July 20, 2005

To: Journalists

Fr: Ralph G. Neas, President

Re: Why is the Far Right Rejoicing About Roberts' Nomination?

"The President … promised to nominate someone along the lines of a Scalia or a Thomas and that is exactly what he has done."

Tony Perkins, Family Research Council, *New York Times*, July 20, 2005

Radical Right Leaders Celebrate Roberts Nomination

In the days leading up to President Bush's announcement, far-right activists were brutally straightforward about what they wanted and believed they were owed in a Supreme Court nominee. They denounced the very idea of consensus and compromise and they savaged potential nominees they deemed insufficiently committed to right-wing judicial activism, including Attorney General Alberto Gonzales. Right-wing leaders implored President Bush not to find a replacement in the mold of Sandra Day O'connor, a mainstream conservative who was often the swing vote on cases involving fundamental rights and liberties. Instead they demanded judges in the mold of right-wing activists Antonin Scalia and Clarence Thomas.

Those same right-wing leaders are unanimous in their support for Supreme Court nominee John Roberts. Pat Robertson, James Dobson, Tony Perkins, Gary Bauer, Manny Miranda, Operation Rescue, and other radical right leaders and groups are raving about Roberts as "exceptional," "refreshing," and "outstanding." "President Bush has guaranteed he would appoint a U.S. Supreme Court Justice with a Thomas-Scalia type judicial demeanor," said the president of the Alabama Christian Coalition. "The President has once again followed through on his word…."

The enthusiastic embrace of John Roberts by radical right leaders who have been demanding more far-right activists like Scalia and Thomas on the Court should sound alarm bells for senators and for Americans who want Supreme Court justices who will uphold the rights and legal protections that the far-right is eager to dismantle – equality under the law, environmental protection, privacy, reproductive choice, church-state separation, and more.

What if Roberts is the Scalia-Thomas Justice Demanded by the Right?

There's a reason why those on the far right are such big fans of Scalia and Thomas: their beliefs are stunningly radical. A Supreme Court controlled by Scalia and Thomas and justices like them would deprive Americans of many of their rights, freedoms, and legal protections. Such a Supreme Court would turn back the clock on many of the social justice gains of the last 70 years and could even return us to a pre-New Deal era of jurisprudence, when programs to protect workers and help the nation recover from the Great Depression were declared unconstitutional. A

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Scalia-Thomas Court could overturn more than 100 precedents. Replacing Justice O'Connor with someone in the mold of Scalia and Thomas would move the Court dangerously in that direction.

Under a Supreme Court controlled by Scalia and Thomas and similar justices, rights that most Americans take for granted would be curtailed, including freedom of speech and expression, the right to privacy, and religious liberty free from government interference or coercion. Basic constitutional principles including equal justice under the law, and one person, one vote would be torn to shreds. Environmental protections would be rendered unconstitutional, as would legislation giving patients the right to have doctors—not HMO bureaucrats—make life-or-death medical decisions.

This is not crying wolf. It is an all-too-real possibility that is outlined by Scalia and Thomas in their own speeches and Supreme Court opinions.

Far-Right Leaders Close to the Court of Their Dreams

As People For the American Way Foundation has documented in its *Courting Disaster* reports, more than 100 Supreme Court precedents protecting seven decades of social justice gains could be overturned or undermined if even one or two more justices who share the judicial philosophies of Justices Clarence Thomas and Antonin Scalia are appointed to the Court. Updated in June 2005, *Courting Disaster* (www.courtingdisaster.org) examines the dissenting and concurring opinions of Justices Scalia and Thomas, dating back to 1986 and 1991 respectively, and asks how American law and society would be different if their opinions were in the majority on the Supreme Court.

Dozens of precedents could fall if Justice O'Connor—often the swing vote—is replaced by a justice who shares the judicial philosophies of Scalia and Thomas. And of course, the current vacancy could be only the first of several over the next few years. It has been 11 years since the last vacancy, the longest interval without an appointment in 182 years, since the administration of James Monroe in 1823. Since 1950, there has been on average one vacancy about every two years. We could be entering a period with multiple vacancies, comparable to the four vacancies between 1969 and 1972 and the five vacancies between 1987 and 1994.

A Radical Ideology with Serious Consequences

Far-right ideologues want a Supreme Court dominated by Antonin Scalia and Clarence Thomas because they believe a radically different America would result. Scalia's and Thomas's speeches, writings, and Supreme Court opinions make it clear that the far-right ideologues are probably correct. Indeed, the America that Justices Scalia and Thomas envision would be virtually unrecognizable to most of us.

