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Congressional Black Caucus

of the United States Congress

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September 12, 2005

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Ranking Member Leahy:

The Congressional Black Caucus is taking the unprecedented step of submitting for your consideration during the Roberts Supreme Court nomination several questions concerning racial discrimination, in the hope that you will include them among your own questions or that they will stimulate similar questions by you. Although you may well have similar questions of your own on this subject, we submit questions concerning racial discrimination because we are both astonished and troubled by what the papers of Judge John Roberts, Jr., that have been released reveal about his views on civil rights matters in virtually all the areas of concern to African Americans. Civil rights, in our view, has emerged as the most controversial subject of the Supreme Court nomination hearings. African Americans and their representatives will be watching the hearings perhaps more closely than most Americans because they are all too aware that their rights and remedies, many of them won through Supreme Court decisions, could be retracted by changes in the Court.

As a result of our research, we have deep and expansive concerns about the Roberts nomination, covering many areas of the law, but we are submitting only eight questions – all stimulated by troubling concerns that arise directly from Judge Roberts' documented record on matters of racial discrimination. These issues particularly concern us as well, because of the CBC's agenda to concentrate on the correction of racial disparities in American life and law. We ask you to press Judge Roberts on his views on racial discrimination, considering that the White House has refused to respond to Senators' requests for Judge Roberts' papers, particularly on a number of controversial civil rights matters.

The Court was the first branch of government to assure equal opportunity to African Americans and has been a central actor in

protecting the rights of minorities ever since. However, application of equal protection of the laws to people of color and remedies to enforce the 14th and 15th Amendments are barely 50 years-old. Our country's transformation on race could not have been achieved lawfully and nonviolently without the decisions of the Supreme Court. We hope that you agree that this achievement at a minimum deserves a central place in your examination of the nominee.

The CBC previously had not been aware of the hostility to civil rights remedies and court decisions Judge Roberts' papers appear to reveal. However, in fairness, the Caucus has delayed taking a position on the Roberts nomination in order to give him the opportunity to explain his views, many of which go back a quarter of a century when he was a young man. We believe that the pride the country now takes in the racial progress of the last 50 years and the pain it took to achieve this progress demands forthright answers on this subject from any nominee, especially one whose early record as an influential official was at odds with this progress.

We would very much appreciate your consideration of the attached questions.

Sincerely,

Melvin L. Watt
Chair, CBC

Eleanor Holmes Norton
Judicial Nominations Chair

Questions Submitted by the Congressional Black Caucus to Members of the Senate Judiciary Committee with a Request that Judge John G. Roberts, Jr., be asked to Respond:

1. ORIGIN AND OPERATION OF DISCRIMINATION IN THE UNITED STATES

A 1981 government report described discrimination as follows:

Today's discriminatory processes originated in our history of inequality.... These processes became self-sustaining as the prejudiced attitudes and behaviors of individuals were built into the operations of organizations and their supporting social structures (such as education, employment, housing, and government). These built-in mechanisms reinforce existing discrimination and breed new unfair practices and damaging stereotypes. (U.S. Civil Rights Commission Affirmative Action in the 1980s, p. 2 (1982)).

Question: **Do you believe this is an accurate or an inaccurate description of how discrimination has operated historically in our country?**

2. AFFIRMATIVE ACTION REMEDIES

While working in key positions in the government, you strongly opposed affirmative action of all kinds, advising the Attorney General "that race and gender should never be factors in employment decisions" (Roberts Memorandum, August 9, 1982), even in the early 1980s when such remedies were barely a decade old. As you are aware, the Supreme Court has allowed the use of race and gender in some narrowly tailored circumstances in some areas with considerable results, particularly in employment where these remedies were deemed necessary to break patterns the employer could not show were free of discrimination.

Question: **Considering that engrained patterns of employment discrimination were deeply rooted through hundreds of years of our history, do you believe that these patterns could have been removed, as many have, short of the remedies that have been in place since the 1960s, sanctioned by the Court and by Republican and Democratic administrations alike?**

3. REAUTHORIZATION OF THE 1965 VOTING RIGHTS ACT

The Congress is considering the reauthorization of the Voting Rights Act for the first time since 1982, when you were perhaps the most energetic opponent of a key section of the Act. In more than 25 memoranda, among other actions, you led an unsuccessful attempt by the Reagan administration to narrow Section 2 by requiring proof of intent in order to find a violation by state or local actions of the right to vote. The Congress instead adopted the effects test, finding that an intent test "places an unacceptable burden

upon plaintiffs" and cited as an example of a Georgia case that had not survived the intents test "even though the evidence showed pervasive discrimination in the political process." (S.Rep. No. 97-417, 97th Cong., 2d Sess. at 16, 39). You continued to oppose the effects test even following the compromise fashioned by Sen. Robert Dole making more explicit that proportional representation was disallowed (Roberts Memorandum to the Attorney General 2/16/82), although it had not been claimed or found by any Court.

