S. HRG. 109–158

# CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR. TO BE CHIEF JUSTICE OF THE UNITED STATES

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BEFORE THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

SEPTEMBER 12–15, 2005

**Serial No. J–109–37**

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# NOMINATION OF JOHN G. ROBERTS, JR., OF MARYLAND, TO BE CHIEF JUSTICE OF THE UNITED STATES

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**MONDAY, SEPTEMBER 12, 2005**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 12:00 p.m., in room 325, Russell Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. Good afternoon, ladies and gentlemen. We begin these hearings on the confirmation of Judge John Roberts to be Chief Justice of the United States, with first the introduction by Judge Roberts of his beautiful family, and then a few administrative housekeeping details before we begin the opening statements, which will be 10 minutes in length by each Senator. At the conclusion of the opening statements, we will then turn to the introductions by Senator Lugar, Senator Warner, and Senator Bayh, and then the administration of the oath to Judge Roberts and to his opening statement.

So, Judge Roberts, if you would at this time introduce your family, we would appreciate it.

Judge ROBERTS. Thank you very much, Mr. Chairman. I am very happy to have my mother and father here, Jack and Rosemary Roberts; my sisters Kathy Godbey, Peggy Roberts, and Barbara Burke; Barbara's husband, Tim Burke, is also here; my uncle, Richard Podrasky; and representing the cousins, my cousin, Jean Podrasky. My wife, Jane, is right here front and center, with our daughter, Josephine, and our son, Jack. You will see she has a very tight grasp on Jack.

[Laughter.]

Chairman SPECTER. Thank you very much, Judge Roberts.

Judge Roberts had expressed his appreciation to have the introductions early, said the maximum time of the children's staying power was 5 minutes, and that is certainly understandable. Thank you for doing that, Judge Roberts.

And now before beginning the opening statements, let me yield to my distinguished ranking member, Senator Leahy.

Senator LEAHY. Mr. Chairman, I want to thank you for all the consultations. I think we have each other's home phones on speed

dial, we have talked to each other so often. And I have every confidence the Chairman will conduct a fair and thorough hearing.

Less than a quarter of those of us currently serving in the Senate have exercised the Senate's advice and consent responsibility in connection with a nomination to be Chief Justice of the United States. I think only 23 Senators have actually been involved in that. We are fortunate that a veteran of these proceedings is chairing this.

We are at a time of great stress in our Nation because of what has happened in New Orleans and throughout much of the Gulf Coast regions. I think the hearts and prayers of certainly my State of Vermont but all Americans are for those people, and I would hope that they understand that while we were having these hearings, they are first and foremost in our thoughts and prayers. I am sure they are with you, Judge.

This is the only time we are going to find out what he is, and so it is all the more important that we have a good hearing. Again, Mr. Chairman, I appreciate our meetings on this. I appreciate the meeting earlier this morning with you and Judge Roberts. I think that you have set exactly the perfect tone for a hearing of this nature.

## OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Thank you very much, Senator Leahy. And now we will begin the opening statements, as I have said, of 10 minutes' duration.

This hearing, Judge Roberts, is being held in the Senate Caucus Room, which has been the site of many historic hearings, going back to 1912 with the sinking of the Titanic; 1923, Teapot Dome; 1954, Army-McCarthy; 1973, Watergate; 1987, Iran-contra; and this chamber still reverberates with the testimony of Judge Bork in 1987, and it still reverberates with the testimony of Justice Clarence Thomas and Professor Anita Hill in 1991.

This is a very unique hearing—the first one in 11 years in the Senate for a Supreme Court Justice, and the first one in 19 years for a Chief Justice. And you would be, if confirmed, the 17th Chief Justice in the history of the country and the second youngest since Chief Justice Marshall was sworn in, in 1800.

Your prospective stewardship of the Court, which could last until the year 2040, or longer—the senior Justice now is Justice Stevens, who is 85, and projecting ahead 35 years, that would take us to the year 2040 and would present a very unique opportunity for a new Chief Justice to rebuild the image of the Court away from what many believe it has become, a super-legislature, and to bring consensus to the Court with the hallmark of the Court being 5–4 decisions—a 5–4 decision this year allowing Texas to display the Ten Commandments, and a 5–4 decision turning Kentucky down from displaying the Ten Commandments; a 5–4 decision 4 years ago striking down a section of the Americans With Disabilities Act; and last year, a 5–4 decision upholding the Americans With Disabilities Act on the same Congressional record.

Beyond your potential voice for change and consensus, your vote will be critical on many, many key issues, such as Congressional

power, Presidential authority, civil rights, including voting rights and affirmative action, defendants' rights, prayer, many decisions for the future, and perhaps institutional changes in the Court, looking for the day when the Court may be televised.

This hearing comes at a time of turbulent partisanship in the United States Senate. Turbulent partisanship. Earlier this year, the Senate faced the possibility of a virtual meltdown, with filibusters on one side of the aisle and on the other side of the aisle the threat of the constitutional or nuclear confrontation. This Committee, with the leadership of Senator Leahy, has moved to a bipartisan approach. We had a prompt confirmation of the Attorney General. We reported out bills which have become legislation, after being stalled for many years, on bankruptcy reform and class action. We have confirmed contentious circuit court nominees. We have reported out unanimously the PATRIOT Act and, after very deliberate and complex hearings, reported out asbestos reform. So it has been quite a period for this Committee.

And now we face the biggest challenge of the year, perhaps the biggest challenge of the decade, in this confirmation proceeding. I have reserved my own judgment on your nomination until the hearings are concluded, and it is my firm view that there ought not to be a political tilt to the confirmation of a Supreme Court Justice, thought to be Republican or Democratic. We all have a responsibility to ask probing questions to determine qualification beyond academic and professional standing.

These hearings, in my judgment, ought to be in substantive fact and in perception for all Americans, that all Americans can feel confident that the Committee and the full Senate has done its job.

There are no firmly established rules for questions and answers. I have expressed my personal view that it is not appropriate to ask a question about how the nominee would vote on a specific case, and I take that position because of the key importance of independence, that there ought not to be commitments or promises made by a nominee to secure confirmation. But Senators have the right to ask whatever questions they choose, and you, Judge Roberts, have the prerogative to answer the questions as you see fit or not to answer them as you see fit.

It has been my judgment, after participating in nine—this will be the tenth for me personally—that nominees answer about as many questions as they think they have to in order to be confirmed. It is a subtle minuet, and it will be always a matter of great interest as to how we proceed.

I do not intend to ask you whether you will overrule *Roe* v. *Wade*. I will ask you whether you think the Constitution has a right of privacy, and I will ask questions about precedents as they bear on *Roe* v. *Wade*. I am very much concerned about what I conceive to be an imbalance in the separation of powers between the Congress and the Court. I am concerned about what I bluntly say is the denigration by the Court of Congressional authority. When the Supreme Court of the United States struck down a portion of the legislation to protect women against violence, the Court did so because of our "method of reasoning." And the dissent noted that that had carried the implication of judicial competence, and the inverse of that is Congressional incompetence. And after 25 years in this

body, on fact finding—and there was an extensive record made in the case, in the legislation to protect women against violence, the Court simply disregarded it.

And then the issue of States' rights, the Supreme Court of the United States has elevated States' rights, but in a context that it is impossible to figure out what the law is. The Americans With Disabilities Act had a very extensive record, but when the case came up in 2001, Garrett, a woman who had breast cancer, the Supreme Court said that the section of the Act was unconstitutional. Four years later, in *Lane* v. *Tennessee*, you had a paraplegic crawling up the steps access to a courtroom. The Court said that that was constitutional, again 5–4, on what really turned out to be inexplicable decisions.

You have a very extensive paper trail, and there will obviously be questions on that subject, and we will be concerned about what your views are today contrasted with what your views may have been in the past. Phyllis Schlafly, the president of the Eagles Forum, said that they were smart-alecky comments by a bachelor who did not have a whole lot of experience. So she is putting on an understandable gloss on that subject. But I know that will be a matter of considerable interest.

In one of your earlier memoranda, you came forward with an intriguing thought, one of many in those early memoranda, as your conceptualization power was evident, that Justices ought to be limited to a 15-year term. And with that idea in play, if time permits, it is something I would like to explore, voluntary action on the part of a Justice or perhaps the President could make that a condition.

Between now and the year 2040, or in the intervening years, technology will present many, many novel issues, and there, again, if time permits, I would like to explore that.

I am down to 10 seconds, and I intend to stop precisely on time, and this Committee has a record for maintaining that time. That is it.

[Laughter.]

Judge ROBERTS. Thank you, Mr. Chairman.

Chairman SPECTER. I now yield to my distinguished colleague, Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. Thank you for the way you have conducted the whole run-up to this hearing.

A few days ago, William Rehnquist passed away. He had 33 years of service on the Supreme Court. Last week, many of us paid our respects for his service at the monumental building across the street in which he devoted himself to protecting the independence of the Federal judiciary. I know, Judge Roberts, that was a particularly difficult time for you because of your close relationship with him. But I think of the facade of that Court with its marble from Vermont, and I think of how much our State served as a refuge for the Chief Justice, especially in the summer months.

Today, the devastation and despair facing millions of our fellow Americans in the Gulf region is a tragic reminder of why we have a Federal Government and why it is critical that our Government

be responsive. We need the Federal Government for our protection and security; to cast a lifeline to those in distress; to mobilize vital resources, beyond the ability of any State or local government, all for the common good.

The full dimensions of the disaster are not yet known. Bodies of loved ones need to be recovered, families need to be reunited, survivors need to be assisted. Long-term health risk and environmental damage have to be assessed.

But if anyone needed a reminder of the need for and role of the Government, the last few days have provided it. If anyone needed a reminder of the growing poverty and despair among too many Americans, we now have it. And if anyone needed a reminder of the racial divide that remains in our Nation, no one can now doubt that we still have miles to go.

I believe that the American people still want and expect and demand a Government that will help ensure justice and equal opportunity for all, and especially for those who, through no fault of their own, were born into poverty. The American people deserve a Government as good as they are with a heart as big as theirs are. We are all Americans, and all Americans should have an opportunity to earn a fair share of the bounty and blessings that America has to offer.

And, Judge, we have been given a great Constitution. As you know as well as anybody here, it begins, "We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." It is a framework for our Government, the foundation of our rights and liberties.

In fact, Vermont joined the union the same year the Bill of Rights was ratified. Those of us from the Green Mountain State, the Nation's 14th State, have historically been very protective of our fundamental rights and liberties. Many feel that we did not join the union until we were sure the Bill of Rights was going to go through. We understand the importance of the Constitution and the Bill of Rights.

In these hearings we are going to be discussing constitutional issues that may seem legalistic, but they are vital issues. They affect every one of us every day. When we discuss the Constitution's Commerce Clause or Spending Power, for example, we are asking about Congressional authority to pass laws to ensure clean air and water and children's and seniors' health, safe food and drugs, safe work places, even wetland protection and levees that should protect our communities from natural disasters.

Our constitutional values remain constant. We want to realize the American promise of fairness and equality and justice. The Constitution says "We the People." When the Constitution was written, though, "We the People" did not include Native Americans, or African-American slaves, but only free people. It took more than four score years and a civil war before the Constitution was amended to include all citizens, all persons born and naturalized in the United States. Even then half of the people did not have one of democracy's defining rights: women were not yet guaranteed the right

to vote. That did not happen until 1920, and decades later still it took an historic constitutional ruling, a unanimous ruling by the United States Supreme Court in the case of *Brown* v. *Board of Education*, and then landmark legislation by the Federal Government for America to begin to provide a measure of equality to many who were held back for so long because, and only because, of the color of their skin.

I have long been a proponent of First Amendment freedoms and open Government because the public's right to know what their Government is doing promotes accountability.

Federal Judges are not elected. They serve for life if they are confirmed. The people never have the opportunity for effective oversight of their work. Judiciary is the most isolated branch of our Government from public accountability. So this is the only opportunity to examine what kind of justice John Roberts will dispense if promoted to the Supreme Court, the direction he would lead the Federal Judiciary.

This hearing is the only chance that "We the People" have to hear from and reflect on the suitability of the nominee to be a final arbiter of the meaning of the Constitution. Open and honest public conversation with a nominee in these hearing rooms is an important part of this process. This hearing is about the fundamental rights of all Americans, and you are the first nominee of the 21st century. If you are confirmed, you will serve not just for the remaining 3 years of the Bush administration, but you could serve through the administrations of the next seven or eight Presidents. Judge Roberts, you will be deciding matters that affect not only all Americans today but also our children and our grandchildren.

In one of these hearings nearly 20 years ago, I noted how critical it is for the Senate to engage in a public exploration of the judicial philosophy of Supreme Court nominees. I said: "There can hardly be an issue closer to the heart of the Senate's role than a full and public exposition of the nominee's approach to the Constitution and to the role of the courts in discerning and enforcing its commands. That is what I mean by judicial philosophy." That truth has not changed.

What is more difficult to see, though, is the arc of the law in the years ahead, as Justices will vote on which cases to accept and then how to decide them. Ours is a Government of laws. When we are faced with a vacancy on the Supreme Court, we are reminded that it is our fellow citizens, 9 out of our 280 million Americans, who interpret and apply those laws. The balance and direction of the Supreme Court is now at issue with the two vacancies of Chief Justice William Rehnquist and Justice Sandra Day O'Connor. Chief among emerging concerns are whether the Supreme Court will continue its recent efforts to restrict the authority of Congress to pass legislation to protect the people's interest in the environment and safety, and in civil rights, and whether the Supreme Court will effectively check the greatly enhanced Presidential power that has been amassed in the last few years.

In other words, Judge Roberts, the issue is whether you would be the protector of the rights of all Americans, not just Republicans, not just Democrats, not just Independents, but all Ameri-

cans, whether you can serve as the check and balance that all Americans expect.

The light of the nominations process is intense. It is intense because it is the only time that light is going to shine. The afterglow lasts for the rest of a Justice's career. "We the People" have just this one chance to inquire whether this person should be entrusted with the privilege and responsibility of interpreting our Constitution, and dispensing justice from the Nation's highest court. Two hundred eighty million Americans. The President stated his choice. Now there are only 100 Americans standing in the shoes of all other Americans, and on behalf of the American people, it is the job of the 100 of us in the Senate to do all we can to make sure we get it right.

Mr. Chairman, there is time left over, but I have said all I intend to say.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy for your statement. Thank you for your leadership, and your leadership on observing the time so meticulously.

Senator Hatch.

## STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I want to begin by saying that my thoughts and prayers are with the family of Chief Justice William Rehnquist. He concluded his life on Earth just the way he lived it, independently and with dignity. I am glad that his family was with him when he passed away. He was a good man and a great Judge.

Judge Roberts, I know that you and Chief Justice Rehnquist remained close friends. He would have been proud to have a former clerk serve with him as a colleague on the Court, and now you have been nominated to succeed him as Chief Justice.

When President Bush nominated you 2 years ago to your current post on the U.S. Court of Appeals, you had two hearings before this Committee, and additionally answered approximately 100 written questions from various Senators. The American Bar Association twice unanimously gave you its highest "well-qualified" rating. That process covered a lot of ground, including many of the same issues which are sure to be raised here. You acquitted yourself so well that the Senate confirmed you without dissent. Do not be surprised now, however, if it seems like none of that scrutiny and evaluation had ever happened.

Let me mention one example relating to my home State of Utah to show how the confirmation process has changed. President Warren G. Harding nominated former Utah Senator George Sutherland to the Supreme Court on September 5th, 1922. That same day the Judiciary Committee Chairman went straight to the Senate floor, and after a few remarks, made a motion to confirm the nomination. The Senate promptly and unanimously agreed. There was no inquisition, no fishing expedition, no scurrilous and false attack ads. The judicial selection process, of course, has changed because what

some political forces want judges to do is change from what America's founders established.

America's founders believed that separating the branches of Government with the Legislature making the law and the Judiciary interpreting and applying the law is the linchpin of limited Government and liberty. James Madison said that no political truth has greater intrinsic value. Quoting the philosopher Montesquieu, Alexander Hamilton wrote in the Federalist No. 78 that, "There is no liberty if the power of judging be not separated from the Legislative and Executive powers."

Well, times have changed. Today some see the separation of powers not as a condition for liberty, but as an obstacle to their own political agenda. When they lose in the legislature they want the Judiciary to give them another bite at the political apple. Politicizing the Judiciary leads to politicizing judicial selection.

The confirmation process has sometimes been, it seems to me, unbecoming of the Senate and disrespectful of nominees. I applaud President Bush for resisting this trend and for nominating qualified men and women who as judges will not legislate from the bench, and you are a perfect example of that.

The conviction that judges interpret and apply but do not make the law, helps us sort out the information we need, the questions we ask, the standards we apply, and the decisions we make. With that in mind, I believe that there are three facts that should guide us in this hearing.

First, what judges do limits what judicial nominees may discuss. Judges must be impartial and independent. Their very oath of office requires impartiality and the canons of judicial ethics prohibit judges and judicial nominees from making commitments regarding issues that may come before them. I will be the first to admit that Senators want answers to a great many questions, but I also have to admit that a Senator's desire to know something is not the only consideration on the table. Some of have said that nominees who do not spill their guts about whatever a Senator wants to know are hiding something from the American people. Some compare a nominee's refusal to violate his judicial oath or abandon judicial ethics to taking the Fifth Amendment.

These might be catchy sound bites, but they are patently false. That notion misleads the American people about what judges do and slanders good and honorable nominees who want to be both responsive to Senators and protect their impartiality and independence.

Nominees may not be able to answer questions that seek hints, forecasts or previews about how they would rule on particular issues. Some Senators consult with law professors to ask these questions a dozen different ways, but we all know that is what they seek.

In 1993, President Clinton's Supreme Court nominee, Judge Ruth Bader Ginsburg, explained better than I can why nominees cannot answer such questions no matter how they are framed. She said, "A judge sworn to decided impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."

Nominees may not be able to answer questions asking them to opine or speculate about hypotheticals outside of an actual case with concrete issues and real facts. Since 1792, as long as the Judiciary itself has existed, the Supreme Court has held that judges do not have the authority to render such advisory opinions. We should not be surprised then when nominees decline to provide what judges themselves may not provide. So the first fact that should guide us here is that, no matter how badly Senators want to know things, judicial nominees are limited in what they may discuss. That limitation is real, and it comes from the very nature of what judges do.

The second fact is that nominees themselves must determine where to draw the line. Judges, not Senators, take the oath of judicial office. Judges, not Senators, are bound by the canons of judicial ethics. Judge Roberts will be a Federal judge for many years to come. This process will only determine which courtroom he will occupy. He must determine how best to honor his judicial obligations. Different nominees may draw this line a little differently, but they draw the same kind of line protecting their judicial impartiality and independence.

Justice Stephen Breyer drew that line in 1994. As he put it, clients and lawyers must understand that judges are really open-minded. Justice Anthony Kennedy drew that line in 1987. He said that the public expects that a judge will be confirmed because of his temperament and character, not his position on the issues.

Recently one of our colleagues on this Committee dismissed as a myth the idea that Justice Ginsburg refused to discuss things related to how she would rule. Anyone watching C–SPAN's recent replays of Justice Ginsburg knows that this is not a myth, it is a reality.

I was on this Committee in 1993. Justice Ginsburg was not telling mythological tales when she refused nearly 60 times to answer questions, including mine, that she believed would violate what she said was her rule of "no hints, no forecasts, no previews." Those were her words, not mine. Justice Ginsburg did what every Supreme Court nominee has done, she drew the line she believed was necessary to protect her impartiality and independence.

Finally, the third fact that should guide us is that the Senate traditionally has respected the nominee's judgment about where to draw the line. In response to some of my questions, Justice Ginsburg said, "I must draw the line at that point and hope you will respect what I have tried to tell you." Did I wish she had drawn the line differently? Of course. But I respected her decision. This is the historical standard.

In 1967, our colleague, Senator Kennedy, a former Chairman of this Committee, made the same point at a press conference supporting the Supreme Court nomination of Thurgood Marshall. Senator Kennedy said, "We have to respect that any nominee to the Supreme Court would have to defer any comments on any matters which are either before the Court or very likely to appear before the Court." This has been a procedure which has been followed in the past and is one which I think is based upon sound, legal precedent.

Justice Marshall drew his line, yet we confirmed him by a vote of 69–11. Justice Sandra Day O'Connor drew her line, yet we confirmed her by a vote of 99–0. Justice Kennedy drew his line, yet we confirmed him by a vote of 97–0. Justice Ginsburg drew her line, yet we confirmed her by a vote of 96–3. Justice Breyer drew his line, yet we confirmed by a vote of 87–9.

We must use a judicial rather than a political standard to evaluate Judge Roberts's fitness for the Supreme Court. That standard must be based upon the fundamental principle that judges interpret and apply, but do not make the law.

Judge Roberts, as every Supreme Court nominee has done in the past, you must decide how best to honor your commitment to judicial impartiality and independence. You must decide when that obligation is more important than what Senators, including this one, might want to know. As the Senate has done in the past, I believe we should honor your decision and make our own.

Judge Roberts, you have a tremendously complex and important and honorable record, from law school through the various positions in Government that you held, to the judge on the U.S. Circuit Court of Appeals for the District of Columbia to now. We have a great deal of respect for you. We expect you to make a great Justice, and I just want to congratulate you on your nomination.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Hatch.

I know Senator Warner is with us, one of the introducers, and, of course, he is welcome to stay. But the timing, we will move to him at about 3:20, approximately.

Senator Kennedy?

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge Roberts, I join in welcoming you and your family to this Committee and to this famous room—the site of so many historic hearings.

Today, our Nation's flags are at half mast to honor the memory of Chief Justice Rehnquist and his deep dedication to his beloved Supreme Court. We know that Judge Roberts was especially close to him, and our thoughts and prayers go to the Rehnquist family and all who knew him.

As we are all aware, the Senate's action on this nomination is profoundly important. It is a defining opportunity to consider the values that make our Nation strong and just, and how to implement them more effectively, especially the guiding principle of more than two centuries of our history—that we are all created equal.

Our commitment to this founding principle is especially relevant today. Americans are united as rarely before in compassion and generosity for our fellow citizens whose lives have been devastated by Hurricane Katrina.

That massive tragedy also taught us another lesson. The powerful winds and floodwaters of Katrina tore away the mask that has hidden from public view the many Americans who are left out and

left behind. As one Nation under God, we cannot continue to ignore the injustice, the inequality, and the gross disparities that exist in our society.

Across the years, we have experienced times of great turmoil and great triumph as each succeeding generation struggled to live up to our founding principle and give it meaning for everyone. Americans have shed blood, campaigned, and marched. They have worked in countless quiet ways, as well, to see that every one of our citizens is part of our democracy and has an equal opportunity for a good education, a good job, and a good life.

Today, grandparents who were denied the right to vote expect their grandsons and granddaughters to be able to cast a ballot without discrimination or intimidation. And our society is better because of that progress.

Today, fathers and mothers expect their daughters to have the same opportunities as their sons to attend college, play sports, and earn fair pay. And our society is better because of that progress.

Today, parents expect their disabled children to live in hope—to receive an education that draws out their talent, enables them to reach for their dreams like all other Americans. And our society is better because of that progress.

Too many have sacrificed too much, worked too hard, come too far, to turn back the clock on that progress. Americans today expect their elected representatives to carry on the great unfinished business of making America the land of opportunity for all, and we expect our courts to defend our progress as their constitutional responsibility.

The challenge today is especially difficult because of the vast global economic changes and major new threats to our national security, and we need the ingenuity and innovation and commitment of every American.

Our military leaders are the first to say that highly qualified, racially diverse Armed Forces are essential to defend our country and the cause of freedom at home and abroad.

Every citizen counts, and we must continue to remove barriers that hold back millions of our people. We must draw strength from our diversity as we compete in a new world of promise and peril.

So the central issue before us in these hearings is whether the Supreme Court will preserve the gains of the past and protect the rights that are indispensable to a modern, more competitive, more equal America. Commitment to equality for all is not only a matter of fairness and conscience. It is also our path to sustained national strength and purpose.

We also are a Government of the people in which citizens have a strong voice in the great issues that shape our lives. Our system of checks and balances was drawn up in full awareness of the principle that absolute power corrupts absolutely and was designed to make sure that no branch of Government becomes so powerful that it can avoid accountability. The people have a right to know that their Government is promoting their interests, not the special interests, when it comes to the price of gasoline and the safety of prescription drugs, the air we breathe and the water we drink, and the food and other products we buy. The people have a right to

keep Government from intruding into their private lives and most personal decisions.

But the tragedy of Katrina shows in the starkest terms why every American needs an effective national Government that will step in to meet urgent needs that individual States and communities cannot meet on their own.

Above all, the people and their Congress must have a voice in decisions that determine the safety of our country and the integrity of our individual rights. We expect Supreme Court Justices to uphold those rights and the rule of law in times of both war and peace.

All this—and more—will be before the Supreme Court in the years ahead, and its judgments will affect the direction and character of our country for generations to come.

Judge Roberts, you are an intelligent, well-educated, and serious man. You have vast legal experience and you are considered to be one of the finest legal advocates in America. These qualities are surely important qualifications for a potential Supreme Court Justice. But they do not end the inquiry or our responsibility. This Committee and the full Senate must also determine whether you have demonstrated a commitment to the constitutional principles that have been so vital in advancing fairness, decency, and equal opportunity in our society.

We have only one chance to get it right, and a solemn obligation to do so. If you are confirmed, you could serve on the Court for a generation or more, and the decisions you make as a Justice will have a direct impact on the lives of our children, our grandchildren, and our great-grandchildren.

Because of the special importance of an appointment like yours, the Founders called for shared power between the President and the Senate. The Senate was not intended to be a rubber stamp for a President's nominees to the Supreme Court—and, as George Washington himself found out, it has not been.

Judges are appointed "by and with the advice and consent of the Senate," and it is our duty to ask questions on great issues that matter to the American people, and to speak for them. Judge Roberts, I hope you will respond fully and candidly to such questions, not just to earn our approval, but to prove to the American people that you have earned the right to a lifetime appointment to the highest court in the land.

Unfortunately, Mr. Chairman, there are real and serious reasons to be deeply concerned about Judge Roberts's record. Many of his past statements and writings raise questions about his commitment to equal opportunity and to the bipartisan remedies we have adopted in the past. This hearing is John Roberts's job interview with the American people. He will have a fair chance to express his values, state his views, and defend his record. The burden on him is especially heavy because the Administration, at least so far, has chosen not to allow the Senate to have access to his full record. We can only wonder what they don't want us to know.

In particular, we need to know his views on civil rights, voting rights, and the right to privacy—especially the removal of existing barriers to full and fair lives for women, minorities, and the disabled.

From the start, America was summoned to be a shining city on a hill. But each generation must keep building that city. Even in this new century, some Americans are still denied a voice at the ballot box because of their color, denied a promotion because of their gender, denied a job because of their age, denied hope because they are gay, or denied an appropriate education because they are disabled. Long-established rights to privacy are under heavy siege.

We need a Chief Justice who believes in the promise of America and the guarantees of our Constitution, a person who will enter that majestic building near here and genuinely believe the four inspiring words inscribed in marble above the entrance: "Equal Justice Under Law."

I look forward to hearing from Judge Roberts about whether, if he joins the Supreme Court, he will uphold the progress we have made and will guarantee that all Americans have their rightful place in the Nation's future.

Thank you, Mr. Chairman.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Grassley?

**STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Judge Roberts, I welcome you and congratulate you on your nomination. I think it is fitting that you have been nominated to replace a mentor of yours, Chief Justice Rehnquist. You obviously have a tough act to follow, and that is because Chief Justice Rehnquist was a great Supreme Court Justice. He believed in the strict application of the law and the Constitution and was a consistent voice for judicial restraint. And we will all miss his leadership.

Judge Roberts, we had a good personal meeting in my office a little over a month ago, and based on our discussions and what I have reviewed, you appear to be extremely well qualified. At our meeting, I was encouraged by your respect for the limited role of the courts as an institution in our democratic society. I look forward to asking more questions about your record and qualifications, as well as your judicial approach. I also look forward to asking you about what you think are priorities for the Federal judiciary, as you now lead that branch.

Of course, as we reflect on the enormous build-up to this day and the packed hearing room filled with media lights and cameras, it is worth recalling the fact that judicial nominees never appeared before the Senate until 1925. Ever since then, for the most part, the hearings were not public spectacles. In 1962, for example, when Byron White was nominated to the Supreme Court by President Kennedy, the hearing before the Judiciary Committee lasted all of 15 minutes and eight questions. And it seems to me that the Senate sure got it right within Justice White. And Justice White went on to serve then for a generation.

Of course, all this was before we had televised hearings, which has encouraged ratcheting up the rhetoric to play to various constituencies. Furthermore, Judge Roberts, you are the first nominee

of the Internet age, with millions of eyes scrutinizing thousands of downloaded pages of writing, not to mention the hundreds of website blogs characterizing the documents that have been produced in an accurate or, more likely, inaccurate way, and opinion on every record that you have been involved with, and doing it by the minute.

So to some extent, there is no turning back from what we have created here, and you just happen to be the latest victim of such scrutiny.

During the Ginsburg nomination, Senator Biden, then Chairman of the Judiciary Committee, urged that we not treat these hearings, in Senator Biden's words, as "make-or-break trials" of "dramatic importance." And I sure agree with what he said then.

Rather, the hearing provides a unique opportunity for us to ensure that each person appointed to the Federal bench will be a true judge and not some sort of super-legislator. The courts should not be made up of seats designated conservative, liberal, moderate. Rather, we have a responsibility to fill the Federal bench with individuals who will faithfully interpret the laws and the Constitution, individuals who will withhold any personal, political, or ideological tendencies from their decisionmaking process. And this is even more important when we are confirming you now to the Supreme Court as opposed to when we confirmed you to the circuit court.

There are a number of qualities that I look for in a Supreme Court nominee. I believe that the nominee should be someone who knows he or she is not appointed to impose his or her views of what is right or wrong. As Chief Justice Marshall said over 200 years ago, the duty of the judge is to say what the law "is," not what it "ought to be." Moreover, the nominee should be someone who not only understands, but truly respects the equal roles and responsibilities of the different branches of Government and the role of our States in the Federal system. If we confirm a nominee who is all of this, none of us—on the political right or the political left—will be disappointed, because it will mean in the end that the people, through their elected representatives, will be in charge. On the other hand, if we confirm individuals who are bent on assigning to themselves the power to "fix society's problems" as they see fit, a bare majority of these nine unelected and unaccountable men and women will usurp the power of the people—hijacking democracy to serve their own political prejudices. We do not want to go down that road, and we should not go down that road.

Why is it, then, so important to have Supreme Court Justices practice judicial restraint? Because that means the policy choices of the democratically elected branches of Government will only be overturned if and when there is a clear warrant to do so in the Constitution itself. We want Supreme Court Justices to exercise judicial restraint so that cases will be decided solely on the law and the principles set forth in the Constitution, and not upon an individual Justice's personal philosophical views or preferences. Felix Frankfurter identified this as the highest example of judicial duty. A fundamental principle of our country is that the majority has a legitimate right to govern. This approach hardly means that the courts are less energetic in protecting individual rights. But the words of the Constitution constrain judges every bit as much as

they control legislators, executives, and our citizens. Otherwise, we are no longer a Nation of laws, but a Nation of politicians dressed in judges' robes.

During my tenure in the Senate, I have participated in a number of these Supreme Court nomination hearings, and I believe it is nine to date. I am hopeful that we will see a dignified confirmation process that will not degenerate into what we saw during the Bork and Thomas hearings. Rather, we need to see the same level of civility as we saw during the O'Connor, Ginsburg, and Breyer hearings.

Moreover, I am hoping that we will not see a badgering of the nominee about how he will rule on specific cases and possible issues that will or may come before the Court. That has not been the practice, as you know, in the past. And let me remind my colleagues that Justices Ginsburg and Breyer refused to answer questions on how they would rule on cases during their confirmation hearings. The fact is that no Senator has a right to insist on his or her own issue-by-issue philosophy or seek commitments from nominees on specific litmus-test questions likely to come before that Court. To do so is to give in to the liberal interest groups that only want judges who will do their political bidding from the bench, regardless of what is required by the law and the Constitution. The result is then a loss of independence for the Supreme Court and a lessening of our Government's checks and balances.

Some have suggested that since you have been nominated now to be Chief Justice, you deserve even more scrutiny than before when you were just nominated for Associate. Some are saying that we should prolong the hearings and turn over even more stones than we have already turned over thus far. Well, the Chief Justice has been described as "first among equals." The plain truth is that there really isn't anything substantively different in your role, and your vote will count just the same as other Justices of the Court. So my own questioning and analysis of your qualifications will not really be much different from your previous appointment.

But it is true that the Chief Justice has additional duties as the head of the Federal judiciary. The Chief Justice has to be someone who has a good management style, who can run the trains on time, and who can foster collegiality on the Court. So, Judge Roberts, I think that since you have appeared before the Court 39 times to argue cases on appeal, and that the current Justices know and respect you, that bodes very well in terms of your smoothly transitioning into the Court, into the new role now of Chief Justice.

I congratulate you.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Grassley.

Senator Biden?

## STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you, Mr. Chairman.

Judge Roberts, welcome. Mrs. Roberts, welcome to you. I might note at the outset I have never heard of or seen a Federal judge who was not independent. It is amazing what that life tenure does.

So I do not think you have any worry, Judge, about having to cash in your independence. It has never occurred in my memory or in my study.

And, Judge, I want to point out to my friends that it is true judges did not come before the Committee in the past, but in the past you needed unanimous consent of the entire Senate to get before the Senate. So, you know, there are some good things and some bad things that have changed.

Judge, as you know, there is a genuine intellectual debate going on in our country today over whether the Constitution is going to continue to expand the protections of the right to privacy, continue to empower the Federal Government to protect the powerless. And it is a big debate. All you have got to do is turn to any website—American Enterprise Institute, left, right, center. It is a gigantic debate. It has not occurred, as you and I both know, and my colleagues know, in the last 70 years. It has not been this contentious—not just the politics but the debate, the intellectual debate.

For 70 years, there has been a consensus, Judge, on our Supreme Court on these issues of privacy and protecting the powerless, and this consensus has been fully embraced, in my view, by the American people. But there are those who strongly disagree with the consensus, as is their right, and they seek to unravel the consensus. And, Judge, you are in the unenviable position, as we talked about in my office, of being right in the middle of this fundamentally important debate. And, quite frankly, Judge, we need to know on which side of that divide you stand, for whoever replaces Justice Rehnquist, as well as Justice O'Connor, will play a pivotal role in this debate. And for tens of millions of the American people, this is no academic exercise, for the position you will take in this debate will affect their lives in very real and personal ways for at least, God willing, the next three decades. And there is nothing they can do about it after this moment.

Judge, I believe in, as our Supreme Court's first great Chief, who has been mentioned here today, Justice Marshall, said in 1819, and I quote: "A Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." That is the Constitution I believe in, and that is the way I think we should look at the Constitution.

At its core, the Constitution envisions ever-increasing protections for human liberty and dignity for all its citizens, and a national Government empowered to deal with these unanticipated crises. Judge, herein lies, in my view, the crux of the intellectual debate I referred to at the outset, whether we will have an ever-increasing protection for human dignity and human liberty, or whether those protections will be diminished, as suggested by many in their reading of the Constitution that says there are no unenumerated rights. That is a very narrow reading of the Constitution.

In 1925, the Constitution preserved the rights of parents to determine how to educate their kids, striking down a law that required children to attend public school. In 1965, the Constitution told the State to get out of married couples' bedrooms, by striking down a State law prohibiting married couples from using contraception. In 1967, the Constitution defended the right of a black woman to marry a white man. In 1977, the Constitution stopped

a city from making it a crime for a grandmother to live with her grandchildren.

And, fortunately, even when the Supreme Court at first took the Constitution away from the promise and hope of our Constitution's ennobling phrases, in the end it has kept the faith. In 1873, for example, the Court said States could forbid women from being lawyers. It took 100 years to undo this terrible mistake, but the Court eventually got it right. In 1896, the Supreme Court said separate but equal is lawful. It took 58 years for the Supreme Court to outlaw racial segregation, throwing the doctrine into the dust bin of history, but it got it right. In the early 1900s, the Court rendered the Federal Government powerless to outlaw child labor, to protect workers. It took until 1937 for the Supreme Court to see the error of its ways, but it finally got it right.

In every step we have had to struggle against those who saw the Constitution as frozen in time, Judge, but time and again we have overcome, and the Constitution has remained relevant and dynamic, thanks to the proper interpretation, in my view, of the ennobling phrases, purposely placed in what I refer to as our civic bible, the Constitution.

Once again, when it should be even more obvious to all Americans, we need increased protections for liberty as we look around the world and we see thousands of people persecuted because of their faith, women unable to show their faces in public, children maimed and killed for no other reason than they were born into the wrong tribe. Once again, when it should be obvious we need a more energetic national Government to deal with the challenges of the new millennium, terrorism, the spread of weapons of mass destruction, pandemic disease, and religious intolerance, and once again our journey of progress is under attack, and it is coming from, in my view, the right.

There are judges, scholars and opinion leaders who belong to this group of people who are good, honorable and patriotic Americans. They believe the Constitution provides no protection against Government intrusion into highly personal decisions like the Schiavo case, decisions about birth, about marriage, about family, about religion. There are those who would slash the power of our national Government, fragmenting it among the States in a new reading of the Tenth and Eleventh Amendments. Incredibly, some even argue, as you well know—people will not believe this—but some are arguing today, in the Constitution-in-Exile group, who argue that the national Government has no power to deal with what is going on in the Gulf at this moment.

Judge, I do not believe individuals could for very long have accomplished what we did had we read our Constitution in such a narrow way.

Like the Founders, I believe our Constitution is as big and as grand and as great as its people. Our constitutional journey did not stop with women being barred from being lawyers, with 10-year-olds working in coal mines, or with black kids forced into different schools than white kids, just because in the Constitution nowhere does it mention sex discrimination, child labor, segregation. It does not mention it. Our constitutional journey did not stop then, and it must not stop now, Judge.

We will be faced with equally consequential decisions in the 21st century. Can a microscopic tag be implanted in a person's body to track his every movement? There is actual discussion about that. You will rule on that, mark my words, before your tenure is over. Can brain scans be used to determine whether a person is inclined toward criminality or violent behavior? You will rule on that.

And, Judge, I need to know whether you will be a Justice who believes that the constitutional journey must continue to speak to these consequential decisions, or that we have gone far enough in protecting against Government intrusion into our autonomy, into the most personal decisions we make. Judge, that is why this is a critical moment.

There are elected officials in this Government, such as Mr. DeLay, a fine, honorable, patriotic man, and others, who have been unsuccessful in implementing their agenda in the elected branches, so they have now poured their energies—as the left would—they have now poured their energy and resources into trying to change the Court's view of the Constitution, and now they have a once-in-a-lifetime opportunity, the filling of two Supreme Court vacancies, one of which is the Chief, and the other is for Associate Justice, the first time that has happened in 75 years.

Judge, I believe with every fiber of my being that their view of the Constitution and where the country should be taken would be a disaster for our people. Like most Americans, I believe the Constitution recognizes a general right to privacy. I believe a woman's right to be nationally and vigorously protected exists. I believe that the Federal Government must act as a shield to protect the powerless against the economic interests of this country. And I believe the Federal Government should stamp out discrimination wherever it occurs, and I believe the Constitution inspires and empowers us to achieve these great goals.

Judge, if I look only at what you have said and written, as used to happen in the past, I would have to vote no. You dismissed the constitutional protection to privacy as "a so-called right." You derided agencies like the Securities and Exchange Commission that combat corporate misconduct, as "constitutional anomalies." And you dismissed gender discrimination as "merely a perceived problem." This is your charge, Judge, to explain what you meant by what you have said and what you have written. That is what I said when I was Chairman. That is what this is about.

The Constitution provides for one democratic moment, Judge, one democratic moment before a lifetime of judicial independence. This is that moment, when the people of the United States are entitled to know as much as they can about the person we are entrusting with safeguarding our future and the future of our children and grandchildren. Judge, as you know, and we talked about it, this is that moment, and this is what this hearing is about.

I thank you.

[The prepared statement of Senator Biden appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Biden.

Senator Kyl.

**STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA**

Senator KYL. Thank you, Mr. Chairman.

Before discussing Judge Roberts's nomination, I would like to take a moment to express my respect and admiration for the Justice whom he will be replacing on the Supreme Court, William Rehnquist, who began his career as a lawyer in Phoenix. In 1994, until last year, he made an annual return to Arizona to teach a course of Supreme Court history at my alma mater, the University of Arizona.

Chief Justice Rehnquist provided steady leadership at the Supreme Court through several turbulent decades, showing in the process how much of a difference one person with great integrity can make. We mourn his loss.

In spite of the fact that he is not from Arizona, Judge Roberts clearly is eminently qualified to serve as Chief Justice of the United States Supreme Court. Enough has already been said about his credentials, that I will not catalog them here. Rather, the principal matter that I would like to address today is the proper scope of this Committee's questioning of the nominee. With all due respect to my colleagues, a seat on the Supreme Court is not a political, let alone a legislative office, and not every question that a Senator might think of is legitimate.

This Committee's precedents, the rules of judicial ethics, and a sound respect for the unique role of the Federal Judiciary in our society, all counsel in favor of some basic limits on the types of questions that a Senator should ask of a judicial nominee. One is not qualified for the Court by virtue of his position on issues, but rather, by his ability to judge fairly.

Most importantly, it is not appropriate for a Senator to demand a nominee's views on issues that are likely to come before the Court. This standard was reiterated 4 years ago by the late Lloyd Cutler, White House Counsel to former Democratic Presidents Carter and Clinton. In a hearing before this Committee on the subject of the Senate's role in evaluating judicial nominees, Mr. Cutler stated quite clearly what the proper limits are, and I quote: "We viewers must refrain from asking candidates for particular precommitments about unresolved cases or issues that may come before them as judges." And he continued, "The ultimate question is simply whether or not potential candidates have the qualities of integrity, good judgment and experience to become judicial officers of the United States. It would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science, it also serves to weaken public confidence in the courts."

Just imagine, Mr. Chairman, expecting litigants to appear before a court knowing in advance what the ruling will be.

Limits on the questioning of judicial nominees are reflected even in the questionnaire that this Committee submits to nominees. Question 27(b) of the Committee's questionnaire makes clear that it is unacceptable for anyone involved in the process of selecting

the nominee to seek assurances about his positions on cases, questions or issues that might come before him as a judge.

Let me quote the question. "Has anyone involved in the process of selecting you as a judicial nominee, including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff, discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question?"

Judge Roberts answered in the negative to that question, and I think it would be ironic indeed if the Committee were now to demand that the nominee take stands on questions that may come before him as a member of the Court.

As Senator Hatch noted earlier, the confirmation hearings of the two most recent nominees, Justices Ginsburg and Breyer, confirmed this same principle. Those hearings were held under the chairmanship of our colleague, Senator Biden, who presided at the time. One of the comments that he made at the time of Justice Ginsburg's hearing was, and I quote: "You not only have a right to choose what you will answer and not answer, but in my view, you should not answer a question of what your view will be on an issue that clearly is going to come before the Court."

Not only would it violate this Committee's standards and procedures for a nominee to answer questions about issues that may come before him as a judge, it would also be unethical for the nominee to answer such questions. Some have argued that nominees cannot talk about cases, but that they can still talk about issues. Well, the Code of Judicial Ethics draws no such distinctions. The American Bar Association Model Code of Judicial Conduct dictates, and I quote, "that a judge or candidate for election or appointment to judicial office, shall not, with respect to cases, controversies or issues that are likely to come before the Court, make pledges, promises of commitments that are inconsistent with the impartial performance of the judicative duties of the office."

The import of this ethical rule is unambiguous. If a nominee is asked to commit himself to a particular stance on an issue that is likely to come before him as a judge, that nominee is obligated to decline to answer the question. Any other approach would violate the Code of Judicial Conduct.

Judge Roberts, I expect you to adhere to the Code of Judicial Ethics, and I want you to know that I will defend your refusal to answer any question that you believe is improper under those circumstances.

