

**Testimony for the Senate Judiciary Committee on Judge Ketanji Brown Jackson  
Keisha Toni Russell, Counsel, First Liberty Institute  
Critical Race Theory’s Impact on Judicial Philosophy**

Good afternoon, and thank you for the opportunity to testify.

I am a constitutional lawyer at First Liberty Institute. First Liberty is a national legal organization with a mission to defend and restore religious liberty for all Americans. In addition to being a lawyer, I am also the daughter of Jamaican-born parents, and I am a former elementary school teacher.

I’m here to explain how critical race theory may impact a judge’s judicial philosophy including the fulfillment of her oath to uphold the Constitution, as well as to remain impartial and uphold the integrity and independence of the judiciary.

What is Critical Race Theory?

Critical race theory (CRT) is a subset of critical theory that began with Immanuel Kant in the 1790s. Critical theory rejected the principles of the Enlightenment and the Age of Reason on which the American republic was founded.<sup>1</sup> Critical theory teaches that all human relationships are relationships of power between the oppressors and the oppressed.<sup>2</sup> The oppressor/oppressed lens of critical theory helped establish totalitarian ideologies such as Marxism and Nazism. In Marxism, the rich elite are the oppressors. For the Nazis, the Jewish people were the oppressors. Today, in America, critical race theory teaches that whites are the oppressors.<sup>3</sup>

CRT’s key assertion is that racism is not the result of individual, conscious prejudices, actions, or thoughts, but rather that racism is a systemic and structural force.<sup>4</sup> CRT teaches that racism is embedded in America’s legal system, institutions, and capitalist economy, and it demands “whiteness” as the societal norm.<sup>5</sup>

CRT demands a radical reordering of society and restructuring of the systems that perpetuate racial inequality.<sup>6</sup>

---

<sup>1</sup> Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (3rd ed.), 3 New York University Press, NY, NY 2017 (“critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law”); Marc A. Thiessen, *The Danger of Critical Race Theory*, *The Washington Post*, (Nov. 11, 2021), <https://www.washingtonpost.com/opinions/2021/11/11/danger-critical-race-theory/>.

<sup>2</sup> Thiessen, *The Danger of Critical Race Theory*.

<sup>3</sup> *Id.*

<sup>4</sup> The Heritage Foundation, *How to Identify Critical Race Theory*, <https://www.heritage.org/civil-society/heritage-explains/how-identify-critical-race-theory> (last accessed Mar. 22, 2022).

<sup>5</sup> *Id.*

<sup>6</sup> Janel George, *A Lesson on Critical Race Theory*, American Bar Association, (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/)

## Three of CRT's Erroneous Presumptions and the Impact on Judicial Philosophy

1. Believing that America was founded on racist ideals is wrong and incompatible with a judge's oath to uphold the Constitution.

CRT proponents claim that America was founded—and the Constitution was drafted—to promote racism and slavery.<sup>7</sup> Historians have debunked this claim as false.<sup>8</sup> The truth is that America's founders were divided on the issue of slavery and many of the founders were abolitionists.<sup>9</sup>

America's core ideals of freedom and equality, expressed in the Declaration of Independence and the Constitution, sparked the movements that led to the eventual elimination of both slavery and Jim Crow.<sup>10</sup> Thus, America's founding ideals of individual freedom, responsibility, and equality are sound even if the new nation only imperfectly put those ideals into practice.

---

<sup>7</sup> See, e.g., Nikole Hannah-Jones, *The 1619 Project*, *The New York Times Magazine* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> (“Conveniently left out of our founding mythology is the fact that one of the primary reasons some of the colonists decided to declare their independence from Britain was because they wanted to protect the institution of slavery...When it came time to draft the Constitution, the framers carefully constructed a document that preserved and protected slavery without ever using the word.”)

<sup>8</sup> Victoria Bynum, James M. McPherson, James Oakes, Sean Wilentz & Gordon S. Wood, *RE: The 1619 Project*, *New York Times Magazine* (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html> (“We write as historians to express our strong reservations about important aspects of *The 1619 Project*...On the American Revolution, pivotal to any account of our history, the project asserts that the founders declared the colonies' independence of Britain ‘in order to ensure slavery would continue.’ This is not true. If supportable, the allegation would be astounding — yet every statement offered by the project to validate it is false.”)