Their America is an association of states that have the power to run roughshod over Americans' fundamental freedoms – and where any government can intrude into the most personal details of people's lives because there is no right to privacy. In their America, state and local governments can establish official religions and keep controversial ideas from reaching the public, while individuals lose protections against discrimination in the workplace, classroom, or voting booth.

In this America, citizens are powerless against manufacturers that pollute our environment and HMOs that refuse to pay for needed medical treatment. This is an America of "minimum" civil

rights and liberties, where 200 years of progress towards equality and justice comes to a halt. In this America, the government has no obligation to inform arrested persons of their rights, and citizens can be labeled "combatants" and detained without access to legal representation.

As this document makes plain, the term "radical" seriously understates the changes those on the far right seek. Their extreme ideology is stridently retrogressive, and it contradicts what the vast majority of Americans believe. These far-right activists want the Supreme Court to be an extension of their political power and dramatically reshape our nation.

America Needs to Know

It is deeply disappointing that President Bush passed up the opportunity to choose a consensus nominee in the mold of Sandra Day O'Connor. John Roberts' record raises serious concerns and questions about where he stands on crucial legal and constitutional issues. It will be extremely important for Senators and the American people to get answers to those questions – and to find out whether right-wing leaders are correct that Roberts is in the mold of Scalia and Thomas. It is up to John Roberts to demonstrate that he is committed to upholding Americans' rights and legal protections. Replacing O'Connor with someone who is not committed to doing so would create far-reaching and long-lasting harm to Americans' lives and liberties.

Justice Scalia's America

As Supreme Court Justice Antonin Scalia's writings and speeches make clear, if justices who share his hard-right ideology take control of the Supreme Court, radical changes are sure to follow. Here are just some of the things that would change in Justice Scalia's America:

People would lose the right to make their own medical decisions. Scalia has written that even fully competent adults have no constitutional right to refuse unwanted medical treatment.[1]

The government would control women's bodies and eliminate a woman's right to choose. Scalia has repeatedly advocated overturning the landmark *Roe v. Wade* decision that established a woman's constitutional right to an abortion.[2] He even believes women don't have the constitutional right to decide whether to use birth control and contraceptives that could protect them from sexually transmitted infections.[3]

Government and religion would be one and the same. Scalia has written that people of faith should "combat" the tendency of democracy to "obscure the divine authority" of government.[4] He issued one dissent that would require governments to fund instruction in ministry if they fund education generally.[5] His dissent to another Supreme Court opinion would have allowed state governments to require the teaching of religious creationism.[6] All of this pales in comparison to his dissent in *Lee v. Weisman*, in which Scalia actually argued for the elimination of the Constitution's requirement that government be neutral toward religion. He would replace this requirement with an interpretation that would allow government-endorsed religion and prayer.[7]

Affirmative action would be forbidden at state schools, and campus diversity could disappear. Scalia dissented from the Supreme Court's *Grutter v. Bollinger* ruling, which held that state colleges and universities can use affirmative action to increase educational opportunities for minorities.[8] According to Scalia, if you support affirmative action programs, you subscribe to the "way of thinking" that resulted in slavery.[9]

People's bedrooms would be fair game for government intrusion. Justice Scalia thinks the right to privacy concerning reproductive freedom or bodily integrity doesn't exist. He has explicitly argued against overturning laws that made it illegal for gay Americans to have private, consensual sex, but his radical beliefs go much further. Scalia would actually allow the government to make sex between any consenting adults a criminal act—if it takes place outside of marriage. According to Scalia, the government should even be able to make masturbation a crime.[10]

Civil rights and liberties would "be ratcheted right down to the constitutional minimum." Scalia thinks many of our rights aren't really protected by the Constitution, and that they could, and perhaps should, be eliminated in a time of war. In one speech he actually said Americans should expect these fundamental freedoms to "be ratcheted right down to the constitutional minimum."[11]

Women would have to pay taxes to fund public educational institutions that are only for men. When the Supreme Court voted to end gender discrimination by the state-funded Virginia

Military Institute, which previously had been open only to men, Antonin Scalia was the only justice to dissent.[12]

Courts would no longer fight school segregation. In *Freeman v. Pitts*, Justice Scalia wrote that courts should no longer oversee the implementation of desegregation plans. Scalia argued in the same dissent that school segregation can never be remedied because it is impossible to identify its causes.[13]