I would also like to emphasize that the standards for questioning that apply in this Committee are not simply quaint relics of the past to be abandoned at no cost to the future. Rather, these rules are fundamental to preserving the nature and role of an independent Judiciary. A judicial nominations process that required candidates to make a series of specific commitments in order to navigate the maze of Senate confirmation, would undermine the very concept of a fair and independent Judiciary. Constitutional law would become a mere extension of politics, but in a less accountable and less democratic arena.

If the Supreme Court operated this way, if it simply enforced political commitments made during the confirmation process, why would we give the power of judicial review, the power to strike down laws made by other more accountable and democratic branches of the Government? Granting this kind of power to the Supreme Court, the power to override democratic majorities, makes sense only if what the Court is deciding is applying and upholding the rule of law and our Constitution. When the Court adheres to that neutral and unbiased role, rather than making policy like the other branches, it is enforcing principles that the people themselves have deemed so important that they should be installed in the constitutional firmament, and placed above the reach of transient majorities or the political compromises reached by elected representatives.

The Court's legitimate authority derives not from commitments made during confirmation, but from its obligations embodied in the Constitution. I raise this matter not to suggest that all questions about a nominee's understanding of the law are improper. Indeed, I think that an examination of the Court's role, and the source of legitimacy of its authority, reinforces the importance of inquiring into a nominee's judicial philosophy, of determining whether he is devoted to upholding and enforcing the laws and the Constitution as they were adopted by the people.

Our proper role this week is to determine whether Judge Roberts has the character, the legal ability and the judicial philosophy to fulfill that responsibility.

Chairman SPECTER. Thank you very much, Senator Kyl.

Now, Senator Kohl.

**STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Senator KOHL. Thank you, Mr. Chairman.

Judge Roberts, let me also extend my welcome to you this afternoon and to your family. Judge Roberts, if confirmed you will succeed Justice Rehnquist and serve as only the 17th Chief Justice in the history of the United States, and the youngest in 200 years. You are nominated to a position of awesome power and responsibility. The decisions you and the other Justices make will shape the lives of every person in America for generations.

Yet for only a few days this week will the people, through their Senators, be able to question and to judge you. That means that we on this Committee who will be questioning you have an awesome power and responsibility as well.

Judge Roberts, our democracy, our rights and everything we hold dear about America are built on the foundation of our Constitution. That remarkable document has endured throughout our history. In the hands of the Supreme Court, the Constitution has established a right to equal education regardless of race, has guaranteed an attorney and a fair trial to all Americans, rich and poor alike. It has allowed women to keep private medical decisions private. It has allowed Americans to speak, vote and worship without interference from their Government.

You will lead the Court in its most solemn duty to interpret the Constitution and the rights it grants to all Americans. The Court

has the last say in what will be the scope of our rights and the breadth of our freedoms. The Court even has power over which constitutional questions it will hear and which cases the Court will decide. That is why the Supreme Court is so vital to our lives, and who decides these issues, Judge Roberts, is therefore of unsurpassed importance.

Moreover, you will enjoy even greater authority as Chief Justice of the United States than your fellow Associate Justices. You will not only lead an entire branch of our Government if you are confirmed, but also you will have a less evident but an even more important power because it will be your sole responsibility to determine which Justices write which opinions when you are in the majority. Who writes the opinion governs the principle the case stands for, and whether the precedent it sets is broad and important or narrow and less consequential.

If you are confirmed for this lifetime position, your decisions and those of your colleagues will be the final word on the rights and freedoms of all Americans for decades to come. You will have no constraints on the decisions you reach, other than your understanding of the Constitution and your heart. That is why it is so essential that we, the democratic representatives in a democratic country, take this week to probe that understanding and that heart.

This process of lifetime tenure is unique in our system of Government. The President, Senators and Governors make decisions every day. Our choices and our opinions are transparent to the public, and every few years we are accountable for the decisions we make and the votes we cast. If the people do not like our votes or disagree with our record, then they vote for someone else and we are gone. Just as we want and need to know much more about you, we presume that you want the country to know a lot more about what is in your mind and in your heart. People in high places of public trust in this country have a responsibility to share their thoughts about important issues like civil rights, privacy, property rights, separation of church and state, civil liberties, and much more.

We hope you understand the need to be totally forthcoming in your answers to questions on these issues. Evasions, avoidance and hiding behind legal jargon simply will not suffice.

So the panel will ask you about some of the most important issues that you will face should you be confirmed, for example, the right to privacy. In early writings you questioned this freedom, calling it a "so-called right to privacy." So we expect you to discuss with us your current thinking on this basic question.

This past term the Court decided a ground-breaking case concerning the Government's power of eminent domain. The Supreme Court held that the Government may take private land not only for public use, but also for private development. Public opinion is opposed to this outcome, and so we look forward to hearing your views on this important issue.

The Supreme Court's decisions may be most important when they address the breadth of our civil rights. Some people think that your early writings were cavalier and dismissing many civil rights protections. For example, you were active in efforts to narrowly define voting rights protections, and your narrow interpretation of

Congressional power to address civil rights and other important issues while a judge on the D.C. Circuit does give us some pause.

The American people deserve to know how you will approach cases involving voting rights, gender discrimination, violence against women, and affirmative action, among many others.

Finally, some speculate that if confirmed, you will seek to weaken the separation between church and state. Your critics point to positions you took as a Government attorney, critical of Supreme Court decisions on prayer in school. And so we need to hear your views about the Establishment Clause of the Constitution as well.

Judge Roberts, if confirmed, we can expect that you will serve 25 to 30 years as Chief Justice of the United States. You will likely become the most influential Justice of your generation. During these decades you will help shape the nature of our country and our democracy. It will be your job to give life and meaning to the broad and lofty promises of the Constitution—such essential principles as due process, equal protection and free speech, and to stand up for the civil rights and the liberties of the underrepresented and the unpopular.

Before we decide whether to entrust you with this power, we ask you to stand before the public and explain your views, express our hopes, and expound on your approach to the bedrock principles that guide us as a Nation.

We have an obligation to find out where you will take us before we decide whether we want you to lead us there, and most importantly, you have an obligation to tell us.

This would be an appropriate time to share my perspective on how I will judge a nominee. In judging this and other Supreme Court nominations my test has been judicial excellence. To me judicial excellence involves four elements.

First, a nominee must possess the competence, character and temperament to serve on the Supreme Court. He or she must have a keen understanding of the law and the ability to explain it in ways that the American people will understand.

Second, judicial excellence means that a Supreme Court Justice must have a sense of the values which form the core of our political and economic system. We have a right to require the nominee to understand and respect our constitutional values.

Third, judicial excellence requires a sense of compassion. The law is more than an intellectual game, and more than a mental exercise. As Justice Black said, "The Court stands against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are nonconforming victims of prejudice and public excitement."

A Supreme Court Justice must understand this. He or she must recognize that real people with real problems are affected by the decisions rendered by the Court. They must have a connection with and an understanding of the problems that people struggle with on a daily basis. Justice, after all, must be blind, but it should not be deaf.

And finally, judicial excellence requires candor before confirmation. We are being asked to give the nominee enormous power, so we want to know how he or she will exercise this power, and how

they see the world, and we need and we deserve to know what is in your mind and in your heart.

Judge Roberts, I am convinced that you satisfy the requirements of competence, character and temperament. I enjoyed meeting you a few weeks ago and appreciated our discussion. Your legal talents are undeniably impressive. Yet, while we are now familiar with your abilities, we still know precious little about your philosophies and views on crucial issues that you will face on the Supreme Court in the years ahead.

We look forward to these hearings as an opportunity to learn more and measure whether you meet our test of judicial excellence.

[The prepared statement of Senator Kohl appears as a submission for the record.]

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Kohl.

Senator DeWine.

**STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO**

Senator DEWINE. Mr. Chairman, thank you very much.

Judge Roberts, I congratulate you on your nomination, applaud you on your extraordinary legal career, and welcome you and your wife, Jane, and your children Jack and Josie to our hearing. Over the next several days we will be spending a lot of time together, you and the 18 Members of this Committee and the American people.

This is the time really for a national conversation, a conversation about the document that binds us all together as a Nation and as a people. That document of course is our Constitution. For more than 215 years we have been having an extended conversation about the meaning of our Constitution. Sometimes the conversation has been civil, sometimes it has been passionate, and sometimes, tragically, it has been violent.

The New Deal and the court battles that were fought about the scope of the Federal Government's power to combat the Great Depression was really a debate about the meaning of the Constitution. The civil rights movement and the vigorous and often violent resistance to the efforts to bring about equality for all Americans, was and remains a debate about the meaning of our Constitution. The Civil War, the most violent and bloodiest time in our history, was really a war about the meaning of our Constitution.

We have seen a President resign, elections decided, and popular laws overturned all because of our Constitution. But our Constitution is more than just a symbol of our Nation's history. It is also a light for the rest of the world. As a Nation we were among the first to sit down and draft a document that quite literally constitutes our Government, but we were not the last. Since our Founders embraced the idea of a written Constitution, others have followed suit. In fact, after the fall of the Soviet regime, we witnessed an explosion of constitution writing in Eastern Europe. There are now more than 170 written constitutions in the world, more than half of which have been drafted just in the last 30 years. To paraphrase Thomas Paine, the cause of America truly is indeed the cause of all mankind.

That is why our gathering today is so significant. We are charged with providing our advice and consent on the President's nominee to the Supreme Court. Our job is important. But if confirmed, Judge Roberts, your job, your job will be even more important. It would be your job, as the 17th Chief Justice of the United States, to correctly construe that Constitution, to preserve the balance of power sewn into it, and to protect those rights and values that are so much a part of our history and our tradition.

Former Chief Justice John Marshall once warned that, and I quote, "People made the Constitution, and people can unmake it." It will be your job, in other words, to ensure that our Constitution is never unmade.

As of late, however, many Americans believe that the Supreme Court is unmaking the very Constitution that our Founders drafted. Many Americans are concerned when they see the Court strike down laws protecting the aged, the disabled and women who are the victims of violence. Many Americans worry when they see the Court permit the taking of private property for economic development. Many are troubled when they see the Court cite international law in its decisions, and many fear that our Court is making policy when it repeatedly strikes down laws passed by elected members of Congress and elected members of State legislatures.

I must tell you, Judge, I too am concerned. Judges are not members of Congress. They are not elected. They are not members of State legislatures. They are not Governors. They are not Presidents. Their job is not to pass laws, implement regulations, nor to make policy. Perhaps no one said this better than Justice Byron White. During his confirmation hearing in 1962, White was asked to explain the role of the Supreme Court in our constitutional form of Government. Nowadays, in response to this type question, we probably would hear some grand theories about the meaning of the Constitution and its history.

Justice White, however, said nothing of the kind. When he was asked about the role of the Supreme Court in our system of Government, he gave a simple answer. Justice White said the role of the United States Supreme Court was simply to decide cases.

To decide cases. So simple. It sounds too obvious to be true, but, you know, I think that is the right answer. Judges need to restrict themselves to the proper resolution of the case before them. They need to avoid the temptation to set broad policy. And they need to pay proper deference to the role of the Executive, the Congress, and the States, while closely guarding the language of the Constitution.

We would do well to keep this example in mind. The Constitution does not give us all the answers. It does, however, create the perfect process for solving our problems. The Congress and the President have a role in this process, the States have theirs, and when there are disputes, the courts are there to decide cases.

There is a reason that judges need to take on this limited role. As my esteemed colleague from Iowa, Senator Grassley, explained during Justice Souter's confirmation hearing, a judge should not be—and I quote—"pro this and anti that. He should rather be a judge of cases, not causes."

Judge Roberts, causes come and go, but cases do not. In years or decades, one cause may fade, another will merge. But judges will remain deciding cases and interpreting our Constitution. Our next Chief Justice is not merely for today. He is a Chief Justice for the future, a future that will present constitutional issues that are now simply unknown.

The career of Chief Justice Rehnquist certainly proves this point. When he joined the Court in 1972, there was no Internet, no need to protect our children from the proliferation of online pornography; and at the time, there was no war on terror, no presidential order to detain terrorists as enemy combatants, and no terrorist prison at Guantanamo Bay. But yet, Chief Justice Rehnquist dealt with all of these issues while on the Court.

When faced with new and unexpected issues, a Justice is left only with the tools that every good judge must use: the facts of the case, the language of the Constitution, and the weight of precedent. This is a simple, unlimited approach to deciding cases, the kind of approach that Justice White would have understood and, I believe, that our Founders would have admired.

While preparing for this hearing, I came across a statement from a sitting Federal judge that I think neatly sums up this philosophy. "Deciding cases," this judge said—and I quote—"requires an essential humility grounded in the properly limited role of an undemocratic judiciary in a democratic republic, a humility reflected in doctrines of deference to legislative policy judgments and embodied in the often misunderstood term 'judicial restraint.'"

Judge Roberts, as you know, those words are yours. And in my opinion, they are very wise words indeed. You, sir, have the talent, experience, and humility to be an outstanding member of the United States Supreme Court. And I expect that these hearings will show that you have the appropriate philosophy to lead our Nation into the future as the 17th Chief Justice of the United States.

I thank the chair.

[The prepared statement of Senator DeWine appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator DeWine.

Senator Feinstein?

## STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good afternoon, Judge Roberts and Mrs. Roberts and the Roberts family. This must be a moment of enormous pride for you. I hope that, despite the toughness of this hearing, you really realize that this family member of yours is taking over not just the position of an Associate Justice, but the Chief Justice of the United States, at a time of unique division and polarization in this country. And so many of us are going to be pressing him to see if he has what we think it takes to do this.

And Fred Thompson, welcome back. I hope you miss us just a little bit from time to time. Somehow I am not quite sure that is the case.

[Laughter.]

Senator FEINSTEIN. Judge Roberts, thank you very much. We spent a very interesting hour together. I came away from it feeling that you are certainly brilliant, talented, and well-qualified. I do not think there is a question about that. But as we take a look at you, 50 years old, to be Chief Justice of the United States, I think it is really essential for us to try to determine whether you can be the kind of leader that can generate consensus, find compromise, and, above all, really embody the mainstream of American legal thinking. For me, the most important thing is to see that the Chief Justice really cares about the fact that justice is provided to all Americans. It has been said here before, but it is really important—young and old, rich and poor, powerful and weak, all races, creeds, colors, et cetera.

This is going to be a big session. The Court is going to consider some very critical cases among many others: The standard of review for abortion cases, the health of the mother; the constitutionality of an Oregon law which permits physician-assisted suicide for terminally ill but legally competent individuals; and whether two oil industry leaders and competitors can be allowed to work together to fix the price of gas once they have entered into a joint venture. In addition, the rights of enemy combatants, the so-called partial-birth abortion law, whether Congress has the authority to protect our Nation's environment through legislation. The Endangered Species Act is winding its way through the appellate courts. It looks like they differ, and if the courts keep going the way they are going, many of us feel that they will take away from the Congress the grounds on which we base legislation in the environment. This is an enormous macro-question that you are going to be right in the middle of as a pivotal force.

Chief Justice Rehnquist, I believe, will be remembered not only for his distinguished tenure, which it certainly was, but also for applying a much more restrictive interpretation of the Constitution, which has limited the role of Congress. In recent years, the Court has adopted a politically conservative States'-rights view of several constitutional provisions. As a result, congressional authority to enact important legislation has been significantly curtailed. This has occurred through its restrictive interpretation of the Spending Clause, the Commerce Clause, the 14th Amendment, the 11th Amendment, all of which Congress uses to enact certain laws.

Based on these federalism grounds, the Court has wiped out all, or key parts, of legislation addressing issues such as gun-free schools—should schools be allowed to prohibit guns within 1,000 feet; religious freedom; overtime protections; age discrimination; violence against women; and discrimination against people with disabilities. In fact, over the past decade, the Rehnquist Court has weakened or invalidated more than three dozen Federal statutes. Almost a third of these decisions were based on the Commerce Clause and the 14th Amendment. If you, Judge Roberts, subscribe to the Rehnquist Court's restrictive interpretation of Congress's ability to legislate, the impact could be enormous. It would severely restrict the ability of a Congress to tackle nationwide issues that the American people have actually elected us to address.

Now, as the only woman on this Committee, I believe I have an additional role in evaluating nominees for the Supreme Court, and

that is to see if the hard-earned autonomy of women is protected. Like any population, women enjoy diverse opinions, beliefs, political affiliations, priorities, and values. And we share a history of having to fight for many of the rights and opportunities that young American women now take so much for granted. I think they do not really recall that during the early years of the United States, women actually had very few rights and privileges. In most States, women were not allowed to enter into contracts, to act as executor of an estate; they had limited inheritance and child-custody rights. It actually was not until 1839 that a woman could own property separate from her husband, when Mississippi passed the Married Woman's Property Act.

It was not until the 19th century that women began working outside their homes in large numbers. Most often, women were employed as teachers or nurses and in textile mills and garment shops. As women entered into the workforce, we had to fight our way into nontraditional fields—medicine, law, business, and yes, even politics.

The American Medical Association was founded in 1846, but it barred women for 69 years from membership, until 1915. The American Bar Association was founded in 1876, but it barred women and did not admit them until 1918. That is 42 years later. And it was not until 1920 when, after a very hard fight, women won the right to vote—not even 100 years ago.

By virtue of our accomplishments and our history, women have a perspective, I think, that has been recognized as unique and valuable. With the retirement of Justice Sandra Day O'Connor, the Court loses the important perspective she brought as a woman and the deciding vote in a number of critical cases.

For me—and I said this to you privately, and I will say more about it in my time on questions—one of the most important issues that needs to be addressed by you is the constitutional right to privacy. I am concerned by a trend on the Court to limit this right and thereby to curtail the autonomy that we have fought for and achieved—in this case, over just simply controlling our own reproductive system, rather than having some politicians do it for us. It would be very difficult—and I said this to you privately and I have said it publicly—for me to vote to confirm someone who I knew would overturn *Roe* v. *Wade* because I remember—and many of the young women here do not—what it was like when abortion was illegal in America.

As a college student at Stanford, I watched the passing of the plate to collect money so a young woman could go to Tijuana for a back-alley abortion. I knew a young woman who killed herself because she was pregnant. And in the 1960s, then, as a member of the California Women's Board of Terms and Parole, when California had what was called the Indeterminate Sentencing Law, I actually sentenced women who committed abortions to prison terms. I saw the morbidity, I saw the injuries they caused. And I do not want to go back to those days.

How the Court decides future cases could determine whether both the beginning-of-life and the end-of-life decisions remain private or whether individuals could be subject to Government intrusion or perhaps the risk of prison.

And I will be looking to understand your views on the constitutional provision for providing for the separation of church and state. Once again, history. For centuries, individuals have been persecuted for their religious beliefs. During the Roman Empire, the Middle Ages, the Reformation, and even today, millions of innocent people have been killed or tortured because of their religion.

A week ago, I was walking up the Danube River in Budapest when I saw on the shore 60 pair of shoes covered in copper—women's shoes, men's shoes, small, tiny children's shoes. They lined the bank of the river.

My time is already up? May I just finish this one paragraph?

Chairman SPECTER. Yes.

Senator FEINSTEIN. During World War II, it turned out that Hungarian Fascists and Nazi soldiers forced thousands of Jews, including men, women, and children, to remove their shoes before shooting them and letting their bodies float down the Danube. These shoes represent a powerful symbol of how religion has been used in catastrophic ways historically.

The rest of my comments we will have to wait for.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator Sessions?

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Mr. Chairman. And Judge Roberts, recalling the words of former Senator Alan Simpson when Justice Scalia was here, welcome to the pit.

[Laughter.]

Senator SESSIONS. Congratulations on your nomination to be our Nation's 17th Chief Justice. You are one of our Nation's premier lawyers. Some have called you the finest appellate lawyer of your generation. You have won the respect of your colleagues, adversaries, and judges for your integrity, professionalism, and legal skill. And I salute President Bush for choosing you for this important position.

But as you have already seen, our confirmation process is not a pretty sight. Time and again you will have your legal positions, your predecisional memoranda, even as a young lawyer, distorted or taken out of context. These attacks are driven most often by outside groups. They will dig through the many complex cases you have dealt with in an effort to criticize your record. They will produce on cue the most dire warnings that civil liberties in America will be lost forever if you are confirmed as a Federal judge. It is really a form attack sheet. All they have to do is place your name in the blank space. These tactics, I think, are unfair and sometimes have been dishonest.

My advice to you is this: Keep your famous good humor, take your time, and explain the procedural posture of the cases and exactly how you ruled as a judge or the position you took as a lawyer. Americans know these matters are complex and they will appreciate your answers.

The American commitment to the rule of law is one of our most exceptional characteristics as a people. It is the foundation of our liberties and our productive economic system, it is a product of centuries of development. In his magnificent speech in March of 1775 in the House of Commons urging King George not to go to war against the Colonies, Edmund Burke described America's commitment to the rule of law by saying, "In no country perhaps in the world is the law so general a study," adding, "I hear they may have sold as many of Blackstone's Commentaries on the Law in America as in England."

But activism by a growing number of judges threatens our judiciary. And frankly, that is what I am hearing as I talk to my constituents and hear from the American people. Activism is when a judge allows his personal views on a policy issue to infect his judgments. Activist rulings are not based on statutes or the Constitution, but reflect whatever a judge may think is decent or public policy.

This should not be. But even some members of our body have encouraged this thinking. Indeed, Judge Roberts, one Senator in recent weeks, the man did not know whose side you are on before he voted. His statement provides a direct glance, I think, into the philosophy of activism. When we have an activist judiciary, the personal views of a judge become everything. Who the judge is and whose side the judge is on, not the law and the facts, will determine the outcome of a case. Since judges hold their offices for as long as they live or choose to serve, and are unaccountable to the citizenry, activist rulings strike at the heart of democracy. Five members of the Court may effectively become a continuing constitutional convention on important questions such as taking of private property, the definition of marriage, the Pledge of Allegiance, or a moment of silence before a school day.

If a Congress acts wrongly, new members may be elected and a result changed by a simple majority. A Supreme Court decision founded on the Constitution can be changed by the people only by constitutional amendment, which requires a two-thirds vote of both houses and three-fourths of the State legislatures.

This result-driven philosophy of activism does not respect law. It is a post-modern philosophy that elevates outcomes over law. Today many believe the law does not have an inherent moral power and that words do not have and cannot have fixed meanings. Judges are thus encouraged to liberally interpret the words to reach the result the judge believes is correct. Activist Supreme Court judges have done this in recent years by saying they are interpreting the plain words of the Constitution in light of evolving standards of decency. This phrase has actually formed the legal basis for a number of recent decisions. But as a legal test, it utterly fails because the words can mean whatever a judge wants them to mean. It is not objective, cannot be consistently followed, and is thus by definition not law, but a license.

Such vague standards provide the Court a license to legislate, a power the Constitution did not provide judges. Indeed, recently this license has led some judges to conclude they may look beyond American standards of decency to the standards of foreign nations in an attempt to justify their decisions. The arrogant nature of this

concept is further revealed by a Supreme Court ruling in 2003, when the Supreme Court explicitly declared that the Constitution prohibits the elected representatives of the people—us—from relying on established morality as a basis for the laws they pass. The Court thus declares itself free to, in effect, amend the Constitution by redefining its words to impose whatever it decides is evolving standards of decency. Yet at the same time, it prohibits legislatures from enacting laws based on objective standards of morality.

While these unprincipled decisions are becoming too frequent, I do not want to suggest that such is the common practice in courts in America. Having practiced full-time in Federal court for 14 years, I witnessed this first-hand. Day after day, if the law and facts were on my side, I would win consistently. If they were not, I would lose. This was true regardless of whether a judge was a Democrat, a Republican, a liberal, or a conservative. Certainly our Founders were so adamant that judges be unbiased and committed to the law that they drafted a Constitution that gave them a lifetime appoint and provided that Congress could not even reduce their pay.

My fear today is that many have come to believe that to expect objectivity in judges is hopelessly naive. Liberals and conservatives openly make this point. On one committee, one that Senator Kyl quoted Lloyd Cutler as testifying at, we focused on the question of whether or not ideology could be a factor in a judge's rulings and that we should in effect admit that people have political views and that those political views will infect their rulings and therefore we should openly talk about that. A writer in the conservative National Review complained that Republicans are hurting the conservative cause by insisting on "abiding by those outdated norms," in effect suggesting conservatives should get their guys in there to promote their ideas.

While many advocates on the left and right would like a Court that promotes their agenda, I do not want that and neither do the American people. What we must have, what our legal system demands, is a fair and unbiased umpire, one who calls the game according to the existing rules and does so competently and honestly every day. This is the American ideal of law. Ideals are important because they form the goals to which we all strive. We must never abandon our ideal of unbiased judges, judges who rule fairly without regard to politics.

Two important bipartisan commissions, the Miller Center of Public Affairs at the University of Virginia, and the Citizens for Independent Courts, have issued reports that deplore any policies that would tend to politicize the courts. These hearings, therefore, provide this Nation an excellent opportunity to discuss these important concepts. Our Nation cries out for judges who love the law and who work every day to uphold its moral authority. The people rightly demand judges who follow, not make, law.

From everything I have seen and from what I have read, Judge Roberts, you are just the man to fill that need. Straight from central casting. We unanimously confirmed you 2 years ago to the Court of Appeals. I am confident that after this exhaustive process you will be confirmed to the august position of Chief Justice of the United States Supreme Court.

I look forward to participating in the hearing with you and congratulate you on being nominated to the position.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Feingold?

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Mr. Chairman, thank you, and, Judge Roberts, welcome. Welcome to you and your entire family.

First, I want to say, Mr. Chairman, how much I appreciate the evenhanded way that you and Senator Leahy have approached the preparations for the hearing.

Judge Roberts, I also want to thank you in advance for the long hours you will put in with us this week. I wish you well, and I truly do admire your record and your impressive career.

This is a confirmation proceeding, however, not a coronation. It is the Senate Judiciary Committee's job to ask tough questions. We are tasked by the Senate with getting a complete picture of your qualifications, your temperament, and how you will carry out your duties. Obviously, nominees to the Supreme Court must be subject to the highest level of scrutiny, and so as the nominee to be the Chief Justice of the United States, you will be subject to the ultimate level of scrutiny. Our colleagues in the Senate and the citizens of this country are entitled to a hearing that will actually help them decide whether you should be confirmed. And I am sure you understand that.

This is a lifetime appointment to preside over the Supreme Court and lead the entire Federal judiciary. You are obviously very talented, and you also look healthy. So I am sure—

[Laughter.]

Senator FEINGOLD. I am sure you appreciate the importance of this hearing for the future of our country.

Some have called for a dignified process. So have I. But at times, it sounds like what some really want for the nominee is an easy process. That is not what the Constitution or the traditions of the Senate call for. If by dignified they mean that tough and probing questions are out of bounds, I must strongly disagree. It is not undignified to ask questions that press the nominee for his views on the important areas of the law that the Supreme Court confronts. It is not undignified to review and explore the nominee's writings, his past statements, the briefs he has filed, the memos he has written. It is not undignified to ask the nominee questions he would rather not answer should he prefer to remain inscrutable or, worse yet, all things to all people.

This process is not a game. It is not a political contest. It is one of the most important things that the Senate does—confirm or reject nominees to the highest court in the land—and we as Senators must take that responsibility very seriously.

The most recent nine Justices of the Supreme Court served together almost as long as any other Court in history, more than 11 years. Because the Court has been so stable for so long, and Chief Justice Rehnquist presided over it for 19 years, Members of Congress and lawyers and the public have come to know the views of the Justices pretty well. Many Court watchers have become pretty

good at predicting the outcome of cases. That predictability is about to be tested because we will now have a new Chief Justice and because a member of the Court who was the deciding vote in many cases has also announced her retirement.

I do not think, however, that the public is required to wait until a new Chief Justice is seated on the Court to get some idea of how that new Chief Justice thinks, how that new Chief Justice will approach controversial issues that might come before the Court, and how that new Chief Justice also might run the Court. This hearing is our only opportunity to hear from this nominee how he would approach the important issues facing the Court.

In fact, I was struck as I was preparing for this hearing by remarks written years ago by Senator Grassley, my friend and colleague from Iowa and a senior member of this Committee, in the Committee Report on the nomination of Justice O'Connor. The current nomination to the position of Chief Justice makes his remarks even more apt. Senator Grassley said the following: "I do not agree that commenting on past Supreme Court decisions is a commitment to hold a certain way on future cases, and I feel that in order that we as Senators fulfill our duty, it is incumbent upon us to discover a nominee's judicial philosophy. In that we had a very limited number of judicial opinions rendered by Judge O'Connor on constitutional questions, it was my hope," Senator Grassley said, "by asking specific questions regarding past Supreme Court decisions, that the Committee might obtain a clearer understanding of her philosophy. My purpose was to satisfy my questions regarding Judge O'Connor's record in that I felt it was less complete than many other Supreme Court nominees who have had extensive experience either on the Federal bench or in leadership positions in the profession of law."

In some ways, Mr. Chairman, the record of our current nominee to the Court raises similar questions. He has a long record as a lawyer, but he has been on the Federal bench for only 2 years, and we have little in the way of his own writings on the issues before the Court to evaluate.

So, like Senator Grassley, I am interested in this nominee's views on a number of cases. I don't think that getting his reaction to those decisions will commit him to vote a certain way in a future case. After all, it is not that past case he will be deciding, but a different one. Even the current Justices, whose views on specific cases are well known, since they either wrote or joined one opinion or another, do not have to recuse themselves from a future case just because we know what they think of a crucial precedent in that case.

So I am looking for Judge Roberts to be forthcoming with this Committee about his views. So, to show the Senate's role in this process the respect it deserves, he should make every effort to be responsive.

Chief Justice Rehnquist himself acknowledged the importance of the Senate's role when he wrote the following in his last annual report on the Federal judiciary: "Our Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the Federal judiciary sub-

ject ultimately to the popular will because judges are appointed and confirmed by elected officials."

Now, that suggests to me that it is not only permissible, but critical, that the Senate seek to learn as much as it can about the views of nominees and that nominees be as forthcoming as they possibly can be without compromising their independence.

Now, we do have a mountain of material from the nominee's early years as a lawyer in the Justice Department and White House Counsel's office of the Reagan Administration. In memo after memo, his writing was highly ideological and sometimes dismissive of the views of others. I do, however, recognize that this is a different time, and he has been nominated to play a different kind of role than he played in those early Reagan years.

So, frankly, I will be looking for a somewhat different John Roberts than the John Roberts of 1985. As I have a chance to ask questions about topics such as executive power, civil liberties, voting rights, the death penalty, and other important issues, I hope to see how his views have developed and changed over the years. Of course, the best evidence of this would be some more recent writings of the nominee. But the administration has steadfastly refused a reasonable request for documents pertaining to a small fraction of the cases in which he participated as Deputy Solicitor General during the administration of President George H.W. Bush. I find this refusal very troubling in light of the ample precedent for releasing such documents in this kind of proceeding and the weakness of any claim that the release would damage the litigating position of the United States over 12 years later.

I also must say, candidly, the refusal gives rise to a reasonable inference that the administration has something to hide here. The administration has done this nominee no service by maintaining its intransigent position.

Mr. Chairman, it goes without saying that the Supreme Court is one of the most important institutions in our constitutional system and that the position of Chief Justice of the United States is one of the most important positions in our Government. The impact of this nominee on our country, should he be confirmed, will be enormous. That means our scrutiny of this nominee must be intense and thorough. In my view, we must evaluate not only his qualifications but also his ability to keep an open mind, his sensitivity to the concerns of all Americans and their right to equal protection under the laws, not only his intellectual capacity but his judgment and wisdom, not only his achievements but his fairness and his courage to stand up to the other branches of Government when they infringe on the rights and liberties of our citizens.

Judge Roberts, I look forward to the opportunity to question you, and I thank you, Mr. Chairman, again for the opportunity to speak today.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Feingold.

We will take a 15-minute break, and Senator Graham will be recognized for his opening statement at 2:15.

[Recess 2:00 to 2:15 p.m.]

Chairman SPECTER. We will resume our opening statements.

Senator Graham, you are recognized for your opening statement.

**STATEMENT OF HON. LINDSEY O. GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. Thanks for the seventh-inning stretch, too. We all very much appreciate it.

Judge Roberts, playing a little bit off of what my colleague Senator Feingold said, I don't think you expect it to be easy. And having to listen to 18 Senators proves the fact that it is not going to be easy. But I hope that we will live up to our end of the bargain to make it fair. And "fair" is something that comes around in September in South Carolina, or it can be an idea. The idea of treating you fairly is very important to me because not only are you on display but the Senate is on display. And Senator Kennedy said something that I disagree with, but he is very passionate in his statement. He said the central issue is whether or not you will embrace policies, a certain set of policies or whether or not you will roll back certain policy decisions.

I respectfully disagree with Senator Kennedy. To me, the central issue before the Senate is whether or not the Senate will allow President Bush to fulfill his campaign promise to appoint a well-qualified strict constructionist to the Supreme Court, and in this case, to appoint a Chief Justice to the Supreme Court in the mold of Justice Rehnquist.

He has been elected President twice. He has not hidden from the public what his view of a Supreme Court Justice should be and the philosophy that they should embrace. In my opinion, by picking you, he has lived up to his end of the bargain with the American people by choosing a well-qualified strict constructionist. You have been described as brilliant, talented, and well qualified, and that is by Democrats. The question is: Is that enough in 2005 to get confirmed? Maybe not.

Professor Michael Gerhardt has written an article in 2000 called "The Federal Appointments Process," and I think he has given some advice to our Democratic friends in the past, and maybe recently, about the confirmation process that we are engaged in today. And he has written, "The Constitution establishes a presumption of confirmation that works to the advantage of the President and his nominee."

I agree with that. Elections matter. We are not here to debate how to solve all of the Nation's problems. We are not here to talk about liberal philosophy versus conservative philosophy and what is best for the country. We are here to talk about you and whether or not you are qualified to sit on the Supreme Court, whether or not you have the intellect, the integrity, and the character. And it has been said in the past by members of this Committee—Senator Kennedy, and I believe is recognized by most Senators—that we are not charged with the responsibility of approving Justices if their views always coincide with our own. We are really interested in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle the most sensitive, important, and responsible job, and that is, being on the Supreme Court.

If you are looking for consistency, you have probably come to the wrong place, because the truth of the matter is that we are all involved in the electoral process ourselves, and we have different agendas. Your memos are going to be talked about. The memos you wrote while you were working for President Reagan and Bush I in my opinion reflect a conservative lawyer advising a conservative President about conservative policies. And to some, those policies make no sense. Those policies are out of the mainstream. But this hearing is about whether or not you are qualified and whether or not Reagan conservativism is in the mainstream.

Does affirmative action require quotas? From a conservative's point of view, no. From a conservative point of view, we do not want Federal judges setting the value of someone's wages from the bench. And you wrote about that. Now, some people want that, but conservatives do not.

Environmental policies. We want a clean environment. We do not want to ruin the economy in the process. We want to be able to build levees to protect cities. Conservatives have a different view of a lot of issues versus our friends on the other side. The election determines how that shakes out.

We are here to determine whether or not you and all you have done in your life makes you a fitting candidate to be on the Supreme Court. Before we got here, the Senate was in disarray. May 23rd of this year, I engaged in a compromise agreement with seven Democrats and seven Republicans to keep the Senate from blowing itself up. You are the first nomination that we have dealt with in any significant manner after that agreement. There is plenty of blame to go around, Judge Roberts. On our watch, I am sure we did things in Committee that were very unfair to Democratic nominees, particularly by President Clinton. And at the time of that agreement, there were ten people being filibustered for the first time in the history of the Senate in a partisan manner that were going to be on the court of appeals.

We were in chaos. We were at each other's throats. And since May 23rd, we have done better. The Senate has gotten back to a more traditional role when it comes to judges, and as Senator Specter described the Committee, we have done some good things here on this Committee and in the Senate as a whole.

I hope we will take the chance to start over because the public approval of the Senate now is in the 30s. And that is not your fault, Judge Roberts. It is our fault. We have an opportunity as Senators to show that we can disagree based on philosophy but give you a fair shake. The question is whether we will rise to the occasion. I am hopeful we will based on the statements being made.

What is the standard for a Senator to confirm a Supreme Court nominee? Whatever the Senator wants it to be. And, really, that is the way it should be. But there should be some goals, in my opinion. The way we conduct ourselves, one of the goals we should have is to make sure we don't run good people away from wanting to be a judge. I do not know what it is like to sit at home and turn on the television and watch a commercial about you in the presence of your wife and your kids that say some pretty unflattering things about you. That is just not a problem you have faced. I am sure Democratic nominees have faced the same type problem.

We should not in our standard, trying to come up with a standard, invalidate elections. The President won. The President told us what he is going to do, and he did it. He picked a strict constructionist to be on the Supreme Court. If anybody is surprised, they were not listening to the last campaign.

*Roe* v. *Wade*—it divides America. If you believe in polling, most Americans would like to see the decision stand, even though we are divided 50/50 on the idea of abortion on demand. My good friend from California has expressed a view about *Roe* v. *Wade*, which I completely understand and respect. I can just tell you, Judge Roberts, there are plenty of women in South Carolina who have an opposite view about abortion.

If we were to base our votes on that one principle, Justice Ginsburg would not be Justice Ginsburg. In her writings, she embraced the idea of Federal funding for abortion. She indicated that an abortion right was based on the Equal Protection Clause of the Constitution. I dare say that 90 percent of the Republican Caucus is pro-life. I dare say that 90 percent of the Democratic Caucus is pro-choice. Justice Ginsburg got 96 votes, even though she expressed a view of the Federal Government's role in abortion that I completely disagree with, and I think most conservatives disagree with.

There was a time not too long ago, Judge Roberts, where it was about the way you lived your life, how you conducted yourself, what kind of lawyer you were, what kind of man or woman you were, not whether you had an allegiance to a specific case or a particular cause. Let's get back to those days. Let's get back to the days where the Ginsburgs and the Scalias can be pushed and pressed, but they can be honored for their commitment to the law and the way they lived their life. Let's get back to the good old days where we understood that what we were looking for was well-qualified people to sit on the highest Court of the land, not political clones of our own philosophy.

The reason I signed the agreement more than anything else was that I love the law. The role of the law in our society is so important. You take out the rule of law and you do not have a democracy. The law, Judge Roberts, to me represents a quiet place in American discourse. Politics is a loud, noisy, and destructive place. But the courtroom is a quiet place where the weak can challenge the strong and the unpopular can be heard. I know you will honor the rule of law in our country and that you will be a judge that we all can be proud of.

God bless you and your family.

Chairman SPECTER. Thank you very much, Senator Graham.

Senator Schumer?

## STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. And, Judge Roberts, welcome to you and Mrs. Roberts, your parents, your family, your two beautiful children. I join my colleagues in congratulating you on your nomination to the position of Chief Justice of the United States. Now, this is indisputably the rarest opportunity in American Government. In the entire history of the Republic, we

have had but 16 Chief Justices. But the responsibility is as great as the opportunity is rare.

The decisions of the Supreme Court have a fundamental impact on people's lives, and the influence of a Chief Justice far outlasts that of a President. As the youngest nominee to the High Court's top seat in 204 years, you have the potential to wield more influence over the lives of the citizens of this country than any jurist in history. I cannot think of a more awesome responsibility—awesome not in the way my teenage daughter would use the word, but in the Biblical sense of the angels trembling in the presence of God.

But before you can assume that responsibility, we Senators, on behalf of the people, have to exercise our own responsibility. Fundamental to that responsibility is our obligation to ascertain your legal philosophy and judicial ideology. To me, the pivotal question which will determine my vote is this: Are you within the mainstream, albeit the conservative mainstream, or are you an ideologue who will seek to use the Court to impose your views upon us as certain judges, past and present, on the left and on the right, have attempted to do?

The American people need to learn a lot more about you before they and we can answer that question. You are without question an impressive, accomplished, and brilliant lawyer. You are a decent and honorable man. You have a remarkable resume. There are those who say your outstanding and accomplished resume should be enough, that you should simply promise to be fair and that we should confirm. I disagree. To me, the most important function of these hearings, because it is the most important qualification for a nominee to the Supreme Court, is to understand your legal philosophy and judicial ideology. This is especially true now that judges are largely nominated through an ideological prism by a President who has admitted he wants to appoint Justices in the mold of Scalia and Thomas. To those who say ideology does not matter, they should take their quarrel to President Bush.

I began to argue that consideration of a nominee's judicial ideology was crucial 4 years ago. Then I was almost alone. Today, there is a growing and gathering consensus on the left and on the right that these questions are legitimate, important, and awfully crucial. Therefore, I and others, on both sides of the aisle, will ask you about your views.

Here is what the American people need to know beyond your resume. They need to know who you are and how you think. They need to assess not only the sharpness of your mind but the fullness of your heart. They need to believe that an overachiever can identify with an underdog who has nothing but the Constitution on his side. They need to understand that your first-class education and your advantaged life will not blind you to the plight of those who need help and who rely on the protections of the Constitution, which is every one of us at one point or another. They need to be confident that your claim of judicial modesty is more than easy rhetoric, that your praise of legal stability is more than lip service. They need to know above all that if you take the stewardship of the High Court, you will not steer it so far out of the mainstream that it founders in the shallow waters of extremist ideology.

As far as your own views go, however, we only have scratched the surface. In a sense, we have seen maybe 10 percent of you, just the visible tip of the iceberg, not the 90 percent that is still submerged. And we all know that it is the ice beneath the surface that can sink the ship.

For this reason, it is our obligation to ask and your obligation to answer questions about your judicial philosophy and legal ideology. If you cannot answer these questions, how are we to determine whether you are in the mainstream? A simple resume, no matter how distinguished, cannot answer that question. So for me, the first criterion upon which I will base my vote is whether you will answer questions fully and forthrightly. We do not want to trick you, badger you, or play a game of "gotcha." That is why I met with you privately three times, and that is why I gave you a list of questions in advance of these hearings. It is not enough to say you will be fair. If that were enough, we would have no need for a hearing. I have no doubt you believe you will be a fair judge. I have no doubt that Justice Scalia thinks he is a fair judge and that Justice Ginsburg thinks she is a fair judge. But in case after case, they rule differently. They approach the Constitution differently, and they affect the lives of 280 million Americans differently. That is so, even though both Scalia and Ginsburg believe that they are fair.

You should be prepared to explain your views of the First Amendment and civil rights and environmental rights, religious liberty, privacy, workers' rights, women's rights, and a host of other issues relevant to the most powerful lifetime post in the Nation.

Now, having established that ideology and judicial philosophy are important, what is the best way to go about questioning on these subjects? The best way, I believe, is through understanding your views about particular past cases, not future cases that haven't been decided, but past, already decided cases. It is not the only way, but it the best and most straightforward way.

Some have argued that questioning a nominee about his or her personal views of the Constitution or about decided cases indicates prejudgment about a future case. It does nothing of the sort. Most nominees who have come before us, including Justice Ginsburg, whose precedent you often cite, have answered such questions. Contrary to popular mythology, when she was a nominee, Justice Ginsburg gave lengthy answers to scores of questions about constitutional law and decided cases, including individual autonomy, the First Amendment, criminal law, choice, discrimination, and gender equality. Although there were places she said she did not want to answer, she spoke about dozens of Supreme Court cases and often gave her unvarnished impressions, suggesting that some were problematic in their reasoning while others were eloquent in their vindication of important constitutional principles. And nominee after nominee, from Powell to Thomas to Breyer, answered numerous questions about decided cases, and no one ever questioned their fitness to hear cases on issues raised during confirmation hearings.

So I hope you will decide to answer questions about decided cases, which so many other nominees have done. If you refuse to talk about already decided cases, the burden, sir, is on you, one of

the most preeminent litigators in America, to figure out a way in plain English to help us determine whether you will be a conservative, but mainstream conservative, Chief Justice or an ideologue.

Let me be clear. I know you are a conservative. I do not expect your views to mirror mine. After all, President Bush won the election, and everyone understands that he will nominate conservatives to the Court. But while we certainly do not expect the Court to move to the left under the President, it should not move radically to the right.

You told me when we met that you were not an ideologue and you share my aversion to ideologues. Yet you have been embraced by some of the most extreme ideologues in America, like the leader of Operation Rescue. That gives rise to a question many are asking: What do they know about you that we do not?

