COMMITTEE HEARING REINFORCES
CASE AGAINST CONFIRMATION OF JANICE ROGERS BROWN

Prior to the Senate Judiciary Committee hearing on October 22 on the nomination of California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit, the nomination had already generated significant opposition. The NAACP, People For the American Way, Congressional Black Caucus, National Bar Association, Leadership Conference on Civil Rights, National Women's Law Center, California Association of Black Lawyers, NAACP LDF, Sierra Club, and many other organizations, along with more than 200 law professors, opposed her confirmation based on her record of ideological extremism and right-wing judicial activism.

At her hearing, the *New York Times* explained, "Justice Brown only ratified her critics' worst fears."[1] In fact, the day after the hearing, a prominent California law professor who had been singled out by Committee Chair Orrin Hatch at the hearing for signing a letter of support for Brown wrote to Hatch that after watching her testimony before the Committee, he could "no longer support the nomination."[2]

Specifically, the October 22 hearing reinforced serious concerns about Brown in five areas: 1) her troubling dissents concerning discrimination, consumer rights, and other issues; 2) her disturbing disregard for precedent, especially with respect to constitutional and civil rights; 3) her ultra-conservative ideological views as reflected both in her speeches and judicial opinions; 4) her strong support for extreme "private property" rights theories, including long-discredited legal theories that threaten important governmental actions regulating corporate behavior; and 5) her troubling disagreement with constitutional protection for fundamental rights and liberties. As the *Atlanta Journal-Constitution* has concluded, Brown's views are "far out of the mainstream of accepted legal principles" and she is "not qualified for the U.S. Court of Appeals for the D.C. Circuit."[3]

BROWN'S TROUBLING DISSENTS IN CIVIL RIGHTS AND OTHER AREAS

At the outset of the hearing, Senator Durbin summarized the concerns of many about Justice Brown's record of dissents on the California Supreme Court. Noting that all but one of the other justices on the court were also Republican, Durbin explained that Brown has dissented, often by

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1 Out of the Mainstream, Again, *New York Times* (Oct. 25, 2003) ("NYT")

2 Letter from Professor Stephen R. Barnett to the Honorable Orrin Hatch (Oct. 23, 2003)("Barnett letter").

3 Judicial Pick Not Fit for U.S. Court, *Atlanta Journal-Constitution* (Oct. 29, 2003).

herself, in "a great many cases involving the rights of discrimination victims, consumers, and workers" on the side of "denying rights and remedies to the downtrodden and disadvantaged." For example, Durbin noted, Brown was the "only member" of the court to:

- find that the state Fair Employment and Housing Commission "did not have the authority to award damages to housing discrimination victims";
- conclude that a disability discrimination victim "was not entitled to raise past instances of discrimination that occurred";
- try to rule that age discrimination victims "should not have the right to sue under common law – an interpretation that is directly contrary to the will of the California legislature";
- dissent "in a case involving the sale of cigarettes to minors";
- argue that her court should "strike down a San Francisco law that provided housing assistance to displaced low-income, elderly, and disabled people";
- dissent in "two rulings that permitted counties to ban guns or gun sales on fairgrounds and other public property"; and
- conclude (along with other dissenting court members) that "victims who are repeatedly harassed in the workplace must take a back seat to the free speech rights of their harassers."[4]

The primary response to these concerns by Chairman Hatch and other Brown supporters was to discuss the many cases where she has been in the majority and to note that last year, she had written the most majority opinions on her court. That argument, however, simply reflects the way that cases were assigned to be written in one year and the fact that there is little or no dissent in many state supreme court cases. It does not deny the fact that in the cases that have been controversial over her seven-plus years on the court, Brown has frequently dissented in a manner that would have denied "rights and remedies to the downtrodden and disadvantaged."[5] In fact,

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[4] See Statement of Senator Richard J. Durbin on California Supreme Court Justice Janice Rogers Brown Before the Senate Judiciary Committee (Oct. 22, 2003)("Durbin") at 3,4.