Question: **Now, after 25 years of court enforcement of the effects test, is there any evidence that the effects test has established "essentially a quota system for electoral politics" or even a "drastic alteration of local governmental affairs" as you feared? In light of 25 years of litigation under the effects test, do you still oppose this test?**

4. DESEGREGATION OF HIGHER EDUCATION

In a rare retraction, Solicitor General Kenneth Starr withdrew the position taken in a case you supervised, U.S. v. Fordice, 505 U.S. 717 (1992), endorsing "freedom of choice" as a means of removing unconstitutionally segregated higher education in the state of Mississippi that would have left in place most of the vestiges of segregation, including discriminatory testing and starkly unequal programs, facilities, and teacher salaries. Solicitor General Starr's reply brief flatly stated that the positions taken in the brief you co-signed "no longer reflect the position of the United States..." and that "it is incumbent on the state... to eradicate discrimination from its system of higher education" (Reply Brief for the United States, U.S. v. Fordice, 505 U.S. 717 (1992) (No. 90-1205)). The Supreme Court, 8-1, agreed, rejected the freedom of choice position, and required the dismantlement by the state of policies and practices traceable to segregation.

Question: **Because the White House has not provided your memoranda from this period, we must ask you whether you agreed with the position taken in the brief you originally supervised or with Solicitor General Starr's reply brief retracting the freedom of choice position in the earlier brief?**

5. THE SUPREME COURT'S ROLE IN CRIMINAL JUSTICE

The Supreme Court agreed with the position in an amicus brief, signed by you, in Herrera v. Collins (No. 91-7328, 1991 U.S. Briefs 7328 (July 10, 1992)) that newly discovered evidence proving the actual innocence of a condemned prisoner did not require court consideration under the Due Process Clause, but the Court said it assumed an execution in such a case would be unconstitutional if there were no state avenue for correcting "a truly persuasive demonstration of 'actual innocence.'" However, in your brief, you disagreed and said, "There is no reason to fear that there is a significant risk that an innocent person will be executed under the procedures that the States have in place" (Herrera Brief at p. 9, n.18).

Question: **With the emergence of DNA and other evidence that have resulted in the release of a significant number of people held on death row in states such as Illinois, do you believe that a revision of this view is justified that would require the Court to act in a case involving "a truly persuasive demonstration of 'actual innocence'" if a governor refused to stop the execution?**

6. STRIPPING THE SUPREME COURT AND OTHER FEDERAL COURTS OF JURISDICTION TO HEAR CIVIL RIGHTS AND OTHER CASES

Throughout your career in government you were at odds with the administrations in which you served on the constitutionality of proposals to strip the federal courts, including the Supreme Court, of jurisdiction over controversial issues. For example, you argued in a 25-page memorandum that the federal courts, including the Supreme Court, could be stripped of jurisdiction to hear school desegregation cases, among other issues (Roberts Memo on Proposals to Divest the Supreme Court of Appellate Jurisdiction, attached to an October 30, 1981 note from Kenneth Starr to Theodore Olson). You later indicated some opposition to court stripping as a policy matter, but continued to hold to the view that court stripping was constitutional (Roberts Memo to Fred Fielding re: S. 47, 6/21/95).

Question: **In hindsight, would you now agree with Ted Olson, who as Assistant Attorney General along with others in the Justice Department, opposed your view and advised the Attorney General that Congress may not "make 'exceptions' which would negate the power of the Supreme Court to decide cases arising under the Constitution and laws of the United States" because only the Court has the power to provide "an authoritative and final expression of the meaning of the Constitution"?**

7. EFFECT OF LIFE TENURE ON JUDICIAL INDEPENDENCE TO RENDER UNPOPULAR DECISIONS

In a 1983 memorandum opposing the Justice Department's position supporting life tenure for federal judges, you favored a limited term of years today when judges live longer and argued that "the case for insolating the judges from political accountability" is outweighed by judges' longevity, allowing them to live "decades of ivory tower existence."

Question: **In responding to whether this is still your view, please say whether you would agree that life tenure has the benefit of protecting judges to render highly unpopular decisions affecting, for example, racial minorities or unpopular forms of speech?**

8. THE AIDS CRISIS AND THE LAW

This is a question about evidence that must guide a judge, regardless of the nature or controversy surrounding the issue. President Reagan was late and hesitant in offering leadership on the AIDS crisis, but by 1985, the White House believed it had to confront the shunning of children with AIDS that had resulted in discrimination against them in public schools for fear of contracting the disease. You recommended that the President avoid the position that had been recommended to the President by the Centers for Disease Control (CDC) that "as far as our best scientists have been able to determine, (the) AIDS virus is not transmitted through casual or routine contact," (Roberts Memo to Fred Fielding, p. 1, 9/13/85) the very reassurance that needed presidential leadership.

Question: **On the basis of what evidence did you believe that, notwithstanding the CDC's expert opinion, President Reagan should omit this statement of reassurance and should "assume AIDS can be transmitted through casual or routine contact" because of "disputed" scientific evidence (Roberts Memo, p. 1)?**