Judge Roberts, if you want my vote, you need to meet two criteria: first, you need to answers questions fully so we can ascertain your judicial philosophy; and, second, once we have ascertained your philosophy, it must be clear that it is in the broad mainstream.

Judge Roberts, if you answer important questions forthrightly and convince me you are jurist in the broad mainstream, I will be able to vote for you, and I would like to be able to vote for you. But if you do not, I will not be able to vote for you.

Mr. Chairman, I have high hopes for these hearings. I want and the American people want a dignified, respectful hearing process, open, fair, thorough, aboveboard, one that brings not only dignity but, even more importantly, information about Judge Roberts's views and ideology to the American people. I, along with all of America, look forward to hearing your testimony.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Schumer.

Senator Cornyn?

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman.

Judge Roberts, let me also join in extending a warm welcome to you and your family for these hearings. As the 15th speaker in the order of seniority here, I recall the adage I learned when I first came to Washington that everything has been said, but not everyone has said it yet. And perhaps by the time this hearing is over this week, you will have a fuller appreciation than you do now for that.

But, of course, you are a known quantity, so to speak, to this Committee and to this Senate, having been confirmed by unanimous consent just 2 short years ago. And I want to extend a compliment to you on your judicial service. You have served with distinction in your current capacity.

While the importance of your nomination as Chief Justice of the United States cannot be overstated, it seems as though each new nomination to the Court brings an element of drama, somewhat akin to an election. Indeed, we have seen special interest groups raising money, running television advertisements, and even trying

to coerce you into stating your opinion on hot-button issues that are likely to come before you as a judge, as if this were an election.

But, of course, this is not an election, and no reasonable person expects you to make promises to politicians about how you are likely to rule on those issues when they come before the Court as a condition of confirmation.

Still, some in our country have lost sight of the proper role of an unelected judge where the people are sovereign and where Government enjoys no legitimacy except by consent of the governed. They see unelected judges primarily as policymakers and arbiters of every pressing social issue that might arise, with the authority to dictate to the people what they think is good for us.

Well, this ideal of the Supreme Court as a super-legislature to which we might turn to give us everything that is good and stop everything that is bad is not a view that I share, nor, for that matter, did those who wrote and ratified the Constitution. The Constitution does not guarantee everything that is good and prohibit everything that is bad, or it could have been written in two sentences. Rather, it guarantees some specific things, it prohibits some specific things, and leaves the rest to be sorted out through the democratic process.

Alexander Hamilton, as you know, wrote in the Federalist Papers, which argued for ratification of the Constitution, that the judicial branch, he predicted, would be known as the least dangerous branch. He believed that there is no liberty if the power of judging is not separated from the legislative and executive powers. Its sole purpose was to interpret and apply the laws of the land. Its role would be limited.

Regrettably, Justices have not always been faithful to this constitutional design. All we need to do is to look at the Supreme Court's track record to see why abdicating our right of self-government to nine judges isolated behind a monumental marble edifice, far removed from the life experiences of the average American, is a bad idea.

For example, the Constitution says in part that the Federal Government shall not prohibit the free exercise of religion or abridge freedom of speech. Many Americans, including me, are concerned that the Supreme Court, by erecting extra-constitutional and contradictory judge-made standards in this area of the law, has effectively banned voluntary religious expression from much of our public life, turning what should be official neutrality into a policy of official hostility.

To be sure, the Court has been zealous in protecting the rights of those who express themselves or promote their products using violence or sex, but voluntary expression of one's faith, never.

Likewise, many Americans, including me, are baffled that the Supreme Court recently saw fit to strike down the display of the Ten Commandments in Kentucky but uphold the constitutionality of a display in Texas, even while the Ten Commandments itself is prominently displayed in the chambers of the United States Supreme Court on its ceiling.

Many Americans, including me, wondered what to read into the Court's recent dismissal of a suit seeking to deny school children the right to recite the pledge of allegiance because it contains the

words "One nation under God." A majority of the Court refused to agree that the pledge was constitutional, leaving this time-honored tradition of school children across our Nation in legal limbo.

And, recently, the Court expanded the awesome power of Government to condemn private property beyond all previous bounds by reading the public use limitation on eminent domain right out of the Constitution. Justice O'Connor warned, "The specter of condemnation now hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

On what legitimate basis can the Supreme Court uphold State laws on the death penalty in 1989, then strike them down in 2005, relying not on the written Constitution, which, of course, had not changed, but on foreign laws that no American has voted on, consented to, or may even be aware of? When in 2003 the Court decided *Lawrence* v. *Texas*, the Court overruled a 1986 decision on the constitutionality of State laws based on the collective moral judgment of those States about permissible sexual activity. What changed in that intervening time? Did the Constitution change? Well, no. Did the Justices change? Yes. But should that determine a different meaning of the Constitution? Are some judges merely imposing their personal preferences under the guise of constitutional interpretation? Indeed, this was the same case, as you know, Judge Roberts, that served as the cornerstone of the Massachusetts Supreme Court's decision holding that State laws limiting marriage to a man and a woman amounted to illegal discrimination.

Let me close on an issue that several Senators have already mentioned today, and that is, your obligation to answer our questions. Of course, I share with all of my colleagues a desire and a curiosity, really, to know what you think about all sorts of issues. All of us are curious. But just because we are curious does not mean that our curiosity should be satisfied. You have no obligation to tell us how you will rule on any issue that might come before you if you are confirmed to the Supreme Court.

It boils down to a question of impartiality and fairness. One characteristic of good judges is that they keep an open mind until they hear the facts and hear the lawyers argue the case before them. If you pledge today to rule a certain way on an issue, how can parties to future cases possibly feel that they would ever have a fair day in court?

Justice Ginsburg, as we have heard already, one of the last Supreme Court Justices confirmed by the Senate, noted not too long ago, "In accord with longstanding norm, every member of the current Supreme Court declined to furnish such information. The line each Justice drew in response to pre-confirmation questioning is crucial to the health of the Federal judiciary." And this has come to be known as "the Ginsburg standard," although it has been the norm for all nominees who come before the Committee and before the Senate for confirmation.

Now, I know some of the members of the Committee will ask you questions that you cannot answer. They will try to entice you to abandon the rules of ethics and the long tradition described by Justice Ginsburg. But that should not concern you, Judge Roberts. Don't take the bait. Do not head down that road, but do exactly

what every nominee of every Republican President and every Democratic President has done: decline to answer any question that you feel would compromise your ability to do your job. The vast majority of the Senate, I am convinced, will not punish you for doing so. Rather, I am convinced that the vast majority of the Senate will respect you for this decision because it will show you are a person of deep integrity and independence, unwilling to trade your ethics for a confirmation vote.

Again, let me say welcome to you again before the Committee, and thank you for your continued willingness to serve this great Nation.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Durbin?

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman.

Judge Roberts, welcome to you and your family. Congratulations on your nomination. The Committee hearing began with the Chairman telling us that you had shared the wisdom of 47 individual Senators by visiting their office, some of them on several different occasions, and many people believe that that fact alone should earn you confirmation before the United States Senate.

Twelve years ago, at the nomination hearing of Justice Ruth Bader Ginsburg, my friend, Illinois Senator Paul Simon, said something worth repeating. He said to the nominee, and I quote, "You face a much harsher judge. . . than this Committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

I think Senator Simon put his finger on how the United States Senate should evaluate a nominee for a lifetime appointment to the Federal bench.

Judge Roberts, if you are confirmed to be the first Supreme Court Justice in the 21st century, the basic question is this: Will you restrict the personal freedoms we enjoy as Americans, or will you expand them?

When we met in my office many weeks ago, I gave you a biography of a judge I admire greatly. His name was Frank Johnson, a Federal district judge from Alabama and a lifelong Republican. Fifty years ago, following the arrest of Rosa Parks, Judge Johnson ruled that African-Americans in Montgomery, Alabama, were acting within their constitutional rights when they organized a boycott of the buses, and he later ruled that Martin Luther King, Jr., and others could march from Selma to Montgomery. As a result of those decisions, the Ku Klux Klan branded Johnson the most hated man in America. Wooden crosses were burned on his lawn. He received so many death threats that his family was under constant Federal protection from 1961 to 1975.

Judge Frank Johnson was denounced as a judicial activist and threatened with impeachment. He had the courage to expand freedom in America. Judge Roberts, I hope that you agree America must never return to those days of discrimination and limitations on our freedom.

Now, some of the memos you wrote—that I talked to you about in my office—many, many years ago in the Reagan administration have raised some serious concerns about where you stand on civil rights and women's rights, concerns that have led some of the most respected civil rights groups in America to openly oppose your nomination.

So it is important for you at this hearing to answer the questions and to tell us your views on civil rights and equality and the role of courts in protecting these basic freedoms. This hearing is your opportunity to clarify the record, to explain your views. We cannot assume that time or maturity has changed your thinking from those Reagan-era memos. The refusal of the White House to disclose documents on 16 specific cases you worked on as Deputy Solicitor General denies this Committee more contemporary expressions of your values. Only your testimony before this Committee can convince us that John Roberts of 2005 will be a truly impartial and open-minded Chief Justice.

Concerns have also been raised about some of the things you wrote relative to the right of privacy. We have gone through *Griswold*, we know what that Supreme Court decision meant in 1965, 40 years ago, when the Court struck down the Connecticut statute which made it a crime for married couples to buy and use birth control. They said there was a fundamental right of privacy in that Constitution, though you can search every word of it and not find the word "privacy." But it is far from settled law in the minds of many. Forty years later, there have been new efforts to restrict the right of privacy—attempts to impose gag rules on doctors when they speak to their patients about family planning. You saw it in the sad debate over the tragedy of Terri Schiavo, a debate that led some members of Congress to threaten judges who disagreed with their point of view with impeachment. And you can find it in the eagerness to authorize the Government to pry into our financial records, medical records, and library records.

Whether the Court continues to recognize and protect America's right to privacy will have a profound impact on every American from birth to death. In your early writings, that we have to rely on here, you referred to this right of privacy as "an abstraction." We need to know if that is what you believe.

We also need to hear your views on another basic issue, and that is executive power. They do not teach this subject much in law school. It is not tested on any bar exam. It has not been a major focus in many Supreme Court hearings. Yet it is very important today.

Some aspects of your early record when you were an attorney for a President, suggest you might be overly deferential to the executive branch. We need to know where you stand. Throughout history during times of war, Presidents have tried to restrict liberty in the name of security. The Supreme Court has always been the guardian of our Constitution. It has usually been up to the task, but sometimes it has failed—such as in the notorious *Korematsu* decision.

We are being tested again. Will we stand by our Constitution in this age of terrorism? That challenge will fall especially on our Supreme Court and on you, Judge Roberts, if you are confirmed.

We also need to know what you think about religious liberty. Over the past few decades, the Supreme Court has maintained a delicate yet, what I believe, proper balance between church and state. Justice Sandra Day O'Connor said it so well in the recent Ten Commandments decision, and I quote: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

I asked you a question when you came by to see me, which I am not sure either one of us could answer at that moment. I asked you who has the burden of proof at this hearing. Do you have the burden to prove that you are a person worthy of a lifetime appointment to the Supreme Court, or do we have the burden to prove that President Bush was wrong in selecting you? Your position as Supreme Court Chief Justice gives you extraordinary power to appoint 11 judges on the FISA court, which has the authority to issue warrants for searches and wiretaps of American citizens, all the way to the establishment of rules of criminal and civil procedure. No one has the right to sit on that court. No one has the right to be Chief Justice. But they can earn it through a hearing such as the one which we have today.

I spoke earlier about the courage of Frank Johnson. A few months ago, another judge of rare courage testified before this Committee. Her name is Joan Lefkow. She is a Federal judge in Chicago, and I was honored to recommend her. Last February, her husband and mother were murdered in her home by a deranged man who was angry that she had dismissed his lawsuit. In her remarks to the Committee, Judge Lefkow said that the murders of her family members were "a direct result of a decision made in the course of fulfilling our duty to do justice without fear or favor." In my view, that is the only proper test for a Supreme Court justice. Will he do justice without fear or favor? Will he expand freedom for all Americans, as Judge Frank Johnson, the condemned judicial activist, once did?

I congratulate you, Judge Roberts, on your nomination and on your accomplished career. I look forward to these hearings to give you your chance in the next several days not to rely on 20-year-old memos or innuendos and statements by those who are not part of the hearing, but in your own words, a chance to tell us and to tell the American people what you truly believe. If you believe that you have the burden at this hearing to establish why you are worthy of this, the highest-ranking position of a judge in America, I hope that you will be forthcoming. If you do not answer the questions, if you hold back, if you believe, as some on the other side have suggested, that you have no responsibility to answer these questions, I am afraid that the results will not be as positive. I certainly hope that they will be positive.

Thank you.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Durbin.

I recognize now Senator Brownback, and also recognize today is his birthday.

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you very much. This is certainly a long way to spend it. It is seeming like a long birthday. Judge Roberts, as one of my colleagues was just saying, I hope we are done before my birthday ends.

I welcome you to the Court, delighted to have you and your family here. I want to congratulate you on your lifetime of service thus far, and I look forward to future service that you will have for this great land.

I recall the enjoyable meeting that you and I had in my office, as many of the members here have had as well. You said two things in our meeting that I particularly took away and hung on to as an indicator of how you would look at the courts and also what America needs from our courts. One of the statements was that we need a more modest Court. And I looked at that and I thought, that is exactly the way the American people would look at the situation today. We need a more modest Court—a Court that is a court, and not a super-legislature. That looks at the Constitution as it is, not as we wish it might be, but as it is, so that we can be a rule-of-law Nation.

You had a second point that was very apt, I thought, when you talked about the courts and baseball. The analogy you draw, I found very appealing. You said it is a bad thing when the umpire is the most watched person on the field. In today's American governance, the legislature can pass a bill, and the Executive can sign it, but then everybody holds their breath, waiting to see how the Court is going to look at this and how it is going to interpret it. It seems as if the Court is the real mover of what the actual law is. And that is a bad thing. The umpire should call the ball fair or foul, it is in or it is out, but not become actively involved as a player on the field. Unfortunately, we have reached a point where, in many respects, the judiciary is the most active policy player on the field.

I was struck by your statement when you originally were nominated, that you had "a profound appreciation for the role of the Court in our constitutional democracy." That is something I think we all respect and we look for in what we need to do.

Democracy, I believe, loses its luster when Justices on the High Court—who are unelected and not directly accountable—invent constitutional rights and alter the balance of governmental powers in ways that find no support in the text, the structure, or the history of the Constitution. Unfortunately, the Court in recent years, I believe, has gone into that terrain.

In our system of government, the Constitution contemplates that Federal courts will exercise limited jurisdiction. They should neither write nor execute the laws, but simply "say what the law is," as Chief Justice Marshall said in *Marbury* v. *Madison*. The narrow

scope of judicial power was the reason the people accepted the idea that the Federal courts could have the power of judicial review; that is, the ability to decide whether a challenged law comports with the Constitution. The people believed that the courts would maintain their independence and, at the same time, would recognize their role by deferring to the political branches on policy choices.

Legitimacy based on judicial restraint was a concept perhaps best expressed by Justice Felix Frankfurter, appointed by President Franklin Delano Roosevelt. He said this: Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures. Primary responsibility for adjusting the interests which compete of necessity belongs to the Congress.

Yet courts today have strayed far beyond this limited role. Constitutionalists from Hamilton to Frankfurter surely would be shocked at the broad sweep of judicial activity today. Federal courts are redefining the meaning of marriage, deciding when a human life is worthy of protection, running prisons and schools by decree, removing expressions of faith from the public square, permitting the Government, under the Takings Clause, to confiscate property from one person and give it to another in the name of private economic development, and then interpreting our American Constitution on the basis of foreign and international law.

Perhaps the Supreme Court's most notorious exercise of raw political power came in *Roe* v. *Wade* and *Doe* v. *Bolton*, two 1973 cases based on false statements which invented a constitutional right to abortion. The issue had been handled by the people through their elected representatives prior to that time. Since that decision, nearly 40 million children have been aborted in America. Forty million lives that could be amongst us, but are not. Beautiful innocent faces that could bless our existence, our families, and our Nation, creating and expanding a culture of life.

If you are confirmed, your Court will decide if there is a constitutional right to partially deliver a late-term child and then destroy it. Partial-birth abortion is making its way to the Supreme Court. The Federal courts have thus far found laws limiting partial-birth abortion unconstitutional.

Now, it should be noted again, if Roe is overturned, it does not ban abortion in America. It merely returns the issue to the States, so States like Kansas or California can set the standards they see right and just. Although the principle of *stare decisis* will be involved, I would note that the Supreme Court frequently has overruled prior precedents. A case founded in my State, *Brown* v. *Board of Education*, which overruled *Plessy* v. *Ferguson*, fits within a broad pattern of revising previous decisions since the founding. I would note for you that, by some measures, the Supreme Court has overruled itself in 174 cases, with a substantial majority of those cases involving constitutional, not statutory, issues.

One final thought. In a just and healthy society, both righteousness and justice travel together. Righteousness is the knowledge of right from wrong, good from evil, and that is something that is written on our hearts. Justice is the application of that knowledge.

Everybody in our representative form of Government tries to do both of these, righteousness and justice, within the boundaries set for each of us. No one branch has unlimited control. The Supreme Court has boundaries, too. There are checks and balances on what it can deal with and what it can do. For instance, the Court cannot appropriate money. That power is specifically left to the Congress in the Constitution, no matter how right or just the Court may view the cause.

We all are constitutional officers, sworn to uphold the Constitution. Yet each branch has separate functions, which the other branch can check and balance. The total system functions best when each branch does its job but not the other's.

We have arrived at an important moment with your nomination to serve as Chief Justice of the United States, that is quite a title. Will you serve, as Hamilton assured the people, by exercising judgment rather than will? My review of your many legal writings over the past quarter-century leads me to believe that this is the case. I hope that this instinct will be proven correct during the days to come, that you, Judge Roberts, will be confirmed to serve as the first Justice among equals and that the noble legacy of the Justice that you once served will be honored.

God bless you and your family.

Chairman SPECTER. Thank you, Senator Brownback.

Senator Coburn?

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator COBURN. Thank you, Senator. First of all, I would like to thank you and your staff, as well as all the staff of this Committee. While we were traveling in August, they were laboring diligently to help prepare us for these hearings.

I also think everybody should know that Senator Brownback is entering his fifth decade, so he can catch up with the rest of us.

And finally, I am somewhat amused at the propensity for us to project your life expectancy. I met with you twice, and as the only physician on this panel and one of the few non-lawyers on this panel, I find it somewhat amusing that we can predict that without a history, a physical exam, or a family history. But we will let that pass.

I am a physician, and up until the end of this month and, hopefully, after that, I will continue to practice. This weekend I had the great fortune of delivering two little girls. And I have had the opportunity to talk with people from all walks of life as a physician—those that have nothing and those that have everything. And I believe the people in our country, and in my State in particular, are interested and concerned with two main issues. One is this word of judicial activism that means such a different thing to so many different people. And the second is the polarization that has resulted from it, and the division that occurred in our country that separates us and divides us at a time when we need to be together.

We each have our own definition of judicial activism. Essentially, the Court will not become an activist court if it adheres to its appropriate role and does not attempt to legislate or create policy. There always will be and should always be checks on each of the different branches of Government. Yet look where we are today. Decades of judicial activism have created these huge rifts in the social fabric of our country. Whether we are on one side or the other, it is a tension pulling us apart rather than a tension pulling us together.

I believe we have seen Federal and State legislators' responsibility usurped by the Court, especially to make important decisions, and I think that is what has created a lot of the division within our country. And I believe it is time that that stop, and a limited role for the Supreme Court. I think we are willing to debate as a country what judicial activism is, but we are also wanting someone who will listen to both sides of that and, in a measured and balanced way, knowing what the Constitution says and the restraint that our forefathers have written about, will take that into consideration.

I am deeply heartened in that I have read many statements that you have made, where you indicate a more proper role for that of the judiciary, and I believe in our discussion, a super-legislator body is not what the Court was intended to be.

When I ponder our country and its greatness, its weaknesses, its potential, my heart aches for less divisiveness, less polarization, less finger pointing, less bitterness, less mindless partisanship, which at times sounds almost hateful to the ear of Americans. The problems before our country are enormous. Our family structures have declined. Our dependency on Government has grown. The very heritage of our country, which was born out of sacrifice by those who preceded us is at risk. We are all Americans. We all want the greatest future for the generations to come, protection for the innocent and the frail, support for those less fortunate. But most of all we want an America that will live on as a beacon of hope, freedom, kindness and opportunity.

America is an idea. It is not competing ideologies. It is an idea that has proven tremendously successful, and when we reduce it to that of competing ideologies, we make it less than what it is. I believe the genius of our Founders is that they recognized that individual rights were derived from a creator, not a king, not a court, not a legislature or a state. Our Founders were concerned that if our rights derived from the state or a court, they could be taken away by a state or a court. Our Constitution enshrines this idea and gives its meaning in the rule of law. That is why it is important for us to respect the words of that Constitution.

I would hope, as we conduct these hearings over the next few days, our tendency as politicians to be insensitive, bitter, discourteous and political, will surrender to the higher values that define us as a Nation. We have an opportunity to lead by example, to restore the values and principles that bind us together. How we conduct ourselves and how we treat you, Judge Roberts, can be a great start towards reconciliation in our country.

I want one America. An America that continues to be divided is an America that is at risk. Our country waits for its leaders at all

levels to rise to the occasion of rebuilding our future by placing our political fortunes last and constitutional principles first, and working diligently to reconcile each and every American to the freedom and responsibility that our republic demands.

May God bless our efforts.

Chairman SPECTER. Thank you very much, Senator Coburn.

We now move to the presenters, Senator Lugar, Senator Bayh and Senator Warner, and then the administration of the oath to Judge Roberts, and then Judge Roberts's opening statement.

Welcome, Senator Lugar, as the senior presenter, elected in 1976, Indiana's senior Senator. We have allotted 5 minutes each to the presenters, and Senator Lugar, you are now recognized.

**PRESENTATION OF JOHN G. ROBERTS, JR., NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES, BY HON. RICHARD G. LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA**

Senator LUGAR. Mr. Chairman, let me first ask that a copy of my full statement appear in the Committee record.

Chairman SPECTER. Without objection, your full statement will be made a part of the record.

Senator LUGAR. Thank you, Mr. Chairman. It is a genuine privilege and pleasure to appear before you, Senator Leahy, and my other distinguished colleagues who serve on this important Committee.

I am pleased to introduce the President's nominee to serve as the 109th Justice of the Supreme Court and the 17th Chief Justice of the United States, John G. Roberts, Jr.

Judge Roberts was born in Buffalo, New York, but moved at age 8 to Indiana. The Roberts's family settled in Long Beach, a small Hoosier community on the shores of Lake Michigan. John attended local schools there in nearby LaPorte, and in 1973 was graduated first in his high school class of 22, having also excelled in numerous extracurricular activities, including co-captaining the football team, despite his self-described status as a slow-footed halfback.

I know Committee Members will understand my observing that our State takes a certain pride of its own nomination by the President to lead the Nation's highest court. Simply put, John Roberts is a brilliant lawyer, a jurist with an extraordinary record of accomplishments in public service. This exceptional blend of professional and personal qualifications is especially important now, given the further responsibilities Judge Roberts has been called upon to assume on the passing of the Chief Justice.

I know Judge Roberts is keenly and humbly aware of the large shoes he has now been asked to fill, the more so since the late Chief Justice was his own initial boss when he arrived in Washington a quarter century ago. All Americans can be grateful that Judge Roberts not only learned, but has lived the lessons taught by his mentor and his role model. In my judgment, he is extremely qualified to carry forward the tradition of fair, principled and collegial leadership that so distinguished the man for whom he once worked, and has now been nominated to replace.

Under the judicial confirmation standards that prevail throughout most of our history, my remarks could appropriately end at this point, and the Committee and the Senate as a whole could proceed

to consider Judge Roberts's nomination in light of his outstanding qualifications. Indeed, nominees almost never testified in such hearings before 1955, and the last Supreme Court Justice from Indiana, Sherman Minton, was confirmed without controversy, despite declining even to appear before the Committee, following his nomination by President Truman.

I am not troubled by the fact that the Committee hearings, including testimony by Supreme Court nominees now seems firmly established as part of the confirmation process. These proceedings serve a vital role in our deliberations and are a vivid course in living history for all Americans. But it is important we write that history well.

Today's Supreme Court regularly faces issues of enormous public import and attendant controversy. Many are deeply divisive with well-funded, well-organized advocacy groups passionately committed to one or the other side, and for whom the central exclusive focus is who wins. Media coverage and the information age, whether on talk radio or countless cable outlets, featuring talking heads for each side, fuels both the controversy and the resultant tendency to see the Supreme Court as a kind of political branch of last resort. When a Court vacancy occurs, the confirmation process takes on the trappings of a political campaign, replete with interest group television ads that often reflect the same oversimplifications and distortions that are disturbing even in campaign for offices that are in fact political.

All of this may be understandable. It remains, in my view, a fundamental departure from the vision of the courts and their proper role than animated those who crafted our Constitution. The Founders were at pains to emphasize the difference between the political branches, the executive and legislative and the judiciary. Their concern about the potential dangers of passionate, interest-driven political divisions, which Madison famously called the "Mischiefs of Faction," influenced their design of our entire governmental structure, but they were especially concerned that such mischiefs not permeate those who would sit on the bench. Otherwise, they warned, the pestilential breath of faction may poison the fountains of justice, and would stifle the voice both of law and of equity.

I believe that each of us in the Senate bears a special responsibility to prevent that from occurring. The primary focus of these hearings and our subsequent debate and vote on the floor will be Judge Roberts and his qualifications. But another focus will be whether the Senate, in discharging this solemn advice as a consent duty conferred by the Constitution, is faithful to the trust the Founders placed in us.

I thank you, Mr. Chairman, and all Members of the Committee for your courtesy in allowing me to introduce Judge John G. Roberts, Jr., a distinguished son of Indiana, who I believe will prove to be an outstanding Chief Justice of the United States Supreme Court.

I thank you very much.

[The prepared statement of Senator Lugar appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Lugar.

We now turn to Senator Bayh, elected in 1998, previously Governor of Indiana. Senator Bayh.

**PRESENTATION OF JOHN G. ROBERTS, JR., NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES, BY HON. EVAN BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA**

Senator BAYH. Thank you very much, Chairman Specter, Senator Leahy, members of the Judiciary Committee.

There is not nearly enough civility in Washington today, so when I was asked to uphold longstanding and bipartisan tradition to introduce someone from my State, I did not hesitate to accept.

I am pleased to join with my friends and our colleagues, Dick Lugar and John Warner, to introduce to you, John Roberts.

John Roberts grew up in northwest Indiana and still has family living in our State. He is the proud father of two lovely children, Jack and Josie, and the husband of Jane.

At only 50, Judge Roberts has had a distinguished legal career that would make most lawyers envious. He has argued 39 cases before our Supreme Court, and won 25 of them. Most lawyers are lucky to argue and win one case before our Nation's highest Court. There is no question that Judge Roberts has achieved much through hard work and great ability to reach the pinnacle of the legal profession.

If confirmed as Chief Justice of the Supreme Court, Judge Roberts could serve for 30 or more years. During that time, the Court will likely hear cases that affect every aspect of the law and American life, from civil rights, to women's rights, to property rights, to States' rights. I look forward to a full and clarifying discussion of his views on these important topics and others, because for this nominee and for anyone who aspires to our Nation's highest Court, it is ultimately their beliefs, even more than their biography, which determine the result of the confirmation process.

As a fellow Hoosier, I am proud that someone from our State would be so talented and so successful to be considered for a position on the highest Court of our land.

Mr. Chairman, Senator Leahy, my colleagues, I am pleased to introduce to you a fellow Hoosier, Judge John Roberts.

Chairman SPECTER. Thank you very much, Senator Bayh.

Senator Warner, welcome back. When you were here earlier this morning I said you would be recognized at about 3:20. I want to apologize for being two minutes off.

Senator WARNER. It is almost, Mr. Chairman. I will take till 3:10 to finish my statement if you yield back your time to me.

Chairman SPECTER. Your full statement will be made a part of the record, Senator Warner.

**PRESENTATION OF JOHN G. ROBERTS, JR., NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WARNER. Members of the Committee and Judge Roberts and his family, I find this a singular privilege in my now 27 years in this institution.

Speaking of institutions, in 218 years since the Constitution was ratified, we have had 43 Presidents and this is the 17th Chief Jus-

tice. It seems to me that underscores the importance of this hearing. Further, the Senate deliberations in this hearing, followed by subsequent floor debate, provide a unique opportunity for generations of Americans, particularly the younger Americans, to acquaint themselves with how our Government operates.

I am absolutely confident that this distinguished Committee, before whom I have appeared many, many times in these years, will comport yourselves in a manner in the finest traditions of the Senate, and will impart in our audience across America, particularly the younger ones, a respect for and an understanding of the institution of the United States Senate and its responsibilities.

The Constitution, together with the Bill of Rights, is an amazing document, for it is the reason that our Nation's Government stands today as the oldest continuous democratic republic form of government in the world today. Indeed, most all of the other bold experiments in Government have gone into the dust bin of history. Little wonder why so many other nations are forming their governments today, patterning their government on ours.

But only of the President and the Senate fairly, objectively and in a timely manner, exercise these respective constitutional powers, can the judicial branch have the numbers of qualified judges to properly serve the needs of our citizens. For this reason, in my view, a Senator has no higher duty than his or her responsibilities under Article II, Section II.

Recently 14 Senators, of which I was one, committed ourselves in writing to support the Senate leadership in facilitating the Senate's responsibility of providing advice and consent. In our memorandum of understanding, Senator Byrd and I incorporated language that spoke directly to the Founding Fathers' explicit use of the word "advice." Without question our framers put the word "advice" in the Constitution for a reason, to ensure consultation between a President and the Senate prior to the forwarding of a nominee to the Senate for consideration. I commend President Bush for the exemplary manner in which he conducted the advice and consent responsibility.

Now, with the beginning of these hearings, the Senate commences the next phase, the consent phase of this constitutional process. After the Committee consideration, the nomination will move to the full Senate for debate, followed by a vote. Throughout this process, the ultimate question will remain the same, whether the Senate should grant, or deny, consent.

Now to this distinguished jurist. I judge his credentials to be Chief Justice in the same manner as I have applied to all others since I have been privileged to serve in this institution. I recounted there are about over 2,000 nominations that have come in this quarter of a century plus. I can say without equivocation, I have never seen the credentials of any nominee with stronger qualifications than Judge Roberts.

Some 2 years ago, when nominated to serve in the Court of Appeals for the District of Columbia, I was privileged, at his request, to introduce him. At the time he was relatively unknown. Today the world knows him.

We were brought together because we were both fortunate to have been partners at different times in our careers at the law firm

of Hogan & Hartson, a venerable firm known for its integrity and rigid adherence to ethics. Among the firm's many salutary credentials, it has been long known for its pro bono work.

In fact, I will share a personal story. In 1960, I was an Assistant U.S. Attorney—been there about 4 years. A knock came on my door, and in walked a very tall, erect man, introducing himself as having just been appointed to represent an indigent defendant charged with first degree murder. We had a brief consultation. The trial followed. Midway in the trial the defendant pleaded guilty to a lesser offense. That man was Nelson D. Hartson, Senior Partner and Founder of this firm.

I firmly believe that John Roberts shares in the belief that lawyers have an ethical duty to give back to the community by providing free legal services, particularly to those in need. The hundreds and hundreds of hours he spent working on pro bono cases are a testament to that. He did not have to do any of it. The bar does not require it, but he did it out of the graciousness of his heart and obligation.

Those who know him best can also attest to the kind of person he is. Throughout his legal career, both in public and private practice, in his pro bono work, Roberts has worked with and against hundreds of lawyers. Those attorneys who know him well typically speak with one voice when they tell you that dignity, humility and a sense of fairness are the hallmarks of this nominee.

In conclusion, Mr. Chairman, I take a moment to remind all present, and those listening and following, that this exact week 218 years ago, our Founding Fathers finished the final draft of the U.S. Constitution, after a long hot summer of drafting and debating. And when Ben Franklin ultimately emerged from Independence Hall upon the conclusion of the Convention, a reporter asked him, "Mr. Franklin, sir, what have you wrought?" And he said, "A republic, if you can keep it." And that is ultimately what this advice and consent process is all about.

But while the Constitution sets the course of our Nation, it is without question the Chief Justice of the United States who must have his hand firmly on the tiller to keep our great ship of state on a course consistent with the Constitution.

I shall follow carefully the deliberations of this Committee. I will participate in the floor debate. I look forward to the privilege of voting for this fine outstanding public servant.

Judge Roberts, I am the last. You are on your own.

[Laughter.]

[The prepared statement of Senator Warner appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Warner. Thank you, Senator Lugar. Thank you, Senator Bayh.

Judge Roberts, if you will now resume your position at center stage. Judge Roberts, if you would now stand, please. The protocol calls for your swearing in at this point. We have 23 photographers in the well, 5 more waiting. We may revise our procedures to swear you in at the start of the proceeding if you should come back.

If you would raise your right hand. They have asked me to do this slowly because this is their one photo op.

Do you solemnly swear that the testimony you will give before this Committee on the Judiciary of the United States Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge ROBERTS. I do.

Chairman SPECTER. Thank you. You may be seated.

Judge Roberts, we compliment you on your patience in listening to 21 speeches, and the floor is now yours.

**STATEMENT OF JOHN G. ROBERTS, JR., NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES**

Judge ROBERTS. Thank you very much, Mr. Chairman, and Senator Leahy, and members of the Committee.

Let me begin by thanking Senators Lugar and Warner and Bayh for their warm and generous introductions.

And let me reiterate my thanks to the President for nominating me. I am humbled by his confidence, and if confirmed, I will do everything I can to be worthy of the high trust he has placed in me.

Let me also thank you, Mr. Chairman, and the members of the Committee for the many courtesies you have extended to me and my family over the past eight weeks. I am particularly grateful that members have been so accommodating in meeting with me personally. I have found those meetings very useful in better understanding the concerns of the Committee as the Committee undertakes its constitutional responsibility of advice and consent.

I know that I would not be here today were it not for the sacrifices and help over the years of my family, who you met earlier today, friends, mentors, teachers and colleagues, many of whom are here today.

Last week one of those mentors and friends, Chief Justice William Rehnquist, was laid to rest. I talked last week with the nurses who helped care for him over the past year, and I was glad to hear from them that he was not a particularly good patient.

[Laughter.]

Judge ROBERTS. He chafed at the limitations they tried to impose. His dedication to duty over the past year was an inspiration to me and I know to many others. I will miss him.

My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.

Mr. Chairman, when I worked in the Department of Justice in the Office of the Solicitor General, it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, "I speak for my country." But it was after I left the Department and began arguing

cases against the United States, that I fully appreciated the importance of the Supreme Court in our constitutional system. Here was the United States, the most powerful entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law, and the Government was wrong, and all that power and might would recede in deference to the rule of law.

That is a remarkable thing. It is what we mean when we say that we are a Government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world, because without the rule of law, any rights are meaningless.

President Ronald Reagan used to speak of the Soviet Constitution, and he noted that it purported to grant wonderful rights of all sorts to people, but those rights were empty promises because that system did not have an independent judiciary to uphold the rule of law and enforce those rights. We do, because of the wisdom of our Founders and the sacrifices of our heroes over the generations to make their vision a reality.

Mr. Chairman, I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.

Senators Lugar and Bayh talked of my boyhood back in Indiana. I think all of us retain from the days of our youth certain enduring images. For me those images are of the endless fields of Indiana, stretching to the horizon, punctuated only by an isolated silo or a barn. And as I grew older, those endless fields came to represent for me the limitless possibilities of our great land.

Growing up, I never imagined that I would be here in this historic room, nominated to be the Chief Justice. But now that I am here, I recall those endless fields with their promise of infinite possibilities, and that memory inspires in me a very profound commitment. If I am confirmed, I will be vigilant to protect the independence and integrity of the Supreme Court, and I will work to ensure that it upholds the rule of law and safeguards those liberties that make this land one of endless possibilities for all Americans.

Thank you, Mr. Chairman. Thank you, members of the Committee. I look forward to your questions.

[The biographical information of Judge Roberts follows:]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**GENERAL (PUBLIC)**

1. **Name**: Full name (include any former names used).

   John Glover Roberts, Jr.

2. **Position**: State the position for which you have been nominated.

   Associate Justice, Supreme Court of the United States

3. **Address**: List current office address. If state of residence differs from your place of employment, please list the state where you currently reside.

   Office:

   E. Barrett Prettyman Courthouse
   333 Constitution Avenue, N.W.
   Washington, D.C. 20001

   Residence:

   Maryland

4. **Birthplace**: State date and place of birth.

   January 27, 1955
   Buffalo, New York

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Jane Sullivan Roberts, July 27, 1996.
   Spouse's maiden name: Jane Marie Sullivan
   Spouse's occupation: Attorney
   Spouse's employer: Pillsbury Winthrop Shaw Pittman L.L.P.
   2300 N Street, N.W.
   Washington, D.C. 20037
   Two dependent children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Attended Harvard Law School, 1976-1979. Awarded J.D. *magna cum laude* June 7, 1979.

   Attended Harvard College, 1973-1976 (entered with sophomore standing). Awarded A.B. *summa cum laude* June 17, 1976.

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

   June 2003 – present: Judge, U.S. Court of Appeals for the D.C. Circuit, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

   July 2005: Adjunct Professor, Georgetown University Law Center Summer Program, Jeremy Bentham House, University College London, Endsleigh Gardens, London, WC1H OEG, Great Britain.

   January 1993 – May 2003: Partner, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004.

   October 1989 – January 1993: Principal Deputy Solicitor General, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

   May 1986 – October 1989: Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004. I joined the firm as an associate and was elected a general partner of the firm in October, 1987.

   November 1982 – May 1986: Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

   August 1981 – November 1982: Special Assistant to Attorney General William French Smith, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

   July 1980 – August 1981: Law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

June 1979 – June 1980: Law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, N.Y. 20543. At the time, Judge Friendly also served as the Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court.

Summer 1978: Law clerk, Carlsmith, Carlsmith, Wichman & Case (now Carlsmith Ball L.L.P.), 1001 Bishop Street, Suite 2200, Post Office Box 656, Honolulu, HI 96813.

Summer 1977: Law clerk, Ice, Miller, Donadio & Ryan (now Ice Miller), One American Square, Box 82001, Indianapolis, IN 46282.

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received. Please list, by approximate date, Selective Service classifications you have held, and state briefly the reasons for any classification other than I-A.

No military service.

Selective Service Number: 12-46-55-304. Registered at: Selective Service System, Indiana Local Board No. 46, 1200 Michigan Avenue, LaPorte, IN 46350.

05-16-73 1-H – Registrant not currently subject to processing for induction or alternate service.

Note: Beginning in 1972, all new registrants were classified 1-H and kept there until after the lottery drawing for their age group. For year of birth 1955, the lottery drawing was held on March 20, 1974. The highest number called for processing out of the 1-H classification was number 95 for year of birth 1955. The lottery number for date of birth January 27, 1955, was 323. Those registrants with lottery numbers above the processing number remained in class 1-H.

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Harvard College honors:

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

A.B. degree awarded *summa cum laude*, 1976. Honors thesis on British domestic politics, 1900-1914.

Harvard Law School honors:

Editor, *Harvard Law Review*, volumes 91-92. Managing Editor, volume 92.

J.D. degree awarded *magna cum laude*, 1979.

**10. Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups. Also, if any such association, committee or conference of which you were or are a member issued any reports, memoranda or policy statements prepared or produced with your participation, please furnish the committee with four (4) copies of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee or conference which produced a report, memorandum or policy statement even where you did not contribute to it.

United States Judicial Conference Advisory Committee on Appellate Rules, appointed October 1, 2000.

D.C. Circuit Judicial Conference, 1991, 1992, 1998, 2000, 2003, 2004, 2005.

Fourth Circuit Judicial Conference, 1995.

American Law Institute, elected October 1990.

American Academy of Appellate Lawyers, elected August 1998.

Edward Coke Appellate American Inn of Court, joined January 2001.

Supreme Court Historical Society, joined December 10, 1987.

State and Local Legal Center, Legal Advisory Board (unpaid advisor to non-profit organization) (resigned upon assuming the bench).

Georgetown University Law Center, Supreme Court Institute, Outside Advisory Board (unpaid advisor to non-profit organization) (resigned upon assuming the bench).

National Legal Center for the Public Interest, Legal Advisory Board (unpaid advisor to non-profit organization) (resigned upon assuming the bench).

**11. Bar and Court Admission:**

**a.** List the date(s) you took the examination and the date you passed for all states where you sat for a bar examination. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission.

District of Columbia Bar Examination administered July 28 and 29, 1981.

Admitted to the District of Columbia Bar on December 18, 1981.

**b.** List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

District of Columbia Court of Appeals, December 18, 1981.

United States Court of Federal Claims, December 3, 1982.

United States Court of Appeals for the Federal Circuit, December 3, 1982.

Supreme Court of the United States, March 2, 1987.

United States Court of Appeals for the District of Columbia Circuit, March 31, 1988.

United States Court of Appeals for the Ninth Circuit, October 17, 1988.

United States Court of Appeals for the Fifth Circuit, November 4, 1988.

United States Court of Appeals for the Eleventh Circuit, May 31, 1995.

United States Court of Appeals for the Third Circuit, November 3, 1995.

United States District Court for the District of Columbia, February 5, 1996.

United States Court of Appeals for the Tenth Circuit, April 10, 1996.

United States Court of Appeals for the Seventh Circuit, June 21, 1996.

United States Court of Appeals for the Fourth Circuit, November 24, 1997.

United States Court of Appeals for the Sixth Circuit, June 3, 1998.

United States Court of Appeals for the Eighth Circuit, February 5, 1999.

United States Court of Appeals for the Second Circuit, September 30, 1999

**12. Memberships**:

**a.** List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have participated since graduation from law school. Provide the dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications. Please describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an officer or other person from whom more detailed information may be obtained.

Phi Beta Kappa, National Academic Honor Society, Elected 1976. Contact: Doris Lawrence, (202) 265-3808.

American Judicature Society. According to its website, the society "is a nonpartisan organization with a national membership of judges, lawyers, and non-legally trained citizens interested in the administration of justice." I was a member from time-to-time during the 1990s, with lapses in membership. The Society extends membership to sitting judges. Contact: Laury Lieurance, Membership Coordinator, (515) 271-2285.

As detailed in the response to question 26, I served in 1999 on the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators George Mitchell and Robert Dole. Contact: Thomas E. Mann, (202) 797-6050, and Norman J. Ornstein, (202) 862-5893.

The Lawyers Club of Washington, Member since 1996. Social association of lawyers that meets for lunches and annual dinner. Contact: Patrick L. O'Donoghue, Esq., Secretary/Treasurer, (301) 652-6880.

The Metropolitan Club, Member since June 7, 1995. Contact: Sandra Howland, Controller, (202) 835-2500.

Robert Trent Jones Golf Club, Member since December 1992. Contact: Glenn Smickley, Chief Operating Officer, (703) 881-4450.

Palisades Pool. Neighborhood swimming pool. Family membership since 2003. Contact: Joyce Chung, (301) 320-6499.

Justice Advisory Council, December 2000-January 2001, a group of 75-90 individuals formed to advise the Bush-Cheney transition team on general issues relating to the Department of Justice. I am listed as a member, but to the best of my recollection did not participate in any of the Council's activities. Contact: Paul McNulty, (703) 299-3700.

Republican National Lawyers Association, association of Republican lawyers, joined February 18, 1991; last dues paid November 15, 1993; membership expired November 15, 1994. Contact: Michael Thielen, Executive Director, (703) 719-6335.

According to recent press reports, in 1997 I was listed in brochures as a member of the Washington Lawyers Steering Committee of the Federalist Society. The same reports indicate that one could be on that Committee without also being a member of the Society. I have no recollection of serving on that Committee, or being a member of the Society. I have participated in Society events, including moderating a panel around 1993 and more recently speaking before a lunch meeting of the Washington chapter on October 30, 2003.