[5] Senator Hatch also sought to defend Brown's controversial ruling in the California affirmative action case, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), which upheld California's Proposition 209. Yet neither Senator Hatch nor Brown addressed the primary critique of her opinion in that case –that it went far beyond Proposition 209 to criticize even affirmative action programs upheld by the Supreme Court and to suggest that they are comparable to discriminatory policies promoting racial segregation. As California Chief Justice George explained, Brown's opinion "represents a serious distortion of history and does a grave disservice to the sincerely held views of a significant segment of our population." *Id.* at 1095. See People For the American Way and the NAACP, "Loose Cannon": Report in Opposition to the Confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit (Aug. 28, 2003)("PFAW-NAACP Report") at 9-11. As the *St. Louis Post-Dispatch* noted in editorializing against her nomination, moreover, Brown also displayed a "remarkable" lack of

according to statistics reported by a right-wing organization that supports Brown's nomination, she has the second highest number of full or partial dissents on the California Supreme Court during her period of service.[6]

Brown testified specifically concerning several of these dissents, but only reinforced the concerns about her record. Senator Feingold asked Brown about her dissent in the age discrimination case, *Stevenson v. Superior Court*, 941 P.2d 1157, 1187 (Cal. 1997), in which she suggested that age discrimination "does not mark its victim with a 'stigma of inferiority and second class citizenship.'" Senator Feingold expressed concern about her view of age discrimination and the rights of senior citizens, especially in light of a speech by Brown in which she stated that "[t]oday's senior citizens blithely cannibalize their grandchildren because they have a right to get as much free stuff as the political system will permit them to extract."[7] Brown attempted to address these concerns by expressing opposition to age discrimination. Incredibly, however, she also testified that the fact that all of us "pass through" the aging process somehow makes age discrimination "different in quality" from other kinds of discrimination, and that she does not think that age discrimination "stigmatizes senior citizens." This view of age discrimination is truly appalling.

Brown was asked by several senators about her dissent in the workplace harassment case, *Aguilar v. Avis Rent A Car Systems, Inc.* 980 P.2d 846 (Cal. 1999), *cert. denied*, 529 U.S. 1138 (2000). In that case, the court majority upheld a lower court ruling that Latino employees were repeatedly subjected to racial slurs, creating a hostile work environment, and that an injunction against such conduct was appropriate to help provide a remedy. Brown claimed at the hearing that she agreed that the slurs created an illegal hostile working environment, and that the "only question" where she disagreed was whether an injunction was an appropriate remedy. That claim is flatly inconsistent with her opinion in the case. In her dissent, she not only disagreed with the injunctive remedy; for several pages, she also criticized the majority's holding that verbal conduct that creates a hostile work environment can properly lead to a finding of employment discrimination and is "not constitutionally protected." *Id.* at 891. In fact, despite several Supreme Court rulings to the contrary, she explicitly suggested that according to her interpretation of one Supreme Court case, "Title VII [of the 1964 Civil Rights Act] is unconstitutional because it is a content-based regulation of speech *not* limited to fighting words." *Id.* at 892. Although she

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familiarity with the Supremacy Clause, "one of the most elemental rules of constitutional interpretation," in answering Senator Specter's questions about the case. *See* A Nominee to Filibuster, *St. Louis Post-Dispatch* (Oct. 24, 2003).

[6] See S. Dokupil, *Voting Patterns of the California Supreme Court, 1996-2003* (downloaded from Committee for Justice website, www.committeeforjusitce.org, on November 3, 2003). Specifically, these statistics reflect that Brown dissented in full 57 times and in part (listed as "concur/dissent") 22 times, for a total of 79 full or partial dissents. Only Justice Kennard, with 110 full or partial dissents, is listed as having more dissents on the Committee for Justice website. Brown's total does not include several opinions labeled as concurring opinions, in which she nevertheless disagreed strongly with the majority opinion or advanced other troubling theories. See, e.g. PFAW-NAACP Report at 15, 22, 26.

[7] See Brown speech to Institute for Justice (Aug. 12, 2000) ("IFJ") at 2.

avoided discussing it at her hearing, this extreme criticism of landmark federal civil rights legislation, which Brown would be called upon to interpret as a judge on the D.C. Circuit, is deeply troubling.