The police will have no obligation to inform people who are arrested of their rights. Justices Scalia and Thomas were the only two justices who supported reversing the *Miranda* decision that requires law enforcement authorities to inform people who are arrested of fundamental rights like the right to remain silent and the right to an attorney.[14]

Votes of members of a racial minority group could matter less. Scalia's opinions in voting rights cases would reverse rulings preventing redistricting plans that dilute the voting strength of minorities.[15]

The government could allow blatant exclusion of African Americans from juries. Scalia and Thomas have both argued that only blacks should be able to challenge the exclusion of blacks from juries. This would make discrimination in jury selection much harder to challenge.[16]

Workers would have a harder time striking for fair wages and benefits. Scalia wrote a dissent that would have weakened employees' rights to strike and to engage in collective bargaining by expanding employers' ability to refuse to negotiate with union representatives.[17]

State laws won't protect patients if an HMO declines to pay for needed medical care. Scalia tried to overturn "patients' bill of rights" laws that give people the right to a second opinion if HMOs refuse to fund needed treatment.[18]

The government will be able to prevent speeches that provoke controversy. Scalia signed onto a dissent that would have allowed local governments to charge controversial speakers large permit and police protection fees that could prevent the speakers from appearing.[19]

Americans' cars would be subject to search at any time. Scalia argued police should be allowed to set up highway checkpoints to randomly search vehicles for illegal drugs.[20]

Environmental protection would be dealt a serious blow. Scalia has made the perplexing argument that if all members of a community are injured by environmental pollution, a citizens' group shouldn't be allowed to file suit to enforce anti-pollution laws.[21] He wanted to prevent the federal government from enforcing protections against the destruction of endangered species.[22] And Scalia actually wanted to prevent the Environmental Protection Agency from stepping in to stop pollution when state agencies fail to do so.[23]

Government workers could be fired if their boss doesn't like their politics. Scalia wrote a dissent that would allow government supervisors to fire subordinates or deny them promotions if those subordinates belong to political parties the supervisors don't like.[24]

State workers will lose their right to seek damages from their employer when their right to take time off to care for sick family members is violated. In his dissent to a Supreme Court decision about the Family and Medical Leave Act, Scalia wrote that he believes it is unconstitutional for the government to require states to compensate their employees when their rights to family and medical leave are violated.[25]

Justice Thomas' America

Like Antonin Scalia, Clarence Thomas has sought to use his power as a Supreme Court justice to rewrite the law in order to create radical changes threatening our rights. Here are just some of the sweeping changes you could expect in Justice Thomas's America:

There would be no right to privacy. Thomas believes that there is no "general right to privacy" guaranteed by the Constitution.[26] Some of the consequences of this radical belief are his stance against reproductive choice and his judgment that hospitals should have the right to test pregnant women for drug use without their consent and then hand the results to police. [27]

State and local governments would be able to establish official religions. Thomas argued that displays of the Ten Commandments on government property should be allowed, because the First Amendment's Establishment Clause does not apply at all to state and local governments.[28] This would literally allow any state to adopt an official religion.

The government would be able to censor library, museum, and public broadcasting content. Thomas and Scalia have stated that they believe the First Amendment's free speech protections do not apply to much government activity. They would permit overt viewpoint discrimination and censorship by government agencies providing funds to libraries and museums.[29]

A judge's foremost responsibility would be to his or her religious beliefs—not the Constitution. At a swearing-in ceremony, Thomas reportedly told a new appointee to the Alabama Supreme Court that the Constitution should be regarded as secondary to a judge's personal understanding of the will of God. [30]

The government would be able to jail American citizens and hold them for unlimited amounts of time without access to an attorney. Thomas would uphold the Bush Administration's assertion that the government can indefinitely detain as enemy combatants U.S. citizens who are apprehended abroad. These citizens would be denied any legal representation and would lose their constitutional right to a day in court.[31]

Voters would lose effective protections from racial discrimination at the polls. Thomas once offered such a radical interpretation of the Voting Rights Act of 1965 that Justices Stevens, Blackmun, Souter, and Ginsburg responded by saying his interpretation would require overturning at least 28 previous Supreme Court decisions.[32] Despite clear congressional intent and Court precedent, Justice Thomas has refused to recognize that the Voting Rights Act is intended to be broadly interpreted to prohibit racial discrimination in all aspects of voting.[33]

Americans would lose protections against horrific punishment. When a prisoner was handcuffed to a "hitching post," taunted, and deprived of access to water and a bathroom for long periods, the Supreme Court ruled that the "cruel and unusual" nature of this punishment was "obvious," and that the punishment was therefore unconstitutional. Thomas, however, joined Scalia in dissenting from the majority opinion.[34]