**b.** If any of these organizations of which you were or are a member or in which you participated issued any reports, memoranda or policy statements prepared or produced with your participation, please furnish the committee with four (4) copies of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee or conference which produced a report, memorandum or policy statement even where you did not contribute to it. If any of these materials are not available to you, please give the name and address of the organization that issued the report, memoranda or policy statement, the date of the document, and a summary of its subject matter.

None, except for the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution. Four copies of the report issued by the Joint Project are attached.

**c.** Please indicate whether any of these organizations currently discriminate or formerly discriminated on the basis of race, sex, or religion — either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None have from before the time I joined.

**13. <u>Published Writings</u>:**

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

"The Takings Clause," Developments in the Law — Zoning, 91 *Harvard Law Review* 1462 (1978) (unsigned student note).

Comment, "Contract Clause — Legislative Alteration of Private Pension Agreements," 92 *Harvard Law Review* 86 (1978) (unsigned student note).

Comment, "First Amendment — Media Right of Access," 92 *Harvard Law Review* 174 (1979) (unsigned student note).

"New Rules and Old Pose Stumbling Blocks in High Court Cases," *Legal Times*, February 26, 1990 (also reprinted in various affiliated publications), co-authored with E. Barrett Prettyman, Jr.

"Article III Limits on Statutory Standing," 42 *Duke Law Journal* 1219 (1993).

"Riding the Coattails of the Solicitor General," *Legal Times*, March 29, 1993.

"The New Solicitor General and the Power of the Amicus," *The Wall Street Journal*, May 5, 1993.

"The 1992-93 Supreme Court," 1994 *Public Interest Law Review* 107.

"Forfeitures: Does Innocence Matter?" *Legal Times*, October 2, 1995.

"Thoughts on Presenting an Effective Oral Argument," *School Law in Review* (1997).

"Oral Advocacy and the Re-emergence of a Supreme Court Bar," 30 *Journal of Supreme Court History* 68 (2005).

b. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

| | |
|---|---|
| Aug. 23, 1993 | I appeared before the House Republican Conference Task Force on Crime to discuss crime legislation. Four copies of the hearing transcript are attached. |

June 11, 1999 — I appeared before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee with former Senators George Mitchell and Robert Dole and former Solicitor General Drew Days to discuss the report of the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution. Four copies of the hearing transcript and the report from the Joint Project are attached.

c. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions, by you which relate in whole or in part to issues of law or public policy. If you have a recording of a speech or talk and it is not identical to the transcript or copy, please supply four (4) copies of the recording as well. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you have reason to believe that the group has a copy or tape recording of the speech, please request that the group supply the committee with a copy or tape recording of the speech. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke. If there were press reports about the speech, and they are readily available to you, please supply them.

Brookings Institution, October 3, 1983, Washington, D.C., on Giving Legal Advice to the President.

Indiana University School of Law, 1984 Harris Lecture series, January 20, 1984, Bloomington, IN, on Federal Court Jurisdiction.

Maryland Association of County Attorneys, December 7, 1989, on Appellate Advocacy.

District of Columbia Bar Association, Section on Administrative Law, September 19, 1990, Washington, D.C., on Supreme Court Environmental Cases.

American Bankruptcy Institute, December 7, 1991, Scottsdale, AZ, on Supreme Court Bankruptcy Cases.

American Academy of Appellate Lawyers, February 5, 1994, Kansas City, MO, on Supreme Court practice.

Elderhostel, Rockville, MD, November 14, 1996, on Supreme Court oral arguments.

D.C. Copyright Law Society, March 16, 1998, Washington, D.C., on *Feltner v. Columbia Pictures*.

Bureau of National Affairs, Supreme Court Constitutional Law Seminar, Washington, D.C., September 11, 1998, on Supreme Court oral arguments.

D.C. Bar Administrative Law Section, September 24, 1998, Washington, D.C., on *NCUA v. First National Bank & Trust Co.*

Alabama Bar Institute for Continuing Legal Education, 36th Annual Southeastern Corporate Law Institute, Point Clear, AL, April 24, 1999, on recent Supreme Court cases.

Arizona Bar Appellate Practice Section, June 25, 1999, on the certiorari process.

National Mining Association, Lake George, N.Y., September 10, 1999, on amicus briefs.

Republican National Lawyers Association, Washington, D.C., April 3, 2000, on cases pending before the Supreme Court.

Cosmetics, Toiletries, and Fragrances Association, Napa Valley, CA, April 26, 2000, on the First Amendment and commercial speech.

Symposium, Bicentennial Celebration of the Courts of the District of Columbia Circuit, Washington, D.C., March 9, 2001, Panelist on Constitutional Confrontations in the District of Columbia Circuit Courts. Proceedings published at 204 F.R.D. 499.

National Association of Legal Secretaries, Washington, D.C., July 28, 2001, on Supreme Court arguments.

Environmental Law Seminar, Harvard Law School, Cambridge, MA, January 17, 2002, on *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.*

John F. Kennedy School of Government, Masters Program visit to Washington, D.C., January 24, 2002, on Supreme Court practice.

American Academy of Appellate Lawyers, New Orleans, LA, February 8, 2002, on Supreme Court practice, with E. Barrett Prettyman, Jr., and Seth Waxman.

Georgetown University Law School, Supreme Court Institute, May 16, 2002, Washington, D.C., 1992 Supreme Court law clerk program, on the 1992 Supreme Court term.

Brigham Young University and J. Reuben Clark Law School, Rex E. Lee Conference on the Office of Solicitor General of the United States, Provo, UT, September 12-13, 2002, with 19 other alumni of the Office. Proceedings transcribed and published at 2003 *BYU Law Review* 1 (2003) (copies attached).

Supreme Court Historical Society Annual Lecture, "Oral Advocacy and the Re-emergence of a Supreme Court Bar," June 7, 2004, published at 30 *Journal of Supreme Court History* 68 (2005) (copies attached).

Lecturer, Appellate Advocacy Course, District of Columbia Bar Continuing Legal Education Program, October 27, 2004, Washington, D.C. (notes attached).

Guest Speaker, U.S. Department of Justice Civil Division Awards Ceremony, December 7, 2004, Washington, D.C. (notes attached).

Wake Forest University School of Law, Jeff Rupe Memorial Lecture, February 25, 2005, Winston-Salem, N.C. (videotape available).

University of Virginia School of Law, Ola B. Smith Lecture, "What Makes the D.C. Circuit Different? A Historical View," April 20, 2005, Charlottesville, VA (audiodisc available).

Since 1995, I have addressed the Street Law/Supreme Court Historical Society program for high school teachers. Two sessions of the program are held annually in June, and I typically address both sessions. My remarks offer an introduction for the teachers on how the Supreme Court decides which cases to review and how it decides those cases on the merits.

Prior to joining the bench, I also regularly participated in press briefings sponsored by the National Legal Center for the Public Interest and the Washington Legal Foundation upon the opening of a new Supreme Court term or the Court's rising for the summer.

On no occasion did I speak from a prepared text. Notes or recordings are available only as indicated.

d. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

NPR, Morning Edition, Nov. 13, 2002, "Supreme Court to take up issue of whether or not Megan's Law violates constitutional rights of past sex offenders."

NPR, Morning Edition, Apr. 24, 2002, "U.S. Supreme Court hears case on whether a student can sue his college for releasing his records without his permission."

NPR, Morning Edition, Jan. 16, 2002, "Supreme Court to hear Illinois case concerning independent review board and HMO."

NPR, Morning Edition, Jan. 7, 2002, "Supreme Court to hear case challenging government's right to impose a moratorium on development."

NPR, All Things Considered, Nov. 7, 2001, "Supreme Court case on how impaired a person must be to be considered disabled under the Americans with Disabilities Act."

NPR, Morning Edition, July 11, 2000, "Decisions the Supreme Court reached this term."

NPR, Morning Edition, Oct. 6, 1999, "Racial discrimination case in Hawaii."

NPR, Weekend Edition, June 26, 1999, "Supreme Court's big decisions of the past week."

NPR, Talk of the Nation, June 24, 1999, "Recent decisions by the Supreme Court and their possible effects on states' rights and the rights of citizens."

PBS, MacNeil/Lehrer NewsHour, July 2, 1997, "Focus — Supreme Court Watch."

NPR, Morning Edition, Mar. 27, 1996, "NFL antitrust case will impact all of sports industry."

PBS, MacNeil/Lehrer NewsHour, June 12, 1995, "Focus — Affirmative Action."

PBS, MacNeil/Lehrer NewsHour, Aug. 7, 1991, "Focus — Abortion Protest."

In addition to the foregoing more formal interviews, I have also occasionally been asked by media representatives to comment on particular legal developments. I have not maintained a file or listing of such requests or whether they resulted in any media report.

**14. <u>Public Office, Political Activities and Affiliations</u>:**

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed

you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

| | |
|---|---|
| 06/79 - 06/80 | Law Clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit. Appointed by Judge Henry J. Friendly. |
| 07/80 - 08/81 | Law Clerk to Justice William H. Rehnquist, Supreme Court of the United States. Appointed by Justice William H. Rehnquist. |
| 08/81 - 11/82 | Special Assistant to the Attorney General, United States Department of Justice. Appointed by Attorney General William French Smith. |
| 11/82 - 05/86 | Associate Counsel to the President, White House Counsel's Office. Appointed by President Ronald W. Reagan. |
| 10/89 - 01/93 | Principal Deputy Solicitor General, United States Department of Justice. Appointed by Attorney General Richard L. Thornburgh. |

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. Please supply four (4) copies of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a presidential transition team.

Executive Committee, D.C. Lawyers for Bush-Quayle '88.

Lawyers for Bush-Cheney.

At the request of Benjamin Ginsberg and Ted Cruz, I went to Tallahassee in November 2000 to assist those working on behalf of George W. Bush on various aspects of the recount litigation. My recollection is that I stayed less than one week. I recall participating in a preparation session for another lawyer scheduled to appear before the Florida Supreme Court and generally being available to discuss issues as they arose. I returned to Tallahassee at some later point to meet with Governor Jeb Bush, to discuss in a general way the constitutional and statutory provisions implicated by the litigation.

**15. <u>Legal Career:</u>** Please answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

After graduation from law school, I served as a law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, N.Y. 10007. At the time, Judge Friendly also served as Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court. I clerked for Judge Friendly from June 1979 to June 1980.

I next served as a law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543. I served in that capacity from July 1980 to August 1981.

ii. whether you practiced alone, and if so, the addresses and dates;

No.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

After completing my clerkship with Justice Rehnquist, I accepted appointment as a Special Assistant to Attorney General William French Smith, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. I served in that capacity from August 1981 to November 1982.

I left the Department of Justice in November 1982 to accept an appointment as Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

I left the White House Counsel's Office in May 1986 to join the Washington law firm of Hogan & Hartson as an associate. I was elected a general partner of the firm in October 1987. Hogan & Hartson is now located at 555 13th Street, N.W., Washington, D.C. 20004.

I resigned my partnership in the firm in October 1989 to accept an appointment as Principal Deputy Solicitor General, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

I left the Solicitor General's Office in January 1993 to rejoin Hogan & Hartson as a partner. I resigned my partnership in May 2003 to assume the bench.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

From 1986 until I joined the bench in 2003, I had an intensive federal appellate litigation practice, in both the private and public sectors, with an emphasis on Supreme Court litigation. During that period I orally argued 39 times before the Supreme Court, in addition to arguments before the United States Courts of Appeals for the District of Columbia, Federal, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, as well as the District of Columbia and Maryland Courts of Appeals. The subject matter of these cases covered the full range of federal jurisdiction, including administrative law, admiralty, antitrust, arbitration, banking, bankruptcy, civil rights, constitutional law, environmental law, federal jurisdiction and procedure, First Amendment, health care law, Indian law, interstate commerce, labor law, and patent and trade dress law.

In addition to presenting oral argument and briefing the cases on the merits, my Supreme Court practice consisted of seeking and opposing Supreme Court review, seeking and opposing stays pending such review, preparing *amicus curiae* briefs on behalf of clients interested in pending Supreme Court matters, helping to prepare other counsel to argue before the Court, and counseling clients on the impact of specific Supreme Court rulings.

The court of appeals aspect of my federal appellate practice involved appearances in every federal circuit court of appeals, although the largest number of my court of appeals arguments were before the Court of Appeals for the D.C. Circuit. I did not specialize in any particular substantive area, but instead in the preparation of appellate briefs and the presentation of appellate oral argument.

The nature of my practice was essentially the same during my time at Hogan & Hartson and when I served as Principal Deputy Solicitor General, although of course during the latter period my sole client was the United States and its agencies and officers. As Principal Deputy Solicitor General, my duties included presenting oral argument before the Supreme Court and preparing and filing briefs on the merits on behalf of the United States, its agencies and officers, subject to the supervision of the Solicitor General and with the assistance of subordinates in the Office of the Solicitor General. I also supervised the preparation and filing of petitions for and briefs in opposition to certiorari, and engaged in an active motions practice seeking or opposing stays or other relief from the Supreme Court. In addition to this actual litigation before the Court, my duties included participating in the government's determination whether to appeal adverse decisions in the lower courts. Any such appeal, whether from a district court to an appellate court or from a circuit court to the Supreme Court, requires the approval of the Solicitor General. The same is true for any filing of a suggestion for rehearing en banc before a court of appeals.

Immediately prior to joining Hogan & Hartson for the first time in 1986, I served in counseling and advisory roles in the federal government. My duties as Associate Counsel to the President involved reviewing bills submitted to the President for signature or veto, drafting and reviewing executive orders and proclamations, and generally reviewing the full range of Presidential activities for potential legal problems. I participated in drafting

and reviewed various documents embodying Presidential action under certain trade, aviation, asset control, and other laws. I played a role in the Presidential appointment process, reviewing the Federal Bureau of Investigation background reports and ethics disclosures of prospective executive branch appointees.

My duties as Special Assistant to Attorney General William French Smith were also of an advisory nature, focusing on particular matters of concern to the Attorney General. I also served as a speechwriter and represented the Attorney General throughout the Executive Branch and before state and local law enforcement officials.

I was fortunate to have two appellate clerkships immediately after law school. Judge Henry J. Friendly is justly remembered as one of this Nation's truly outstanding federal appellate judges. The clerkship on the Supreme Court for then-Associate Justice Rehnquist the following year was an intensive immersion in the federal appellate process at the highest level.

ii. your typical former clients and the areas, if any, in which you have specialized.

Clients of Hogan & Hartson for whom I rendered substantial legal services included large and small corporations, state and local governments, trade and professional organizations, nonprofit associations, and individuals. Such clients included, for example, the States of Alaska and Hawaii, the National Collegiate Athletic Association, Litton Industries, Inc., Gonzaga University, the Tahoe Regional Planning Agency, the Credit Union National Association, Pulte Corporation, and Intergraph Corporation.

From October 1989 to January 1993, my sole client was the United States, its agencies and officers. With minor exceptions, the Office of the Solicitor General is the exclusive representative of the federal government before the Supreme Court. I accordingly represented a wide variety of departments, agencies, and other entities within the federal government. In doing so, I worked with each of the litigating divisions in the Department of Justice. Also included among my clients were individual officers of the United States or its agencies sued in *Bivens* actions.

My clients during my service as Associate Counsel to the President included the President of the United States and members of the White House staff. As Special Assistant to the Attorney General, my client was the Attorney General.

While in practice, I specialized in federal appellate litigation.

c. Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

I appeared in federal court frequently while in practice, arguing over 65 cases before the Supreme Court of the United States, the Court of Appeals for the District of Columbia

Circuit, and various other federal circuit courts of appeals. The public service positions I held prior to 1986 did not involve court appearances, although my two clerkships necessarily afforded intensive exposure to the appellate process.

i. Indicate the percentage of these appearances in:
   1. federal courts;
   2. state courts of record;
   3. other courts.

Federal courts: approx. 95 percent
State courts of record: approx. 5 percent

ii. Indicate the percentage of these appearances in:
   1. civil proceedings;
   2. criminal proceedings.

Civil proceedings: approx. 95 percent
Criminal proceedings: approx. 5 percent

d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As noted, my practice was primarily an appellate one, and my appearances in court were typically to argue appeals. I have personally argued over 65 cases leading to a final appellate judgment. I have, however, also appeared on occasion in trial courts.

i. What percentage of these trials were:
   1. jury;
   2. non-jury.

One trial proceeding in which I served as an associate counsel was before a jury, although my participation in the case did not involve work before the jury itself.

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, describe in detail the nature of your participation in the litigation and the final disposition of the case, and provide the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

From 1986 until 2003, I appeared frequently before the Supreme Court, both as counsel of record and as co-counsel to others. The nature of this practice is described above in the response to question 15.b. During that period I orally argued 39 times before the Court in 38 separate matters. A description of each of these cases, and my participation, follows:

1. *Smith v. Doe*, 538 U.S. 84 (2003). This case involved a challenge to the Alaska Sex Offender Registration Act, which required convicted sex offenders to register with law enforcement authorities and made offender information available to the public. The question presented was whether the application of the Act to offenders convicted before its enactment violated the Ex Post Facto Clause of the United States Constitution. Representing the petitioners, the Alaska Commissioner of Public Safety and the Alaska Attorney General, I argued that the Act was not punitive in nature and therefore did not implicate the Ex Post Facto Clause. Justice Kennedy's majority opinion accepted this argument and upheld the constitutionality of the Act.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668, who appeared on behalf of the United States as *amicus curiae* in support of the petitioners. My co-counsel on the brief were Jonathan S. Franklin and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Cynthia M. Cooper, 3410 Southbluff Circle, Anchorage, AK 99515, (907) 349-3483, and Bruce M. Botelho, then Alaska Attorney General, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Principal counsel for the respondents were Verne E. Rupright of Rupright & Foster, 322 Main Street, Wasilla, AK 99654, (907) 373-3215, and Daryl L. Thompson of Daryl L. Thompson P.C., 841 I Street, Anchorage, AK 99501, (907) 272-9322.

2. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). The Coal Act of 1992 calls on the Commissioner of Social Security to assign coal industry retirees to particular coal companies "before October 1, 1993," for the purpose of funding retiree benefits. The question presented was whether assignments made after the specified date were nonetheless valid, or whether retirees not assigned in time should be allocated pursuant to the formula for unassigned retirees. Representing respondents Peabody Coal Company and Eastern Associated Coal Corporation, I argued that the statute precluded the Commissioner from making belated assignments. Writing for the majority, Justice Souter rejected this argument, reasoning that the date in question was meant to spur the Commissioner to action but did not restrict the time in which she could act.

With me on the brief were Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and John R. Woodrum and W. Gregory Mott of Heenan, Althen & Roles L.L.P., 1110 Vermont Avenue, N.W., Washington, D.C. 20005, (202) 887-0800. Jeffery S. Sutton, then of Jones, Day, Reavis & Pogue, 1900 Huntington Center, 41 South High Street, Columbus, OH 43215, (614)

469-3855, and now a judge on the Court of Appeals for the Sixth Circuit, 540 Potter Stewart U.S. Courthouse, 100 East Fifth Street, Cincinnati, OH 45202, (513) 564-7000, argued on behalf of respondents Bellaire Corporation, Nacco Industries, and North American Coal Corporation. Peter Buscemi of Morgan, Lewis & Bockius L.L.P., 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 739-5190, represented petitioners United Mine Workers of America Combined Benefit Fund. Barbara B. McDowell, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented petitioner Barnhart.

3. *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355 (2002). Under an Illinois statute, if a patient's primary care physician deems a procedure to be necessary but the patient's HMO disagrees, the patient is entitled to have the HMO's decision reviewed by an outside physician, and that outside physician's decision is binding on the HMO. The question before the Court was whether this independent review provision was pre-empted by the federal Employee Retirement Income Security Act (ERISA). Representing the petitioner, I argued that the provision conflicted with ERISA's exclusive remedial scheme. Justice Souter's majority opinion disagreed, reasoning that the provision was protected by ERISA's savings clause.

I was assisted by Clifford D. Stromberg, Craig A. Hoover, Jonathan S. Franklin, and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and James T Ferrini, Michael R. Grimm, Sr., and Melinda S. Kollross of Clausen Miller P.C., 10 South LaSalle Street, Chicago, IL 60603, (312) 855-1010. Respondent Debra Moran was represented by Daniel P. Albers of Barnes & Thornburg, 2600 Chase Plaza, 10 South LaSalle, Chicago, IL 60603, (312) 357-1313. Respondent the State of Illinois was represented by John P. Schmidt, Assistant Attorney General, 100 West Randolph Street, 12th Floor, Chicago, IL 60601, (312) 814-3312. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* in support of the respondents.

4. *Gonzaga University v. Doe*, 536 U.S. 273 (2002). John Doe sought damages from Gonzaga University for the unauthorized release of personal information in violation of the Family Educational Rights and Privacy Act of 1974 (FERPA). The question presented was whether FERPA's provisions could be enforced by a suit for damages under 42 U.S.C. § 1983, which provides a cause of action for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws." I represented the University and argued that FERPA did not create personal rights, and thus could not be so enforced. The Chief Justice's opinion for the majority accepted this argument and held that a Section 1983 action could not be maintained under these circumstances.

I shared oral argument with Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, who appeared on behalf of the United States as *amicus curiae* in support of the University. With me on the briefs were Martin Michaelson, Alexander E. Dreier, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and

Charles K. Wiggins and Kenneth W. Masters of the Wiggins Law Office, 241 Madison Avenue, N. Bainbridge Island, WA 98110 (206) 780-5033. Beth S. Brinkmann of Morrison & Foerster L.L.P., 2000 Pennsylvania Ave., N.W., Washington, D.C. 20006, (202) 887-1544, represented respondent Doe.

5. *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The Tahoe Regional Planning Agency instituted temporary moratoria on development while devising a comprehensive land use plan. The question presented was whether the moratoria constituted a taking of property that required compensation under the Takings Clause of the United States Constitution. Representing the respondent Planning Agency, I argued that the enactment of temporary moratoria does not constitute a *per se* taking, and that the moratoria instead should be evaluated using a fact-specific inquiry set forth in prior Supreme Court opinions. Under that inquiry, there was no taking. The Court agreed, with Justice Stevens writing for the majority.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668, appearing on behalf of the United States as *amicus curiae* supporting the respondents. With me on the brief were E. Clement Shute, Jr., Fran M. Layton, and Ellison Folk of Shute, Mihaly & Weinberger L.L.P., 396 Hayes Street, San Francisco, CA 94102, (415) 552-7272, John L. Marshall, Tahoe Regional Planning Agency, P.O. Box 1038, Zephyr Cove, NV 89448, (775) 588-4547, and Richard J. Lazarus, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, (202) 662-9129. The petitioners were represented by Michael M. Berger of Berger & Norton Law Corporation, 1620 26th Street, Suite 200, South Santa Monica, CA 90404, (310) 449-1000.

6. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). Respondent Williams sued her former employer under the Americans with Disabilities Act, for failing to provide her with a reasonable accommodation for carpel tunnel syndrome and related injuries. The question presented was whether the Court of Appeals for the Sixth Circuit, which had ruled for Williams, had applied the proper standard in concluding that Williams's injuries qualified as a "major life impairment" under the Act. Representing petitioner Toyota, I argued that the Sixth Circuit erred in only considering the effect of the injuries on a specific set of work-related tasks, rather than on a wide range of life activities. Justice O'Connor's opinion for a unanimous Court accepted this argument and reversed and remanded the case so that the Sixth Circuit could apply the proper standard.

I shared oral argument with Barbara B. McDowell, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, who appeared on behalf of the United States as *amicus curiae* supporting the petitioners. I was assisted by Christopher T. Handman and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeffrey A. Savarise, John A. West, and Katherine A. Hessenbruch of Greenebaum Doll & McDonald P.L.L.C., 3300 National City Tower 101, South Fifth Street, Louisville, KY 40202, (502) 589-4200.

Robert L. Rosenbaum of Rosenbaum & Rosenbaum P.S.C., 300 Lexington Building 201, West Short Street, Lexington, KY 40507, (859) 259-1321, represented the respondent.

7. *TrafFix Devices Inc. v. Marketing Displays Inc.*, 532 U.S. 23 (2001). Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind, which TrafFix Devices copied and improved upon after Marketing Displays' patent expired. The question presented was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. On behalf of TrafFix Devices, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder exclusive rights to his invention for a limited period of time, on the condition that the invention becomes public property when the patent expires. The Supreme Court agreed with this position in a unanimous opinion authored by Justice Kennedy, and ruled that the sign stand could not qualify for trade dress protection.

Co-counsel with me were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C., 201 W. Big Beaver, Suite 400, Troy, MI 48084, (248) 689-3500. I shared oral argument with Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae* supporting the petitioner. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, MI 48034, (248) 223-9500, argued for the respondent.

8. *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000). Eastern Associated Coal sued to vacate an arbitration award requiring it to reinstate a truck driver who had twice tested positive for marijuana. The question before the Court was whether the arbitration award should be set aside. Representing Eastern Associated Coal, I argued that the Omnibus Transportation Employee Testing Act of 1991 and implementing regulations reflected a well-defined public policy against employees performing safety-sensitive jobs under the influence of illegal drugs, and that the award should be set aside on the basis of that policy. Justice Breyer, writing for the majority, refused to vacate the award, holding that the Testing Act's complex remedial scheme counseled against courts divining a broader public policy from it.

With me on the brief were David G. Leitch and H. Christopher Bartolomucci of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Ronald E. Meisburg of Heenan, Althen & Roles, 1110 Vermont Avenue, N.W., Suite 400, Washington, D.C. 20005, (202) 887-0800, and Anna M. Dailey and Donna C. Kelly Hennan of Althen & Roles, 1380 One Valley Square, P.O. Box 2549, Charleston, W.V. 25329, (304) 342-8960. Mr. Leitch is now General Counsel of Ford Motor Company, One American Road, Dearborn, MI 48126, (313) 322-7453. The respondents were represented by John R. Mooney of Mooney, Green, Gleason, Baker, Gibson, & Saindon P.C., 1920 L St., N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010. Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice,

Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* in support of the respondents.

9. *Rice v. Cayetano*, 528 U.S. 495 (2000). The Court of Appeals for the Ninth Circuit upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction constituted racial discrimination in violation the Fourteenth and Fifteenth Amendments. On behalf of the State, I argued that the classification was based on trust beneficiary status rather than race, and that the classification was also permissible because Congress had recognized the political status of Native Hawaiians as an indigenous people. Justice Kennedy, writing for the majority, rejected these arguments and struck down the statute.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl L. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, Hawaii 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* urging affirmance.

10. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999). The Court of Appeals for the Third Circuit had ruled that Title IX of the Education Amendments of 1972 — which applies only to organizations that receive federal financial assistance — applied to the NCAA, because it received dues from entities that receive federal financial assistance. The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. On behalf of the NCAA, we argued that according to Supreme Court precedent, coverage under the statute is limited to direct recipients of federal funding — those who knowingly entered into a bargain by accepting the funding. In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with this position and reversed the Third Circuit.

Appearing on the briefs with me were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100, and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN 46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* supporting the respondent.

11. *Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340 (1998). A district court granted summary judgment against petitioner Feltner in a copyright infringement suit. The question before the Supreme Court was whether the petitioner had a right to have his claim determined by a jury. I represented the petitioner, and argued that both the Copyright Act and the Seventh Amendment of the United States Constitution guaranteed a right to jury trial in copyright infringement cases. Writing for eight Justices, Justice Thomas rejected my Copyright Act argument, but agreed that the Seventh Amendment created a right to jury trial in such cases and remanded the case to district court so that a jury trial could be held.

I was assisted by David G. Leitch and Jonathan S. Franklin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Principal counsel for the respondent was Henry J. Tashman of Davis Wright Tremaine L.L.P., 1000 Wilshire Boulevard, Suite 600, Los Angeles, CA 90017, (213) 633-6800.

12. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998). The National Credit Union Administration (NCUA) interpreted the Federal Credit Union Act to allow credit unions to be composed of multiple, unrelated employee groups, each having a common bond of occupation. The questions before the Court were whether commercial banks had standing to challenge the NCUA's interpretation, and, if so, whether that interpretation was permissible. I represented petitioners, Credit Union National Association and AT&T Family Federal Credit Union, and argued that commercial banks lacked prudential standing because they were outside the "zone of interest" protected by the statute, and that the NCUA's interpretation was reasonable and entitled to deference. Writing for the majority, Justice Thomas disagreed, holding that commercial banks did have prudential standing and that the NCUA's interpretation was impermissible because the Act required *all* members of credit unions to share the *same* common bond.

With me on the briefs were Jonathan S. Franklin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Brenda S. Furlow, Credit Union National Association, Inc., 5710 Mineral Point Road, Box 431, Madison, WI 53701, (608) 231-4348, and Paul J. Lambert, Teresa Burke, and Gerard F. Finn of Bingham, Dana, & Gould L.L.P., 1200 19th Street, N.W., Suite 400, Washington, D.C. 20036, (202) 778-6150. Petitioner National Credit Union Administration was represented by Seth P. Waxman, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6800. Respondents were represented by Michael S. Helfer of Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6000.

13. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). An Alaskan native village attempted to levy a business tax against a state contractor hired to construct a school on village property. The question before the Court was whether the land owned by the village — an expanse of 1.8 million acres — constituted "Indian Country," such that the village was its sovereign with taxing authority. Representing the

State of Alaska, I argued that Congress alone can recognize an area as "Indian Country," and that Congress had made no such recognition in awarding the land to the village in the Alaska Native Claims Settlement Act of 1971. Writing for a unanimous court, Justice Thomas agreed and held that the village lacked the authority to impose the tax.

I was assisted by Gregory G. Garre of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Bruce M. Botelho, then Attorney General, Barbara J. Ritchie, Deputy Attorney General, and D. Rebecca Snow and Elizabeth J. Barry, Assistant Attorneys General, State of Alaska Department of Law, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Respondents were represented by Heather R. Kendall-Miller, Native American Rights Fund, 310 K Street, Suite 708, Anchorage, AK 99501, (907) 276-0680.

14. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Petitioners sued the City of Tarrant for wrongful death in a fire. The question presented was whether the City could be held liable, given the interaction between the Alabama wrongful death statute and 42 U.S.C. § 1983. The former had been interpreted to allow only punitive damages and the latter does not allow plaintiffs to sue municipalities for punitive damages. Representing the City, I argued that the United States Supreme Court lacked jurisdiction to hear the case, because the Alabama Supreme Court had not yet rendered a final judgment in the matter. Writing for eight Justices, Justice Ginsburg agreed and dismissed the writ of certiorari as improvidently granted.

I was assisted by Gregory G. Garre and H. Christopher Bartolomucci of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Wayne Morse, John W. Clark, Jr., and David W. McDowell of Clark & Scott P.C., 3500 Blue Lake Drive, Suite 350, Birmingham, AL 35248, (205) 967-9675. Dennis G. Pantazis of Gordon, Silberman, Wiggins & Childs P.C., 1400 SouthTrust Tower, Birmingham, AL 35203, (205) 328-0640, represented the petitioners.

15. *Adams v. Robertson*, 520 U.S. 83 (1997). Alabama state courts approved a class action lawsuit and settlement agreement in a case against Liberty Life Insurance Company, without providing individual class members the right to exclude themselves from the class or the settlement. The question before the Court was whether that approval violated the class members' Due Process rights under the Fourteenth Amendment of the United States Constitution. Representing the respondent, I argued that the United States Supreme Court lacked jurisdiction to hear the case, as the question presented had been neither raised nor decided by the Alabama Supreme Court. In a unanimous, *per curiam* opinion, the Supreme Court agreed and dismissed the writ of certiorari as improvidently granted.

With me on the brief were David G. Leitch, Gregory G. Garre, and Amy Folsom Kett of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Michael R. Pennington, James W. Gewin, and James W. Davis of Bradley, Arant, Rose & White, 1400 Park Place Tower, Birmingham, AL 35203, (205) 521-8391, and

William C. Barclift and Edgar M. Elliott, III, Liberty National Life Insurance Company, P.O. Box 2612, Birmingham, AL 35202, (205) 325-2778. Respondent Charlie Robertson was represented by Paul M. Smith of Jenner & Block, 601 Thirteenth Street, N.W., Twelfth Floor, Washington, D.C. 20005, (202) 639-6000. The petitioners were represented by Norman E. Waldrop, Jr., of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves L.L.C., P.O. Box 290, Mobile, AL 36601, (334) 405-1300.

16. *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995). The Court of Appeals for the Third Circuit vacated an arbitral award in a case involving debts to First Options of Chicago, a stock-clearing company. The questions presented were what standard a trial court should use in reviewing an arbitrator's conclusion that the parties had agreed to arbitration, and what standard a court of appeals should use in reviewing that trial court's ruling confirming the award. Representing respondent Manuel Kaplan — one of the parties against whom the arbitrator had ruled — I argued that the first issue should be reviewed *de novo* and that the second issue should be reviewed according to ordinary appellate review standards. Writing for a unanimous Court, Justice Breyer agreed and affirmed the Third Circuit's decision.

My co-counsel on the brief were David G. Leitch of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Donald L. Perelman and Richard A. Koffman of Fine, Kaplan & Black, 1845 Walnut Street, Philadelphia, PA 19103, (215) 567-6565. Respondent Carol Kaplan was represented by Gary A. Rosen of Connolly Epstein Chicco Foxman Engelmyer & Ewing, 1515 Market Street, 9th Floor, Philadelphia, PA 19102, (215) 851-8426. The petitioner was represented by James D. Holzhauer of Mayer, Brown & Platt, 190 South LaSalle Street, Chicago, IL 60603, (312) 782-0600.

17. *Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The respondent, which owned a barge involved in construction on the banks of the Chicago River, sought to limit its liability for damages that occurred when the river flooded into a set of tunnels beneath the City of Chicago. The question presented was whether federal courts had admiralty jurisdiction over the case. Representing the respondent, I argued that they did, as the barge was a "vessel on navigable waters" under the Extension of Admiralty Jurisdiction Act, and as Great Lakes' allegedly negligent actions posed a threat to maritime commerce. Justice Souter's opinion for the majority accepted this argument and reinstated the case in district court.

With me on the brief were David G. Leitch of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Duane M. Kelley and Jack J. Crowe of Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, (312) 558-5600. Petitioner Jerome G. Grubart was represented by Ben Barnow of Barnow and Hefty P.C., 105 W. Madison St., Ste. 2200, Chicago, IL 60602 (312) 621-2000. Petitioner City of Chicago was represented by Lawrence Rosenthal, Deputy Corporation Counsel, Room 610, City Hall, Chicago, IL 60602, (312) 744-5337.

18. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). In a Virginia civil contempt proceeding, petitioners were assessed $64 million in fines for violating a court-ordered injunction barring them from engaging in unlawful strike-related activities. The question before the Court was whether the fine amounted to a criminal penalty that could be constitutionally levied only after a jury trial. Representing respondents, including the special commissioner appointed to collect the fine, I argued that the fine was a civil penalty because it had been assessed according to a prospective schedule of fines announced with the court's earlier injunction and was therefore coercive, not punitive. The Court disagreed and unanimously ruled that a jury trial was required.

Co-counsel with me on the briefs were David G. Leitch and Kathryn W. Lovill, Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and William B. Poff, Clinton S. Morse, Frank K. Friedman, Woods, Rogers & Hazlegrove, Dominion Tower, Suite 1400, 10 South Jefferson Street, Roanoke, VA 24038, (703) 983-7600. Arguing for petitioners was Laurence Gold, 815 16th Street, N.W., Washington, D.C. 20006, (202) 637-5390.

19. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994). Digital Equipment Corp. sought to appeal a district court's decision to vacate a settlement agreement Digital had reached with Desktop Direct. The question presented was whether the decision to vacate was appealable as a collateral order even without final resolution of Desktop Direct's cause of action. I argued on behalf of Digital Equipment that the decision was appealable because it met the established criteria of conclusively resolving the issue of Digital's right not to go to trial under the settlement agreement, was separate from the underlying merits, and was effectively unreviewable on appeal from a final judgment. The Court, in a unanimous opinion by Justice Souter, ruled that the decision to vacate was not appealable as a collateral order.

Co-counsel with me on the briefs were Thomas C. Siekman and Andrew C. Holcomb, Digital Equipment Corporation, 111 Powdermill Road, Maynard, MA 01754, (508) 493-3264, David G. Leitch and Denise P. Lindberg, Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Laurence R. Hefter and David M. Kelly, Finnegan, Henderson, Farabow, Garrett & Dunner, 1300 I Street, N.W., Washington, D.C. 20005, (202) 408-4000. Arguing for respondent Desktop Direct was the late Rex E. Lee, then of Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000. Mr. Lee was assisted by Carter Phillips, also of Sidley & Austin.

20. *Helling v. McKinney*, 509 U.S. 25 (1993). William McKinney, an inmate in the Nevada prison system, sued state officials claiming that having to share a cell with a smoker violated the Eighth Amendment's proscription of "cruel and unusual punishment." The question before the Court was whether exposure to environmental tobacco smoke could serve as the basis for such a claim. I argued on behalf of the United States as *amicus curiae* that exposure to tobacco smoke did not amount to a "serious deprivation of basic human needs" under the Court's Eighth Amendment decisions. The Court ruled that the claim could go forward, in part because the Court considered it

premature to dismiss respondent's claim as a matter of law on the grounds I had advanced.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Edwin S. Kneedler, Assistant to the Solicitor General, William Kanter, Peter R. Maier, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Mr. Starr is now Dean at Pepperdine University School of Law, 24255 Pacific Coast Highway, Malibu, CA 90263. Arguing for petitioner was Frankie Sue Del Papa, Attorney General of the State of Nevada, Capitol Complex, Carson City, NV 89710, (702) 687-4170. Arguing for respondent was Cornish F. Hitchcock, Public Citizen Litigation Group, 2000 P Street, N.W., Suite 700 Washington, D.C. 20036, (202) 833-3000.

21. *Withrow v. Williams*, 507 U.S. 680 (1993). Robert Williams, a Michigan prisoner, filed a federal habeas corpus action challenging his murder convictions on the ground that they were obtained using statements taken in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The question before the Court was whether federal habeas jurisdiction extended to claims of *Miranda* violations, or whether instead such claims should be treated like certain Fourth Amendment claims that are not cognizable in habeas under *Stone v. Powell*, 428 U.S. 465 (1976). As Deputy Solicitor General, I argued on behalf of the United States as *amicus curiae* that the claims were not cognizable in habeas. The Court disagreed, and in a 5-4 decision, ruled that federal habeas jurisdiction extended to claims grounded in *Miranda*.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General and Ronald J. Mann, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jeffrey Caminsky, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine Detroit, MI 48226, (313) 224-5846. Arguing for respondent was Seth P. Waxman, then of Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Washington, D.C., 20037, (202) 833-5125. Mr. Waxman is now at Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6800.

22. *United States v. Green*, 507 U.S. 545 (1993). Lowell Green, after being arrested on a drug charge and given his *Miranda* warnings, invoked his right to counsel and later pled guilty to a lesser charge as part of a plea bargain. Three months later, while still in police custody, he was arrested for murder and — after receiving *Miranda* warnings again — waived his *Miranda* rights and confessed to the crime. The question before the court was whether the lower court erred in excluding the confession on the ground that police may not reinitiate interrogation once a suspect has invoked his rights under *Miranda*. I argued on behalf of the United States that the confession should not have been excluded because it concerned a matter wholly unrelated to the original drug charge and because the passage of time and intervening guilty plea dispelled any concern that police had coerced Mr. Green into confessing the murder. Mr. Green died before the case was decided, and the Court dismissed the petition.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General, William C. Bryson, then Deputy Solicitor General, Robert A. Long, Jr., then Assistant to the Solicitor General, Nina Goodman, Roy McLeese, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for respondent was Joseph R. Conte, Bond, Conte & Norman, P.C., 601 Pennsylvania Avenue, N.W., Suite 900, Washington, D.C. 20001, (202) 638-4100.

23. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). Several abortion clinics sued to enjoin Operation Rescue, an anti-abortion organization, from conducting demonstrations outside their facilities. The question before the Court was whether the clinics had a cause of action under section 2 of the Civil Rights Act of 1871. As Deputy Solicitor General representing the United States as *amicus curiae*, I argued that, while the clinics had various state-law remedies, section 2 did not provide a federal cause of action because defendants' conduct did not involve class-based invidiously discriminatory animus, as required by the Court's section 2 precedents. The case was first argued before 8 Justices and reargued when a full court was available. The Court, in an opinion by Justice Scalia, agreed with the government's position.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Paul J. Larkin, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jay Alan Sekulow, 1000 Thomas Jefferson Street, N.W., Suite 520, Washington, D.C. 20007, (202) 337-2273. Arguing for the respondents was Deborah Ellis, NOW Legal Defense and Education Fund, 99 Hudson Street, New York, N.Y. 10018, (212) 925-6635.

24. *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Commonwealth of Massachusetts, having lost a seat in the House of Representatives due to reapportionment, challenged the Commerce Department's method for counting federal employees serving overseas in the 1990 census. The questions before the Court were, first, whether the conduct of the census is subject to judicial review and, second, whether the Commerce Department's allocation of overseas federal employees to their home states was consistent with both the Constitution and the Administrative Procedure Act. I argued on behalf of the United States that the census was not subject to judicial review and that, even if it were, the Commerce Department's method of allocating overseas federal employees was consistent with the Census Clause and not arbitrary or capricious. The opinion for the Court by Justice O'Connor ruled that the census was not reviewable under the Administrative Procedure Act, and that the Commerce Department's method of allocation, while subject to judicial review as to constitutional claims, was nevertheless consistent with the requirements of the Census Clause.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Edwin S. Kneedler, Assistant to the Solicitor General, Michael Jay Singer, Mark B. Stern, Lori M. Beranek, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the

respondent was Dwight Golann, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, (617) 727-2200.

25. *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). The question presented was whether the Interstate Commerce Commission (ICC) had properly approved an exercise of eminent domain authority by Amtrak under the Rail Passenger Service Act. As Acting Solicitor General, I argued that a subsequent congressional amendment to the Act — passed while rehearing was pending before the lower court — made clear that Amtrak's action was permissible. The Supreme Court agreed with our position, 6-3, and in an opinion by Justice Kennedy gave deference to the ICC's construction of the statute it has been charged with administering.

With me on the brief were then Deputy Solicitor General Lawrence G. Wallace and then Assistant to the Solicitor General Michael R. Dreeben (now Deputy Solicitor General), Department of Justice, Washington, D.C. 20530, (202) 514-2217, as well as General Counsel Robert S. Burk, Deputy General Counsel Henri F. Rush, and Attorney Charles A. Stark, Interstate Commerce Commission (now the Surface Transportation Board), 1925 K Street, N.W., Washington, D.C. 20423, (202) 565-1558. Arguing for the respondent was Irwin Goldbloom, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 637-2200.

26. *Suter v. Artist M.*, 503 U.S. 347 (1992). Respondents filed a class-action suit alleging that officials at the Illinois Department of Children and Family Services failed to comply with the Adoption Assistance and Child Welfare Act of 1980. The question before the Court was whether the Act contained an implied right of action or conferred rights enforceable through an action under 42 U.S.C. § 1983. I argued on behalf of the United States as *amicus curiae* that the language of the Act demonstrated that Congress contemplated enforcement by the Secretary of Health and Human Services, not through private civil suits. The Court agreed, 7-2, with Chief Justice Rehnquist writing for the majority.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Michael R. Dreeben, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioners was Christina M. Tchen, Skadden, Arps, Slate, Meagher & Flom, 333 West Wacker Drive, Suite 2100, Chicago, IL 60606, (312) 407-0700. Arguing for the respondents was Michael G. Dsida, Cook County Public Guardian, 1112 South Oakley Boulevard, Chicago, IL 60612, (312) 633-2500.

27. *Hudson v. McMillian*, 503 U.S. 1 (1992). Petitioner Keith Hudson, a Louisiana prison inmate, filed suit against several corrections officers alleging that the officers had used excessive force while attempting to restrain him. The question before the Court was whether Hudson was required to show a "significant injury" as part of his claim that the officers' conduct amounted to cruel and unusual punishment under the Eighth Amendment. Representing the United States as *amicus curiae* supporting the inmate, I argued that the "significant injury" test was inappropriate because it lacked any basis in

the Constitution or in the Court's prior Eighth Amendment decisions. The Court agreed, ruling that where the claim is excessive force, a plaintiff need not show a "significant injury," but only that "prison officials maliciously and sadistically use[d] force to cause harm."