BROWN'S DISTURBING DISREGARD FOR PRECEDENT, ESPECIALLY ON CONSTITUTIONAL AND OTHER RIGHTS

As with many other Bush Administration nominees, Brown tried to answer many concerns about her record and philosophy by repeatedly pledging that she would respect court precedent. Senator Feinstein raised serious concerns about Brown's assurances. In light of Brown's "stark" views as expressed in speeches and elsewhere, and in light of the many opinions by Brown that have criticized or "openly flouted" precedent, Feinstein asked, how can Senators rely on Brown to fairly and fully apply key precedents on constitutional and other issues?

Brown's answers raised even more concerns. Initially, Brown admitted that when it comes to precedent of her court, the California Supreme Court, she has indeed urged that the court "review" or "rethink" prior precedent with which she disagrees, and that this is appropriate for a judge. In fact, her record demonstrates that in a number of cases, she has argued in dissent that the court should limit or overturn precedent that protects consumer, worker, and other rights, including precedent established years before she joined the court.[8] The D.C. Circuit has established numerous precedents, particularly concerning such subjects as labor law, environmental law, the Freedom of Information Act, and review of federal agency decisions. According to Brown's testimony, all these would be fair game for her to question and seek to overturn if she is confirmed to that court.

Neither the California Supreme Court nor the D.C. Circuit, of course, can overturn precedent of the U.S. Supreme Court. In her rulings in such cases, Brown testified that she limits herself to suggesting that "perhaps" the Court should "rethink" precedents with which she disagrees, but that she follows precedent that is "clearly on point." This statement provides no real reassurance, however, since two cases are almost never exactly alike, and a judge can almost always claim that a precedent should be interpreted differently or is not "clearly on point." In this way, an appellate judge can, for example, claim that *Roe v. Wade* is not "clearly on point," and then reach a decision that severely undercuts privacy or reproductive rights without purporting to overrule it. In fact, in several cases, Brown has severely criticized or urged changes in Supreme Court precedents or doctrine on important constitutional issues, and then claimed that existing precedent was not "clearly on point" or should be interpreted differently than the majority of her court, in a way that would have harmed employees or helped corporations.[9] Brown's testimony at

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[8] *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1111, 1114 (Cal. 1998)(challenging precedents "[o]ver the last quarter century" broadly interpreting unfair competition law and urging that the courts "restrain their own precedents" in the area); *Green v. Ralee Engineering Co.*, 960 P.2d 1046, 1073 (Cal. 1998)(arguing that court should "take a fresh look" at long-established precedents protecting employees against firing in violation of public policy).

[9] In addition to the *Aguilar* case, in which Brown's dissent suggested that previous Supreme Court cases on verbal workplace harassment were not "clearly on point", examples include her dissenting opinions in *Kasky v.*

her hearing served only to underline the concerns that have been raised about whether she will faithfully follow key precedents protecting constitutional and civil rights.

BROWN'S EXTREME VIEWS IN SPEECHES ON GOVERNMENT, LAW, AND THE JUDICIARY

When Brown was nominated for the California Supreme Court in 1996, she received an "unqualified" rating from the state judicial evaluation committee, partly because of concerns that she was "prone to inserting conservative political views into her appellate opinions."[10] Much of the questioning at the October 22 hearing concerned Brown's extreme views as expressed in speeches and elsewhere. As Senator Durbin and others pointed out, Brown has expressed hostility towards government, claiming that "where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies," resulting in a "debased, debauched culture which finds moral depravity entertaining and virtue contemptible." She has severely criticized the courts, including her own court, complaining that over the past 30 years, the Constitution "has been demoted to the status of a bad chain novel." She has attacked the New Deal as "the triumph of our socialist revolution."[11]

Brown offered several explanations for such statements. She suggested that in some speeches, she was trying to "stir the pot." She stated that despite her speeches, she believes that government "can" have a "very positive role," although any speech "speaks for itself." Primarily, however, she sought to distance her "role" as a speaker from her role as a judge, suggesting that her speeches should be viewed completely separately from her judicial opinions.