<sup>9</sup> See, e.g., *Id.*; Matthew Spalding, *How to Understand Slavery and the American Founding*, Heritage Foundation (Aug. 26, 2002), <https://www.heritage.org/node/18776/print-display> (“Since America's beginning, there has been intense debate about slavery...Many of the leading American Founders—most notably Thomas Jefferson, George Washington, and James Madison—owned slaves, but many did not. Benjamin Franklin thought that slavery was ‘an atrocious debasement of human nature’ and ‘a source of serious evils.’ He and Benjamin Rush founded the Pennsylvania Society for Promoting the Abolition of Slavery in 1774. John Jay, who was the president of a similar society in New York, believed: ‘the honour of the states, as well as justice and humanity, in my opinion, loudly call upon them to emancipate these unhappy people. To contend for our own liberty, and to deny that blessing to others, involves an inconsistency not to be excused.’ John Adams opposed slavery his entire life as a ‘foul contagion in the human character’ and ‘an evil of colossal magnitude.’ James Madison called it ‘the most oppressive dominion ever exercised by man over man.’”); John W. York, Ph.D., *What Our Founders Really Thought of Slavery—and Why The New York Times Is Wrong*, Heritage Foundation (Sept. 27, 2019), <https://www.heritage.org/american-founders/commentary/what-our-founders-really-thought-slavery-and-why-the-new-york-times>.

<sup>10</sup> See, e.g., Frederick Douglass, *What to the Slave is the Fourth of July?* (1852), [https://liberalarts.utexas.edu/coretexts/\\_files/resources/texts/c/1852%20Douglass%20July%204.pdf](https://liberalarts.utexas.edu/coretexts/_files/resources/texts/c/1852%20Douglass%20July%204.pdf) (“The Constitution is a GLORIOUS LIBERTY DOCUMENT.”); Martin Luther King Jr., *I Have a Dream* (Aug. 28, 1963), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> (“When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men — yes, Black men as well as white men — would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness.”)

CRT is sometimes erroneously analogized to the Civil Rights Movement,<sup>11</sup> and some CRT proponents even assert that Dr. King was a critical race theorist.<sup>12</sup> He was not. Author Marc A. Thiessen summarizes Dr. King’s position well:

The Rev. Martin Luther King Jr. did not argue that America was systemically racist; he argued that racism was un-American. He appealed to the Enlightenment ideals contained in what he called our “magnificent” Declaration of Independence and Constitution, and declared his goal was to take “the whole nation back to those great wells of democracy, which were dug deep by the Founding Fathers.” King argued Bull Connor, head of the Birmingham, Ala., police, and the Southern racists were violating the principles of the American founding. But critical race theory argues the opposite—that Connor was the fulfillment of the American founding, because America was founded to perpetuate white supremacy.<sup>13</sup>

Ultimately, we cannot expect a critical race theorist to defend and protect the Constitution, because CRT asserts that the Constitution is not worth defending.<sup>14</sup> Such a view completely contradicts the oath every judge takes. This is an especially problematic view for a justice who will sit on America’s highest court, which often has the last word on the liberty the Constitution guarantees. If we adopt the anti-American views of CRT, we will see the eradication of the principles that made America the freest and most successful republic in history.

2. A judge who embraces critical race theory’s perspective that America must address racism by encouraging racism cannot be an impartial judge.

Contrary to CRT’s assertions that racism is socially created, racism is the result of individual feelings of superiority and prejudice. There is no doubt that bad laws can further a racist society, but such racism must first be alive in the individual before it can become alive in society.

Ultimately, “when unaddressed prejudice gets married to power, there is going to be an unintended pregnancy which will give birth to the evil of racism.”<sup>15</sup> Since personal prejudices advance a racist society, we cannot address racism by encouraging racist behaviors.

CRT encourages racist actions and attitudes against the perceived “oppressor” group, namely whites. Ibram X. Kendi, one of CRT’s advocates, brazenly declared: “The only remedy to racist

---

<sup>11</sup> See, e.g., Bernie D Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 2 Harv. BlackLetter L.J. 18 (2002), <https://harvardblackletter.org/wp-content/uploads/sites/8/2016/10/18-JREJ-1.pdf> (“The critical race theorists had as their objective, ending exclusive reliance upon civil rights litigation, storytelling to broaden public consciousness of racism and discrimination under the law, and protest reminiscent of the civil rights movement of the 1950s and 1960s.”); Janel George, *A Lesson on Critical Race Theory*, American Bar Association (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/) (Critical Race Theory “provides a lens through which the civil rights lawyer can imagine a more just nation.”).

<sup>12</sup> Kimberle Williams Crenshaw, *Critical Race Theorist Before There was a Name for It*, LA Times, (Jan. 17, 2022), <https://www.latimes.com/opinion/story/2022-01-17/critical-race-theory-martin-luther-king>.