Co-counsel with me on our briefs were Kenneth W. Starr, then Solicitor General, John R. Dunne, then Assistant Attorney General, Robert S. Mueller, III, then Assistant Attorney General, Christopher J. Wright, then Acting Deputy Solicitor General, Ronald J. Mann, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Alvin J. Bronstein, National Prison Project of the American Civil Liberties Union Foundation, 1875 Connecticut Ave., N.W., Suite 410, Washington, D.C. 20009, (202) 234-4830. Arguing for respondent was Harry McCall Jr., Chang, McCall, Philips, Toler & Sarpy, 2300 Energy Centre, 1100 Poydras Street, New Orleans, LA 70163, (504) 585-7000.

28. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). In the Tax Reform Act of 1986, Congress authorized the Chief Judge of the United States Tax Court to appoint special trial judges to hear certain cases. The question before the Court was whether vesting this power in the Chief Judge was consistent with the Appointments Clause of the Constitution. Representing the Commissioner, I argued that petitioners had waived their constitutional claim by consenting to trial before a special trial judge and that, in any event, vesting this power with the Chief Judge was consistent with the Appointments Clause. The Court ruled that the Tax Court, as a "Court of Law" within the meaning of the Appointments Clause, was eligible to exercise the appointment power.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Shirley D. Peterson, then Assistant Attorney General, Stephen J. Marzen, then Assistant to the Solicitor General, Gary R. Allen, Steven W. Parks, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioners was Kathleen M. Sullivan, then at Harvard Law School, 1525 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4633. Ms. Sullivan is now at Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305, (650) 725-9875.

29. *Florida v. Jimeno*, 500 U.S. 248 (1991). A police officer received consent to search the car of a suspected drug trafficker, and found a kilogram of cocaine in a paper bag lying on the floor of the car; the suspect challenged the search of the bag. The question before the Court was whether the contents of the paper bag were beyond the scope of the consented search. I argued on behalf of the United States as *amicus curiae* that consent to search a car, in the absence of any express or implied limitation, includes consent to search a container within the car. The Court agreed, ruling that a search satisfies the Fourth Amendment if it is objectively reasonable for an officer to believe that the scope of a suspect's consent permitted a search of the container.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General, William C. Bryson, then Deputy Solicitor General, Amy L. Wax, then Assistant to the Solicitor General, Sean Connelly,

Attorney, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Michael J. Neimand, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 Northwest 2nd Avenue, Miami, FL 33128, (305) 377-5441. Arguing for respondent was Jeffrey Weiner, Weiner & Ratzan, P.A., Two Datran Center, Nineteenth Floor, Suite 1910, 9130 South Dadeland Boulevard, Miami, FL 33156, (305) 670-9919.

30. *Cottage Savings Ass'n v. Commissioner of Internal Revenue*, 499 U.S. 554 (1991). Cottage Savings Association exchanged a pool of its own mortgages for an equivalently-valued pool of mortgages belonging to four other savings and loans; the Internal Revenue Service disallowed Cottage's attempt to claim a deduction for a realized loss on the transaction. The question before the Court was whether, under the relevant statute, an exchange of interests in mortgages gave rise to a tax-deductible loss. Representing the Commissioner as Acting Solicitor General, I argued that the exchange of substantially identical pools of mortgages did not give rise to a deductible loss because the property transferred was not materially different from that received. The Court disagreed in an opinion by Justice Marshall, ruling that a gain or loss is realized so long as the properties exchanged embody "legally distinct entitlements."

Co-counsel with me on the briefs were Shirley D. Peterson, then Assistant Attorney General, Lawrence G. Wallace, then Deputy Solicitor General, Clifford M. Sloan, then Assistant to the Solicitor General, Richard Farber, Bruce R. Ellisen, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioner was Dennis L. Manes, Schwartz, Manes & Ruby, 2900 Carew Tower, 441 Vine Street, Cincinnati, OH 45202, (513) 579-1414.

31. *United States v. Centennial Savings Bank FSB*, 499 U.S. 573 (1991). On its 1981 tax return, Centennial Savings Bank claimed a deduction for a realized loss from an exchange of mortgages, and excluded certificate of deposit withdrawal penalties from its income; the Internal Revenue Service disallowed both. The question before the Court was whether the deduction and exclusion were permitted under the relevant statutes. As Acting Solicitor General, I argued on behalf of the United States that an exchange of substantially identical pools of mortgages did not give rise to a tax-deductible loss, and that withdrawal penalties did not constitute income from the discharge of indebtedness and therefore could not be excluded. The Court agreed as to the exclusion of withdrawal penalties, but relying on *Cottage Savings*, *supra*, which was argued the same day, ruled that Centennial could claim a tax-deductible loss on the mortgage transaction.

Co-counsel with me on the briefs were Shirley D. Peterson, then Assistant Attorney General, Lawrence G. Wallace, then Deputy Solicitor General, Clifford M. Sloan, then Assistant to the Solicitor General, Richard Farber, Bruce R. Ellisen, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for respondent was Michael F. Duhl, Hopkins & Sutter, 888 Sixteenth Street, N.W., Washington, D.C. 20006, (202) 835-8257.

32. *Grogan v. Garner*, 498 U.S. 279 (1991). Before petitioners could collect on a securities fraud judgment they had won against respondent, respondent included the judgment as a dischargeable debt in a petition under Chapter 11 of the Bankruptcy Code. Petitioners then brought an action claiming that the judgment was not dischargeable under the Bankruptcy Code because it was money obtained by "actual fraud." The question before the Court was whether petitioners' claim under the Bankruptcy Code required proof of fraud by clear and convincing evidence, rather than by the preponderance of the evidence — the standard applied in the securities fraud trial. I argued on behalf of the United States as *amicus curiae* that the language of the relevant statute was silent as to burden of proof and that applying a standard of clear and convincing evidence in bankruptcy actions would require burdensome relitigation of fraud claims. The Court agreed, and in a unanimous opinion by Justice Stevens, ruled that the preponderance of the evidence standard applied.

Co-counsel with me on the briefs were James R. Doty, then General Counsel, Paul Gonson, Solicitor, Jacob H. Stillman, Associate General Counsel, Richard A. Kirby, Senior Litigation Counsel, Joseph O. Click, Attorney, Securities and Exchange Commission, Washington, D.C. 20549, Alfred J.T. Byrne, General Counsel, Federal Deposit Insurance Corporation, Washington, D.C. 20429, Kenneth W. Starr, then Solicitor General, Robert A. Long, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioners was Michael J. Gallagher, One Main Plaza, Suite 840, 4435 Main Street, Kansas City, MO 64111, (816) 756-0030. Arguing for the respondent was Timothy K. McNamara, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, MO 64108, (816) 842-0820.

33. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The lower court dismissed Shirley Irwin's suit under Title VII of the Civil Rights Act of 1964 because it was filed more than 30 days after the Equal Employment Opportunity Commission (EEOC) denied Irwin's discrimination claim. The questions before the Court were whether the statutory 30-day period began to run when the EEOC letter was delivered to Irwin's attorney, as opposed to when Irwin or his attorney actually received the letter, and whether the 30-day period was subject to equitable tolling. Representing the Department of Veterans Affairs as Deputy Solicitor General, I argued that Irwin received constructive notice of the EEOC decision when the letter was delivered to his counsel and that the 30-day time limit was jurisdictional and therefore not subject to equitable tolling. The Court, in an opinion by Chief Justice Rehnquist, ruled that the 30-day period ran from delivery of the letter and that equitable tolling, while not categorically barred by the statute, did not extend to the circumstances of this case.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Harriet S. Shapiro, Assistant to the Solicitor General, Robert S. Greenspan, Michael E. Robinson, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jon R. Ker, P.O. Box 1087, Hewitt, TX 76643.

34. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Two individuals filed suit challenging thousands of agency decisions affecting millions of acres of public land. The question presented was whether the individuals' allegations of injury, based on their affidavits alone, were sufficient to support standing to bring such a broad-based challenge. As Acting Solicitor General, I argued that the allegations were insufficient to give the respondents standing to sue. The Court, in a 5-4 opinion by Justice Scalia, agreed and ruled that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not presume the specific facts necessary to establish adequate injury.

Co-counsel for the United States assisting me were then Assistant Attorney General Richard Stewart, then Deputy Solicitor General Lawrence G. Wallace, then Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

35. *United States v. Kokinda*, 497 U.S. 720 (1990). Two individuals soliciting contributions outside a U.S. Post Office were convicted under a postal regulation making it a misdemeanor to solicit funds on "postal premises" — defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The question before the Supreme Court was whether respondents' convictions were consistent with the First Amendment. As Deputy Solicitor General, I argued on behalf of the United States that the regulation was constitutionally valid as applied to the respondents. Writing for a plurality of four Justices, Justice O'Connor agreed that the postal walkway where the conduct at issue occurred was not a public forum, but instead government property set aside to facilitate particular government business — in this case, the handling of the mails.

Other counsel on the brief with me were Kenneth W. Starr, then Solicitor General, then Assistant Attorney General Edward S.G. Dennis, Jr., then Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

36. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). The Virginia Hospital Association filed suit against several Virginia officials under 42 U.S.C § 1983 to enforce a provision of the Medicaid Act requiring "reasonable and adequate" reimbursement of medical care. The question before the Court was whether the provision was enforceable through an action under section 1983. As Deputy Solicitor General representing the United States as *amicus curiae*, I argued that neither the language nor the history of the provision evinced an intent by Congress to create a right enforceable through section 1983. The Court, by a 5-4 margin, ruled in an opinion by Justice Brennan that the mandatory language of the relevant provision of the Medicaid Act gave rise to an enforceable right.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Lawrence S. Robbins, then Assistant to the Solicitor General, Anthony J. Steinmeyer, Irene M. Solet, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was R. Claire Guthrie, Deputy Attorney General, 101 North Eighth Street, Richmond, VA 23219, (804) 786-4072. Arguing for respondent was Walter Dellinger, Corner of Science Drive and Towerview Road, Durham, N.C. 27706, (919) 684-3404.

37. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). USA Petroleum sued Atlantic Richfield, alleging antitrust violations. The question presented was whether a firm suffers an "antitrust injury" under section 4 of the Clayton Act when it loses sales to a competitor that charges non-predatory prices pursuant to a vertical, maximum-price-fixing scheme. Representing the United States as *amicus curiae* in support of the petitioner, I argued that a plaintiff suffers an "antitrust injury" only if its injury results from the anticompetitive effect of the alleged violation, and that the antitrust laws do not protect competitors from non-predatory pricing by their rivals. Justice Brennan, writing for the majority, accepted this argument and held that USA Petroleum could not maintain the antitrust suit.

My co-counsel on the brief were Kenneth W. Starr, then Solicitor General, Michael Boudin, then Acting Assistant Attorney General, David L. Shapiro, then Deputy Solicitor General, Michael R. Dreeben, then Assistant to the Solicitor General, Catherine G. O'Sullivan and Steve MacIsaac, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and Kevin J. Arquit, General Counsel, Federal Trade Commission, Washington, D.C. 20530. Ronald C. Redcay of Hughes Hubbard & Reed, 555 South Flower Street, Los Angeles, CA 90071, (213) 489-5140, represented the petitioner. Maxwell M. Blecher of Blecher & Collins P.C., 611 West Sixth Street, Suite 2800, Los Angeles, CA 90017, (213) 622-4222, represented the respondent.

38. *United States v. Halper*, 490 U.S. 435 (1989). Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties for the same false Medicaid claims. The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. In private practice at the time, I was appointed by the Supreme Court to argue in support of the judgment below and handled the case on a pro bono basis. I argued that the aspect of the Double Jeopardy Clause forbidding successive punishments was not limited to the criminal context, but applied in certain circumstances to civil penalties as well. In a unanimous opinion authored by Justice Blackmun, the Court agreed.

I had no co-counsel assisting me. Arguing for the United States was then Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

Cases in which, while I was in private practice, my name appeared on the briefs of petitioners or respondents, but in which I did not present oral argument:

1. *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461 (2004). The Alaska Department of Environmental Conservation (DEC), in approving the operation of a mine, determined that the mine's proposed electric power generation plan made use of the "best available control technology," as required by the Clean Air Act. EPA disagreed with DEC's determination. The question before the Court was whether EPA had authority under the Clean Air Act to review DEC's determination and block issuance of the permit. My participation in the case was interrupted by confirmation to the D.C. Circuit, and I participated only at the certiorari stage and in petitioner's opening brief. The Court ruled, 5-4, that EPA had authority to block the permit.

With me on the briefs were Gregg D. Renkes, then Attorney General, State of Alaska Department of Law, P.O. Box 110300, Juneau, Alaska 99811, (907) 465-3600, Cameron M. Leonard, Assistant Attorney General, State of Alaska Department of Law, 100 Cushman Street, Suite 400, Fairbanks, AK 99701, (907) 451-2811, Jonathan S. Franklin, Lorane F. Hebert, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the respondents was Thomas Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. *Goldberg v. Sweet*, 488 U.S. 252 (1989). The State of Illinois imposed a tax on all interstate telecommunications charged to a service address within the State. The question for the Court was whether this tax violated the Constitution's Commerce Clause. We argued on behalf of two Illinois residents that it did. The Court disagreed, holding that the tax was fairly apportioned, non-discriminatory, and fairly related to the activities of taxpayers within the State.

With me on the briefs were Walter A. Smith, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-6448, William G. Clark, Jr., William G. Clark, Jr. & Associates, Ltd., 29 South LaSalle Street, Chicago, IL 60603, (312) 263-0830, John G. Jacobs, Jonah J. Orlofsky, Plotkin & Jacobs, Ltd., 116 South Michigan Avenue, Suite 1300, Chicago, IL 60603, (312) 372-0001. Arguing for appellees was Andrew L. Frey, Mayer, Brown & Platt, 2000 Pennsylvania Ave., N.W., Suite 6500, Washington, D.C. 20006, (202) 778-0602.

3. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 485 U.S. 976 (1988). The Webster County tax assessor valued petitioners' recently purchased properties at their purchase prices, but made only minor adjustments to the value of similar property that had not been recently conveyed. The question presented was whether this practice — the so-called "welcome stranger" approach — denied petitioners equal protection of the laws under the Fourteenth Amendment. We argued on behalf of petitioners that it did. The Court, in a unanimous opinion by Chief Justice Rehnquist, agreed.

With me on the briefs were William James Murphy, Robert T. Shaffer, III, Murphy & McDaniel, 118 West Mulberry St., Baltimore, MD 21201, (301) 685-3810, E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th St., N.W., Washington, D.C. 20004, (202) 637-5685, Ernest V. Morton, Jr., 210 Back Fork St., Webster Springs, W.V. 26288, (304) 847-5256, William D. Peltz, 900 Louisiana St., P.O. Box 2463, Houston, TX 77252, (713) 241-2414, Dan O. Callaghan, Callaghan & Ruckman, 48 East Main St., Richwood, W.V. 26261, (304) 846-2561, W. T. Weber, Jr., 208 Main Ave., Weston, W.V. 26452, (304) 269-2228. Arguing for the respondents was C. William Ullrich, Chief Deputy, Attorney General's Office, State of West Virginia, State Capitol, Charleston, W.V. 25305, (304) 348-2021.

4. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). In this case, environmental groups sued Gwaltney of Smithfield, the holder of a Clean Water Act discharge permit, for having exceeded in past years the effluent limitations of its permit. The question before the Court was whether the action could be maintained under the Clean Water Act. Representing Gwaltney, E. Barrett Prettyman, Jr. of Hogan & Hartson argued that the citizen-suit provision of the Act did not authorize such suits for wholly past violations. The Court agreed, in an opinion by Justice Marshall.

I was on the briefs with Mr. Prettyman, along with Richard M. Poulson, Patrick M. Raher, David J. Hayes, and Catherine James LaCroix of Hogan & Hartson, then located at 815 Connecticut Ave., N.W., Washington, D.C. 20006, and now at 555 13th Street, N.W., Washington, D.C. 20009, (202) 637-5600. Respondents were represented by the late Louis F. Claiborne, Washburn and Kemp P.C., 144 Second Street, San Francisco, CA 94188, (415) 543-8131.

5. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). The Pole Attachments Act calls on the FCC to regulate the rates that utilities can charge cable television companies for use of the utilities' poles. The question presented was whether the Act violates the Takings Clause of the United States Constitution. Representing appellants Group W Cable Inc., National Cable Television Association Inc., and Cox Cablevision Corporation, Jay E. Ricks, then of Hogan & Hartson, argued that rate regulation does not constitute a *per se* taking of property, and that the specific rate imposed by the FCC provided for adequate compensation. The Court, Justice Marshall writing for the majority, accepted both arguments and upheld the constitutionality of the Act.

I was on the briefs with Mr. Ricks, along with E. Barrett Prettyman, Jr., Gardner F. Gillespie, III, and Timothy J. Dowling of Hogan & Hartson, then located at 815 Connecticut Ave., N.W., Washington, D.C. 20006, and now at 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 633-2217, argued the case on behalf of the FCC. The appellees were represented by Allan J. Topol of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044, (202) 662-6000.

Cases in which, while I was in private practice, my name appeared on an amicus brief at the merits stage:

1. *Pharmaceutical Research & Mnfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). State law created a drug rebate in excess of that provided by Medicaid, and subjected non-participating companies to a pre-authorization regime for Medicaid sales. The question presented was whether the state regime was consistent with federal law and the United States Constitution. On behalf of the United States Chamber of Commerce, I submitted an *amicus* brief in support of petitioner, in which I contended that the state law was preempted by the Medicaid Act and conflicted with the Commerce Clause. The Court disagreed. While no opinion on Medicaid preemption commanded a majority of the Justices, the Court held that the district court had abused its discretion in enjoining the state program. Writing for a majority, Justice Stevens also rejected the Commerce Clause challenge.

My co-counsel on the brief were Catherine E. Stetson, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600 and Robin S. Conrad, National Chamber Litigation Center Inc., 1615 H Street, N.W., Washington, D.C. 20062 (202) 463-5337. Carter G. Phillips of Sidley Austin Brown & Wood L.L.P., 1501 K Street, N.W., Washington, D.C. 20005, (202) 736-8000, represented the petitioners and shared oral argument with Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae* supporting reversal. Andrew S. Hagler, Assistant Attorney General, Six State House Station, Augusta, ME 04333, (207) 626-8800, represented the respondents.

2. *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Petitioner, representing the estate of a boat passenger who had died when struck by a propeller blade, brought a tort suit in state court against the boat engine designer. The question presented was whether federal law preempted the suit. In an *amicus* brief on behalf of the Chamber of Commerce, I maintained that the uniquely federal field of maritime law, the Federal Boat Safety Act, and a Coast Guard decision not to require propeller guards on engines such as the one at issue, all conflicted with the petitioner's state tort claim. Writing for the majority, Justice Stevens disagreed and held that the suit could go forward.

With me on the brief were Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Robin S. Conrad, National Chamber Litigation Center Inc., 1615 H. Street, N.W., Washington, D.C. 20062, (202) 463-5337. Leslie A. Brueckner, Trial Lawyers for Public Justice P.C., 1717 Massachusetts Avenue, N.W., Suite 800, Washington, D.C. 20036, (202) 797-8600, represented the petitioner and shared oral argument with Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae*. The respondent was represented by Stephen M. Shapiro of Mayer, Brown, Rowe & Maw, 190 South LaSalle Street, Chicago, IL 60603, (312) 782-0600.

3. *United States v. Fior D'Italia, Inc.*, 536 U.S. 238 (2002). Fior D'Italia, a restaurant, challenged the IRS's method of assessing Federal Insurance Contribution Act (FICA) taxes on tips received by restaurant employees. The question presented was whether FICA authorized the IRS to base the assessment on an aggregate estimate of all the tips received by restaurant employees, rather than estimating each employee's tip income separately. On behalf of the American Gaming Association, I filed an *amicus* brief in support of the restaurant, in which I contended that the IRS's aggregate method improperly shifted the responsibility of policing tip reporting from the agency onto the employer. Justice Breyer, writing for the majority, disagreed and held that FICA allowed the IRS to use an aggregate method.

I was assisted by John S. Stanton, Robert H. Kapp, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Frank J. Fahrenkopf Jr. and Judy L. Patterson, American Gaming Association, 555 13th Street, N.W., Washington, D.C. 20004 (202) 637-6500. Eileen J. O'Connor, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented the United States. Tracy J. Power of Power & Power, 2300 Clarendon Blvd., Arlington, VA 22201, (703) 841-1330, represented the respondents.

4. *Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002). The Court of Appeals for the Federal Circuit held that patent-holders cannot rely on the "doctrine of equivalents" — which protects them from copyists who try to circumvent the patent by making minor alterations in design — if the holders had previously submitted a claim-narrowing amendment to the Patent and Trademark Office. The question before the Supreme Court was whether this ruling complied with the Patent Act and the United States Constitution. Representing Litton Systems, Inc., I filed an *amicus* brief in support of petitioner, arguing that the Federal Circuit's decision effected a taking of private property without just compensation, and that the ruling should not be applied retroactively. The Court, in a unanimous opinion by Justice Kennedy, vacated the Federal Circuit's decision and held that claim-narrowing amendments do not always bar patentholders from relying on the doctrine of equivalents.

With me on the brief were Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Frederick A. Lorig and Sidford L. Brown of Bright & Lorig, 633 West 5th Street, Los Angeles, CA 90071, (213) 627-7774, Rory J. Radding of Pennie & Edmonds L.L.P., 1155 Avenue of the Americas, New York, N.Y. 10036, (212) 790-9090, and Stanton T. Lawrence III and Carl P. Bretscher of Pennie & Edmonds L.L.P., 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Robert H. Bork, Suite 1000, 1150 17th Street, N.W., Washington, D.C. 20036, (202) 862-5851, argued the case for the petitioner. Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued for the United States as *amicus curiae* supporting vacatur and remand. Arthur I. Neustadt of Oblon, Spivak, Mcclelland, Maier & Neustadt P.C., 1755 Jefferson Davis Highway, Arlington, VA 22202, (703) 413-3000, argued for the respondents.

5. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). Petitioner Adarand Constructors challenged a Department of Transportation program on the ground that racial preferences in the program violated the Equal Protection Clause of the Fourteenth Amendment. On behalf of the Association of General Contractors of America, I filed an *amicus* brief supporting petitioner, in which I argued that the DOT program did not have a sufficient basis in evidence of discrimination, as required by Supreme Court precedent, to support the preferences. The Court dismissed certiorari as improvidently granted — finding that Adarand lacked standing — and hence did not reach the merits of the dispute.

My co-counsel on the brief were Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Michael E. Kennedy, General Counsel, The Associated General Contractors of America Inc., 333 John Carlyle Street, Suite 200, Alexandria, VA 22314, (703) 837-5335. Adarand was represented by William Perry Pendley, Mountain States Legal Foundation, 707 Seventeenth Street, Suite 3030, Denver, CO 80202, (303) 292-2021. The Secretary of Transportation was represented by Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668.

6. *United States and Dep't of Agriculture v. United Foods, Inc.*, 533 U.S. 405 (2001). A mushroom producer challenged a federal assessment imposed on the mushroom industry to fund advertisements promoting mushroom sales. The question before the Court was whether the assessment violated the First Amendment. On behalf of the American Mushroom Institute, the National Cattlemen's Beef Association, the American Soybean Association, the National Milk Producers Federation, the Milk Industry Foundation, the United Egg Producers, and the United Egg Association, I filed an *amicus* brief in support of the United States and the Department of Agriculture, in which I defended the assessment as a form of government speech. In an opinion by Justice Kennedy, the Court struck the assessment down, but specifically noted that it was not engaging the government speech argument, because the petitioners had not raised it below.

With me on the brief were David G. Leitch, then of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Wayne R. Watkinson Richard and T. Rossier McLeod of Watkinson & Miller, One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 842-2345. Barbara McDowell, Assistant to the Solicitor General, Department of Justice Washington, D.C. 20530, (202) 514-2217, represented the petitioners. Laurence H. Tribe, Hauser Hall 420, 1575 Massachusetts Ave., Cambridge, MA 02138, (617) 495-4621, represented the respondents.

7. *Jones v. United States*, 529 U.S. 848 (2000). The defendant in this case set fire to his cousin's house. The question before the Court was whether this act constituted a federal crime under 18 U.S.C. § 884(i), which outlaws the arson of "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In an *amicus* brief on behalf of Dale Lynn Ryan — another defendant convicted of a similar act — I argued that the arson of private residences does not fall within the statute's compass.

The Court, in an opinion by Justice Ginsburg, agreed and dismissed the federal prosecution.

With me on the brief was Gregory G. Garre of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. The petitioner was represented by Donald M. Falk of Mayer, Brown & Platt, 1909 K Street, N.W., Washington, D.C. 20006, (202) 263-3000. Representing the United States was Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

8. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999). Petitioners sued the United States and the FCC, seeking to establish their right to broadcast advertisements for legal gambling at area casinos. The question presented was whether 18 U.S.C. § 1304, which criminalizes broadcast advertising of lotteries and casino gambling, could be applied in areas where gambling was legal. In an *amicus* brief on behalf of the American Gaming Association, I argued that such an application violated the First Amendment of the United States Constitution. The Court agreed, in an opinion by Justice Stevens.

My co-counsel on the brief were David G. Leitch and Adam K. Levin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Frank J. Fahrenkopf, Jr. and Judy L. Patterson, American Gaming Association, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-6500. The petitioners were represented by the late Bruce J. Ennis, Jr. of Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005. The United States was represented by Barbara D. Underwood, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Ms. Underwood is now Chief Assistant United States Attorney for the Eastern District of New York, 147 Pierrepont St., Brooklyn, N.Y. 11201, (718) 254-7000.

9. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). This case involved a challenge to the Coal Act, which required employers to fund coal industry retiree benefits, even if the employer had since exited the coal business. The question presented was whether this funding mechanism violated the Takings Clause of the United States Constitution. In an *amicus* brief on behalf of the Ohio Valley Coal Company and Maple Creek Mining, Inc., I argued that the Act did not effect a taking of private property. The Court disagreed and held that the Act was unconstitutional as applied to employers who had left the coal industry.

With me on the brief was Mathew A. Lamberti of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. John T. Montgomery of Ropes & Gray, One International Place, Boston, MA 02110, (617) 951-7000, argued on behalf of the petitioner. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and Peter Buscemi of Morgan, Lewis & Bockius L.L.P, 1800 M Street, N.W., Washington, D.C. 20036, (202) 467-7190, represented the respondents.

10. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). Growers, handlers, and processors of California tree fruits challenged targeted federal assessments used to fund generic advertising of California nectarines, plums, and peaches. The question presented was whether the assessments violated the First Amendment. On behalf of the National Association of State Departments of Agriculture, the National Milk Producers Federation, and the National Cattlemen's Beef Association as *amici curiae* in support of petitioner, I argued that the assessment was a constitutional exercise of government speech. The Court upheld the assessments but did not engage the government speech argument.

With me on the brief were Wayne R. Watkinson and Richard T. Rossier of McLeod, Watkinson & Miller, One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 842-2345. Alan Jenkins, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented the petitioners. Thomas E. Campagne of Thomas E. Campagne & Associates, 1685 North Helm Avenue, Fresno, CA 93727, (209) 255-1637, represented the respondents.

11. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997). A California law prohibited employers from paying an apprentice wage to workers in unapproved apprenticeship programs; an employer brought suit challenging the law. The question before the Court was whether the law was pre-empted by the federal Employee Retirement Income Security Act (ERISA). I participated in an amicus brief filed on behalf of the Associated General Contractors of America. We argued that if the Court found the California law protected by ERISA's saving clause, it should do so only to the extent that California's standards for approving apprenticeship programs were consistent with federal apprenticeship standards. The Court held that the California law did not fall within ERISA's pre-emption clause, and did not reach the saving clause issue.

With me on the brief were William G. Jeffery, Jeffery, Ferring & Jenkel, 1000 Second Avenue, Suite 3300, Seattle, WA 98104, (206) 623-4600, David P. Wolds, Merrill, Schultz & Wolds, Ltd., 401 West "A" Street, Suite 2550, San Diego, CA 92101, (619) 234-4525, Carmel Martin, Hogan & Hartson L.L.P., 555 13th Street, N.W. Washington, D.C. 20004, (202) 637-5600, Michael E. Kennedy, General Counsel, Associated General Contractors Of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735. Arguing for the petitioners was John M. Rea, Chief Counsel, State of California Department of Industrial Relations, Office of the Director, Legal Unit, 45 Fremont Street, Suite 450, San Francisco, CA 94105, (415) 972-8900. Arguing for the respondents Richard N. Hill, Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, CA 94108, (415) 433-1940. Arguing for the United States as *amicus curiae* was James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

12. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The question presented was whether the Medical Device Amendments (MDA) of 1976 pre-empted a state common-law negligence action. I participated in an amicus brief filed on behalf of the Center for

Patient Advocacy and the California Health Care Institute. We argued that the comprehensive regulatory scheme established by the MDA pre-empted state common law claims. The Court ruled, 5-4, that respondents' common law claims were not pre-empted by the MDA.

With me on the brief were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5810. Arguing for the petitioner was Arthur R. Miller, 1545 Massachusetts Avenue, Cambridge, Massachusetts 02138. Arguing for the respondents was Brian Wolfman, Public Citizen Litigation Group, 1600 20th Street, N.W., Washington, D.C. 20009, (202) 588-1000. Arguing for the United States as *amicus curiae* was Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

13. *Brown v. Pro Football, Inc., D/B/A Washington Redskins*, 518 U.S. 231 (1996). After labor negotiations reached an impasse, NFL owners agreed among themselves to impose unilaterally the terms of their last bargaining offer. The question for the Court was whether this agreement fell within an implicit antitrust exemption for collective bargaining. I participated in an amicus brief filed on behalf of the Associated General Contractors of America. We argued in support of the respondents that certain activities of multi-employer bargaining groups were exempt from the antitrust laws. The Court held, 8-1, that the collective-bargaining exemption applied.

With me on the brief were Michael E. Kennedy, General Counsel, Associated General Contractors Of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735, Charles E. Murphy, Murphy, Smith & Polk, P.C., Twenty-Fifth Floor, Two First National Plaza, Chicago, IL 60603, (312) 558-1220, Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioners was Kenneth W. Starr, Kirkland & Ellis, 655 15th Street, N.W., Washington, D.C. 20005, (202) 879-5000. Arguing for the respondents was Gregg H. Levy, Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20004, (202) 662-6000. Arguing for the United States as *amicus curiae* was Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

14. *Holly Farms Corporation v. NLRB*, 517 U.S. 392 (1996). The NLRB approved a collective bargaining unit that included a class of workers known in the poultry industry as "live-haul" workers; Holly Farms challenged the Board's decision on the ground that "live-haul" workers are agricultural laborers exempt from the coverage of the National Labor Relations Act (NLRA). The question before the Court was whether the Board's decision was based on a reasonable interpretation of the NLRA. I participated in an amicus brief filed on behalf of the National Broiler Council. We argued in support of the petitioners that the Board's decision was contrary to the NLRA. The Court disagreed, and ruled that the Board's interpretation was reasonable.

With me on the brief were Gary Jay Kushner and Jonathan S. Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5856.

Arguing for the petitioners was Charles P. Roberts III, Haynsworth, Baldwin, Johnson & Greaves, P.A., 2709 Henry Street, Greensboro, N.C. 27405, (910) 375-9737. Arguing for the respondents was Richard H. Seamon, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

15. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). A group of employee welfare benefit plan beneficiaries sued their employer alleging that they had been misled into withdrawing from the plan. The questions before the Court involved whether the employer breached its fiduciary obligations under the Employee Retirement Income Security Act (ERISA) and whether the particular ERISA provision at issue authorized the beneficiaries to sue to enforce those obligations. I participated in an amicus brief filed on behalf of the U.S. Chamber of Commerce in support of the petitioner. We argued, first, that the relevant provision did not provide a cause of action because the liability of fiduciaries was governed by other sections of ERISA, and second, that ERISA contemplated a different standard from the one argued for by the beneficiaries. The Court disagreed, and ruled for the beneficiaries.

With me on the brief were Stephan A. Bokat, Mona C. Zieberg, The National Chamber Litigation Center, Inc., 1615 H Street, N.W., Washington, D.C. 20062, (202) 463-5337, Evan Miller, H. Christopher Bartolomucci, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was Floyd Abrams, 80 Pine Street, New York, N.Y. 10005, (212) 701-3000. Arguing for the respondent was H. Richard Smith, Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., 100 Court Avenue, Suite 600, Des Moines, IA 50309, (515) 243-7611. Arguing for the United States as *amicus curiae* was Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

16. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Adarand Constructors challenged a federal government preference in the award of contracts for firms that employ minority-owned subcontractors. The question before the Court was whether this preference was subject to strict scrutiny. I participated in an amicus brief filed on behalf of the Associated General Contractors of America in support of petitioner. We argued that the Court's earlier decision to apply strict scrutiny in the context of state and local contracts should apply equally to federal contracts. The Court agreed.

With me on the brief were Michael E. Kennedy, Special Counsel, Associated General Contractors of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735, David G. Leitch, H. Christopher Bartolomucci, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was William Perry Pendley, Mountain States Legal Foundation, 1660 Lincoln Street, Suite 2300, Denver, Colorado 80264, (303) 861-0244. Arguing for the respondents was Drew S. Days, III, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Mr. Days is now at Morrison & Foerster, 2000 Pennsylvania Avenue, N.W., Suite 5500, Washington, D.C. 20006, (202) 887-6920.

17. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995). The Plant Variety Protection Act of 1970 grants the developer of a novel plant variety a limited monopoly to sell seeds of that variety; petitioners alleged that respondents were selling seeds in violation of the Act. The question presented was whether respondents' sales fell within an exemption provided for by the Act. I participated in an amicus brief filed on behalf of the American Seed Trade Association in support of the petitioner. We argued that reading the Act to exempt respondents' sales was inconsistent with its language and purpose. The court, in an 8-1 decision, agreed.

With me on the brief were Gary Jay Kushner, Mark D. Dopp, David G. Leitch, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was Richard L. Stanley, Arnold, White & Durkee, 750 Bering Drive, Suite 400, Houston, Texas 77057, (713) 787-1400. Arguing for the respondents was William H. Bode, William H. Bode & Associates, 1150 Connecticut Avenue, N.W., Ninth Floor, Washington, D.C. 20036, (202) 828-4100. Arguing for the United States as *amicus curiae* was Richard H. Seamon, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

18. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Several individuals brought suit challenging retroactive changes in the terms and conditions of an airline frequent flyer program. The question before the Court was whether the Airline Deregulation Act of 1978 pre-empted respondents' claims. I participated in an amicus brief filed on behalf of the Air Transport Association of America, arguing that state regulation of frequent flyer programs was pre-empted. The Court held that the respondents' claims under an Illinois consumer fraud act were pre-empted, but that their common-law breach of contract claim could go forward.

With me on the brief were John R. Keys, Jr., Winston & Strawn, 1400 L Street, N.W., Washington, D.C. 20005, (202) 371-5700, Calvin P. Sawyier, Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, (312) 558-5600, and Walter A. Smith, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was the late Bruce J. Ennis, Jr., Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005, (202) 639-6000. Arguing for the respondents was Gilbert W. Gordon, Marks, Marks, and Kaplan, Ltd., 120 North LaSalle Street, Suite 3200, Chicago, IL 60602, (312) 332-5200. Arguing for the United States as *amicus curiae* was Cornelia T.L. Pillard, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

19. *Washington v. Harper*, 494 U.S. 210 (1990). A mentally-ill inmate in a Washington prison challenged the State's attempt to administer psychiatric medication against his will. The question presented was whether in deciding to medicate the inmate, the State afforded him the process required by the Due Process Clause of the Fourteenth Amendment. I participated in a brief filed on behalf of the American Psychological Association, arguing that the inmate had not been afforded a truly impartial hearing. The Court held that the procedures established by the prison met the requirements of due process.

With me on the brief were Clifford D. Stromberg, Barbara F. Mishkin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioners was William L. Williams, Sr., Assistant Attorney General, Mail Stop FZ-11, Olympia, WA 98504, (206) 586-1445. Arguing for the respondent was Brian Reed Phillips, 3223 Oakes Avenue, Everett, Washington 98201, (206) 252-3221. Arguing for the United States as *amicus curiae* was Paul J. Larkin, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

20. *South Dakota v. Dole*, 483 U.S. 203 (1987). Under federal law, a state is denied a portion of its federal highway funds if its laws allow persons under the age of 21 to purchase alcohol; South Dakota challenged this provision. The question before the Court was whether the law was a valid exercise of Congress's Spending Clause power. I participated in a brief filed on behalf of the National Beer Wholesalers' Association and 46 state beer, wine, and distilled spirits associations. We argued that the Twenty-First Amendment of the Constitution reserved to the States the authority to regulate alcohol and that Congress could not use its Spending Clause power to circumvent this limitation. The Court disagreed, holding that the provision was valid under the Spending Clause.

With me on the brief were E. Barrett Prettyman, Jr., Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John F. Stasiowski, General Counsel, National Beer Wholesalers' Association, 5205 Leesburg Pike, Suite 505, Falls Church, VA 22041, (703) 578-4300. Arguing for the petitioner was Roger A. Tellinghuisen, Attorney General, State of South Dakota, State Capitol, Pierre, S.D. 57501, (605) 773-3215. Arguing for the respondent was Louis R. Cohen, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 633-2217.

While in private practice, I was also the counsel of record on the following petitions for certiorari, which did not result in an argument before the Court:

Mulvaney Mechanical, Inc. v. Sheet Metal Workers Intern. Ass'n, Local 38 (No. 02-924), *cert. granted and judgment vacated*, 538 U.S. 918 (2003).
Discover Bank v. Szetela (No. 02-829), *cert. denied*, 537 U.S. 1226 (2003).
Bazain v. United States (No. 02-616), *cert. denied*, 537 U.S. 1171 (2003).
Green Spring Health Services, Inc. v. Pennsylvania Psychiatric Society (No. 02-65), *cert. denied*, 537 U.S. 881 (2002).
Besser v. Hardy (No. 01-936), *cert. denied*, 535 U.S. 970 (2002).
National Union Fire Ins. Co. of Pittsburgh, PA v. Textron Financial Corp. (No. 01-176), *cert. granted and judgment vacated*, 534 U.S. 947 (2001).
Ritter v. Stanton (No. 01-1456), *cert. denied*, 536 U.S. 904 (2002).
Citizens Bank of Weston, Inc., v. City of Weston (No. 00-1876), *cert. denied*, 534 U.S. 824 (2001).
Litton Systems, Inc. v. Honeywell, Inc. (No. 00-1617), *cert. dismissed in light of an intervening decision*, 534 U.S. 1109 (2002).
Baltimore Scrap Corp. v. David J. Joseph Co. (No. 00-1592), *cert. denied*, 533 U.S. 916 (2001).

Smithfield Foods, Inc. v. United States (No. 99-1760), *cert. denied*, 531 U.S. 813 (2000).
Mobil Oil Corp. v. McMahon Foundation (No. 99-1830), *cert. denied*, 530 U.S. 1263 (2000).
Roberts v. United States (No. 99-1174), *cert. denied*, 529 U.S. 1108 (2000).
NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel County (No. 99-712), *cert. denied*, 528 U.S. 1117 (2000).
Shoen v. Shoen (No. 99-662), *cert. denied*, 528 U.S. 1075 (2000).
Mary Hitchcock Memorial Hosp. v. Klonoski (No. 98-1181), *cert. denied*, 526 U.S. 1039 (1999).
U-Haul Co. of Cleveland v. Kunkle (No. 98-1097), *cert. denied*, 526 U.S. 1144 (1999).
Kansas City Southern Ry. Co. v. McKenna (No. 98-479), *cert. denied*, 525 U.S. 1016 (1998).
Shoen v. Shoen (No. 98-86), *cert. denied*, 525 U.S. 923 (1998).
UNUM Corp. v. United States (No. 97-1679), *cert. denied*, 525 U.S. 810 (1998).
Shakespeare Co. v. Silstar Corp. of America, Inc. (No. 97-580), *cert. denied*, 522 U.S. 1046 (1998).
Delaware River and Bay Authority v. International Union of Operating Engineers, Local 68, AFL-CIO (No. 97-81), *cert. denied*, 522 U.S. 861 (1997).
Hydranautics v. Filmtec Corp. (No. 95-1887), *cert. denied*, 519 U.S. 814 (1996).
National Union Fire Ins. Co. of Pittsburgh, Pa. v. American Medical Intern., Inc. (No. 95-447), *cert. granted and judgment vacated*, 516 U.S. 984 (1995).
Keystone Sanitation Co., Inc. v. Arcata Graphics Fairfield, Inc. (No. 95-273), *cert. denied*, 516 U.S. 928 (1995).
State Farm Mut. Auto. Ins. Co. v. New Jersey Comm'r of Ins. (No. 95-184), *cert. denied*, 516 U.S. 1184 (1996).
20th Century Ins. Co. v. Garamendi (No. 94-1119), *cert. denied*, 513 U.S. 1140 (1995) & 513 U.S. 1153 (1995).
NationsBank of Texas, N.A. v. Executive Life Ins. Co. (No. 94-884), *cert. denied*, 513 U.S. 1147 (1995).
Bellsouth Advertising & Pub. Corp. v. Donnelley Information Pub., Inc. (No. 93-862), *cert. denied*, 510 U.S. 1101 (1994).
Pardee & Curtin Lumber Co. v. Webster County Comm'n (No. 93-226), *cert. denied*, 510 U.S. 990 (1993).

Finally, while in private practice, I was the counsel of record on the following oppositions to certiorari:

Renzi v. Connelly School of the Holy Child, Inc. (No. 00-1118), *cert. denied*, 531 U.S. 1192 (2001).
Michigan v. EPA (No. 00-632) and Ohio v. EPA (No. 00-633), *cert. denied*, 532 U.S. 904 (2001).
Anadarko Petroleum Corp. v. FERC (No. 99-1429), *cert. denied*, 530 U.S. 1213 (2000).
Miccosukee Tribe of Indians of Fla. v. Tamiami Partners, Ltd. (No. 99-1013), *cert. denied*, 529 U.S. 1018 (2000).
Rockwell Intern. Corp. v. Celeritas Technologies, Ltd. (No. 98-850), *cert. denied*, 525 U.S. 1106 (1999).

Goetz v. Glickman (No. 98-607), *cert. denied*, 525 U.S. 1102 (1999).
Kamilewicz v. Bank of Boston Corp. (No. 96-1184), *cert. denied*, 520 U.S. 1204 (1997).
Amoco Production Co. v. Public Service Co. of Colorado (No. 96-954), *cert. denied*, 520 U.S. 1224 (1997).
Rockland Industries, Inc. v. Chumbley (No. 87-1220), *cert. denied*, 485 U.S. 961 (1988).

16. **Litigation**: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

If any of these cases has already been described in 15(D) above, it need not be repeated here.

1. *United States v. Halper*, 490 U.S. 435 (1989). While in private practice, I was appointed by the Supreme Court to file a brief and present oral argument in support of the judgment below in this case. See *United States v. Halper*, 488 U.S. 906 (1988) (order of appointment). Mr. Halper, the appellee, had proceeded pro se in the lower court; I was the only counsel briefing and arguing in the Supreme Court against the appellant, the United States. I handled the case on a pro bono basis.

The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties under the False Claims Act for the same false Medicaid claims. It was at the time generally assumed that the Double Jeopardy Clause applied only to successive criminal prosecutions, and had no applicability in the civil context.

In briefing and arguing the case, I sought to distinguish the strong line of precedent holding that the Double Jeopardy Clause did not apply to civil cases. My argument distinguished that aspect of the Clause forbidding successive prosecutions — which did not apply to civil cases — from that aspect of the Clause forbidding successive punishments — which, I argued, had no such limitation. In a unanimous opinion authored by Justice Blackmun, the Court agreed with this analysis. 490 U.S. 435 (1989). The case was important in establishing that the protections of the Double Jeopardy Clause are not

limited to the criminal context, and the decision had a significant effect on the government's imposition of sanctions in a wide range of areas. It was later sharply restricted, however, if not overruled, in *Hudson v. United States*, 522 U.S. 101 (1997).

