

May 13, 2019



**OPPOSE THE CONFIRMATION OF JUDICIAL NOMINEES WHO DECLINE TO STATE
BROWN V. BOARD OF EDUCATION DECISION WAS CORRECTLY DECIDED**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, I write to express our alarm at the growing number of judicial nominees who decline to state unequivocally that the landmark and unanimous Supreme Court decision in *Brown v. Board of Education* was correctly decided.

The Supreme Court's 1954 decision in *Brown* is one of the most consequential Supreme Court cases in our nation's history. In a unanimous ruling, the Court declared that the shameful doctrine of "separate but equal" – which had been law for nearly a century to oppress and dehumanize African Americans and created a racial caste system – was inherently unequal and unconstitutional. The *Brown* decision ended legalized apartheid in America's school system, and it set the stage for African-American integration into all facets of American life. The decision impacted the life of every person in America and helped our nation further the promise of equality at the heart of our democracy.

This week – May 17, 2019 – marks the 65th anniversary of the *Brown* decision and the time is now for all senators to be very clear about their standards for lifetime appointments to the federal judiciary. Judicial nominees of both Republican and Democratic administrations have periodically been asked about the *Brown* decision, but for more than a year Senator Blumenthal and Senator Booker have regularly asked judicial nominees whether they agree with it. Some have answered it clearly, but the refusal by some nominees to say that the decision was correctly decided sends a dangerous signal to all Americans – especially African Americans – that *Brown* could someday be overturned and that our nation could return to the disgraceful days of racial segregation. Affirming *Brown* is an essential principle of racial equality that must be endorsed by all who seek a lifetime appointment on our federal courts. Regrettably, it is not, and that should be disqualifying.

Then-Judge John Roberts readily affirmed *Brown* at his 2005 Supreme Court confirmation hearing. Senator Ted Kennedy asked him: "Do you agree with the Court's conclusion [in *Brown v. Board of Education*] that the segregation of children in public school solely on the basis of race is unconstitutional?" Then-Judge Roberts responded: "I do."¹

During his confirmation hearing last year, then-Judge Brett Kavanaugh was also quick to acknowledge that *Brown v. Board* was correctly decided. In response to a question from Senator Klobuchar, he testified that "I think *Brown versus Board of Education*, as I've said many times before, is the single greatest moment in Supreme Court history.... And it's correct. It's correct. It's correct because it corrected a

¹ <https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>.



historic mistake in *Plessy versus Ferguson*.”² He explained his ability to affirm *Brown* by stating: “There are some historical cases where there’s no prospect of that case coming back...”³ Justice Anthony Kennedy, whom Justice Kavanaugh replaced on the Supreme Court, testified at his 1987 confirmation hearing that “I think *Brown v. Board of Education* was right when it was decided, and I think it would have been right if it had been decided 80 years ago or 80 years before.”⁴ Although affirming the widely supported holding of *Brown* does not in itself make someone qualified to serve a lifetime position in the federal judiciary, it must be considered a minimum qualification.

Over the past year, however, several nominees have refused to affirm *Brown*, often testifying that the Code of Conduct for United States Judges precludes them from opining on the merits of any case whatsoever. This interpretation of the Code of Conduct is clearly erroneous, since many previous nominees have been able to state that *Brown* was correctly decided, including the top federal judicial officer, Chief Justice Roberts.

All nominees who have refused to state unequivocally that *Brown* was correctly decided should be given an opportunity to clarify their testimony. And those nominees who cannot bring themselves to affirm a case as vital to the fabric of our democracy and legal order as *Brown* do not deserve a lifetime appointment as a federal judge. Below is a list of pending judicial nominees who as of the time of this letter have declined to state that *Brown v. Board* was correctly decided. We urge all senators to uphold the importance of this fundamental civil rights ruling by voting against these nominees unless they clarify their testimony and state unequivocally that *Brown* was correctly decided. There must be a moral floor for these lifetime appointments to our federal judiciary.

Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

² <https://www.c-span.org/event/?449706/senators-press-supreme-court-nominee-record-spar-documents>.

³ *Id.*

⁴ <https://www.nytimes.com/1987/12/16/us/judge-winding-up-senate-testimony-outlines-his-constitutional-views.html>.

Currently Pending Trump Judicial Nominees Who Declined to State that Unanimous *Brown v. Board of Education* Ruling Was Correctly Decided:

1. Miller Baker (U.S. Court of International Trade)
2. Thomas Barber (Middle District of Florida)
3. Wendy Berger (Middle District of Florida)
4. Ada Brown (Northern District of Texas)
5. Jeffrey Brown (Southern District of Texas)
6. Brian Buescher (District of Nebraska)
7. James Cain (Western District of Louisiana)
8. Daniel Collins (U.S. Court of Appeals for the Ninth Circuit)
9. Clifton Corker (Eastern District of Tennessee)
10. Steven Grimberg (Northern District of Georgia)
11. Greg Guidry (Eastern District of Louisiana)
12. James Hendrix (Northern District of Texas)
13. Richard Hertling (U.S. Court of Federal Claims)
14. Karin Immergut (District of Oregon)
15. Sean Jordan (Eastern District of Texas)
16. Kenneth Lee (U.S. Court of Appeals for the Ninth Circuit)
17. Damon Leichty (Northern District of Indiana)
18. Michael Liburdi (District of Arizona)
19. David Novak (Eastern District of Virginia)
20. Mark Pittman (Northern District of Texas)
21. Nicholas Ranjan (Western District of Pennsylvania)
22. Timothy Reif (U.S. Court of International Trade)
23. Matthew Solomson (U.S. Court of Federal Claims)
24. Brantley Starr (Northern District of Texas)
25. Michael Truncale (Eastern District of Texas)
26. Wendy Vitter (Eastern District of Louisiana)
27. Peter Welte (District of North Dakota)