<sup>13</sup> Thiessen, *The Danger of Critical Race Theory*.

<sup>14</sup> See, Judicial Oath, 8 U. S. C. § 453, (1990); Oath of Office, 5 U. S. C. § 3331 (1966).

<sup>15</sup> Dr. Tony Evans, *Hot Topics: Critical Race Theory Part One*, Oak Cliff Bible Fellowship, (July 14, 2021) <https://www.ocbfchurch.org/services/wednesday-nights-the-cliff/hot-topics/>.

discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”<sup>16</sup> In essence, CRT proposes that the oppressed group must be granted advantages in society to the detriment of the oppressor group in order to address past injustices.

Adherence to CRT removes the principle of equality before the law that is necessary for just judicial decision-making. Consider, for example, how a CRT philosophy could influence a judge’s view in criminal sentencing. If a judge believes that the only way to correct racism is to provide advantages to blacks and disadvantages to whites, this would create dire injustices in that judge’s practices. A judge who is a critical race theorist may decide to provide a lower sentence for a black defendant or a higher sentence to a white defendant to correct perceived disparities in the criminal justice system. Such a philosophy will impact a judge’s fundamental view of legal justice and undermine her ability to adhere to the rule of law.

Such racist favoritism is odious to America’s foundational principles and the furtherance of a free society.<sup>17</sup> Focusing on race only exacerbates the problem of racism. A judge who embraces CRTs views may engage in favoritism and partiality, contrary to the judicial canons.<sup>18</sup>

3. A judge must uphold the integrity and independence of the judiciary and she cannot do so if she considers “systemic racism” in her decision-making.

A judge cannot uphold the judiciary’s integrity and independence if she considers “systematic racism” in her decision-making. While racism is alive in the hearts of many people in our country, it does not determine the outcome of any minority’s educational, professional, or economic accomplishments.

My own testimony is a reflection of this truth. I am a first generation American and the daughter of Jamaican-born parents. Despite coming to this country and having to build a life for themselves from the ground up, my parents still raised successful children.

My personal story is confirmed by research conducted by Columbia University professor, Van C. Tran who studied West Indian immigrants growing up in America.<sup>19</sup> While these West Indians

---

<sup>16</sup> Ibram X. Kendi, *How to Be an Antiracist*, 19 (New York, One World, 2019); Thiessen, *The Danger of Critical Race Theory*.

<sup>17</sup> *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.”) (Quotations and citations omitted); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 298 (1978) (“Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”).

<sup>18</sup> Code of Conduct for United States Judges, Judicial Canon 3: “A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently” (2019).

<sup>19</sup> Mike Gonzalez, *Institutionalizing Racial Fanaticism Across American Society*, The Heritage Foundation, (May 12, 2021), <https://www.heritage.org/progressivism/commentary/institutionalizing-racial-fanaticism-across-american-society>.

also experienced racism, Tran’s research indicates that black migrant communities who navigate disadvantages with strategies such as parental involvement and neighborhood peer networks overcome and avoid pitfalls like dropping out of high school, unemployment, incarceration, and teen pregnancy.<sup>20</sup>

CRT does not consider how cultural upbringing, mindsets, or family and community involvement can change the trajectory of people’s lives and ultimately address the racial disparities that exist in our society. CRT does not acknowledge that regardless of the struggles that people face in life, we are all individually responsible for the lives we live and the success we attain. Instead, CRT makes race the predominant relevant factor.

A judge must maintain independence and the integrity of the law. To do so, she must acknowledge that people are responsible for their actions, despite the racism or setbacks they may have experienced, and that people deserve justice even if CRT defines them as “privileged.”<sup>21</sup>

### Conclusion

Every lawyer and judge promises to defend and protect the U.S. Constitution, but she cannot uphold this oath if she believes that the Constitution and the principles of America’s foundation are racist and inherently flawed. Neither can a judge remain impartial and administer justice independently if she holds a philosophy that correcting racism requires affording privileged classes less justice than oppressed classes.

Ultimately, a judge should consider America’s history as a lesson and a blueprint for why and how we must constantly seek to uphold and protect America’s founding promises.

For these reasons First Liberty has concerns about Judge Jackson’s jurisprudence and First Liberty cannot support her nomination.

Thank you for the opportunity to testify today.

---

<sup>20</sup> *Id.*

<sup>21</sup> Code of Conduct for United States Judges, Judicial Canon 1: “A Judge Should Uphold the Integrity and Independence of the Judiciary” (2019).