I had no co-counsel assisting me. Arguing for the United States was Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. *United States v. Kokinda*, 497 U.S. 720 (1990). I participated in the briefing and presented argument before the Supreme Court on behalf of the United States in this criminal case, which involved a challenge to Postal Service regulations making it a misdemeanor to solicit funds on "postal premises," defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The Court of Appeals for the Fourth Circuit had struck down the convictions of two individuals for soliciting contributions for their organization on the walkway, holding that such activities could not be banned consistent with the First Amendment. The Supreme Court ruled in the government's favor and reversed. Writing for a plurality of four Justices, Justice O'Connor agreed with us that the postal walkway was not a public forum, but instead government property set aside to facilitate particular government business — in this case, the handling of the mails. Since solicitation of contributions to organizations by private individuals would interfere with the conduct of postal business and since the regulation did not discriminate on the basis of viewpoint, Justice O'Connor concluded that the ban on solicitation was valid. Justice Kennedy concurred, relying on our alternative argument that the ban was a valid time, place, and manner restriction.

Other counsel on the brief with me were Kenneth W. Starr, then Solicitor General, then Assistant Attorney General Edward S.G. Dennis, Jr., then Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

3. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). The Court of Appeals for the District of Columbia Circuit had allowed an organization to challenge over a thousand individual land use decisions affecting millions of acres of public land on the basis of the affidavits of two individuals asserting an interest in the decisions. As Acting Solicitor General, I authorized and participated in the preparation of a petition for certiorari seeking Supreme Court review on behalf of the Secretary of the Interior. The Court granted our petition, and I participated in the briefing on the merits and presented oral argument on behalf of the government.

We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5-4 decision, agreed with our analysis. Justice Scalia, writing

for the majority, held that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not "presume" the specific facts necessary to establish adequate injury. Justice Blackmun, for the dissenters, argued that the affidavits should have sufficed at the summary judgment stage.

Co-counsel for the United States assisting me were then Assistant Attorney General Richard Stewart, then Deputy Solicitor General Lawrence G. Wallace, then Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

4. *National Collegiate Athletic Association v. Smith,* 525 U.S. 459 (1999). After the Court of Appeals for the Third Circuit ruled against the NCAA in this case, I was retained to seek Supreme Court review, and to brief and argue for the NCAA on the merits in the event the Court elected to hear the case. The Third Circuit had ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* — which applies only to organizations that receive federal financial assistance — applied to the NCAA, because it received dues from entities that receive federal financial assistance. We argued in our petition for certiorari that hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent, and the Supreme Court granted review.

The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress' Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding — those who knowingly entered into a bargain by accepting the funding — and does not "follow [] the aid past the recipient to those who merely benefit from the aid." *United States Department of Transportation v. Paralyzed Veterans of America,* 477 U.S. 597, 607 (1986). The NCAA, we argued, was accordingly not covered simply because its dues-paying members were.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with our position. The Court explained that, at most, the NCAA's "receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage." 525 U.S. at 468.

Appearing on the briefs with me in this case were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100 and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN

46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000.

5. *Rice v. Cayetano,* 528 U.S. 495 (2000). I was retained by the State of Hawaii to brief and argue this case after a petition for certiorari was granted to review what for the State had been a favorable decision by the Court of Appeals for the Ninth Circuit. That court had upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction violated the Fourteenth and Fifteenth Amendments as racial discrimination.

On behalf of the State, we defended the state law and favorable Court of Appeals decision by arguing that the classification drawn by the statute was not drawn on the basis of race. Instead, the statute simply restricted the franchise to beneficiaries of the underlying trusts. The petitioner had not challenged those trusts, and it was rational to limit voting to those most directly affected by how the trusts were administered.

We also argued that the classification was not based on race but instead on the congressionally-recognized political status of Native Hawaiians as an indigenous people. This ground had been relied on by the Supreme Court and other courts to uphold classifications involving Native Americans in the lower 48 states and Native Alaskans, and we argued that the same rationale should apply to the indigenous people of the Hawaiian Islands.

The Court rejected our arguments, 7-2. Justice Kennedy, writing for the majority, rejected our attempted analogy between Native Hawaiians and other Native Americans, reasoning that Congress had not dealt with Native Hawaiians as members of politically-organized tribes, as was the case with respect to other Native Americans. The majority also rejected our argument that the classification should be regarded as being based on beneficiary status rather than race. Justice Breyer, joined by Justice Souter, concurred in the result, also rejecting the analogy to Native American classifications on the ground that Native Hawaiians were not organized into tribes. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Hawaiian statute should be upheld in light of the unique history of Hawaii and the analogy to principles of American Indian law.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl L. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, HI 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

6. *TrafFix Devices, Inc. v. Marketing Displays. Inc.*, 532 U.S. 23 (2001). The issue in this patent and trade dress case was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind. TrafFix Devices copied

and improved upon the design after Marketing Displays' patent expired. The Sixth Circuit Court of Appeals concluded that the distinctive appearance of the Marketing Displays sign stand design could be protected from such copying as trade dress. I was retained by TrafFix Devices to seek Supreme Court review and brief and argue the case on the merits if review were granted. We argued in our petition for certiorari that the Sixth Circuit decision conflicted with other circuit court decisions and Supreme Court precedent, and the Supreme Court granted review.

In our briefs on the merits and in oral argument before the Court, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder the exclusive rights to his invention for a limited period of time, on the condition that the right to practice the invention becomes public property when the patent expires. Allowing the patent holder to extend the period of exclusive use after the expiration of the patent, under the guise of trade dress, would deprive the public of the benefit of this bargain. We also explained that this was the basis for the trade dress "functionality" doctrine, barring protection for functional features.

The Supreme Court agreed with our position in a unanimous opinion authored by Justice Kennedy. The Court explained that the sign stand design was functional, as evidenced by the fact that it had qualified for and enjoyed patent protection. Because the design was functional, the Court ruled, it could not qualify for trade dress protection.

Co-counsel with me on our briefs were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C., 201 W. Big Beaver, Suite 400, Troy, MI, 48084, (248) 689-3500. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, MI 48034, (248) 223-9500, argued for the respondent.

7. *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The Tahoe Regional Planning Agency (TRPA) instituted two successive moratoria that restricted virtually all development in the Lake Tahoe region for 32 months. In the interim, TRPA sought to develop a comprehensive plan to protect the water quality of the Tahoe region. A group of Tahoe-area property owners challenged the moratoria in federal court on the ground that TRPA's actions constituted a *per se* taking, in violation of the Takings Clause of the United States Constitution. The Ninth Circuit Court of Appeals rejected plaintiffs' claim, ruling that the moratoria were more appropriately analyzed using the fact-specific inquiry set forth in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). I was retained by TRPA to defend that decision before the Supreme Court.

I participated in briefing on appeal and presented oral argument before the Supreme Court. We argued that the moratoria did not constitute a *per se* taking. The Court's earlier decisions made clear, we contended, that *per se* takings are the exception — limited to situations involving physical occupation of property or a permanent prohibition

on productive use. Neither was involved here, and we argued that the moratoria should therefore be evaluated under the factors laid out in *Penn Central*.

The Court, in a 6-3 decision, agreed with our position. Writing for the majority, Justice Stevens noted that the proper inquiry under the Takings Clause considers interference with the rights of the property as a whole. A temporary ban on use, the Court ruled, is not transformed into a total ban — and consequently, a *per se* taking — simply because the right to use the property can be divided into discrete increments of time. Chief Justice Rehnquist, writing for the three dissenters, would have ruled that the moratoria constituted a *per se* taking.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668, appearing on behalf of the United States as *amicus curiae* supporting the respondents. With me on the brief were E. Clement Shute, Jr., Fran M. Layton, and Ellison Folk of Shute, Mihaly & Weinberger L.L.P., 396 Hayes Street, San Francisco, CA 94102, (415) 552-7272, John L. Marshall, Tahoe Regional Planning Agency, P.O. Box 1038, Zephyr Cove, NV 89448, (775) 588-4547, and Richard J. Lazarus, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, (202) 662-9129. The petitioners were represented by Michael M. Berger of Berger & Norton Law Corporation, 1620 26th Street, Suite 200, South Santa Monica, CA 90404, (310) 449-1000.

8. *Smith v. Doe*, 538 U.S. 84 (2003). In 1994, the State of Alaska enacted the Alaska Sex Offender Registration Act, which required convicted sex offenders to register with the State and made offender information available to the public. The Act applied to any "sex offender or child kidnapper who is physically present in the state." Two persons who had been convicted of sexual offenses prior to 1994 brought suit contending that applying the Act to them violated the Ex Post Facto Clause of the United States Constitution. A district court upheld the law, but was reversed by the Ninth Circuit Court of Appeals, which ruled that the Act could only be applied to offenders whose crimes were committed after the law's enactment. I was asked by the Alaska officials named as defendants in the suit to seek Supreme Court reversal of the Ninth Circuit's ruling.

I participated in preparation of briefs on the merits and presented oral argument before the Supreme Court. We argued that the Act was intended not to punish, but to protect the public by making truthful information about sex offenders available to those who wished to access it. Furthermore, we argued that the law was not punitive in effect under the seven-factor test outlined by the Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). As such, we contended, the Act did not implicate the Ex Post Facto Clause.

The Court agreed with our position and, in a 6-3 ruling, reversed the Ninth Circuit. The opinion for the majority by Justice Kennedy concluded that in enacting the sex offender law, Alaska intended to create a civil regulatory regime and that the law was not so punitive in character as to be effectively transformed into a criminal penalty.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668, who appeared on behalf of the United States as *amicus curiae* in support of the petitioners. My co-counsel on the brief were Jonathan S. Franklin and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Cynthia M. Cooper, 3410 Southbluff Circle, Anchorage, AK 99515, (907) 349-3483, and Bruce M. Botelho, then Alaska Attorney General, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Principal counsel for the respondents were Verne E. Rupright of Rupright & Foster, 322 Main Street, Wasilla, AK 99654, (907) 373-3215, and Daryl L. Thompson of Daryl L. Thompson P.C., 841 I Street, Anchorage, AK 99501, (907) 272-9322.

9. *KenAmerican Resources, Inc. v. International Union, UMWA*, 99 F.3d 1161 (D.C. Cir. 1996). The issue in this case concerned the scope of an agreement to arbitrate. An arbitrator had ruled that certain coal companies owned by an individual stockholder were subject to arbitration because another company also owned by that same individual had subscribed to an arbitration agreement purporting to bind nonsignatory parents, subsidiaries, and affiliates. I was retained by the companies to overturn that result. I argued the case before the district court, lost on summary judgment, and appealed to the D.C. Circuit.

I participated in the briefing on appeal and presented oral argument before the Court of Appeals. We contended that the district court erred in deferring to the arbitrator on the issue of arbitrability and that the court should decide that issue *de novo*. On the merits, we relied heavily on the agreement documents and explained that the company that had signed the arbitration agreement had carefully limited the scope of its agreement in a manner that did not include the other companies owned by the common sole shareholder.

In a published opinion authored by Judge Silberman and joined by Judges Ginsburg and Rogers, the D.C. Circuit agreed with our arguments and reversed the district court decision enforcing the arbitration award. The Court of Appeals agreed that the lower court had erred in deferring to the arbitrator on the issue of arbitrability, and agreed with our construction of the agreements limiting the scope of the arbitration clause.

Co-counsel in the case were Daniel F. Attridge, Donald Kempf, John S. Irving, Jr., and Gary Brown of Kirkland & Ellis, 655 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20005, (202) 879-5000, and Jonathan S. Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5766. John R. Mooney, Mooney, Green, Gleason, Baker, Gibson & Saindon, P.C., 1920 L Street, N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010, argued the appeal for the appellees.

10. *Litton Systems, Inc. v. Honeywell, Inc.*, 238 F.3d 1376 (Fed. Cir. 2001). This case was the third published opinion in a long-running, multi-billion dollar patent and state

law dispute between Litton and Honeywell over proprietary interests in laser gyroscope navigational systems for aircraft. Litton had won a $1.2 billion jury verdict on patent and state tort grounds, but the district court entered judgment for Honeywell notwithstanding the verdict. The Federal Circuit reversed and remanded for a new trial. The district court did not hold a new trial but instead once again entered judgment for Honeywell. I was retained on appeal of that result.

I participated in the briefing and presented oral argument before the Federal Circuit. The patent law issue concerned whether Litton was estopped from arguing that Honeywell's technology infringed by equivalents, because Litton had amended its patent claims allegedly to exclude all but its precise embodiment of the invention. The answer turned on technical questions involving the operation of the respective ion guns used by Litton and Honeywell to create the perfectly-reflective mirrors employed in ring laser gyroscopes. The state law issues turned on whether there was sufficient evidence in the record to support the jury's finding that Honeywell had interfered with Litton's agreements with the inventor of the pertinent technology.

Our patent claims became moot after oral argument, when the Federal Circuit issued an en banc opinion in another case holding that the doctrine of equivalents was not available at all to a patentee who had amended his claims. The Federal Circuit, however, issued a published opinion agreeing with our position on the state law claims. The opinion was authored by Chief Judge Mayer and joined by Judge Rader. Judge Bryson concurred in part and dissented in part. The Court reversed the district court's grant of judgment for Honeywell, concluding that the lower court had erred in resolving disputed issues of fact. The case was remanded for a new trial on the state law claims.

I was assisted by Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5491, Frederick Lorig and Sidford Brown, Bright & Lorig, 633 West 5th Street, Los Angeles, California 90071, (213) 627-7774, and Rory Radding, Stanton Lawrence, and Carl Bretscher, Pennie & Edmonds L.L.P., 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Richard G. Taranto, Farr & Taranto, 1220 19th Street, N.W., Suite 800, Washington, D.C. 20036, (202) 775-0184, argued for appellee Honeywell.

17. **Citations**: From your time as a judge, please provide:

a. citations for all opinions you have written (including concurrences and dissents);

Fornaro v. James, 2005 WL 1719431 (D.C. Cir. July 26, 2005)
United States v. Jackson, 2005 WL 1704843 (D.C. Cir. July 22, 2005) (dissenting)
Brady v. FERC, 2005 WL 1591463 (D.C. Cir. July 08, 2005)
Booker v. Robert Half International, Inc., 2005 WL 1540796 (D.C. Cir. July 01, 2005)
Outlaw v. Airtech Air Conditioning and Heating, Inc., 2005 WL 1489687 (D.C. Cir. June 24, 2005)
Amoco Production Co. v. Watson, 410 F.3d 722 (D.C. Cir. 2005)

United States v. Lawson, 410 F.3d 735 (D.C. Cir. 2005)
AFL-CIO v. Chao, 409 F.3d 377 (D.C. Cir. 2005) (concurring in part and dissenting in part)
National Treasure Employees Union v. FLRA, 404 F.3d 454 (D.C. Cir. 2005) (concurring)
Universal City Studios LLLP v. Peters, 402 F.3d 1238 (D.C. Cir. 2005)
Public Service Commission of Kentucky v. FERC, 397 F.3d 1004 (D.C. Cir. 2005)
United States v. Toms, 396 F.3d 427 (D.C. Cir. 2005)
Taucher v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005)
American Federation of State, County & Municipal Employees Capital Area Council 26 v. FLRA, 395 F.3d 443 (D.C. Cir. 2005)
AT&T Corp. v. FCC, 394 F.3d 933 (D.C. Cir. 2005)
Koszola v. FDIC, 393 F.3d 1294 (D.C. Cir. 2005)
United States v. Mellen, 393 F.3d 175 (D.C. Cir. 2004)
United States v. West, 392 F.3d 450 (D.C. Cir. 2004)
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United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004)
In re England, 375 F.3d 1169 (D.C. Cir. 2004)
United States v. Arnett Smith, 374 F.3d 1240 (D.C. Cir. 2004), *reh'g denied*, 401 F.3d 497 (D.C. Cir. 2005) (per curiam)
Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361 (D.C. Cir. 2004)
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Jung v. Mundy, Holt & Mance, PC, 372 F.3d 429 (D.C. Cir. 2004)
Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) (concurring)
Consumers Energy Co. v. FERC, 367 F.3d 915 (D.C. Cir. 2004)
Duchek v. National Transportation Safety Bd., 364 F.3d 311 (D.C. Cir. 2004)
International Action Center v. United States, 365 F.3d 20 (D.C. Cir. 2004)
PDK Laboratories Inc. v. U.S. DEA, 362 F.3d 786 (D.C. Cir. 2004) (concurring)
United States v. Stanfield, 360 F.3d 1346 (D.C. Cir. 2004)
In re Tennant, 359 F.3d 523 (D.C. Cir. 2004)
Graham v. Ashcroft, 358 F.3d 931 (D.C. Cir. 2004)
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BDPCS, Inc. v. FCC, 351 F.3d 1177 (D.C. Cir. 2003)
IT Consultants, Inc. v. Republic of Pakistan, 351 F.3d 1184 (D.C. Cir. 2003)
Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667 (D.C. Cir. 2003)
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Ramaprakash v. FAA, 346 F.3d 1121 (D.C. Cir. 2003)
Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (dissenting from denial of rehearing en banc)

b. a list of cases in which appeal or certiorari has been requested or granted;

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (May 16, 2005)
United States v. Holmes, 385 F.3d 786 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1388 (Feb. 22, 2005)
In re England, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1343 (Feb. 22, 2005)
Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) (concurring opinion), *cert. denied*, 125 S. Ct. 1928 (Apr. 25, 2005)
Graham v. Ashcroft, 358 F.3d 931 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 83 (Oct. 4, 2004)
Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2042 (Apr. 19, 2004)
Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (dissent from denial of rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (Mar. 1, 2004)

c. a list of all appellate opinions where your decision was reversed or where your judgment was affirmed;

None.

d. a list of and copies of all your unpublished opinions;

On the D.C. Circuit, panels traditionally issue unpublished decisions per curiam, instead of under one judge's name. Accordingly, this list includes all the per curiam, unpublished decisions of all the merits panels on which I have sat.

Flynn v. Ohio Building Restoration, Inc. (June 27, 2005)
Pennsylvania Mun. Auth. Ass'n v. Leavit (June 3, 2005)
Interstate Industrial Corp. v. Sec. of Labor (May 19, 2005)
Swinson v. Coates & Lane, Inc. (May 18, 2005)
Mercy Medical Skilled Nursing Facility v. Leavitt (May 18, 2005)
i2way Corp. v. FCC (Mar. 23, 2005)
Muckle v. Gonzalez (Mar. 21, 2005)
Richardson v. Loyola (Mar. 4, 2005)
U.S. Ship Management, Inc. v. U.S. Maritime Admin. (Mar. 3, 2005)
United States v. Fornah (Mar. 1, 2005)
Nat'l Alt. Fuels Ass'n v. EPA (Feb. 25, 2005)
Hernandez v. Norinco (Jan. 21, 2005)
Willson v. SunTrust Bank (Dec. 21, 2004)
United States v. Catlett (Nov. 24, 2004)

Pugh v. Socialist People's Libyan Arab Jamahiriya (Nov. 22, 2004)
United States v. Darko (Sep. 24, 2004)
Jacobson v. Dep't of Agriculture (June 1, 2004)
United States v. Kevin Johnson (May 26, 2004)
Communications Workers of America, Local 13000 v. NLRB (May 24, 2004)
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Ulico Casualty Co. v. Superior Management Services (Mar. 11, 2004)
Lopez Contractors, Inc. v. F&M Bank Allegiance (Feb. 18, 2004)
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In re Sealed Case (Nov. 14, 2003) (order not available)
Mobilfone Service, Inc. v. FCC (Oct. 24, 2003)
Brown v. Koester Environmental Services, Inc. (Oct. 17, 2003)
Riverdale Mills Corp. v. Sec. of Labor (Oct. 3, 2003)
United States v. McDade (Sep. 16, 2003)

e. and citations to all cases in which you were a panel member.

In addition to the cases cited in parts *a.* and *d.* of this question:

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National Ass'n of Home Builders v. Norton, 2005 WL 1591058 (D.C. Cir. July 8, 2005)
Porter v. Natsios, 2005 WL 1540797 (D.C. Cir. July 1, 2005)
ITT Industries, Inc. v. NLRB, 2005 WL 1513091 (D.C. Cir. June 28, 2005)
Town of Springfield, NJ v. Surface Transportation Bd., 2005 WL 1489865 (D.C. Cir. June 24, 2005)
TMR Energy Ltd. v. State Property Fund of Ukraine, 411 F.3d 296 (D.C. Cir. 2005)
Taylor v. U.S. Probation Office, 409 F.3d 426 (D.C. Cir. 2005)
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Xcel Energy Services Inc. v. FERC, 407 F.3d 1242 (D.C. Cir. 2005) (per curiam)
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In re Cheney, 406 F.3d 723 (D.C. Cir. 2005) (en banc)
Wal-Mart Stores, Inc. v. Sec. of Labor, 406 F.3d 731 (D.C. Cir. 2005)
Kreis v. Sec. of Air Force, 406 F.3d 684 (D.C. Cir. 2005)

CSX Transp., Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005) (per curiam)
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Robertson v. American Airlines, Inc., 401 F.3d 499 (D.C. Cir. 2005)
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DTE Energy Co. v. FERC, 394 F.3d 954 (D.C. Cir. 2005)
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Hutchinson v. CIA, 393 F.3d 226 (D.C. Cir. 2005)
Manion v. American Airlines, Inc., 395 F.3d 428 (D.C. Cir. 2004)
Northern California Power Agency v. Nuclear Regulatory Comm'n, 393 F.3d 223 (D.C Cir. 2004)
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United States v. Brown, 374 F.3d 1326 (D.C. Cir. 2004)
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Herero People's Reparations Corp. v. Deutsche Bank, AG, 370 F.3d 1192 (D.C. Cir. 2004)
Stanford Hosp. and Clinics v. NLRB, 370 F.3d 1210 (D.C. Cir. 2004)
United States v. Hayes, 369 F.3d 564 (D.C. Cir. 2004)
American Postal Workers Union, AFL-CIO v. NLRB, 370 F.3d 25 (D.C. Cir. 2004)

American Federation of Government Employees, AFL-CIO v. Loy, 367 F.3d 932 (D.C. Cir. 2004)
National R.R. Passenger Corp. v. Lexington Ins. Co., 365 F.3d 1104 (D.C. Cir. 2004)
National Ass'n of Government Employees, Local R5-136 v. FLRA, 363 F.3d 468 (D.C. Cir. 2004)
Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB, 363 F.3d 437 (D.C. Cir. 2004)
Evergreen America Corp. v. NLRB, 362 F.3d 827 (D.C. Cir. 2004)
SA Storer and Sons Co. v. Sec. of Labor, 360 F.3d 1363 (D.C. Cir. 2004)
United States v. Thomas, 361 F.3d 653 (D.C. Cir. 2004), *cert. granted, judgment vacated in light of United States v. Booker*, 125 S.Ct. 1056 (Jan. 24, 2005)
Association of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA, 360 F.3d 195 (D.C. Cir. 2004)
United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004)
Godwin v. Sec'y of Housing and Urban Development, 356 F.3d 310 (D.C. Cir. 2004)
English-Speaking Union v. Johnson, 353 F.3d 1013 (D.C. Cir. 2004)
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Natural Resources Defense Council v. Dep't of Energy, 353 F.3d 40 (D.C. Cir. 2004) (per curiam)
American Federation of Government Employees, Nat. Veterans Affairs Council 53 v. FLRA, 352 F.3d 433 (D.C. Cir. 2003)
Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229 (D.C. Cir. 2003)
United States v. Riley, 351 F.3d 1265 (D.C. Cir. 2003)
Lohrenz v. Donnelly, 350 F.3d 1272 (D.C. Cir. 2003)
United States v. Howard, 350 F.3d 125 (D.C. Cir. 2003)
Tax Analysts v. IRS, 350 F.3d 100 (D.C. Cir. 2003)
International Union of Operating Engineers, Local 470, AFL-CIO v. NLRB, 350 F.3d 105 (D.C. Cir. 2003)
City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003)
United States v. Seiler, 348 F.3d 265 (D.C. Cir. 2003)
Williams Companies v. FERC, 345 F.3d 910 (D.C. Cir. 2003)
Marseilles Land and Water Co. v. FERC, 345 F.3d 916 (D.C. Cir. 2003)

**18.** **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Prior to first joining Hogan & Hartson in 1986, the significant legal activities I pursued generally did not involve litigation. My duties as Associate Counsel to the

President and Special Assistant to Attorney General William French Smith are discussed in the response to question 15b. Among the more significant of those activities were the review of legislation submitted to the President, as well as the drafting and review of executive orders, Presidential proclamations, and other Presidential documents.

Significant non-litigation legal activities since 1986 have focused on improving the quality of appellate practice before the Courts of Appeals and the Supreme Court. In addition to involvement with the American Academy of Appellate Lawyers and the recently-established Edward Coke Appellate Inn of Court, I regularly participated in moot court programs designed to improve the advocacy of those presenting cases before the Supreme Court, in particular the programs sponsored by the State and Local Legal Center and the Georgetown University Law Center Supreme Court Institute. I have also assisted the American Bar Association in presenting its programs on appellate advocacy, appearing as an advocate in its programs, and I write and speak regularly on the subject.

I have also been active in the area of legal reform. I have participated in the work of the American Law Institute, and currently serve on the United States Judicial Conference Advisory Committee on Appellate Rules. I am scheduled to assume the chairmanship of that Committee in October 2005. I served on that Committee as a lawyer prior to assuming the bench and was reappointed as a judicial member after my confirmation. Another example of such activity was my work on the bipartisan Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell. That work is discussed in greater detail in response to question 26.

In perhaps an excess of caution, I filed a report under the Lobbying Disclosure Act in 1998 in connection with legal work for the Western Peanut Growers Association and the Panhandle Peanut Growers Association. These were clients of the firm primarily represented by another partner. My activities involved legal analysis to assist the partner; I do not recall meeting with any government officials in connection with the representation.

**19.** **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

I undertook my first effort at teaching, apart from occasional guest lecture stints, this summer, co-teaching a course on International Trade as part of the Georgetown Law School summer program at University College London. I was to teach the first two weeks of the course; Judge Timothy Stanceu of the U.S. Court of International Trade was to teach the second two weeks. My teaching was abbreviated due to the present nomination, and Judge Stanceu took over after I had taught only four classes. The topics I taught included the arguments in favor of free trade and in favor of protection, the allocation of authority in domestic law to regulate international trade, the international

law basis for international trade regulation, and the basic features of the General Agreement on Tariffs and Trade and the World Trade Organization.

20. **Party to Civil Legal or Administrative Proceedings:** State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil, legal or administrative proceedings. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest.

I am the subject of Judicial Council Complaint No. 05-13, filed June 6, 2005, by Keith Russell Judd. Acting Chief Judge Harry Edwards issued an order dismissing the complaint on July 7, 2005. Mr. Judd filed an appeal to the Judicial Council on July 19, 2005; that appeal is now pending. The complaint charges me with practicing medicine without a license in connection with an order disposing of complainant's motion to proceed *in forma pauperis*. Mr. Judd, who had incurred three qualifying dismissals under 28 U.S.C. § 1915(g), moved to proceed *in forma pauperis* on the ground that he was "under imminent danger of serious physical injury." The order denying Mr. Judd's motion ruled that "[c]hronic medical conditions such as the hernia discussed in appellant's motion generally do not represent an 'imminent danger of physical injury' for purposes of 28 U.S.C. § 1915(g)."

I am a named party in *Rodriguez, et al. v. Nat'l Ctr. for Missing & Exploited Children, et al.*, No. 03-cv-00120 (D.D.C. filed Jan. 27, 2003), *appeal docketed*, No. 05-5202 (D.C. Cir. May 23, 2005). I was added as a named defendant — along with eight other judges on the D.C. Circuit, Chief Justice Rehnquist, and several judges from other circuits — in plaintiff's First Amended Complaint, filed on March 8, 2005. On March 31, 2005, the District Court for the District of Columbia dismissed the action with regard to the defendants in the original complaint, and ordered the amended complaint stricken. A notice of appeal was filed by Mr. Rodriguez on May 23, 2005. According to published judicial opinions in the matter, Mr. Rodriguez is a Virginia resident with ties to Colombia. He lived in Colombia for much of the period between 1987 and 1999 and there fathered a child, Isidoro, in 1989. In 2001, Isidoro and his mother visited Mr. Rodriguez in Virginia. Near the end of the visit, Mr. Rodriguez would not allow Isidoro to return to Colombia and filed a petition to modify custody in a Fairfax County, Virginia, court. Isidoro's mother answered with a suit in federal district court for the Eastern District of Virginia under the Hague Convention on the Civil Aspects of International Child Abduction; she won, and won again on appeal. Mr. Rodriguez now alleges a conspiracy on the part of numerous federal and private defendants to deprive him of his constitutional rights.

21. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

22. **Potential Conflicts of Interest**: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

If confirmed, I would resolve any conflict of interest by looking to the letter and spirit of the Code of Conduct for United States Judges (although it is not formally binding on members of the Supreme Court of the United States), the Ethics Reform Act of 1989, 28 U.S.C. § 455, and any other relevant prescriptions. I would recuse myself from any matter involving my former law firm or former clients for whom I did work, for the periods specified in the Judicial Conference Guidelines. I would also recuse myself from matters in which I participated while a judge on the court of appeals.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Prior to this nomination, I had agreed to teach a seminar on Supreme Court Litigation beginning in January 2006, at the Georgetown University Law Center.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

A copy of the financial disclosure report is attached.

25. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Statement of Net Worth.

26. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I participated in the briefing and orally argued *Barry v. Little*, 669 A.2d 115 (D.C. 1995), before the District of Columbia Court of Appeals, entirely on a pro bono basis. My client in that appeal was a class of District of Columbia residents receiving general public

assistance benefits — the neediest people in the District. On behalf of that class, we argued that a change in eligibility standards that resulted in a termination of general public assistance benefits without an individual evidentiary hearing denied class members procedural due process. We asserted that class members had a limited entitlement to continued receipt of welfare benefits, and that even if new standards were to be applied, benefits could not be terminated in the absence of an individual evidentiary hearing. My co-counsel in that proceeding included the Washington Legal Clinic for the Homeless, Legal Counsel for the Elderly, the American Civil Liberties Union Fund of the National Capital Area, the Information, Protection & Advocacy Center for Handicapped Individuals, Inc., and the Neighborhood Legal Services Program. I personally spent over 110 hours handling the appeal and related matters. The Court of Appeals ruled against our position and upheld the legislative alteration of standards and accompanying automatic termination of benefits.

I briefed and argued *United States v. Halper*, 490 U.S. 235 (1989), before the Supreme Court entirely on a pro bono basis. The federal government sought to assess civil penalties against Mr. Halper, who had previously been convicted under federal criminal law for the same conduct giving rise to the civil penalties. Mr. Halper was not represented by counsel in the district court. When the Supreme Court agreed to hear the government's direct appeal of the judgment in Mr. Halper's favor, the Court invited me to brief and argue in defense of the judgment below. I personally spent over 200 hours briefing and arguing the case, which resulted in a unanimous Supreme Court decision in Mr. Halper's favor.

In addition to the foregoing, I participated personally in other pro bono efforts in which my former law firm, Hogan & Hartson, had been involved. Hogan & Hartson has a historic commitment to providing legal services to the disadvantaged, a commitment embodied in its Community Services Department. That department is devoted exclusively to rendering legal services to those who cannot afford them. I assisted personally in various of the firm's efforts in this area, including spending 25 hours assisting in the firm's representation of an inmate on Florida's death row. I regularly assisted the firm's pro bono efforts in my area of specialization, not only by handling pro bono appeals myself, as in *Barry v. Little* and *United States v. Halper*, but also by helping prepare colleagues handling pro bono appeals for oral argument. I have done the latter with respect to pro bono matters involving such issues as termination of parental rights, minority voting rights, noise pollution at the Grand Canyon, environmental protection of Glacier Bay, Alaska, and election law challenges. Each of these moot court projects involves study of the briefs in the case, participation in one or often more moot court practice sessions for the arguing attorney, and discussion of ways to improve that attorney's presentation and the substantive legal arguments.

My pro bono legal activities were not restricted to providing services for the disadvantaged. For example, I participated on a pro bono basis in a program sponsored by the National Association of Attorneys General to help prepare representatives of state and local governments to argue before the Supreme Court of the United States. Several times per year, I reviewed the briefs in selected cases, and then met with state or local counsel

for a moot court session prior to counsel's Supreme Court argument. Several of the Supreme Court Justices have commented on the need to improve the quality of state and local representation before the Court and I considered participation in the NAAG program to be a positive contribution to that end. By the same token, I assisted other attorneys from both the public and private sectors on a pro bono basis by participating in a similar moot court program conducted by the Supreme Court Institute at the Georgetown University Law Center. I also helped present programs on appellate advocacy sponsored by the American Bar Association Appellate Practice Institute, which has a similar objective of improving the quality of appellate advocacy.

I have also sought to assist in improving public understanding of our legal system. Every year I participate in a program jointly sponsored by Street Law, Inc., and the Supreme Court Historical Society, which brings selected high school teachers from around the country to Washington, D.C. to learn about the Supreme Court, so that they might return home better equipped to teach their students and assist other teachers. I have continued my participation in that program after becoming a judge. I also regularly hosted groups of students from the National Youth Leadership Forum and the American University Washington semester program who are studying the legal system and the Supreme Court. With respect to legal education, I have served as a judge for the moot court competition sponsored by the National Black Law Students Association, and participated in my firm's "Introduction to Legal Reasoning" program. That program — sponsored by the Washington Lawyers' Committee for Civil Rights and Urban Affairs — helps prepare entering first year law students from disadvantaged or traditionally underrepresented backgrounds for law study.

In addition, I also actively participated on a pro bono basis in efforts to achieve legal reform. My activities in connection with the Advisory Committee on Appellate Rules and the American Law Institute reflect this commitment. To cite another example, in 1999 I was asked to participate in the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell. This bi-partisan group (other members were Zoe Baird, Drew Days, Carla Hills, Bill Paxon, David Skaggs, Richard Thornburgh, and Mark Tuohey) was convened to consider and propose legislative amendments to the Independent Counsel Statute. The group issued a comprehensive report, and I joined Drew Days in testifying together with Senators Dole and Mitchell before Congress on the results of our efforts.

**27. <u>Selection Process</u>:**

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with the White House staff or the Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications.

I was interviewed on April 1, 2005 by the Attorney General. I was next interviewed on May 3, 2005 by a group including the Vice President, Attorney General, Chief of Staff Andrew Card, Counsel to the President Harriet Miers, Deputy Chief of Staff Karl Rove, and the Vice President's Chief of Staff I. Lewis Libby. On May 23, 2005, I was interviewed by Ms. Miers separately. I had a telephone interview with Ms. Miers and Deputy Counsel to the President William K. Kelley on July 8, 2005. I had several telephone conversations with Mr. Kelley between July 8 and July 19, 2005. Finally, I was interviewed by the President on July 15, 2005; Ms. Miers was present for that interview. There were also telephone conversations with Mr. Kelley arranging the foregoing interviews.

b. Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully. Please identify each communication you had during the six months prior to the announcement of your nomination with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.

No.

28. **Judicial Activism**: Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society, generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. a tendency by the judiciary toward problem-solution rather than grievance-resolution;
b. a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
c. a tendency by the judiciary to impose broad, affirmative duties upon governments and society;
d. a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
e. a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

*Second*, a judge needs the humility to appreciate that he is not necessarily the first person to confront a particular issue. Precedent plays an important role in promoting the stability of the legal system, and a sound judicial philosophy should reflect recognition of the fact that the judge operates within a system of rules developed over the years by other judges equally striving to live up to the judicial oath.

*Third*, a judge must have the humility to be fully open to the views of his fellow judges on the court. Collegiality is an essential attribute of judicial decision-making at the appellate level. This does not refer to personal friendliness, but instead an appreciation that fellow judges have read the same briefs, studied the same precedent and record, and participated in the same oral argument. Their views on the appropriate analysis or outcome accordingly deserve the most careful and conscientious consideration.

A good judge must be a thoughtful skeptic at each stage of the appellate process. Just as a firm view on the correct result should not be reached after reading only the opening brief, so too such a settled view should not be reached simply after studying the briefs without reviewing the record, or reading the precedent without testing the lawyers' contentions during oral argument, or analyzing the different positions without receptive consideration of the views of the other judges. Writing the opinion is a critical part of this decision process. I and most judges have had the experience of attempting to draft an opinion that would just "not write" — because the analysis could not withstand the discipline of careful, written exposition. When that happens, it is time to sit down with the other judges on the panel and revisit the preliminary resolution. All this requires a degree of modesty and humility in the judge, an ability to recognize that preliminary perceptions may turn out to be wrong, and a willingness to change position in light of later insights.

AO-10
Rev. 1/2004

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

| | | |
|---|---|---|
| 1. Person Reporting (Last name, First name, Middle initial)<br>Roberts, Jr., John G | 2. Court or Organization<br>Supreme Court of the US | 3. Date of Report<br>8/1/2005 |
| 4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time)<br>Associate Justice -- Nominee | 5. ReportType (check appropriate type)<br>(●) Nomination, Date 7/29/2005<br>( ) Initial ( ) Annual ( ) Final | 6. Reporting Period<br>1/1/2004<br>to<br>8/1/2005 |
| 7. Chambers or Office Address<br>333 Constitution Avenue NW<br>Room 3832<br>Washington, DC 20001 | 8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.<br>Reviewing Officer_____ Date_____ | |

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

## I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

| | POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|---|
| 1. | Adjunct Professor | Georgetown Law Summer Program, University College London |

## II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

| | DATE | PARTIES AND TERMS |
|---|---|---|
| 1. | 4/28/05 | I agreed to serve as Distinguished Visitor from the Judiciary on the Georgetown Univ. Law Center faculty for the spring semester of the 2005-2006 academic year. |
| 2. | | My duties would include teaching a seminar on Supreme Court litigation, and the salary would be $25,000. |
| 3. | | |
| 4. | 4/21/05 | I agreed to co-teach a course on International Trade for the Georgetown Law Summer Program at University College London, for a salary of $4,500. |
| 5. | | The agreement was approved by the Chief Judge on May 25, 2005. |

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
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| | Roberts, Jr., John G | 8/1/2005 |

## III. NON-INVESTMENT INCOME. (Reporting individual and spouse: see pp. 17-24 of filing instructions)

### A. Filer's Non-Investment Income

☐ NONE - (No reportable non-investment income.)

| | DATE | SOURCE AND TYPE | GROSS INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2003 | Hogan & Hartson LLP | $1,044,399.54 |

### B. Spouse's Non-Investment Income - (If you were married during any portion of the reporting year, please complete this section. Dollar amount not required except for honoraria.)

☐ NONE - (No reportable non-investment income.)

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | 2004 | Pillsbury Winthrop Shaw Pittman LLP (formerly Shaw Pittman LLP) salary |
| 2. | 2005 | Pillsbury Winthrop Shaw Pittman LLP (formerly Shaw Pittman LLP) salary |

## IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | Exempt | |

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
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| | Roberts, Jr., John G | 8/1/2005 |

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | Exempt | | |

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ NONE - (No reportable liabilities.)

