailed as "the most successful civil rights law ever enacted."[5] During a significant portion of his career, Judge Roberts sought to limit the protections of the Voting Rights Act. More than twenty-five memoranda authored by Judge Roberts illustrate his leadership in formulating and advancing the Reagan Administration's opposition to amending Section 2 of the Voting Rights Act to provide an "effects test." The NBA has serious reservations about his respect for the constitutional and statutory provisions that protect the right to vote because he was one of the principal architects of the attacks on this basic civil right.[6]

As special assistant to Attorney General William French Smith, Judge Roberts strongly opposed bipartisan congressional efforts to reinforce the effectiveness of the Voting Rights Act following a Supreme Court decision that previously weakened the protections of the Act.[7] In *City of Mobile v. Bolden*, the Supreme Court ruled that intentional discrimination must be shown to establish a violation of Section 2 of the Voting Rights Act. By requiring a specific showing of intent, the *Bolden* decision changed the legal landscape, making it considerably more difficult to establish violations

[5] People For the American Way, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court, p.52 (2005); Leadership Conference on Civil Rights, Without Justice at 56 (Feb. 1982).
[6] NAACP Legal Defense and Educational Fund, Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States, at 5-6 (2005).
[7] People For the American Way, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court, at 52 (2005).

of Section 2.[8] Recognizing this threat, the House of Representatives passed, by an overwhelming bipartisan margin of 389 to 24, an amendment of the Voting Rights Act that restored the "effects test" in Section 2 of the Act.[9] Congress recognized that state legislators would rarely, if ever, express clear discriminatory intent in the published legislative history. Accordingly, the purpose of the amendment to Section 2 was to permit courts to find a violation when state and local officials' actions, rather than their words, had the "effect" or "result" of abridging the right to vote on account of race.[10]

The record reveals that Judge Roberts vigorously urged the Reagan Administration to oppose the House bill based specifically on the "effects" language used in the bill.[11] In inflammatory language, Roberts argued the House compromise amendment would create a system of "proportional representation" of minorities in electoral politics. This mischaracterization of the "effects test" was directly contrary to the carefully negotiated language in the proposed bill making clear that proportional representation would not be required. Roberts also wrote that Justice Stewart in his *Bolden* opinion "correctly noted.... incorporation of an effects test in § 2 would establish 'essentially a quota system for electoral politics,'" yet Justice Stewart never referred to quotas in the opinion.[12]

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[8] *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

[9] People For the American Way, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court at 52 (2005); *See* Robin Toner and Jonathan D. Glater, "Roberts Helped to Shape 80's Civil Rights Debate," New York Times (Aug. 4, 2005)("8/4 NYT")(quoting Jordan).

[10] NAACP Legal Defense and Educational Fund, Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States at 6 (2005).

[11] *See generally*, David G. Savage and Richard B. Schmitt, "Portrait of Nominee as a Young Lawyer," Los Angeles Times (Aug. 7, 2005).

[12] Memorandum from John Roberts to the Attorney General (Dec. 22, 1981) (Attachment at 2); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The disdain displayed by John Roberts for the effects test in the voting context is similar to his view of the same test in other civil rights areas. The NBA is deeply troubled by John Roberts' rejection of the longstanding method of proving discrimination by showing a disparate effect on a protected class, as opposed to showing evidence of intentional discrimination.

Equal Education Opportunity

In stark contrast to Supreme Court Justice Sandra Day O'Connor's acknowledged reference to real racial discrimination in *Grutter v. Bollinger*[13], Judge Roberts' record reveals his insensitivity towards the efforts made to increase diversity in our educational institutions.. Justice O'Connor struck a delicate balance between our aspirations for a color-blind society and our current need to consider race to remedy the present effects of past and present racial discrimination. She spoke eloquently of the compelling governmental interest in fostering diversity:

> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . What is more, high-ranking military officers and civilian leaders of the United States military assert that, 'based on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security'.[14]

[13] *Grutter v. Bollinger*, 539 U.S. 306 (2003)(where the U.S. Supreme Court upheld the use of race as a factor in law school admissions).
[14] *Grutter, supra,* at 539 U.S. 306, 330-31 (2003) *quoting, Johnson v Transportation Agency*, 480 U.S. 616, 638 (1987).

Decades after the landmark decision in *Brown v. Board of Education*, Judge Roberts supervised and co-authored briefs arguing against educational diversity by limiting the specific requirements of desegregation plans and blocking courts from hearing cases on this issue. In *United States. v. Fordice*, the Solicitor General was forced to withdraw the government's brief, the drafting of which Judge Roberts' supervised personally, because the Supreme Court rejected the argument that , Mississippi had satisfied its duty to provide equal education to students, despite large disparities in funding and academic programs, because these students were free to choose to attend historically white or historically Black schools.[15] In *Freeman v. Pitts*, Judge Roberts's *amicus brief* excused clear racial imbalances in the school system, attributing them merely to "demographic shifts", and favorable argued for setting aside the relevant desegregation decree.[16] In *Oklahoma City Public Schools v. Dowell*, Judge Roberts again argued in favor of terminating a relevant desegregation decree, even though the local decision to eliminate busing, which Judge Roberts espoused, resulted in the re-segregation of a number of schools.[17]