As Senator Schumer pointed out, however, Brown's speeches cannot be viewed separately from her opinions as a state supreme court judge, because just as the state bar committee suggested even before she joined the supreme court, Brown has "inserted" her views into her appellate opinions. For example, Senator Schumer noted that Brown had accused the majority in the San Francisco housing assistance case of "[t]urning a democracy into a kleptocracy," echoing her warning in a previous speech that without effective limits, "a democracy is inevitably transformed into a Kleptocracy."[12] As Senator Schumer stated, a number of Brown's opinions

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Nike, 45 P.3d 243 (Cal. 2002), *cert, dismissed as improvidently granted*, 123 S.Ct. 2554 (2003)(severely criticizing and suggesting changes in commercial speech doctrine but then dissenting from majority ruling that corporate speech at issue was commercial speech); *Loder v. City of Glendale*, 927 P.2d 1200, 1257 (Cal.), *cert. denied*, 522 U.S. 807 (1997)(arguing for a "return" to a restrictive view of government employee rights that "for many years" has been "out of fashion," but also disagreeing with majority ruling that current Court precedent invalidated mandatory drug testing plan for employees seeking promotion).

[10] Maura Dolan, "Bar Faults High Court Nominee in Key Areas," *Los Angeles Times* (April 26, 1996) at A1.

[11] See Durbin at 6; NYT; Brown Speech to Federalist Society (April 20, 2000) at 8. A more complete listing of these and many other troubling quotations by Brown is contained in Janice Rogers Brown: In Her Own Words (PFAW, insert date)

[12] See PFAW-NAACP Report at 35 (citing dissenting opinion and speech by Brown). Several other examples are contained in the PFAW-NAACP report at 35-6 and Senator Schumer's questioning.

"seem to have the same views" and "very similar thinking" as some of her controversial speeches.

Brown did not deny Senator Schumer's statement. She acknowledged that a judge is not an "automaton" or "computer" and that some aspect of judges themselves is "reflected in the work that they do." She nevertheless tried to insist that her speeches should not affect the evaluation of her judicial philosophy and her nomination.

Perhaps the clearest answer comes from Brown's former supporter, Professor Stephen Barnett of the University of California:

> Those speeches, with their government-bashing and their extreme and outdated ideological positions, put Justice Brown outside the mainstream of today's constitutional law…I cannot accept Justice Brown's apparent claim that these are "just speeches" that exist in a different world from her judicial opinions. That defense not only is implausible but trivializes the judicial role.[13]

BROWN'S EXTREME VIEWS ON PROPERTY RIGHTS AND THE DISCREDITED *LOCHNER* ERA

Senators asked Brown a number of questions about the views expressed in both her speeches and opinions on "private property" rights and the long discredited Supreme Court decisions striking down New Deal and other progressive social and economic legislation, beginning with the Court's ruling in *Lochner v. New York*, 198 U.S. 45 (1905). During the so-called *Lochner* era, which ended in 1937, the court struck down laws regulating minimum wages, working hours and conditions, worker protection, and improper business practices, all in the name of "protecting" private property or freedom of contract. Senators of both parties at the hearing decried *Lochner*, noting that it has been criticized even by Judge Robert Bork. But there was significant controversy over Brown's views in this area.

Several senators questioned Brown about dissenting opinions in which she has argued for invalidating important laws for the sake of private property interests, as well as statements in speeches appearing to approve of *Lochner*. In one speech, Brown stated flatly that Justice Holmes' famous dissent in *Lochner* was "simply wrong."[14] Brown answered by stating that her speech was only suggesting that Justice Holmes was wrong in suggesting that the Constitution was not intended to embody a particular economic theory, and that she has stated in one of her decisions that *Lochner* was "justly criticized" for using substantive due process theories to insert judges' personal social and economic views into the Constitution.[15]

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[13] Barnett letter

[14] Speech to Federalist Society (April 20, 2000)("Federalist") at 8.

