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September 2, 2005

The Honorable Arlen Specter, Chairman  
The Honorable Patrick J. Leahy, Ranking Minority Member  
United States Senate  
Senate Committee on the Judiciary  
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

We write on behalf of the American Jewish Committee (AJC), a national human relations organization with over 150,000 members and supporters and 33 regional chapters. Over the last century, AJC has been an active participant in many of the paramount legal and policy debates of the day, advocating for religious liberty, the separation of church and state, and civil rights. Indeed, AJC submitted its first amicus brief to the United States Supreme Court in 1925 in the case of *Pierce v. The Society of the Sisters of the Holy Name of Jesus and Mary*, supporting the rights of Roman Catholic parents in Oregon to send their children to parochial schools.

As a matter of long-standing policy, AJC does not take positions on the qualifications of a particular nominee. However, at this important moment in history, with the first vacancy on the Supreme Court in eleven years, we write to urge that the Senate Judiciary Committee exercise its extremely important constitutional duty under the "Advice and Consent" clause by closely examining the nominee's record and judicial philosophy, focusing in particular on the following issues:

**1. Religious Liberty and the Separation of Church and State**

The challenge our Founding Fathers faced was to create a system of government that respects the right of all individuals to worship as they see fit. The American experiment in separating religion from government not only has proven to be the best defense against the religious strife witnessed around the globe, but has also resulted in a robust religious landscape unlike that seen elsewhere. Thus, we believe it is critical for the nominee to comment in detail on his views about the nature of the relationship between religion and government. Specifically,

- ***Establishment Clause Interpretation.*** What is the nominee's approach to interpreting the First Amendment's Establishment Clause? Does the Constitution require heightened sensitivity in governmental actions affecting religion generally, or merely even-handedness among religions? What is the

nominee's view of the three-pronged test articulated in *Lemon v. Kurtzman* (1972)? Does the nominee favor other analytic tests for Establishment Clause jurisprudence, such as the so-called "endorsement test" advanced by Justice O'Connor?

- **Public Displays.** The Supreme Court recently handed down two divergent opinions concerning displays on public property of religious icons in *Van Orden v. Perry* and *McCreary County v. ACLU*. Did the Supreme Court draw the appropriate lines in either or both of these cases? If not, under which circumstances, if any, is it appropriate to allow the placement of religious symbols on public property?
- **Funding of Religious Activity.** To what extent is it appropriate for the federal government to fund social services and educational programs sponsored by a house of worship or other pervasively religious organizations? What is the nominee's view of the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris*, upholding the constitutionality of publicly-funded vouchers for parochial schools?
- **School Prayer.** What are the parameters of constitutionally permissible religious observance in the context of public schools? What is the nominee's view of the Supreme Court's 2000 decision in *Sante Fe Independent School District v. Doe*, where the Court held unconstitutional the school district's policy of conducting organized prayer at football games?
- **Free Exercise Clause Interpretation.** What are the appropriate standards under which alleged violations of the Free Exercise Clause should be analyzed? Was *Employment Division v. Smith* correctly decided, or should the government be required to demonstrate a compelling interest that cannot be satisfied by more narrowly tailored means?
- **Ability of Congress to Protect Religious Liberty.** Does the nominee believe that Congress has the authority to pass laws requiring governmental entities to accommodate religious beliefs and practices absent a compelling reason that cannot be satisfied by more narrowly tailored means?

## 2. Civil Rights and Civil Liberties

Even prior to its role as sponsor of the social science research cited by the Supreme Court in the landmark *Brown v. Board of Education* decision, civil rights for all Americans has been a vital area of concern for AJC. Since its founding in 1906, the agency has been a vocal advocate for equal rights for all and a steadfast opponent of discrimination in all its invidious forms.

- **Affirmative Action.** Did the recent Supreme Court decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger* draw the appropriate lines in determining whether and when racial classifications by government actors pass constitutional muster? In the nominee's view, under what circumstances, if any, might racial classifications be justifiable in the context of higher education admissions and employment? May private entities engage in such affirmative action consistent with the provisions of the Civil Rights Act of 1964?

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- ***Powers of the Federal Government.*** Recent Supreme Court decisions have undercut the federal government's authority to enact civil rights legislation. To what extent may Congress protect religious liberty and civil rights under the Constitution's Commerce Clause and Section Five of the Fourteenth Amendment? What kind of showing must Congress make, if any, to assert authority under those clauses to take such protective action? Is there greater discretion if the legislation is directed at discrimination against a group that has been found to be entitled to strict scrutiny or other enhanced protection? Moreover, how does the nominee regard the incorporation doctrine? Are the states subject to or obligated to enforce the Bill of Rights?
- ***National Security Concerns.*** In recent months, the courts have been increasingly presented with thorny questions regarding the delicate balance between national security and civil liberties. What is the nominee's view of the relationship between executive authority and legislative authority during wartime? How does the nominee view individual claims to right of counsel and access to the courts where national security interests are at stake? What difference does it make if the claims are made by a citizen? A resident alien? A non-resident alien captured in the United States? Abroad? How deferential should the courts be to executive determinations in this area?

### 3. *Stare decisis*

A fundamental element of the judicial philosophy of any nominee is his or her position on *stare decisis* and the significance of precedent. What criteria would the nominee apply to determine when and whether it is appropriate to overrule established precedent?

The aforementioned queries and considerations are core areas of concern to the American Jewish Committee, the Jewish community and the general public. By bringing these issues to the attention of the Senate Judiciary Committee, we hope to enhance the quality of the debate during the confirmation hearings of Judge John Roberts.

We thank you for your consideration of our views.

Respectfully,



E. Robert Goodkind  
President



David A. Harris  
Executive Director

cc: Members of the Senate Judiciary Committee