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |

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| Name of Person Reporting | Date of Report |
|---|---|
| Roberts, Jr., John G | 8/1/2005 |

## VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

| A. Description of Assets (including trust assets) | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| Place "(X)" after each asset exempt from prior disclosure | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date: Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| ☐ NONE (No reportable income, assets, or transactions) | | | | | | | | | |
| 1. Agilent (Common) | | None | J | T | Exempt | | | | |
| 2. Time Warner (Common) | | None | M | T | | | | | |
| 3. AstraZeneca (Common) | A | Dividend | J | T | | | | | |
| 4. Becton Dickinson & Co. (Common) | A | Dividend | K | T | | | | | |
| 5. Blockbuster (Common) | D | Dividend | J | T | | | | | |
| 6. Cisco Systems (Common) | | None | K | T | | | | | |
| 7. Citigroup (Common) | B | Dividend | K | T | | | | | |
| 8. Coca Cola (Common) | A | Dividend | J | T | | | | | |
| 9. CP (Common) | A | Dividend | J | T | | | | | |
| 10. Dell (Common) | | None | N | T | | | | | |
| 11. Disney (Common) | A | Dividend | K | T | | | | | |
| 12. BB&T Corp. (Common) | A | Dividend | J | T | | | | | |
| 13. Freddie Mac (Common) | A | Dividend | K | T | | | | | |
| 14. Hewlett-Packard (Common) | A | Dividend | K | T | | | | | |
| 15. Hillenbrand (Common) | A | Dividend | K | T | | | | | |
| 16. Intel (Common) | A | Dividend | L | T | | | | | |
| 17. New Ireland Fund | A | Dividend | J | T | | | | | |
| 18. JNJ (Common) | A | Dividend | J | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income/Gain Codes: (See Columns B1 and D4) | A = $1,000 or less | B = $1,001-$2,500 | C = $2,501-$5,000 | D = $5,001-$15,000 | E = $15,001-$50,000 |
| | F = $50,001-$100,000 | G = $100,001-$1,000,000 | H1 = $1,000,001-$5,000,000 | H2 = More than $5,000,000 | |
| 2. Value Codes: (See Columns C1 and D3) | J = $15,000 or less | K = $15,001-$50,000 | L = $50,001-$100,000 | M = $100,001-$250,000 | |
| | N = $250,000-$500,000 | O = $500,001-$1,000,000 | P1 = $1,000,001-$5,000,000 | P2 = $5,000,001-$25,000,000 | |
| | P3 = $25,000,001-$50,000,000 | | P4 = $More than $50,000,000 | | |
| 3. Value Method Codes (See Column C2) | Q = Appraisal | R = Cost (Real Estate Only) | S = Assessment | T = Cash/Market | |
| | U = Book Value | V = Other | W = Estimated | | |

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## VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

| A. Description of Assets (including trust assets) | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| Place "(X)" after each asset exempt from prior disclosure | (1) Amount Code 1 (A -H) | (2) Type (e.g. div. rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date: Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 19. Lucent (Common) | | None | J | T | Exempt | | | | |
| 20. Merck (Common) | A | Dividend | J | T | | | | | |
| 21. Microsoft (Common) | E | Dividend | M | T | | | | | |
| 22. Nokia (Common) | A | Dividend | K | T | | | | | |
| 23. Novellus (Common) | | None | J | T | | | | | |
| 24. Pfizer (Common) | A | Dividend | K | T | | | | | |
| 25. Scientific Atlanta (Common) | A | Dividend | J | T | | | | | |
| 26. State Street (Common) | A | Dividend | K | T | | | | | |
| 27. Texas Instruments (Common) | A | Dividend | M | T | | | | | |
| 28. TMO (Common) | | None | K | T | | | | | |
| 29. XMSR (Common) | | None | N | T | | | | | |
| 30. Washington REIT | B | Dividend | K | T | | | | | |
| 31. Am Cent Gr Fund | A | Dividend | J | T | | | | | |
| 32. Davis Ser Real Est Fund | A | Dividend | K | T | | | | | |
| 33. Fidelity Contrafund Fund | A | Dividend | K | T | | | | | |
| 34. Fidelity Freedom 2010 Fund | A | Dividend | J | T | | | | | |
| 35. Fidelity Low Priced Stock Fund | C | Dividend | N | T | | | | | |
| 36. Fidelity Magellan Fund | B | Dividend | N | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income/Gain Codes: (See Columns B1 and D4) | A = $1,000 or less | B = $1,001-$2,500 | C = $2,501-$5,000 | D = $5,001-$15,000 | E = $15,001-$50,000 |
| | F = $50,001-$100,000 | G = $100,001-$1,000,000 | H1 = $1,000,001-$5,000,000 | H2 = More than $5,000,000 | |
| 2. Value Codes: (See Columns C1 and D3) | J = $15,000 or less | K = $15,001-$50,000 | L = $50,001-$100,000 | M = $100,001-$250,000 | |
| | N = $250,000-$500,000 | O = $500,001-$1,000,000 | P1 = $1,000,001-$5,000,000 | P2 = $5,000,001-$25,000,000 | |
| | P3 = $25,000,001-$50,000,000 | | P4 = $More than $50,000,000 | | |
| 3. Value Method Codes (See Column C2) | Q = Appraisal | R = Cost (Real Estate Only) | S = Assessment | T = Cash/Market | |
| | U = Book Value | V = Other | W = Estimated | | |

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| Name of Person Reporting | Date of Report |
|---|---|
| Roberts, Jr., John G | 8/1/2005 |

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

| A. Description of Assets (including trust assets) | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| Place "(X)" after each asset exempt from prior disclosure | (1) Amount Code 1 (A -H) | (2) Type (e.g. div. rent. or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date: Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 37. Fidelity OTC Fund | | None | K | T | Exempt | | | | |
| 38. Fidelity Overseas Fund | | None | M | T | | | | | |
| 39. Fidelity Select Energy Fund | | None | K | T | | | | | |
| 40. Franklin Mut Beac Z Fund | A | Dividend | J | T | | | | | |
| 41. Franklin Mut Disc Z Fund | A | Dividend | J | T | | | | | |
| 42. GAM Global C Fund | | None | | | | | | | |
| 43. Janus Ent Fund | | None | K | T | | | | | |
| 44. Janus Fund | | None | J | T | | | | | |
| 45. Janus WW Fund | A | Dividend | K | T | | | | | |
| 46. Merrill Lynch Int'l Value Fund | A | Dividend | K | T | | | | | |
| 47. Lord Abbett Dev Gr Fund | | None | K | T | | | | | |
| 48. Putnam New Opp Fund | | None | J | T | | | | | |
| 49. Putnam Voyager Fund | | None | J | T | | | | | |
| 50. Seligman Common A Fund | | None | J | T | | | | | |
| 51. Torray Fund | A | Dividend | L | T | | | | | |
| 52. TR Price Euro Stock Fund | A | Dividend | J | T | | | | | |
| 53. TR Price Sci & Tech Fund | | None | J | T | | | | | |
| 54. Vanguard Int'l Gr Fund | A | Dividend | K | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income/Gain Codes: | A = $1,000 or less | B = $1,001-$2,500 | C = $2,501-$5,000 | D = $5,001-$15,000 | E = $15,001-$50,000 |
| (See Columns B1 and D4) | F = $50,001-$100,000 | G = $100,001-$1,000,000 | H1 = $1,000,001-$5,000,000 | H2 = More than $5,000,000 | |
| 2. Value Codes: | J = $15,000 or less | K = $15,001-$50,000 | L = $50,001-$100,000 | M = $100,001-$250,000 | |
| (See Columns C1 and D3) | N = $250,000-$500,000 | O = $500,001-$1,000,000 | P1 = $1,000,001-$5,000,000 | P2 = $5,000,001-$25,000,000 | |
| | P3 = $25,000,001-$50,000,000 | | P4 = $More than $50,000,000 | | |
| 3. Value Method Codes | Q = Appraisal | R = Cost (Real Estate Only) | S = Assessment | T = Cash/Market | |
| (See Column C2) | U = Book Value | V = Other | W = Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
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| Name of Person Reporting | Date of Report |
|---|---|
| Roberts, Jr., John G | 8/1/2005 |

## VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

| | A. Description of Assets (including trust assets) | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Place "(X)" after each asset exempt from prior disclosure | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | If not exempt from disclosure (2) Date: Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 55. | Vanguard Sm Cap Index Fund | A | Dividend | L | T | Exempt | | | | |
| 56. | Ing Em Countries A Fund | A | Dividend | K | T | | | | | |
| 57. | M&T Bank account | D | Interest | O | T | | | | | |
| 58. | MTB Money Mkt account | A | Dividend | K | T | | | | | |
| 59. | CMA Money Fund | A | Dividend | J | T | | | | | |
| 60. | C. Schwab Money Mkt Fund | A | Dividend | J | T | | | | | |
| 61. | C. Schwab Muni M. Fund | B | Dividend | N | T | | | | | |
| 62. | Wachovia account | A | Interest | K | T | | | | | |
| 63. | Chevy Chase Bank accounts | A | Interest | M | T | | | | | |
| 64. | 1/8 interest in Cottage, Knocklong, Limerick, Ireland | | None | J | W | | | | | |
| 65. | Shaw Pittman Investors Fund -- 2000 LLC | B | Int./Distrib | J | W | | | | | |
| 66. | Encana (Common) | A | Dividend | J | T | | | | | |
| 67. | Fairmont Hotels (Common) | A | Dividend | J | T | | | | | |
| 68. | TR Price Prime Res Fund | A | Dividend | J | T | | | | | |
| 69. | M. Lynch SP 500 Cl A Fund | B | Dividend | M | T | | | | | |
| 70. | Midcap SPDR Tr Series I | A | Dividend | L | T | | | | | |
| 71. | Fording CDN Coal Unit Trust | A | Dividend | J | T | | | | | |
| 72. | CP Ships Ltd. (Common) | A | Dividend | J | T | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| 1. Income/Gain Codes: | A = $1,000 or less | B = $1,001-$2,500 | C = $2,501-$5,000 | D = $5,001-$15,000 | E = $15,001-$50,000 | |
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| (See Columns C1 and D3) | N = $250,000-$500,000 | O = $500,001-$1,000,000 | P1 = $1,000,001-$5,000,000 | P2 = $5,000,001-$25,000,000 | | |
| | P3 = $25,000,001-$50,000,000 | | P4 = $More than $50,000,000 | | | |
| 3. Value Method Codes | Q = Appraisal | R = Cost (Real Estate Only) | S = Assessment | T = Cash/Market | | |
| (See Column C2) | U = Book Value | V = Other | W = Estimated | | | |

**FINANCIAL DISCLOSURE REPORT**
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| Name of Person Reporting | Date of Report |
|---|---|
| Roberts, Jr., John G | 8/1/2005 |

## VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

| | A. Description of Assets (including trust assets) | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Place "(X)" after each asset exempt from prior disclosure | (1) Amount Code 1 (A-H) | (2) Type (e.g. div. rent. or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | If not exempt from disclosure (2) Date: Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 73. | Allied Capital (Common) | A | Dividend | J | T | Exempt | | | | |
| 74. | Utah Educ. Svgs Plans, Vanguard Inst. Index Fund Plus | A | Dividend | M | T | | | | | |
| 75. | Utah Educ. Svgs Plans, Vanguard Mid-Cap Index Fund | A | Dividend | K | T | | | | | |
| 76. | Utah Educ. Svgs Plans, Vanguard Small-Cap Index Fund | A | Dividend | K | T | | | | | |
| 77. | Utah Educ. Svgs Plans, Vanguard Int'l Growth Fund | A | Dividend | J | T | | | | | |
| 78. | Utah Educ. Svgs Plans, Vanguard Int'l Value Fund | A | Dividend | J | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income/Gain Codes: | A = $1,000 or less | B = $1,001-$2,500 | C = $2,501-$5,000 | D = $5,001-$15,000 | E = $15,001-$50,000 |
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| (See Column C2) | U = Book Value | V = Other | W = Estimated | | |

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|---|---|---|
| | Roberts, Jr., John G | 8/1/2005 |

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Part III -- Other than as noted, non-investment income for 2003-2005 is U.S. government salary.

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|---|---|---|
| | Roberts, Jr., John G | 8/1/2005 |

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature John G Roberts, Jr. Date 8/1/05

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL NET WORTH STATEMENT

**John Glover Roberts, Jr.**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings), all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | 1,347 | 000 | 00 | Notes payable to banks – secured | | 0 | |
| U.S. Government securities – add schedule | | 0 | | Notes payable to banks – unsecured | | 0 | |
| Listed securities – add schedule | 1,614 | 809 | 40 | Notes payable to relatives | | 0 | |
| Unlisted securities – add schedule | | 0 | | Notes payable to others | | 0 | |
| Accounts and notes receivable: | | 0 | | Accounts and bills due | | 0 | |
| Due from relatives and friends | | 0 | | Unpaid income tax | | 0 | |
| Due from others | | 0 | | Other unpaid tax and interest | | 0 | |
| Doubtful | | 0 | | Real estate mortgages payable – add schedule | 790 | 000 | 00 |
| Real estate owned – add schedule | 1,310 | 000 | 00 | Chattel mortgages and other liens payable | | 0 | |
| Real estate mortgages receivable | | 0 | | Other debts – itemize: | | 0 | |
| Autos and other personal property | 40 | 000 | 00 | | | | |
| Cash value – life insurance | 19 | 934 | 41 | | | | |
| Other assets – itemize: | 1,735 | 437 | 96 | | | | |
| See schedule | | | | | | | |
| | | | | Total liabilities | 790 | 000 | 00 |
| | | | | Net worth | 5,277 | 181 | 77 |
| Total assets | 6,067 | 181 | 77 | Total liabilities and net worth | 6,067 | 181 | 77 |

| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
|---|---|---|---|---|---|---|---|
| As endorser, comaker or guarantor | | 0 | | Are any assets pledged? – add schedule | | No | |
| On leases or contracts | | 0 | | Are you defendant in any suits or legal actions? | | Yes* | |
| Legal claims | | 0 | | Have you ever taken bankruptcy? | | No | |
| Provision for Federal Income Tax | | 0 | | | | | |
| Other special debt | | 0 | | | | | |

* I am a named party in *Rodriguez, et al. v. Nat'l Ctr. for Missing & Exploited Children, et al.*, No. 03-cv-00120 (D.D.C. filed Jan. 27, 2003), *appeal docketed*, No. 05-5202 (D.C. Cir. May 23, 2005). I was added as a named defendant — along with eight other judges on the D.C. Circuit, Chief Justice Rehnquist, and several judges from other circuits — in plaintiff's First Amended Complaint, filed on March 8, 2005. On March 31, 2005, the District Court for the District of Columbia dismissed the action with regard to the defendants in the original complaint, and ordered the amended complaint stricken. A notice of appeal was filed by Mr. Rodriguez on May 23, 2005. According to published judicial opinions in the matter, Mr. Rodriguez is a Virginia resident with ties to Colombia. He lived in Colombia for much of the period between 1987 and 1999 and there fathered a child, Isidoro, in 1989. In 2001, Isidoro and his mother visited Mr. Rodriguez in Virginia. Near the end of the visit, Mr. Rodriguez would not allow Isidoro to return to Colombia and filed a petition to modify custody in a Fairfax County, Virginia, court. Isidoro's mother answered with a suit in federal district court for the Eastern District of Virginia under the Hague Convention on the Civil Aspects of International Child Abduction Act; she won, and won again on appeal. Mr. Rodriguez now alleges a conspiracy on the part of numerous federal and private defendants to deprive him of his constitutional rights.

FINANCIAL NET WORTH STATEMENT – SCHEDULES

**John Glover Roberts, Jr.**

| Listed Securities | Value |
|---|---|
| Agilent | $5,834.52 |
| Allied Capital | 1,251.00 |
| AstraZeneca | 10,985.32 |
| BB&T Corp. | 11,311.51 |
| Becton Dickinson & Co. | 27,455.00 |
| Blockbuster | 8,350.00 |
| CP Ships | 782.50 |
| Canadian Pacific | 3,451.00 |
| Cisco Systems | 46,368.00 |
| Citigroup | 44,420.00 |
| Coca Cola | 8,350.00 |
| Dell | 264,256.00 |
| Disney | 15,498.00 |
| Encana | 10,768.48 |
| Fairmont Hotels | 1,741.50 |
| Fording CDN Coal Unit Trust | 3,042.60 |
| Freddie Mac | 26,260.00 |
| Hewlett-Packard | 29,016.00 |
| Hillenbrand | 15,501.00 |
| Intel | 85,600.00 |
| Johnson & Johnson | 12,864.00 |
| Loral Space & Comm. | 35.00 |
| Lucent | 1,884.96 |
| Merck | $6,228.00 |

| | |
|---|---|
| Microsoft | 205,440.00 |
| New Ireland Fund | 14,358.33 |
| Nokia | 24,896.00 |
| Novellus | 8,670.00 |
| PT Pacific Satellite | 300.00 |
| Pfizer | 15,900.00 |
| Scientific Atlanta | 14,880.00 |
| State Street | 19,300.00 |
| Texas Instruments | 106,552.64 |
| Thermo Electron | 35,354.04 |
| Time Warner | 212,992.00 |
| Washington REIT | 23,712.00 |
| XM Satellite Radio | 291,200.00 |
| Total | $1,614,809.40 |

Real Estate Owned

| | | |
|---|---|---|
| Personal residence: | Chevy Chase, Maryland | Est. value: $1,300,000 |
| Wife's one-eighth interest in cottage (mother, brother's estate, aunt and uncle own the rest) | Knocklong, Limerick Ireland | Est. value $10,000 |

Real Estate Mortgage Payable

On personal residence: Chase Mortgage
$790,000 balance
30-yr. fixed 5.625%

| Other Assets | Value |
|---|---|
| American Cent. Gr. Fund | $11,441.59 |
| Davis Ser Real Est Fund | 27,200.00 |
| Fidelity Contrafund Fund | 43,762.77 |
| Fidelity Freedom 2010 Fund | 2,409.30 |
| Fidelity Low Priced Stock Fund | 319,186.72 |
| Fidelity Magellan Fund | 280,194.20 |
| Fidelity OTC Fund | 41,741.27 |
| Fidelity Overseas Fund | 100,318.02 |
| Fidelity Select Energy Fund | 17,406.40 |
| Franklin Mut Beac Z Fund | 13,365.00 |
| Franklin Mut Disc Z Fund | 7,490.00 |
| ING Emerging Countries Fund | 16,711.81 |
| Janus Enterprise Fund | 22,608.86 |
| Janus Fund | 13,244.22 |
| Janus Worldwide Fund | 23,469.89 |
| Lord Abbett Dev Gr Fund | 19,391.00 |
| Merrill Lynch Intl Value Fund | 51,734.24 |
| Merrill Lynch SP 500 Cl A Fund | 139,847.00 |
| Midcap SPDR Tr Series I | 88,927.00 |
| Putnam New Opp Fund | 10,181.15 |
| Putnam Voyager Fund | 9,753.26 |
| Seligman Communications & Info A Fund | 13,471.90 |
| Shaw Pittman Investors Fund – 2000 LLC | 5,000.00 |
| TR Price Euro Stock Fund | 9,985.90 |
| TR Price Prime Res Fund | 2,060.40 |
| TR Price Sci & Tech Fund | 9,543.77 |

| | |
|---|---|
| Torray Fund | $90,752.77 |
| Utah Educ. Svgs. Plans, Vanguard Inst. Index Fund Plus | 105,347.28 |
| Utah Educ. Svgs. Plans, Vanguard Mid-Cap Index Fund | 44,575.94 |
| Utah Educ. Svgs. Plans, Vanguard Small-Cap Index Fund | 42,753.72 |
| Utah Educ. Svgs. Plans, Vanguard Intl Growth Fund | 10,982.84 |
| Utah Educ. Svgs. Plans, Vanguard Intl Value Fund | 11,103.66 |
| Vanguard Intl Gr. Fund | 41,195.52 |
| Vanguard Small Cap Index Fund | 88,280.56 |
| Total | $1,735,437.96 |

Chairman SPECTER. Thank you very much, Judge Roberts, for that very profound statement.

We will stand in recess until 9:30 tomorrow morning, when we will reconvene in the Hart Senate Office Building, Room 216. That concludes our hearing.

[Whereupon, at 3:33 p.m., the hearing was recessed, to resume at 9:30 a.m. on September 13, 2005.]

# NOMINATION OF JOHN G. ROBERTS, JR., OF MARYLAND, TO BE CHIEF JUSTICE OF THE UNITED STATES

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**TUESDAY, SEPTEMBER 13, 2005**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:30 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. It is 9:30. The confirmation hearing of Judge Roberts will now proceed.

Welcome again, Judge Roberts.

Judge ROBERTS. Thank you, Mr. Chairman.

Chairman SPECTER. We begin the first round of questioning in order of seniority, with 30 minutes allotted to each Senator.

Judge Roberts, there are many subjects of enormous importance that you will be asked about in this confirmation hearing, but I start with the central issue which perhaps concerns most Americans, and that is the issue of the woman's right to choose and *Roe* v. *Wade*. And I begin collaterally with the issue of *stare decisis* and the issue of precedents.

Black's Law Dictionary defines *stare decisis* as "let the decision stand, to adhere to precedents and not to unsettle things which are established." Justice Scalia articulated, "The principal purpose of *stare decisis* is to protect reliance interests and further stability in the law."

Justice Frankfurter articulated the principle, "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations."

Justice Cardozo in a similar vein, "No judicial system could do society's work if each issue had to be decided afresh in every case which raised it."

In our initial conversation, you talked about stability and humility in the law. Would you agree with those articulations of the principles of *stare decisis* as you had contemplated them, as you said you looked for stability in the law?

Judge ROBERTS. Yes, Mr. Chairman, I would. I would point out that the principle goes back even farther than Cardozo and Frank-

furter. Hamilton, in *Federalist No. 78*, said that, "To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents." So even that far back, the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, the appearance of integrity in the judicial process.

Chairman SPECTER. I move now to *Casey* v. *Planned Parenthood*. Thirty minutes may seem like a long time and a second round of 20 minutes, but the time will fly, and I want to get right to the core of the issue.

In *Casey*, the key test on following precedents moved to the extent of reliance by the people on the precedent, and *Casey* had this to say in a rather earthy way: "People have ordered their thinking and living around *Roe*. To eliminate the issue of reliance, one would need to limit cognizable reliance to specific instances of sexual activity. For two decades of economic and social developments, people have organized intimate relationships in reliance on the availability of abortion in the event contraception should fail."

That is the joint opinion, rather earthy in its context. Would you agree with that?

Judge ROBERTS. Well, Senator, the importance of settled expectations in the application of *stare decisis* is a very important consideration. That was emphasized in the *Casey* opinion, but also in other opinions outside that area of the law.

The principles of *stare decisis* look at a number of factors, settled expectations one of them, as you mentioned. Whether or not particular precedents have proven to be unworkable is another consideration on the other side; whether the doctrinal bases of a decision have been eroded by subsequent developments. For example, if you have a case in which there are three precedents that lead and support that result and in the intervening period two of them have been overruled, that may be a basis for reconsidering the prior precedent.

Chairman SPECTER. But there is no doctrinal basis erosion in *Roe*, is there, Judge Roberts?

Judge ROBERTS. Well, I feel the need to stay away from a discussion of particular cases. I'm happy to discuss the principles of *stare decisis*, and the Court has developed a series of precedents on precedent, if you will. They have a number of cases talking about how this principle should be applied. And as you emphasized, in *Casey* they focused on settled expectations. They also looked at the workability and the erosion of precedents. The erosion of precedent I think figured more prominently in the Court's discussion in the *Lawrence* case, for example, but it is one of the factors that is looked at on the other side of the balance.

Chairman SPECTER. Well, do you see any erosion of precedent as to *Roe*?

Judge ROBERTS. Again, I think I should stay away from discussions of particular issues that are likely to come before the Court again. And in the area of abortion, there are cases on the Court's docket, of course. It is an issue that does come before the Court. So while I'm happy to talk about *stare decisis* and the importance of precedent, I don't think I should get into the application of those principles in a particular area.

Chairman SPECTER. Well, Judge Roberts, I don't know that we are dealing with any specific issue. When you mention—and you brought the term up—erosion of precedent, whether you see that as a factor in the application of *stare decisis* or expectations, for example, on the citation I quoted from *Casey* v. *Planned Parenthood*.

Judge ROBERTS. Well, in the particular case of *Roe*, obviously you had the *Casey* decision in '92 or '93.

Chairman SPECTER. '92.

Judge ROBERTS. '92, in which they went through the various factors in *stare decisis* and reaffirmed the central holding in *Roe* while revisiting the trimester framework and substituting the undue burden analysis with strict scrutiny. So as of '92, you had a reaffirmation of the central holding in *Roe*. That decision, that application of the principles of *stare decisis* is, of course, itself a precedent that would be entitled to respect under those principles.

Chairman SPECTER. The joint opinion then goes on, after the statement as to sexual activity, to come to the core issue about women being able to plan their lives. The joint opinion says, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

Do you agree with that statement, Judge Roberts?

Judge ROBERTS. Yes, Senator, as a general proposition. But I do feel compelled to point out that I should not, based on the precedent of prior nominees, agree or disagree with particular decisions, and I'm reluctant to do that. That's one of the areas where I think prior nominees have drawn the line when it comes to do you agree with this case or do you agree with that case. That's something that I'm going to have to draw the line in the—

Chairman SPECTER. Well, I am not going to ask you whether you are going to vote to overrule *Roe* or sustain it, but we are talking here about the jurisprudence of the Court and their reasoning.

Let me come to another key phase of *Casey* where the joint opinion says, "A terrible price would be paid for overruling *Roe*. It would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of the Nation dedicated to the rule of law."

Now, this moves away from the specific holding and goes to a much broader jurisprudential point, really raising the issue of whether there would be a recognition of the Court's authority. And in a similar line, the Court said this: that to overrule *Roe* would be "a surrender to political pressure," and added, "To overrule under fire would subvert the Court's legitimacy."

So in these statements on *Casey*, you are really going beyond the holding. You are going to the legitimacy and authority of the Court.

Do you agree with that?

Judge ROBERTS. Well, I do think the considerations about the Court's legitimacy are critically important. In other cases—I'm thinking of *Payner* v. *Tennessee*, for example—the Court has focused on extensive disagreement as a grounds in favor of reconsideration. In *Casey*, the Court looked at the disagreement as a factor in favor of reaffirming the decision. So it's a factor that is played different ways in different precedents of the Court.

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the Court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.

Chairman SPECTER. A jolt to the legal system, a movement against stability—one of the Roberts doctrines.

Judge ROBERTS. An overruling of a prior precedent is a jolt to the legal system. It is inconsistent with principles of stability and yet—

Chairman SPECTER. One—go ahead.

Judge ROBERTS. I was just going to say, the principles of *stare decisis* recognize that there are situations when that's a price that has to be paid. Obviously, *Brown* v. *Board of Education* is a leading example, overruling *Plessy* v. *Ferguson*, the *West Coast Hotel* case overruling the *Lochner* era decisions. Those were to a certain extent jolts to the legal system, and the arguments against them had a lot to do with stability and predictability. But the other arguments—that intervening precedents had eroded the authority of those cases, that those precedents that were overruled had proved unworkable—carried the day in those cases.

Chairman SPECTER. One final citation from the joint opinion in *Roe*: "After nearly 20 years of litigation in *Roe's* wake, we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding."

Do you think the joint opinion is correct in elevating precedential force even above the specific holding of the case?

Judge ROBERTS. That is the general approach when you're considering *stare decisis*. It's the notion that it's not enough that you might think that the precedent is flawed, that there are other considerations that enter into the calculus that have to be taken into account, the values of respect for precedent, evenhandedness, predictability, stability; the considerations on the other side, whether a precedent you think may be flawed is workable or not workable, whether it's been eroded.

So to the extent that the statement is making the basic point that it's not enough that you might think the precedent is flawed to justify revisiting it, I do agree with that.

Chairman SPECTER. When you and I met on our first so-called courtesy call, I discussed with you the concept of a super-*stare decisis*. And this was a phrase used by Circuit Judge Luttig in *Richmond Medical Center* v. *Governor Gilmore* in the year 2000, when he refers to *Casey* being a super-*stare decisis* decision with respect to the fundamental right to choose, and a number of the academics—Professor Farber has talked about super-*stare decisis*, and Professor Estrich has, as it applies to statutory lines.

Do you think that the cases which have followed *Roe* fall into the category of a super-*stare decisis* designation?

Judge ROBERTS. Well, it's a term that hasn't found its way into the Supreme Court opinions yet. I think—

Chairman SPECTER. Well, there is an opportunity for that.

[Laughter.]

Judge ROBERTS. I think one way to look at it is that the *Casey* decision itself, which applied the principles of *stare decisis* to *Roe* v. *Wade*, is itself a precedent of the Court, entitled to respect under principles of *stare decisis*. And that would be the body of law that any judge confronting an issue in his care would begin with, not simply the decision in *Roe* v. *Wade* but its reaffirmation in the *Casey* decision. That is itself a precedent. It's a precedent on whether or not to revisit the *Roe* v. *Wade* precedent. And under principles of *stare decisis*, that would be where any judge considering the issue in this area would begin.

Chairman SPECTER. When you and I talked informally, I asked you if you had any thought as to how many opportunities there were in the intervening 32 years for *Roe* to be overruled, and you said you did not really know, and you cited a number. And I said, "Would it surprise you to know that there have been 38 occasions where *Roe* has been taken up, not with a specific issue raised but all with an opportunity for *Roe* to be overruled?" One of them was *Rust* v. *Sullivan*, where you participated in the writing of the brief, and although the case did not squarely raise the overruling of *Roe*, it involved the issue of whether Planned Parenthood units funded with Federal money could counsel on abortion. And in that brief, you again raised the question about *Roe* being wrongly decided, and then I pointed out to you that there had been some 38 cases where the Court had taken up *Roe*.

I am very seldom a user of charts, but on this one I prepared a chart because it speaks—a little too heavy to lift, but it speaks louder than just—thank you, Senator Grassley. Thirty-eight cases where *Roe* has been taken up, and I don't want to coin any phrases on super precedents. We will leave that to the Supreme Court. But would you think that *Roe* might be a super-duper precedent in light—

[Laughter.]

Chairman SPECTER.—of 38 occasions to overrule it?

Judge ROBERTS. The interesting thing, of course, is not simply the opportunity to address it, but when the Court actually considers the question. And that, of course, is in the *Casey* decision where it did apply the principles of *stare decisis* and specifically addressed it. And that I think is the decision that any judge in this area would begin with.

Chairman SPECTER. Judge Roberts, in your confirmation hearing for circuit court, your testimony read to this effect, and it has been widely quoted: "*Roe* is the settled law of the land." Do you mean settled for you, settled only for your capacity as a circuit judge, or settled beyond that?

Judge ROBERTS. Well, beyond that, it's settled as a precedent of the Court, entitled to respect under principles of *stare decisis*. And those principles, applied in the *Casey* case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the Court, yes.

Chairman SPECTER. You went on then to say, "It's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision." So it has that added precedential value.

Judge ROBERTS. I think the initial question the judge confronting an issue in this area, you don't go straight to the *Roe* decision; you begin with *Casey*, which modified the *Roe* framework and reaffirmed its central holding.

Chairman SPECTER. And you went on to say, "Accordingly, it is the settled law of the land," using the term "settled" again. Then your final statement as to this quotation, "There is nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as *Casey*."

There had been a question raised about your personal views, and let me digress from *Roe* for just a moment because I think this touches on an issue which ought to be settled. When you talk about your personal views, and as they may relate to your own faith, would you say that your views are the same as those expressed by John Kennedy when he was a candidate and he spoke to the Greater Houston Ministerial Association in September of 1960, "I do not speak for my church on public matters, and the church does not speak for me"?

Judge ROBERTS. I agree with that, Senator, yes.

Chairman SPECTER. And did you have that in mind when you said, "There is nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as *Casey*"?

Judge ROBERTS. Well, I think people's personal views on this issue derive from a number of sources, and there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of *stare decisis*.

Chairman SPECTER. Judge Roberts, the change in positions have been frequently noted. Early on in one of your memoranda you had made a comment on the so-called right to privacy. This was a 1981 memo to Attorney General Smith, December 11, 1981. You were referring to a lecture which Solicitor General Griswold had given 6 years earlier, and you wrote, Solicitor General Griswold "devotes a section to the so-called 'right to privacy,' arguing as we have that such an amorphous right is not to be found in the Constitution." Do you believe that the right to privacy—do you believe today that the right to privacy does exist in the Constitution?

Judge ROBERTS. Senator, I do. The right to privacy is protected under the Constitution in various ways. It's protected by the Fourth Amendment, which provides that the right of people to be secure in their persons, houses, effects and papers is protected. It's protected under the First Amendment, dealing with prohibition on establishment of a religion and guarantee of free exercise, protects privacy in matters of conscience. It was protected by the Framers in areas that were of particular concern to them that may not seem so significant today, the Third Amendment, protecting their homes against the quartering of troops.

And in addition, the Court has, with a series of decisions going back 80 years, has recognized that personal privacy is a component

of the liberty protected by the Due Process Clause. The Court has explained that the liberty protected is not limited to freedom from physical restraint, and that it's protected not simply procedurally but as a substantive matter as well. And those decisions have sketched out over a period of 80 years certain aspects of privacy that are protected as part of the liberty in the Due Process Clause under the Constitution.

Chairman SPECTER. So that the views that you expressed back in 1981, raising an issue about "amorphous" and "so-called" would not be the views you would express today?

Judge ROBERTS. Those views reflected the Dean's speech. If you read his speech, he's quite skeptical of that right. I knew the Attorney General was, and I was transmitting the Dean's speech to the Attorney General. But my views today are as I've just stated them.

Chairman SPECTER. So they were not necessarily your views then, but they certainly are not your views now.

Judge ROBERTS. I think that's fair, yes.

Chairman SPECTER. With respect to, going back again to the import of *Roe* and the passage of time, Supreme Court Chief Justice Rehnquist changed his views on *Miranda* in the 1974 case, *Michigan* v. *Tucker*, which I am sure you are familiar with. They did not apply *Miranda*, without going into the technical reasons there. But the issue came back to the Court in *U.S.* v. *Dickerson* in the year 2000, and the Chief Justice decided that *Miranda* should be upheld, and he used this language, that it became "so embedded in routine police practice to the point where the warnings have become a part of our National culture."

Do you think that that kind of a principle would be applicable to a woman's right to choose as embodied in *Roe* v. *Wade*?

Judge ROBERTS. Well, I think those are some of the considerations the Court applied in *Casey* when it applied *stare decisis* to *Roe*, and those were certainly the considerations that the Chief Justice focused on in *Dickerson*. I doubt that his views of the underlying correctness of *Miranda* had changed, but it was a different question in *Dickerson*. It wasn't whether *Miranda* was right, it was whether *Miranda* should be overruled at this stage, and the Chief applied and address that separate question distinct from any of his views on whether *Miranda* was correct or not when decided, and that's the approach the Court follows under principles of *stare decisis*.

Chairman SPECTER. Well, that is the analogy I am looking for in *Roe* v. *Wade*. He might disagree with it at the time it was decided, but then his language is very powerful when he talks about it becoming "embedded in routine police practices to the point where the warnings have become a part of our National culture." The question, by analogy, whether a woman's right to choose is so embedded that it has become a part of our National culture. What do you think?

Judge ROBERTS. Well, I think that gets to the application of the principles in a particular case, and based on my review of the prior transcripts of every nominee sitting on the Court today, that's where they've generally declined to answer, when it gets to the application of legal principles to particular cases.

I would repeat that the Court has already applied the principles of *stare decisis* to *Roe* in the *Casey* decision, and that stands as a precedent of the Court as well.

Chairman SPECTER. So you are not bound to follow it, but it is pretty impressive logic?

Judge ROBERTS. In the *Casey* decision at—

Chairman SPECTER. No, no. I am talking about Chief Justice Rehnquist on *Miranda*.

Judge ROBERTS. I think in that case, the Chief's explanation of why they weren't going to revisit *Miranda* is—it persuaded, I believe, all but one member of the Court. And I'm sure it had added persuasive effect because of the Chief's prior views on *Miranda* itself. It is a recognition of some of the things we've been talking about, the values of *stare decisis*. I don't think, again, that there's any doubt what the Chief, certainly what he thought. He told us what he thought about *Miranda*.

I doubt that those views have changed, but there are other considerations that come into play when you're asked to revisit a precedent of the Court, and those are the things we've talked about, and they're laid out again in *Dickerson* and other cases of the Court. *Payner* v. *Tennessee*, for example, *Agostini*, a variety of decisions where the Court has explained when it will revisit a precedent and when it will not, and of course the decisions come out both ways.

In *Payne* v. *Tennessee* the Court went through the analyses. It was a case about whether victims could testify at sentencing. The precedent said no, and they overruled those.

Chairman SPECTER. Let me move to two more points before my time is about to expire, 2 minutes and 35 seconds.

There is a continuing debate on whether the Constitution is a living thing, and as you see Chief Justice Rehnquist shift his views on *Miranda*, suggests that he would agree with Justice John Marshall Harlan's dissent in *Poe*, where he discusses the constitutional concept of liberty and says, "The traditions from which it developed, that tradition is a living thing."

Would you agree with that?

Judge ROBERTS. I'd agree that the tradition of liberty is a living thing, yes.

Chairman SPECTER. Let me move in the final two minutes here to your participation, pro bono, in *Romer*, where you gave some advice on the arguments to those who were upholding gay rights, and a quotation by Walter Smith, who was the lawyer at Hogan & Hartson in charge of pro bono work. He had this to say about your participation in that case supporting or trying to help the gay community in a case in the Supreme Court. Mr. Smith said, "Every good lawyer knows that if there is something in his client's cause that so personally offends you, morally, religiously, or if it so offends you that you think it would undermine your ability to do your duty as a lawyer, then you shouldn't take it on, and John"—referring to you—"wouldn't have. So at a minimum he had no concerns that would rise to that level."

Does that accurately express your own sentiments in taking on the aid to the gay community in that case?

Judge ROBERTS. I was asked frequently by other partners to help out particularly in my area of expertise, often involved moot courting, and I never turned down a request. I think it's right that if it had been something morally objectionable, I suppose I would have, but it was my view that lawyers don't stand in the shoes of their clients, and that good lawyers can give advice and argue any side of a case. And as I said, I was asked frequently to participate in that type of assistance for other partners at the firm, and I never turned anyone down.

Chairman SPECTER. My time just expired.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Good morning, Judge.

Judge ROBERTS. Morning.

Senator LEAHY. Looks like you survived well yesterday.

No one doubts you have had a very impressive legal career thus far, and now you have been nominated to be Chief Justice of the United States, but I have concerns as I go back over your career. We have had some discussions about this already, about some of the themes, and some of the goals you sought to achieve in your career using what is formidable skill.

My first area of concern involves a fundamental question of constitutional philosophy, the separation of powers. The last thing our Founding Fathers wanted was to be ruled by a king with absolute power, and the next to the last thing they wanted was to be ruled by a temporary king with absolute power for 4 years. So we have got the political system we talked about a great deal yesterday of checks and balances. Each of the three branches of Government constrains the others when they overreach. Americans have relied on this for our fundamental guarantees of freedom and democracy and open Government. And all of us that serve, whether in the executive branch, the judiciary as you do, the legislative as we do, take an oath to uphold, a very solemn oath to uphold the Constitution.

But there have been times throughout our history where the separation of powers has been strained to its limits by Presidents claiming power way beyond, what was actually almost imperial powers. So let us focus this now a little bit more on Presidential power. Let us go to the President's power as Commander in Chief of the Armed Forces. Certainly he has that power under the Constitution.

I went back to a time when you were a lawyer in the Reagan White House. You objected to a bill that would give certain preference to veterans who had served in Lebanon between August 20th, 1982 and "the date the operation ends." The date would be as either set by Presidential proclamation or a concurrent resolution of Congress. And you wrote that the difficulty with such a bill is that it recognizes a role for Congress in terminating the Lebanon operation. And you wrote further, "I do not think we would want to concede any definite role for Congress in terminating the Lebanon operation even by joint resolution presented to the President." And then you explained parenthetically, that even if the President vetoed such a joint resolution, of course the Congress could override it by a two-thirds majority.

I find that troubling. I will tell you why. Before I read your memo I thought everybody agreed there would be only one answer to the question of whether Congress could stop a war. Your memo suggested Congress is powerless to stop a President who is going to conduct an unauthorized war. I really find that extremely hard to follow, and I imagine most Americans would. I will give you a hypothetical. Congress passes a law for all U.S. Forces to be withdrawn from the territory of a foreign nation by a said date. The President vetoes the law. The Congress overrides that, and sets into law, you must withdraw by a certain date. Now, is there any question in your mind that the President would be bound to faithfully execute that law?

Judge ROBERTS. Well, Senator, I don't want to answer a particular hypothetical that could come before the Court, but I'm happy to comment on the memorandum that you're discussing.

Senator LEAHY. No, wait a minute. I mean is this not kind of hornbook law? I do not know if there would be any cases coming before the Court. I mean this is kind of hornbook. The Congress says to the President, you have to get out, and passes a law which is either signed into law by the President or overridden—or you override a presidential veto. Why would the President not have to—charged as he is under the Constitution to faithfully execute the law, why would he not have to follow that law?

Judge ROBERTS. Well, Senator, that issue and similar issues have in fact come up. There were, for example, lawsuits concerning the legality of the war in Vietnam, various efforts, and certainly the arguments would be made on the other side about the President's authority, and that may well come before the Court.

Senator LEAHY. Judge, with all due respect, the cases in Vietnam were not based on a specific law passed by Congress to get out. I mean Congress did cut off the funding.

Judge ROBERTS. Right.

Senator LEAHY. In April 1975 by a one-vote margin on the Armed Services Committee. I know because I was the newest member of the Committee at that time, and I voted to not authorize the war any longer. Are you saying that Congress could not pass a law that we must withdraw forces?

Judge ROBERTS. No, Senator, I'm not. What I'm saying is that that issue or issues related to that could well come before the Court, and that's why I have to resist answering your particular hypothetical question.

The memo you refer to, I was working in the White House Counsel's Office then. The White House Counsel's office is charged to be vigilant to protect the Executive's authority. Just as you have lawyers here in the Senate and the House has lawyers who are experts and charged with being vigilant to protect the prerogatives of the legislative branch. I believe very strongly in the separation of powers. That was a very important principle that the Framers set forth that is very protective of our individual liberty. It makes sure the legislative branch legislates, the Executive executes, and the judicial branch decides the law.

And it makes—it was part of the Framers' vision that each of the branches would be to a certain extent jealous of what they regarded as their prerogatives, and to the extent there is a dispute

between the legislative branch and the executive branch, it's the job, of course, of the judicial branch to resolve that dispute.

Senator LEAHY. But your position in this memo, and President Reagan's office, seem to indicate that Congress does not have an ability to end hostilities.

Judge ROBERTS. With respect, Senator, you're vastly over-reading the memorandum. It concerned—

Senator LEAHY. Tell me why.

Judge ROBERTS. Well, because it had nothing to do with terminating hostilities. It had to do with the eligibility for certain pension benefits, and the question then was whether or not—who should be determining when the hostilities ceased or should cease—and there again, a lawyer for the executive branch, not a judge who would be considering the issue in an entirely different light, but a lawyer for the executive branch—a careful lawyer would say there may be a problem there. Are we conceding anything by saying the legislature gets to determine when the hostilities end?

Senator LEAHY. I do not think it is over-reading it at all, as you suggest, to say when you write, "I do not think we would want to concede any definitive role for Congress in terminating the Lebanon operation even by joint resolution presented to the President."

Judge ROBERTS. Well, with respect, Senator—

Senator LEAHY. You are saying you do not want to concede any ability to the Congress to stop a war.

Judge ROBERTS. With respect, Senator, the memorandum is about legislation for—if I'm remembering it correctly, it was 20 some years ago—pension benefits or certain additional pay benefits. That's what it was about. And I suspect if you asked any lawyer for any President of any administration whether they wanted to concede that general principle, or if as careful lawyers they would prefer that that provision were rewritten or not in there, I'm fairly confident that regardless of the administration, that a lawyer for the Executive would take the same position.

Now, I am also fairly confident that one of your lawyers here in the Senate would take the opposite position.

Senator LEAHY. Let me ask you this question. Does Congress have the power to declare war?

Judge ROBERTS. Of course. The Constitution specifically gives that power to Congress.

Senator LEAHY. Does Congress then have the power to stop a war?

Judge ROBERTS. Congress certainly has the power of the purse, and that's the way, as you noted earlier, that Congress has typically exercised its—

Senator LEAHY. Yes, but we did that in the Boland amendment, and the Reagan administration, as we found out in the sorry chapter of Iran-Contra, went around that, violated the law, worked with Iran, sold arms illegally to Iran—I think that is part of the axis of evil today—to continue the war, the contra war in Central America. So the power of the purse, we have cut off money, the wars sometimes keep going. Do we have the power to terminate war? We have the power to declare war. Do we have the power to terminate war?

Judge ROBERTS. Senator, that's a question that I don't think can be answered in the abstract. You need to know the particular circumstances and exactly what the facts are and what the legislation would be like, because the argument on the other side—and as a judge, I would obviously be in a position of considering both arguments, the argument for the Legislature and the argument for the Executive. The argument on the Executive side will rely on authority as Commander in Chief, and whatever authorities derive from that. So it's not something that can be answered in the abstract.

Senator LEAHY. As you said, your answer is that you were just talking about the question of veterans' benefits and all after this. I would note that the memo you wrote was not entitled "Veterans Benefits," it was entitled, "War Powers Problem." I do not think I overstated.

Let me ask you another question. We spoke about this again this morning, and I had told you when we met—in fact, I gave you a copy of the Bybee memo so that this would not be a surprise to you. The Justice Department's Office of Legal Counsel issued a secret opinion in August 2002, which argued the President enjoys "complete authority over the conduct of war," and "the Congress lacks authority to set the terms and conditions under which a President may exercise his authority as Commander in Chief to control the conduct of operations during war." And then took the argument to the extreme when it concluded, the President, when acting as Commander in Chief, was not bound by the Federal law banning the use of torture. In other words, the President would be above the law in that regard. You did not write that memo, I hasten to add, but you have seen it.

I asked Attorney General Gonzales for his view of this memo, in particular this sweeping assertion of Executive power which puts a President above the law. He never gave an answer on that, and that is one of the reasons why many voted against his confirmation.

So now let me ask you this: do you believe that the President has a Commander in Chief override to authorize or excuse the use of torture in interrogation of enemy prisoners even though there may be domestic and international laws prohibiting the specific practice?

Judge ROBERTS. Senator, I believe that no one is above the law under our system, and that includes the President. The President is fully bound by the law, the Constitution and statutes. Now, there often arise issues where there's a conflict between the Legislature and the Executive over an exercise of Executive authority, asserted Executive authority. The framework for analyzing that is in the *Youngstown Sheet and Tube* case, the famous case coming out of President Truman's seizure of the steel mills.

Senator LEAHY. And the Supreme Court held that unconstitutional.

Judge ROBERTS. Exactly. And the framework that was set forth in Justice Jackson's concurring opinion, which is the opinion that has sort of set the stage for subsequent cases, analyzes the issues in terms of one of three categories: if the President is acting in an area where Congress is supportive, expressly supportive of his action, the President's power is at its maximum; if the President is

acting in an area such as you postulate under the Bybee memo, where the President is acting contrary to congressional authority; what Justice Jackson said is the President's authority is at its lowest ebb, it consists solely of his authority under the Constitution, less whatever authority Congress has; and then, of course, there's the vast middle area where courts often have to struggle because they can't determine whether Congress has supported a particular exercise or not. The *Dames & Moore* case, for example, is a good example of that.

Senator LEAHY. Would you consider—go ahead.

Judge ROBERTS. I was just going to say the first issue for a Court confronting the question you posed would be whether Congress specifically intended to address the question of the President's exercise of authority or not.

Senator LEAHY. Yes. I would think that if you pass a law saying nobody in our Government shall torture, I think that is pretty specific.

But let me ask you this: is *Youngstown* settled law? Would you consider *Youngstown* settled law?

Judge ROBERTS. I think the approach in the case is one that has guided the Court in this area since 1954 or 1952, whatever it was.

Senator LEAHY. The reason I ask that, when Mr. Bybee wrote this memo, he never cited *Youngstown*, and I think it was Harold Koh, the Dean at the Yale Law School, who said this was a stunning omission. I tend to agree with that. The President instead went ahead and appointed—nominated Mr. Bybee to a Federal judgeship.

Judge ROBERTS. *Youngstown* is a very important case in a number of respects, not least the fact that the opinion that everyone looks to, the Jackson opinion, was by Justice Jackson, who was of course FDR's Attorney General, and certainly a proponent of expansive Executive powers.

Senator LEAHY. You have also said he is one of the Justices you admire the most.