[15] *Santa Monica Beach, Ltd. v. Superior Court,* 968 P.2d 993, 1026 (1999)(Brown, J., dissenting) [tr 122-24]

In fact, however, Brown appears to have retreated from this earlier criticism of *Lochner* and substantive due process as a way to protect property owners. In a speech delivered a year after her opinion suggesting that *Lochner* had been "justly criticized," she stated that as a conservative judge, she had "initially accepted the conventional wisdom that substantive due process was a myth invented by judicial activists who were up to no good" and that "Lochnerism is the strongest pejorative known to American law." She explained, however, that she has come to realize that there are "problems with dismissing the idea of substance in the due process clause," and that it is necessary to invoke "limits on the power of government." In particular, she claimed, there is a "small but credible body of scholarship" demonstrating that the due process clause was "viewed as a restraint on government," designed "in part, to protect the rights of property owners."[16] In other words, despite her earlier criticism of *Lochner*, she appears to approve of its discredited theories in order to "protect" private property from government regulation.

Regardless of whether Brown's theories are viewed as an attempt to revive *Lochner* or to rely on the "takings" clause or other constitutional provisions, Brown's testimony reinforced the suggestions in her opinions and speeches that what she regards as government infringement on private property rights should be vigorously scrutinized. But Brown's opinions demonstrate that her views on what constitutes "infringement" of property rights are extreme and would seriously threaten laws protecting the environment, promoting affordable housing, and accomplishing other important objectives.[17] This was most clearly demonstrated at the hearing by the questioning concerning her dissent urging the invalidation of a San Francisco housing assistance ordinance, *San Remo Hotel L.P. v, City and County of San Francisco*, 41 P.3d 87 (Cal. 2002).

In *San Remo*, the California Supreme Court upheld a city ordinance providing that if a hotel owner wants to eliminate residential hotel units and convert to tourist units, it must contribute to helping provide housing for the low income, elderly, and disabled tenants displaced as a result. Brown vigorously dissented, claiming that as a result of the ruling, "private property, already an endangered species in California, is entirely extinct in San Francisco." *Id.* at 120. She asserted that the ordinance constituted an unconstitutional "taking" of private property by government without compensation, resulting in "theft" and "[t]urning a democracy into a kleptocracy." *Id.* at 128. Every other justice on the court disagreed.

Despite questioning from several senators, Brown adhered to her statements and views in *San Remo*, commenting that "the cases say what they say." Senator Feinstein asked her to justify her assertion that the ordinance, which simply called for payment of fees based on possible future uses of hotel property, constituted a "taking" of private property by government. Despite her concession that the city did not directly interfere with the hotel owners' ownership rights, Brown claimed that it was a "taking" because the city was saying that owners must pay "ransom" if they want to convert hotel property to tourist use – a characterization and a theory squarely rejected by

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[16] IFJ at 3,4.

[17] See PFAW-NAACP Report at 2, 23-4, 35-6; Community Rights Counsel and Earthjusitce, Janice Rogers Brown and the Environment: A Dangerous Choice for a Critical Court (Oct. 21, 2003).

every other member of her court. In trying to justify her view, Brown suggested an analogy: to her, it would clearly constitute a "taking" if government said that in order to relieve traffic congestion in the city, a car owner could not drive alone in certain areas during certain hours but had to "pick up someone from the casual car pool." This remarkable claim by Brown comes close to suggesting that HOV lane requirements, which mandate that cars have two or more passengers in order to drive in certain areas during rush hour, constitute an unconstitutional "taking" of private property. As the court majority pointedly noted in *San Remo*, "nothing in the law of takings would justify an appointed judiciary in imposing" Brown's "personal theory of political economy on the people of a democratic state." *Id.* at 110. Brown's "personal theories" in the area of private property rights are clearly extreme.

BROWN'S DISTURBING DISAGREEMENT WITH VIGOROUS PROTECTION FOR FUNDAMENTAL CONSTITUTIONAL RIGHTS

Prior to Brown's hearing, serious concerns were raised about Brown's criticism of long-established Supreme Court doctrine calling for strict scrutiny of government action infringing on fundamental constitutional rights, such as freedom of speech and the right to privacy. According to one Brown opinion, the "dichotomy" between the Court's treatment of economic rights and its "hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid."[18] Brown's testimony at the hearing reinforced these concerns.