At a time when opportunities in our schools for young women were limited, Judge Roberts was a passioned advocate for a more narrow view of preventing gender discrimination in education than President Reagan's own Secretary of Education, Terrel

[15] Brief for the United States as Petitioner, *United States v. Fordice*, Nos. 90-1205 and 90-6588, 1990 U.S. Briefs 1205, at *31-*33 (July 1, 1991).
[16] Brief for the United States as *Amicus Curiae*, *Freeman v. Pitts*, 503 U.S. 467 (1992).
[17] Brief for the United States as *Amicus Curiae*, *Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991). Judge Roberts often lamented what he considered "the imposition of forced racial busing." Memorandum from John Roberts, to The Attorney General, re: Summary of Material Sent by Arthur Flemming, Chairman of the U.S. Commission on Civil Rights (Aug. 25, 1981).

Bell. [18] Judge Roberts' argument conflicted with prior Democratic and Republican administrations, which traditionally tied federal funds allocated to any particular budget of an educational institution to compliance with Title IX requirements throughout that institution. Judge Roberts' own restrictive interpretation of Title IX anti-sex discrimination provisions would have permitted schools receiving federal funds purposefully to engage in sex discrimination so long as it occurred in unrelated programs. When Congress responded to certain judicial limitations on enforcement of Title IX by passing the Civil Rights Restoration Act of 1987, Judge Roberts' denounced the legislation as an attempt to "radically expand the civil rights laws"[19] and suggested the administration seek to curtail further expansion.[20] Unfortunately, in 1999, it was apparent that while in private practice, Judge Roberts was still advancing a hostile interpretation to Title IX legislation and well-established jurisprudence of Title IX.[21]

Judge Roberts' hostility to expansion of educational opportunities has not been limited solely to young women and students of color. Judge Roberts has sought to limit the educational opportunities available to children with disabilities. Among other things, Judge Roberts supported a position that would weaken the Education for All Handicapped Children Act, by dismissing a lower court ruling in favor of a deaf student's right to a quality education as merely "an effort by activist lower court judges."[22]

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[18] Memo from T.H. Bell to Edwin Meese, III, December 21, 1982.
[19] Memo from John Roberts, to Fred F. Fielding, re: Correspondence from T.H. Bell on Grove City legislation (July 24, 1985).
[20] Memo from John Roberts to Fred Fielding re Grove City -- Civil Rights Legislation, April 12, 1985.
[21] *National Collegiate Athletic Ass'n v. Smith*, , 525 U.S. 459 (1999) (where Judge Roberts argued the NCAA should not be bound by gender discrimination requirements).
[22] *Bd. of Educ v. Rowley*, 458 U.S. 176 (1982).

Commerce Clause

Finally, our review and analysis of the available records on Judge Roberts also included an examination of the nominee's view on Congress' power to legislate, specifically under Article I, Section 8 of the Constitution, known as the Commerce Clause, which empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[23] An overly narrow reading of Congress' Commerce Clause authority would threaten civil rights protections because Congressional regulation of private entities derives generally from its Commerce Clause authority. The judiciary, most notably the Supreme Court, plays a crucial role in interpreting the extent of civil rights. A single Supreme Court ruling can change the very nature of a protected right throughout the entire country, and Supreme Court decisions can also affect the manner in which Congress enacts civil rights legislation, as occurred with the Civil Rights Act of 1964. It is fair, then, to ask what views Judge Roberts, who as Chief Justice would have the power to mold opinion among the other Justices, holds on this constitutional provision. One indication of Judge Roberts' view is in a dissenting opinion in *Rancho Viejo v. Norton*,[24] a 2003 case in which the U.S. Circuit Court of Appeals for the District of Columbia upheld the application of the federal Endangered Species Act to stop a California development. In a five-paragraph dissent, Judge Roberts questioned whether the Commerce Clause justified using it in a matter apparently limited to just one state. Specifically, Judge Roberts asked if Congress' Commerce Clause

[23] U.S. Const. Art I, § 8, cl. 3.

[24] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

powers could reach "a hapless toad" that lives only in California, prompting Senate interest.[25]

Judge Roberts' apparent limiting view of Congress' authority potentially threatens a wide swath of legislation rooted in the Commerce Clause, specifically the Civil Rights Act of 1964 which Congress passed using its power to regulate interstate commerce. This Committee and our country deserve to know expressly whether or not Judge Roberts would support curtailing Congressional authority to protect, among many things, civil rights.

CONCLUSION

In conclusion, on the basis of our thorough review of the available record on Judge Roberts and for the reasons cited above, the NBA cannot support the confirmation of Judge Roberts as Chief Justice. For several decades Judge Roberts has championed limitations on voting as well as educational and employment opportunities for people of color and women. If his views had prevailed in many cases, our Nation would not be far beyond the days when opportunities for Americans like Justices Sandra Day O'Connor and Thurgood Marshall were truncated on the basis of gender and race. Now is not the time for retrenchment. Now is the time for America to step forward into the 21st Century opening the doors of mainstream society to all Americans for the benefit and protection of all Americans.

Again, thank you for the opportunity to testify here today.

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[25] *Rancho Viejo supra* at 1160.