Americans would not have the right to a second medical opinion if their insurance company refused to pay for a needed procedure. Thomas argued that the Court should overturn state laws

that give recipients of health care coverage from HMOs the right to an independent medical review if there is a dispute between the patient's doctor and HMO about the "medical necessity" of a procedure. [35]

Some anti-discrimination and equal opportunity protections would disappear. Thomas suggested that the Court erred in *Brown v. Board of Education* when it considered the social and psychological impact segregation had on black school children[36] and called affirmative action "noxious," and "government-sponsored racial discrimination."[37] Thomas also would have allowed a school district to deny a quadriplegic boy the nursing care that made it possible for him to attend school.*[38]* In addition, Thomas was part of a narrow majority that voted to strike down key parts of the Violence Against Women Act[39] and the Age Discrimination in Employment Act.[40]

Large groups of citizens will have no recourse when big corporations harm their health and pollute their environment. Thomas and Scalia argued that a citizens' group was not allowed to file suit when a waste disposal company released toxic chemicals into the local water supply. These citizens had no standing in court, he argued, because all citizens, not just some, were affected.[41] This backward logic would apparently allow citizens to seek enforcement of environmental regulations only when a few are harmed, but not when a great number are injured.

The government will be able to determine what people can watch on TV. Thomas tried to uphold federal restrictions on allegedly "offensive" or "indecent" programming on cable television, which includes programming with a high degree of educational or artistic value.[42] Such reasoning could enable the government to restrict the expression of ideas that are controversial.

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[1] *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990).
[2] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) are examples.
[3] *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990)
[4] Sean Wilentz, From Justice Scalia, a Chilling Vision of Religion's Authority in America, *New York Times*, July 8, 2002.
[5] *Locke v. Davey*, 540 U.S. 712 (2004).
[6] *Edwards v. Aguillard*, 482 U.S. 578 (1987).
[7] *Lee v. Weisman*, 505 U.S. 577 (1992).
[8] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[9] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995).
[10] *Lawrence v. Texas*, 539 U.S. 558 (2003). In his dissent, Scalia complained that the Court's decision signaled the end to laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."
[11] Justice Scalia Says War Justifies Rights' Recess, *Associated Press*, March 18, 2003.
[12] *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Justice Thomas did not participate in the decision).
[13] *Freeman v. Pitts*, 503 U.S. 467 (1992).
[14] *Dickerson v. United States*, 530 U.S. 428 (2000).
[15] Two such cases include *Georgia v. United States*, 411 U.S. 526 (1973); United Jewish Organizations of *Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).
[16] *Powers v. Ohio* 499 U.S 400, 417 (1991) and *Campbell v. Louisiana* 523 U.S. 392, 403 (1998).
[17] *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).
[18] *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).
[19] *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992).

[20] *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).
[21] *Friends of the Earth, Inc. v. Laidlaw Environmental Services, (TOC) Inc.*, 528 U.S. 167 (2000).
[22] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).
[23] *Alaska Department of Environmental Conservation v. EPA*, 560 U.S. 461 (2004).
[24] *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).
[25] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
[26] *Lawrence v. Texas*, 539 U.S. 558, 606 (2003).
[27] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
[28] *VanOrden v. Perry*, 125 S.Ct. 2854 (2005).
[29] *NEA v Finley*., 524 U.S. 569 (1998).
[30] Stan Bailey, Three Associate Justices, One Judge Sworn In, *Birmingham News*, Jan. 15, 2005; Remarks of Justice Tom Parker on the Occasion of his Oath of Office, Jan. 14, 2005. *Available at* http://parkerforjustice.com/remarks_oath_of_office.htm.
[31] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[32] *Holder v. Hall*, 512 U.S. 963-965 (1994).
[33] *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).
[34] *Hope v. Pelzer*, 536 U.S. 730 (2002).
[35] *Rush Prudential HMO v. Moran*, 536 U.S. 355 (2002).
[36] *Missouri v. Jenkins*, 515 U.S. 70 (1995).
[37] *Adarand Construcors, Inc.v. Pena*, 515 U.S. 200 (1995) at 241.
[38] *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1999).
[39] *United States v. Morrison*, 529 U.S. 598, 628-29 (2000).
[40] *Kimel v. Florida Board of Regents*, 528 U.S. 62, 99 (2000).
[41] *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000).
[42] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996).