In response to a question from Senator Hatch, Brown agreed that just as she was unhappy with the courts' use of substantive due process to protect property rights during the *Lochner* era, she was critical of them for "using substantive due process thereafter" and that hers is a "mainstream" view.[19] But after the *Lochner* era, although it was rejected as a basis for heightened protection of property rights, the due process clause has been an important part of the Supreme Court's basis for protecting fundamental personal rights, such as the right of privacy and womens' right to reproductive freedom.[20] At the hearing, Brown derisively referred to a key basis for applying strict scrutiny to violations of fundamental rights, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), as "that infamous footnote." Brown has criticized the courts for "finding constitutional rights which are nowhere mentioned in the Constitution;"[21] as Senator Leahy pointed out, this would include such firmly established rights as the right to travel, the right of parents to direct the upbringing of their children, and the right to privacy. Although Brown stated that she "accept[s]" the Court's decisions on the right of privacy, her continued criticism of established Court precedent on fundamental rights remains deeply troubling.

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[18] *Kasler v. Lockyer*, 2 P.3d 581, 601 (Cal. 2000)(concurring opinion) [add cert denied]

[19] As discussed above, Brown appears to have become much more sympathetic to the use of substantive due process to protect property rights.

[20] See E. Chemerinsky, Constitutional Law (1997) at 638-9, 657-85.

[21] Speech to California Lincoln Club Libertarian Law Council (Dec. 11, 1997) at 7-8.

At the hearing, Brown attempted to defend her dissent in *American Academy of Pediatrics v. Lungren,* 940 P.2d 797 (Cal. 1997), in which the majority ruled that a California abortion parental consent law violated the right to privacy under the state constitution. She did not address the concern that her opinion conflicted with the Supreme Court's rulings that a restrictive abortion law is invalid if many of its applications are unconstitutional.[22] She adhered to her dissenting view that the California constitution did not accord greater privacy protections than the federal Constitution, and even suggested that a state constitution "cannot impose a more rigid standard on privacy," an assertion that Senator Specter pointed out was clearly incorrect.

In addition, in response to questions from Senator Leahy, Brown expressed disturbing doubts even about the basic principle that the constitutional protections explicitly mentioned in the Bill of Rights apply to actions by state and local government. As Senator Leahy explained, the Supreme Court long ago ruled that the Fourteenth Amendment "incorporated" the Bill of Rights' protections, so that state and local government, as well as the federal government, cannot deprive Americans of freedom of speech, the right to counsel, and other explicitly enumerated rights. Yet Brown gave a speech in 1999 suggesting that the argument against incorporation was "overwhelming" and that the Bill of Rights is "probably not incorporated, " contrary to the Court's rulings. At the hearing, Brown responded that she had since done some additional reading and that today, she thinks that her argument "probably is not entirely correct." Senator Leahy remained concerned, noting that it remains disturbing that in 1999, long after she had been to law school and after many years of law practice, she was criticizing the well-established incorporation doctrine. Perhaps even more disturbing, Brown testified that even after her post-1999 research, she still considers it "anomalous" that the First Amendment is incorporated in the Fourteenth Amendment. Under that view, state and local governments could flagrantly violate Americans' free speech, free press, freedom of religion, and other First Amendment rights. Such a radical theory raises even more concerns about Brown's willingness to protect fundamental constitutional rights.

CONCLUSION

The October 22 hearing on the Brown nomination clearly failed to resolve the serious concerns about her nomination. To the contrary, her testimony reinforced those troubling questions and further demonstrated, in the words of a law professor who formerly supported her, that Brown is "outside the mainstream of today's constitutional law." As the *Washington Post* has noted, Brown's nomination appears calculated to "only inflame further the politics of confirmation to one of this country's highest-quality courts." [23]Her nomination should be rejected.

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[22] See National Partnership for Women and Families, Statement on the Nomination of Janice Rogers Brown at 3; PFAW-NAACP report at 12.

[23] Fueling the Fire, *Washington Post* (Aug. 1, 2003).