Judge ROBERTS. He is for a number of reasons. What's significant about that aspect of his career, is here is someone whose job it was to promote and defend an expansive view of Executive power as Attorney General, which he did very effectively, and then when he went on the Court, as you can tell from his decision in *Youngstown*, he took an entirely different view of a lot of issues, in one famous case even disagreeing with one of his own prior opinions, and wrote a long opinion about how he can't believe he once held those views.

I think it's very important that—

Senator LEAHY. Are you sending us a message?

[Laughter.]

Judge ROBERTS. Well, I'm just saying one reason people admire Justice Jackson so much is that although he had strong views as Attorney General, he recognized, when he became a member of the Supreme Court, that his job had changed, and he was not the President's lawyer, he was not the chief lawyer in the executive branch, he was a Justice sitting in review of some of the decisions of the Executive. And he took a different perspective. And that's, again, one reason many admire him, including myself.

Senator LEAHY. The reason I ask, I thought the memo was outrageous, and once it became public—not until it became public, but after it became public, the President disavowed it and said he is opposed to torture, and I commend him for that. Many wish there had been—the administration had taken that position prior to the press finding out about it. But from the Jackson opinion—and I just pulled it out here—he says: "the President has no monopoly of war powers, whatever they are. While Congress cannot deprive the President of the command of the Army and Navy, only Congress can provide him an Army or Navy to command. Congress is also empowered to make rules for the Government and regulation of land and naval forces, by which it may to some unknown extent impinge upon even command functions."

Do you agree that Congress can make rules that may impinge upon the President's command functions?

Judge ROBERTS. Certainly, Senator. The point that Justice Jackson is making there is that the Constitution vests pertinent authority in these areas in both branches. The President is the Commander in Chief, and that meant something to the Founders. On the other hand, as you just quoted, Congress has the authority to issue regulations governing the Armed Forces, another express provision in the Constitution. Those two can conflict if by making regulations for the Armed Forces, Congress does something that interferes with, in the President's view, his command authority, and in some cases those disputes will be resolved in Court, as they were in the *Youngstown* case.

Senator LEAHY. In his book *All the Laws But One*, Chief Justice Rehnquist, the late Chief Justice, concluded with this sentence, "The laws will not be silent in time of war, but they will speak with a somewhat different voice." He offered as a somewhat different voice, of course, the Supreme Court decision, an infamous decision, a horrible decision in my estimation, *Korematsu*. As we know, in that case the Court upheld the internment of Japanese-Americans in detention camps, not because of anything they had done, not because of any evidence that they were at all disloyal to the United States, but solely based on their race. Sometimes this country has legislated very, very cruelly and very wrongly, solely on the question of race.

Now, the *Korematsu* majority's failure to uphold the Bill of Rights I believe is one of the greatest failures in the Court's history. We cannot, I believe have a Supreme Court that would continue the failings of *Korematsu*, especially when we are engaged in a war on terror that could last throughout our lifetime, and probably will. This country, all the western world, all democracies will face terrorist attacks, whether internal as we had in Oklahoma City, or external, 9/11. I just want to make sure you are not going to be a *Korematsu* Justice, so I have a couple of questions.

Can I assume that you would hold the internment of all residents of this country who are interned just because they have a particular nationality or ethnic or religious group, you would hold that to be unconstitutional?

Judge ROBERTS. The internment of a group solely on the basis of their—

Senator LEAHY. Nationality or ethnic or religious group.

Judge ROBERTS. I suppose a case like that could come before the Court. I would be surprised to see it, and I would be surprised if there were any arguments that could support it.

Senator LEAHY. Let me ask you this. Do you feel that you would be able to interpret the Bill of Rights the same, whether we are at war or not?

Judge ROBERTS. I do, Senator. I read the Chief's book that you quoted from, and for someone who sits on the court that I sit on now, we famously look back to one of the first cases decided in the D.C. Circuit. It was the Aaron Burr trial, and it's, if anything, a motto—

Senator LEAHY. I thought you might—

Judge ROBERTS. Well, it's sort of the motto of our court, an opinion that was written out of that, in which the judge explained that it was our obligation to calmly poise the scales of justice in dangerous times as well as calm times. That's a paraphrase, but the phrase, calmly poise the scales of justice if, if anything, the motto of the court on which I now sit. That would be the guiding principle for me whether I am back on that court or a different one, because some factors may be different, the issues may be different, the demands may be different, but the Bill of Rights remains the same. And the obligation of a court to protect those basic liberties in times of peace and in times of war, in times of stress and in times of calm, that doesn't change.

Senator LEAHY. I hope you feel that way. I often speak of the First Amendment, it is not there to protect popular speech, that is easy, it is unpopular speech. And as I mentioned yesterday, our State really wanted to make sure the Bill of Rights was going to be there before we joined the Union.

Let me switch gears a bit. In the area of environmental protection, I feel that you have narrowly construed laws under the Constitution in a way that closed the courthouse doors to millions of parents who want to protect their children from dangerous air pollution or unsafe drinking water, fish contaminated with mercury, foods covered with pesticides. We all know that often the President, no matter who is President, and the local governments do not do enough to protect people in environmental areas, from environmental dangers, and we have given them protection, the Congress has.

I thought your Duke Law Journal article, which many have commented about in the press and otherwise, was somewhat dismissive regarding these citizen suits to protect the environment. You wrote that Congress may not ask the courts in effect to exercise oversight of responsibility at the behest of any John Q. Public who happens to be interested in the issue. You discount the interests that many citizens and Congress have in preserving our environment. A few years ago—you sound very much like Justice Scalia—I know a few years ago, the Supreme Court, over the dissent of Justice Scalia, ruled that a citizen living near a stream that had been polluted by many illegal discharges of mercury from an upstream company did have the right to go to court over these illegal mercury discharges. The Government was not enforcing the laws.

So I ask you this. People, if their President or their Governor fails to enforce these laws, why should not individuals have access

to courts where polluting companies could be made to pay for their wrongdoing? What can you tell us to assure us, parents or children who are worried about this from birth defects and all, all of us, what can you do to assure us that they as individuals under Chief Justice Roberts would not find the courthouse door slammed shut in their face?

Judge ROBERTS. Well, one thing I would tell them to do is read the rest of the Duke Law Journal article, because one thing it makes—point it makes is that environmental interests, it goes on to say aesthetic interests, those are all protected under the law, and that one reason courts should insist that those who bring suit have standing—that's the issue—that are actually injured, is because standing can encompass certainly environmental harms. The issue that was being addressed in the Duke Law Journal article was whether anyone could bring a lawsuit just because they are interested in the issue, or whether the plaintiffs had to show that they had been injured. In other words, in your hypothetical, the people who are downstream from the mercury pollution, they will be able to show that they are injured and can bring suit.

The question is whether somebody halfway across the country who's not injured by that act should be able to bring suit. That was the issue in the—

Senator LEAHY. But I read it also in conjunction with your brief that you wrote in 1991, when you were Kenneth Starr's political deputy.

This was in *Franklin County* v. *Gwinnett Public Schools*. Now, in that case, a girl, Christine Franklin, had been sexually harassed. She had been abused from the time she was in the 10th grade by a teacher and a sports coach. The school was aware of the sexual harassment but took no action, in fact they even encouraged her not to complain. The Office for Civil Rights at the Department of Education investigated and found her rights were violated under title IX of our civil rights law; she had been physically abused; her right to complain about gender discrimination had been interfered with. You argued that she had no right to damages for this abuse. Now, your view was rejected by the Supreme Court. Justice White, in an opinion joined by Justice O'Connor and others wrote that you fundamentally misunderstood the law and history of the Court's role in providing appropriate remedy for such abuse, and that you had invited them to abdicate their historical judicial authority to award appropriate relief.

So do you now personally agree with and accept as binding law the reasoning of Justice White's opinion in *Franklin*?

Judge ROBERTS. Well, it certainly is a precedent of the Court that I would apply under principles of *stare decisis*. The Government's position in that case, of course, in no way condoned the activities involved. The issue was an open one. The courts of appeals had ruled the same way that the Government had argued before the Supreme Court, and it arose because we were dealing with an implied right of action, in other words, right of action under the statute that courts had implied. The reason that there was difficulty in determining exactly what remedies were available is because Congress had not addressed that question. The remedies that were available, as we explained, included issues such as restitu-

tion, back pay, injunctive relief, and the open issue, again, was whether damages were available. The Supreme Court issued its ruling and cleared that up.

Senator LEAHY. But here in this case, I mean it is a pretty egregious case, you have—and I am sure that you in no way condone what happened to this young girl, but I mean it was awful. She would be taken out of class by this teacher, brought to another room, basically raped. And Justice White made it very clear, contrary to what you and Kenneth Starr had said, that she had a right for actions because of that abuse.

Now, do you feel that they were acting, even though it went differently than what you had argued, do you feel the Court's opinion is based on sound reasoning?

Judge ROBERTS. Well, I don't want to say—

Senator LEAHY. Do you think it is a solid precedent?

Judge ROBERTS. It is a solid—it's a precedent of the Court. It was, as you say, a unanimous precedent. It concerned an issue of statutory interpretation because it was unclear whether Congress had intended a particular remedy to be available or not. That was the question before the Court. The court of appeals had ruled one way. The Supreme Court ruled the other way.

The administration's position was based on the principle that the decision about the remedy of back pay was a decision that should be made by Congress and not the Court. The Court saw the case the other, and that issue is now settled, and those damages actions are brought in courts around the country.

Senator LEAHY. But I wonder if we are balancing angels on the head of a pin. What kind of back pay was this teenage student going to be seeking? What kind of—

Judge ROBERTS. Senator, there—

Senator LEAHY. What kind of injunction is she going to get after she graduated? As a parent, and you are a parent, I mean I just wonder are we saying that we will put up a block for people who have really justiciable reasons to be in court?

Judge ROBERTS. No, Senator. Again, there was no issue in the case about condoning the behavior. I found it abhorrent then. I find it abhorrent now. That's not the issue. The issue in the case is did Congress intend for this particular remedy to be available? Other remedies were available under the provision at issue, and the question is, was this remedy available?

Senator LEAHY. The back pay.

Judge ROBERTS. Restitution and injunction to prohibit the harmful activity. Again, the issue arose because Congress had not spelled out whether there was a right of action in the first place or what the components of that right of action should be. The issue—

Senator LEAHY. We will go back to this in my next round, I can assure you. My time is up.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. I am happy to be here, and I appreciate your leadership, you and Senator Leahy on this Committee.

I want to welcome you again, Judge Roberts.

Judge ROBERTS. Thank you so much.

Senator HATCH. I read an interesting book over the weekend, Cass Sunstein's book, recent book published by Basic Books. He discussed various philosophies with regard to judging, and I would just like to ask you this question. Some of the philosophies he discussed were whether a judge should be an originalist, a strict constructionist, a fundamentalist, a perfectionist, a majoritarian or a minimalist. Which of those categories do you fit in?

Judge ROBERTS. Well, I haven't—I didn't have a chance to read Professor Sunstein's book. He writes a different one every week, it's hard to keep up with.

[Laughter.]

Judge ROBERTS. But, you know, I think—

Senator HATCH. I have read a number of them.

Judge ROBERTS. Like most people, I resist the labels. I have told people when pressed that I prefer to be known as a modest judge, and to me that means some of the things that you talked about in those other labels. It means an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they're not to legislate, they're not to execute the laws.

Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*. Part of that modesty has to do with being open to the considered views of your colleagues on the bench. I would say that's one of the things I've learned the most in the past 2 years on the court of appeals, how valuable it is to function in a collegial way with your colleagues on the bench, other judges being open to your views, you being open to theirs. They, after all, are in the same position you're in. They've read the same briefs. They heard the same arguments. They've looked at the same cases. And if they're seeing things in a very different way, you need to be open to that and try to take another look at your view and make sure that you're on solid ground.

Now, I think that general approach results in a modest approach to judging which is good for the legal system as a whole. I don't think the courts should have a dominant role in society and stressing society's problems. It is their job to say what the law is. That's what Chief Justice Marshall said, of course, in *Marbury* v. *Madison*. And, yes, there will be times when either the executive branch or the legislative branch exceeds the limits of their powers under the Constitution or transgresses one of the provisions of the Bill of Rights, and then it is emphatically the obligation of the courts to step up and say what the Constitution provides, and to strike down either unconstitutional legislation or unconstitutional Executive action.

But the Court has to appreciate that the reason they have that authority is because they're interpreting the law, they're not making policy, and to the extent they go beyond their confined limits and make policy or execute the law, they lose their legitimacy, and I think that calls into question the authority they will need when it's necessary to act in the face of unconstitutional action.

Senator HATCH. I know that I have only mentioned a few of these so-called descriptions of various philosophical attitudes with

regard to judging, but am I correct in interpreting that you are probably eclectic, that you would take whatever is the correct way of judging out of each one of those provisions? There may be truths in each one of those provisions, that none of them absolutely creates an absolute way of judging.

Judge ROBERTS. Well, I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that's true. I tend to look at the cases from the bottom up rather than the top down. And like I think all good judges focus a lot on the facts. We talk about the law, and that's a great interest for all of us, but I think most cases turn on the facts, so you do have to know those, you have to know the record.

In terms of the application of the law, you begin obviously with the precedents before you. There are some cases where everybody's going to be a literalist. If the phrase in the Constitution says two-thirds of the Senate, everybody's a literalist when they interpret that. Other phrases in the Constitution are broader, "unreasonable searches and seizures." You can look at that wording all day and it's not going to give you much progress in deciding whether a particular search is reasonable or not. You have to begin looking at the cases and the precedents, what the Framers had in mind when they drafted that provision.

So, yes, it does depend upon the nature of the case before you I think.

Senator HATCH. Thank you. On the War Powers Act, I remember when Senator Hefflin, years ago, in the Breyer hearing, said, "You, of course, have been here at various times. Do you have any particular thoughts concerning the authority and what ought to be done relative to this, or do you have feelings that the War Powers Act is a proper approach to this issue?" Judge Breyer's simple answer was, "I do not have special thoughts that I would think would be particularly enlightening in that area." He did not get drawn into interpreting the War Powers Act for the Committee, and I suspect that that is the way that you feel as well.

Now, my friend, the Chairman, held up a chart with the number of cases that he said relied on *Roe* v. *Wade*. In fact, if I heard him correctly he called *Roe* a super-duper precedent. Now, I am not sure that a super-duper precedent exists, between you and me, but some have said that *Planned Parenthood* v. *Casey*, a very important case, reaffirmed *Roe*. But let me just ask you, am I correct that *Casey* reaffirmed the central holding in *Roe*, but substantially changed its framework?

Judge ROBERTS. That's what the joint opinion of the three Justices said, it was reaffirming the central holding, it revisited and altered the framework.

Senator HATCH. There were only a few votes to simply reaffirm *Roe*, were there not, in the *Casey* case?

Judge ROBERTS. Well, the plurality opinion is regarded I think as the opinion of—it's the opinion of the plurality, but as the leading opinion of the Justices of the majority, it's the one that judges look to in the first instance. There were separate opinions that disagreed with some of the ways in which that plurality revisited *Roe*. It reaffirmed the central holding in *Roe* v. *Wade*. It dispensed with the trimester framework, and it substituted for the strict scrutiny

that *Roe* had established the undue burden analysis that since the time of *Casey* has governed in this area.

Senator HATCH. As I recall it, there were only a few votes, as you have mentioned, to simply reaffirm *Roe*, but does this suggest that *Casey* itself noted the troubling features of *Roe* and indicated that *Roe's* framework has not been workable?

Judge ROBERTS. Well, the question of the workability of the framework is I think one of the main considerations that you look to under principles of *stare decisis*, along with the settled expectations, whether a precedent has been eroded. That was one of the factors that the Court looked at in *Casey* in determining I think to alter the framework of *Roe*, the trimester framework and the strict scrutiny approach, at least in the terms that were applied by the joint opinion.

Senator HATCH. Our Chairman asked if former Chief Justice Rehnquist's opinion in the *Dickerson* case, upholding *Miranda*, would apply to *Roe* v. *Wade*, and if I recall correctly, you properly declined to answer. But am I right that Chief Justice Rehnquist repeatedly believed that *Roe* should be overruled?

Judge ROBERTS. That was his view, yes.

Senator HATCH. Does that not mean that Rehnquist himself did not believe that his *Dickerson* holding should apply to *Roe*? Would that be a fair conclusion?

Judge ROBERTS. Based on his published opinions—now, I don't remember—well, certainly he wrote in *Casey*, I don't know if he's written since then, so I just hesitate to ascribe views from 1992 to current.

Senator HATCH. Okay. The Chairman and Ranking Member have raised some important issues, and I may turn to some of them shortly, but I believe, however, that we should start with first principles before exploring how those principles should be applied. Many activist groups, and some of my Senate colleagues, would like nothing more than that you take a series of litmus tests, that you reveal your positions on issues and tell us where you stand. I have been on this Committee during the hearings on 9 Supreme Court nominations. I voted to confirm all of the nominees, Democrats and Republicans. As I described yesterday, I agree that this Committee needs answers but only to proper questions.

The important question is not what your views are on any particular issue. You are not campaigning for elective office. The question that needs to be answered is how you view the role of unelected judges in a representative democracy. I know you have said you do not have what might be described as a carefully calibrated, highly defined judicial philosophy, but as each individual case comes before you with its own unique facts and issues. Yesterday you gave us your commitment that you will approach that case within a certain framework. Now I am more interested in learning more about that framework, that perspective on what you believe your job as a judge really is, than I am in how you specifically implement that framework in specific cases or individual cases.

This is where I do differ with some of my colleagues. I want to know more about how you get or how you intend to get to a conclusion, while some appear to only want to know what the conclusion will be like on issues such as abortion. Some think that judges

exist to defend and promote progress, preserving the gains of the past and bringing us to a better future of equality and justice. Now, that does not sound, to use a word you have used to describe judges, very modest to me. On the other hand, Senator DeWine noted Justice Byron White, appointed by President Kennedy, said that judges decide cases, and I thought that that was an important quote yesterday. Yesterday you used the analogy of an umpire who calls balls and strikes, but neither pitches, nor bats.

Please help the Committee sort this out by describing further the role you believe unelected judges play or should play in our system of Government. Are they charged, for example, with using the Constitution to effect cultural and political reform, or does the Constitution require that this should be left to the people and their elected representatives? How can the judiciary sit in constitutional judgment over the legislative and executive branches while still remaining co-equal with them? If you could kind of take a crack at those various questions, I would appreciate it.

Judge ROBERTS. Well, Justice White's insight that was quoted by Senator DeWine yesterday, that judges' obligation is to decide cases, really has constitutional significance. It goes back to *Marbury* v. *Madison*. You know, the Constitution doesn't have any provision that says, oh, and the judges, by the way, are to interpret the Constitution and tell us what it means. What it says it that the judges are to decide cases that arise under this Constitution, this new Constitution, and under any new laws that the Congress might pass. And what Chief Justice Marshall explained in *Marbury* v. *Madison* was that, well, if we've got to decide cases, that's our constitutional obligation, we've got to decide whether in a particular case something's consistent with the Constitution or not. So we have to decide what the Constitution means, and that's what the Framers intended.

So the obligation to decide cases is the only basis for the authority to interpret the Constitution and laws. That means that judges should be careful in making sure that they have a real case in front of them, a real live dispute between parties who have actual injury involved, actual interests at stake, because that is the basis for their legitimacy. And then they're to decide that case as a judge would, not as a legislator would based on any view of what's the best policy, but as a judge would based on the law. That's why the Framers were willing to have the judges decide cases that required them to interpret the Constitution, because they were going to decide it according to the rule of law.

If the people who framed our Constitution were jealous of their freedom and liberty, they would not have sat around and said, "Let's take all the hard issues and give them over to the judges." That would have been the furthest thing from their mind. Now, judges have to decide hard questions when they come up in the context of a particular case. That's their obligation. But they have to decide those questions according to the rule of law, not their own social preferences, not their policy views, not their personal preferences, according to the rule of law.

Senator HATCH. You have explained that it is not the duty of the judiciary to make the law or to execute it, but to interpret it. I am not naive. Sometimes interpretation is more of an art than a

science. There are those who would label "interpretation" absolutely anything a judge might do, or to the text of a statute or Constitution. But it seems to me there comes a point where a judge is using his own creativity and purpose, and crosses the line between interpreting a text written by somebody else, and in a sense creating something new. Now that troubles me, since as I said earlier, I believe in the separation of powers. If a judge crosses the line between interpreting and making the law, he has crossed the line supporting his legitimate authority from the legislative branch's authority. To me that is a very serious matter.

If we believe, as America's Founders did, that the separation of powers, not just in theory or in textbook, but in practice in the actual functioning of Government is the linchpin of limited Government and liberty.

How do you distinguish between these two roles of interpreting and making law? And can you assure the Senate and the American people that you will stay on your side of this line?

Judge ROBERTS. I will certainly make every effort to do so, Senator. I appreciate the point that in some cases the question of whether you are interpreting the law or making the law, that that line is hard to draw in some cases. I would say not in most cases. I think most cases, most judges, know what it means to interpret the law, and can recognize when they're going too far into an area of making law, but certainly there are harder cases. And someone like Justice Harlan always used to explain that when you get to those hard cases, you do need to focus again on the question of legitimacy, and make sure that this is the question that you the judge are supposed to be deciding rather than someone else.

You go to a case like the *Lochner* case. You can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law. The judgment is right there. They say: We don't think it's too much for a baker to work whatever it was, 13 hours a day. We think the legislature made a mistake in saying they should regulate this for their health. We don't think it hurts their health at all.

It's right there in the opinion. You can look at that and see that they are substituting their judgment on a policy matter for what the legislature had said. So, you know, the fact that it's difficult to draw the line doesn't relieve a judge of an obligation to draw the line.

There are those more academic theorists who say it is a question of degree, and since it's just a question of degree, you shouldn't try to draw the line, because it's hard sometimes to interpret the law without making the law. We'll throw our hands up and say, well, judges make the law, and proceed from that.

That has not been my experience either as a judge or an advocate. My experience has been in most cases you can see where the line is, and you do know when judges are exceeding their authority and making a law, rather than interpreting it, and careful judges are always vigilant to make sure that they're adhering to their proper function and not going into the legislative area.

Senator HATCH. All of your experience has been either in the judicial branch from your service as a clerk to then-Justice Rehnquist, and from your current role on the D.C. Circuit, or in the

executive branch, where you worked in the White House Counsel's Office, Assistant to the Attorney General and Deputy Solicitor General. In contrast, I would note that Justice Breyer brought to the Court his experience as Chief Counsel to this Committee. As many commentators during the oral arguments of the Sentencing Guidelines case, Justice Breyer seemed more than willing to defend congressional prerogatives. Now, what can you tell us to assure the Committee that your lack of experience in working in the legislative branch of Government might contribute to a lack of deference to Federal statutes as you review those Federal statutes on the bench?

Judge ROBERTS. Well, I guess the first thing I would say is look at—begin with my opinions as a judge over the past 2 years on the court of appeals. I think they show a healthy regard for the prerogatives of the legislative branch that is appropriate. It is certainly—as an advocate, I've certainly been arguing deference to the legislature in appropriate cases. Other cases of course I was on a different side in arguing the opposite, so I'm familiar with the arguments. I have not only been in a position where I've been pressing arguments, for example, for the executive branch. I have been arguing cases against the executive branch, and frequently arguing cases for the proposition of deference in favor of the Legislature.

I guess I would just hearken back to the model I was talking about earlier of Justice Jackson, who went from being FDR's Attorney General to being a Justice on the Court who I think always had a healthy regard for the prerogatives of the legislative branch.

Senator HATCH. You claimed in your questionnaire that judges do not "have a commission to solve society's problems." I could not agree more. But this is an interesting formulation. It is worth remembering. I think that my office and your office only exist because the American people have authorized them through the Constitution. In other words, the power that you have as a judge comes from the people. Now, that would be a fair assessment, I take it?

Judge ROBERTS. Yes.

Senator HATCH. Let me explore this question of precedent a little bit more with you. Obviously, the Supreme Court decides cases involving a range of issues in requiring application of different kinds of law, including regulations and statutes, as well as the Constitution. All of these cases can set precedence which might be relied upon to decide future cases raising similar issues. Now, what is your understanding of the role that precedent plays in these different categories of cases? Is precedent equally authoritative in, for example, regulatory or statutory cases as in constitutional cases?

As I understand it, the Supreme Court has long said that the strength of its prior decisions is related in part to the difficulty in correcting errors. In constitutional cases there is no external way to correct an error except by constitutional amendment. The Supreme Court says, therefore, that precedent is weakest in constitutional cases.

Now, I have here a list of statements from Supreme Court decisions going back decades and decades to reflect this. In 1997, Justice Sandra Day O'Connor wrote for the Court in *Agostini* v. *Felton*, that you mentioned earlier, that *stare decisis* or precedent is not a command but a policy, and it is a policy that has—and I am

quoting Justice O'Connor here—"at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."

In 1944, Justice Reed wrote for the Court in *Smith* v. *Albright*, "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."

Mr. Chairman, I would like to place this list in the record if I can at this point.

Chairman SPECTER. Without objection, so ordered.

Senator HATCH. Now, the bottom line is that precedent is weakest in constitutional cases. Does this distinction make sense to you, Judge Roberts, and has it in fact resulted in the Supreme Court overruling its previous interpretations of the Constitution with any frequency?

Judge ROBERTS. The Court has frequently explained that *stare decisis* is strongest when you're dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different. Obviously, short of amendment, only the Court can fix the constitutional precedents.

Senator HATCH. Do you believe that Congress is just as bound by constitutional limits as State legislatures?

Judge ROBERTS. There are different limits, of course, but, yes, the limits in the Constitution on Congress are as important as limitations on State legislatures in the Constitution.

Senator HATCH. I ask that question because some seem to argue that overturning a statute that we pass here in the national legislature is almost presumptively an example of judicial activism. I have disagree with the Court on some of these statutes. The *Morrison* case is a perfect illustration to me. I am, along with Senator Biden, the author of the Violence Against Women Act, and I felt that they overreached in that particular case.

But in any event, some believe that it is judicial activism, while turning a blind eye to the much more common practice of striking down State legislation is just an afterthought.

This argument gets even more complicated when the Supreme Court uses a provision actually in the Constitution, to strike down a congressional statute, but provisions not in the Constitution to strike down State statutes. America's Founders were clear that the Constitution established a Federal Government of few and defined powers. It cannot regulate any activity it choose, but may only regulate in those areas which the Constitution grants it power to regulate.

One familiar area is found in Article I, Section 8, which gives the Congress to regulate, "to regulate commerce among the various States." Now, do not get me wrong, I do not necessarily agree with the Supreme Court, as I mentioned in the *Morrison* case. I do not think they always get it right when saying that Congress has overstepped its bounds with respect to regulating interstate commerce.

At the same time some have learned that we are sliding into a constitutional abyss because the Court has found just twice in more than 60 years that there is something, anything that it says the

Constitution does not allow Congress to do regarding Congress and State legislatures and their enactments.

Judge ROBERTS. Well, the obligation to say what the law is, including determining that particular legislation is unconstitutional, is, as Chief Justice Marshall said, emphatically the duty and province of the judicial branch. You and I can agree or disagree on whether the Court is right in a particular case, but if the Court strikes down an Act of Congress and it's wrong, the Court shouldn't have done that, that's not an act of judicial activism, it's just being wrong.

The obligation to strike down legislation is with the judicial branch. They need—I think as Justice Holmes said, it's the gravest and most delicate duty that the Court performs, and the reason is obvious. All judges are acutely aware of the fact that millions and millions of people have voted for you and not one has voted for any of us. That means that you have the responsibility of representing the policy preferences of the people making the determination about when legislation is necessary and appropriate and what form that legislation should take.

Our job is a very different one. We have to consider cases that raise the question from time to time whether particular legislation is constitutional, and we have to limit ourselves in doing that to applying the law and not in any way substituting ourselves for the policy choices you've made. But it is not, as I would say, it's not judicial activism when the courts do that. They may be right or they're wrong, and if they're wrong, they're wrong, but it's not activism.

Senator HATCH. Well, thank you, Judge. You know, our time is almost gone. We have talked about a lot of substantive things in this half-hour.

I know that the American Bar Association has three times unanimously given you its highest rating of "Well Qualified," twice for your appeals court appointment and now again for your Supreme Court nomination. Now, we are going to hear more from the ABA about this later in the week, but I wanted to highlight one thing.

The ABA examines three areas, including judicial temperament, and the ABA has laid out the criteria it uses for this. They include such things as compassion, open-mindedness, freedom from bias, and commitment to equal justice, and you have come out with the highest rating on all of those areas.

Many people note that you have been at the pinnacle of your profession, one of the handful of Supreme Court specialists and a partner at a very prestigious law firm here in Washington, D.C., and yet you have consistently pursued pro bono work, that is, work for free, to help people in need, in which you use your skill and training and legal talent to help others. Perhaps that does not fit with the stereotype that some would force upon you, but it is true and it is real and it says a lot about you as a person.

In the few minutes we have left, please describe some of the pro bono work you have done, why those particular projects are important to you, and what you believe your efforts accomplished. The position that you have been nominated for is Chief Justice of the United States. Do you plan to use that role as a bully pulpit to encourage members of the bar to take seriously their responsibility to

undertake pro bono work as you have done throughout your legal career?

Judge ROBERTS. Yes, Senator. If I am confirmed, I would hope to do that, and if I'm not, I would hope to do that back on the court of appeals. I think it's a very important part of a lawyer's obligation. I'll mention just a couple of examples.

I handled an appeal here before the D.C. court of appeals on behalf of a class of welfare recipients who had had their benefits cut off. Our position was that the benefits had been cut off in violation of the Constitution, in violation of their due process rights to notice and an individualized hearing. These were the neediest people in the District and we pressed their argument before the court of appeals.

The first case I argued in the Supreme Court was a pro bono matter for an individual with a double jeopardy claim against the United States, again, someone who didn't have a lawyer, and I was very happy to do that.

And as I said earlier, I regularly handled moot courts for people. I did one for minority plaintiffs in a voting rights case out of Louisiana. I did one challenging environmental effects in Glacier Bay and another one in the Grand Canyon.

In addition to those actually involving a case, one of the pro bono activities that I'm most committed to is a program sponsored by the Supreme Court Historical Society and an organization called Street Law. They bring high school teachers to D.C. every summer to teach them about the Supreme Court and they can then go back and teach the Court in their classes, and I've always found that very, very fulfilling.

Senator HATCH. Thank you. My time is up. Thanks, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy?

Senator KENNEDY. Thank you. Thank you, Mr. Chairman, and that Street Law program is a marvelous program. I commend you for your involvement in that.

The stark and tragic images of human suffering in the aftermath of Hurricane Katrina reminded us yet again that civil rights and equal rights are still the great unfinished business of America. The suffering has been disproportionately borne by the weak, the poor, the elderly, and the infirm, and largely by African-Americans who are forced by poverty, illness, and unequal opportunity to stay behind and bear the brunt of the storm's winds and floods. I believe that kind of disparate impact is morally wrong in this, the richest country in the world.

One question we must consider today is how we can take action to unify our Nation, heal racial division, end poverty, and give real-life meaning to the constitutional mandate that there be equal protection under law. I believe that the Constitution is not hostile to the idea that national problems can be solved at the national level through the cooperative efforts of the three coequal branches of government, the Congress, the Executive, and the Courts, but not every President, not every legislator, and not every judge agrees that the Federal Government has the power to address and to try to remedy the twin national problems of poverty and access to

equal opportunity. I am not talking about a handout, but a hand up, to give all our citizens a fair shot at the American dream.

Judge Roberts, today we want to find out how you view the Constitution and our ability to protect the most vulnerable. Do you believe that Congress has the power to pass laws aimed at eliminating discrimination in our society, or do you believe that our hands are tied, that the elected representatives of the people of the United States are without the power to pass laws aimed at righting wrongs, ending injustice, eliminating the inequalities that we have just witnessed so dramatically and tragically in New Orleans?

The American people want to know where you stand. We want to find out your view of the rule of law and the role of courts in our system. That is why it is so important, and I hope we will receive your frank and candid and complete responses to the questions we ask today.

To start my inquiry, I want to discuss with you the *Brown* v. *Board of Education* case, which you have already mentioned this morning, which I believe is the most important civil rights decision in our lifetime. In *Brown*, decided in 1954, the year before you were born, the Supreme Court concluded unequivocally that black children have the constitutional right to be educated in the same classrooms as white students. The Court rejected the old doctrine of separate but equal, finding that it violated the Equal Protection Clause of the 14th Amendment.

In considering the issues raised by *Brown*, the Court took a broad and real-life view of the question before it. It asked, whether the segregation of children in public school solely on the basis of race, even though physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities. Do you agree with the Court's conclusion that the segregation of children in public school solely on the basis of race is unconstitutional?

Judge ROBERTS. I do.

Senator KENNEDY. And do you believe that the Court had the power to address segregation of public schools on the basis of the Equal Protection Clause of the Constitution?

Judge ROBERTS. Yes.

Senator KENNEDY. And you are aware that *Brown* was a unanimous decision?

Judge ROBERTS. Yes. That was the—represented a lot of work by Chief Justice Earl Warren, because my understanding of the history is that it initially was not and he spent—it was reargued. He spent a considerable amount of time talking to his colleagues and bringing them around to the point where they ended up with a unanimous Court.

Senator KENNEDY. And a lot of work by the plaintiffs, as well.

Judge ROBERTS. I'm sure.

Senator KENNEDY. First, in reaching its decision, the Court concluded that it must consider public education in the light of its full development and its present place in American life throughout the Nation, that is that it must consider the conditions and impact of its decision in the real present-day world. The Court specifically declined to rely on the legislative history of the 14th Amendment. It

looked instead to the facts and situation as they existed in the case and in the world at the time of the decision.

Judge Roberts, do you agree that the Court was correct in basing its decision on real world consideration of the role of public education at the time of its decision, rather than the role of public education in 1868, when the 14th Amendment was adopted?

Judge ROBERTS. Certainly, Senator. The importance of the Court's approach in *Brown* is, of course, to recognize that the issue was whether or not the discrimination violated equal protection, and you have to look at the discrimination in the context in which it is occurring. I know there has been a lot of recent academic research into this, the original intent of the drafters of the 14th Amendment. Professor McConnell's piece suggests that it's perfectly consistent with the conclusion in *Brown*, and it also, for the very point you mentioned, was an important one, that the nature of the institution of public education wasn't formed to the same extent at the time of the drafting—

Senator KENNEDY. In 1868, that is right.

Judge ROBERTS.—yes, as it was at the time of the decision.

Senator KENNEDY. The *Brown* Court also held that it was important to look at the effects of segregation on public education. The Court determined that education was so vital to a child's development and opportunity for advancement in society, where the State had undertaken to provide public education, it must be available to all on equal terms. Thus, it found that the separate education was inherently unequal. So, is it fair for me to conclude you accept both the holding and the reasoning in the *Brown* case?

Judge ROBERTS. Well, the reasoning, though, I think it's important, is focused on the effects, yes, but the conclusion was that they didn't care if the effects were equal. In other words, the genius of the decision was the recognition that the act of separating the students was where the violation was and it rejected the defense, certainly just a theoretical one given the actual record, that you could have equal facilities and equal treatment.

I think the conclusion, if the record had shown—which it did not—if it had shown perfectly equal treatment in the African-American school and in the white school, then Chief Justice Warren's analysis would be the same because the act of separation is what constituted the discrimination.

Senator KENNEDY. If we could move on now, the *Brown* decision was just the beginning of the historic march for progress towards equal rights for all of our citizens. In the 1960s and 1970s, we came together as a Congress, Republicans and Democrats alike, and passed the historic civil rights legislation that was signed by the President to guarantee equality for all of our citizens on the basis of race, then on gender, then on disability.

We passed legislation to eliminate the barriers to voting that so many minorities had faced in too many States in the country. We passed legislation that prevented racial discrimination in housing.

Those landmark laws were supported by Republicans and Democrats in Congress, and they were signed into law by both Republican and Democratic Presidents. Intelligent and dedicated attorneys in the Justice Department and in the White House and on Capitol Hill devoted their extraordinary talents and imagination

and perseverance to making these laws effective. Every one of the new laws was tested in court all the way to the Supreme Court, and I would like to find out, Judge Roberts, whether you would agree that the progress that we made in civil rights over the past 50 years is irreversible.

I would like to find out whether you think that these laws are constitutional or whether you have any concerns or questions about them. Do you have any concerns or reservations about the constitutionality of the 1964 Civil Rights Act that outlawed racial discrimination in public accommodations, employment, and other areas?

Judge ROBERTS. I don't think any issue has been raised concerning those. You know, I'm cautious, of course, about expressing an opinion on a matter that might come before the Court. I don't think that's one that's likely to come before the Court, so I'm not aware of any questions that have been raised concerning that, Senator.

Senator KENNEDY. So, I'll assume that you don't feel that there are any doubts on the constitutionality of the 1964 Act. Do you have any doubts as to the constitutionality of the 1965 Voting Rights Act?

Judge ROBERTS. That's an issue, of course, as you know, it's up for renewal and that is a question that could come before the Court. The question of Congress's power, again, without expressing any views on it, I do know that it's going to be—

Senator KENNEDY. That's gone up and down the Supreme Court, the 1965 Act and again the 1982 Act extension.

Judge ROBERTS. Yes, and the issue would be—

Senator KENNEDY. I am just trying to find out, on the Voting Rights Act, whether you have any problem at all or are troubled by the constitutionality of the existing Voting Rights Act that was extended by the Congress—

Judge ROBERTS. Oh, well, the existing Voting Rights Act, the constitutionality has been upheld—

Senator KENNEDY. Okay.

Judge ROBERTS.—and I don't have any issue with that. There is a separate question that would be raised if the Voting Rights Act were extended, as I know Congress is considering, and those arguments have been raised about whether or not particular provisions should be extended or should not be extended, and since those questions might well come before the Court, I do need to exercise caution on that.

Senator KENNEDY. But with regards to the bipartisan Act that we passed, your position on the 1982 Act, I know you had concerns, and I am going to come back to those, but you are not suggesting that there is any constitutional issue with that?

Judge ROBERTS. Well, I'm not aware of any constitutional issue that's been raised about it.

Senator KENNEDY. All right.

Judge ROBERTS. But again, I don't want to express conclusions on hypothetical questions, whether as applied in a particular case, whether there would be a challenge in that respect. Those cases come up all the time—

Senator KENNEDY. All right.

Judge ROBERTS.—and I do need to keep—avoid expressing an opinion on those issues.

Senator KENNEDY. Well, it seems that on voting rights, with all of its importance and significance, and with the extraordinary bipartisan balance that came together on that Act, I am going to come back to it. I know you had some reservations about it, which we will come to. But that, I am wondering whether you are hesitant at all in saying that you believe that it is constitutional.

Judge ROBERTS. My hesitancy, Senator, is simply this, that cases do come up—I had one in the D.C. Circuit—concerning issues under the Voting Rights Act—

Senator KENNEDY. All right.

Judge ROBERTS.—and I don't know what arguments parties will be raising in those cases. So an abstract question, you need to know obviously what is the claim, what is the issue, and decide it according to the rule of law.

Senator KENNEDY. How about the constitutionality of the 1968 Fair Housing legislation that outlaws racial discrimination in housing?

Judge ROBERTS. Again, I think that my understanding is it's been upheld and I'm not aware of any issues that are arising under it. I suppose if there's a particular claim that's entered under that statute, litigants make all sorts of arguments and they may raise an argument that it's unconstitutional as applied in a particular case and the court would have to decide that question.

Senator KENNEDY. Well, I was sort of aiming your answer to my friend, Orrin Hatch, about the power of the legislature and the deference that you are going to give when the legislature makes judgments and findings, particularly in the areas of voting, that we spend such an extraordinary amount of time. The Chairman was so involved in that legislation.

Let us go to the Voting Rights Act. As you know, we have had a chance to go through many of the documents that you authored during the early and mid-1980s when you worked in the Department of Justice and in the White House and I am deeply troubled. Let me point out that we don't have all the documents that we would like to have. I am working with the documents that we do have and I want to go through those, get your reactions, and ask your views today.

I am deeply troubled by the narrow and cramped, and perhaps even a mean-spirited view of the law that appears in some of your writings. In the only documents that have been made available to us, it appears that you did not fully appreciate the problem of discrimination in our society. It also seems that you were trying to undo the progress that so many people had fought for and died for in this country.

At the outset, I want to be clear that I do not think, nor am I suggesting, that you are a person who is in favor of discrimination. I don't believe that. I am concerned, however, that at the time you were writing these laws and memoranda and notes, you simply did not grasp the seriousness of the impact of discrimination on our country as a whole.

Let's start with the Voting Rights Act. Most Americans think that the right to vote is among the most important tools that they

have to participate in our democracy. You do agree, don't you, Judge Roberts, that the right to vote is a fundamental constitutional right?

Judge ROBERTS. It is preservative, I think, of all the other rights. Without access to the ballot box, people are not in the position to protect any other rights that are important to them. And so I think it's one of, as you said, the most precious rights we have as Americans.

Senator KENNEDY. And you will recall that in the 1960s, millions of our fellow citizens were denied access to the voting booth because of race, and to remedy that injustice, Congress passed the Voting Rights Act of 1965 that outlawed discrimination in voting. Section 2 of that Act is widely believed to be the most effective civil rights statute enacted by Congress.

In 1982, Congress took action to extend the Voting Rights Act and to make it clear that discriminatory voting practices and procedures are illegal if they are intended to be racially discriminatory or if they are shown to have a racially discriminatory impact. It was this latter prohibition, the prohibition against voting practices that have a discriminatory impact, that provoked your heated opposition, Judge Roberts.

In our earlier discussion of *Brown* v. *Board of Education*, you agreed that the actual impact of racial segregation on public education and school children was perfectly valid for the Court to consider, but when it came to voting rights, you rejected the consideration of actual impact. You wrote that violations of Section 2 of the Voting Rights Act, and I quote, "should not be made too easy to prove since they provide a basis for the most intrusive interference imaginable by Federal courts into State and local processes."

You also wrote, and I quote, "it would be difficult to conceive of a more drastic alteration of local government affairs, and under our Federal system such an intrusion should not be too readily permitted."

And you didn't stop there. You concluded that Section 2 of the Voting Rights Act was, quote, "constitutionally suspect and contrary to the most fundamental tenets of the legislating process on which the laws of this country are based."

I am deeply troubled by another statement that you made at the time, and I quote, "there is no evidence of voting abuses nationwide supporting the need for such a change." No evidence? I was there, Judge Roberts, both the House and the Senate had the extensive hearings. We considered detail-specific testimony from affected voters throughout the country.

But you dismissed the work of Congress out of hand. "Don't be fooled," you wrote, "by the House vote or the 61 Senate sponsors of the bill. Many members of the House did not know that they were doing more than simply extending the Act, and several of the 61 Senators have already indicated they only intended to support a simple extension."

Judge Roberts, Republicans and Democrats overwhelmingly supported this legislation, but you thought we didn't really know what we were doing. Newt Gingrich and James Sensenbrenner voted for the House bill. Dan Quayle was an original Senate cosponsor of the bill. We held extensive hearings, created a lengthy record, yet you

thought there was no evidence of voting abuses that would justify the legislation.

Your comment? Do you believe today that we need Federal laws to assure that all our citizens have the equal access to the voting booth, and do you basically support the 1982 Voting Rights Act signed by President—

Judge ROBERTS. Senator, you will recall at the time of the—this was 23 years ago. I was a staff lawyer in the Justice Department. It was the position of the Reagan administration for whom I worked, the position of the Attorney General for whom I worked, that the Voting Rights Act should be extended for the longest period of its extension in history without change. The Supreme Court had interpreted in the *Mobile* v. *Bolden* case, Section 2 to have an intent test, not an effects test.

Keep in mind, of course, as you know very well, Section 5, the pre-clearance provision, had always had an effects test, and that would be continued. The reference to discrimination nationwide was addressing the particular point that the effects test had been applied in particular jurisdictions that had a history of discrimination and the question is whether or not there was a similar history of discrimination that supported extending the effects test in Section 2.

It was the position of the administration for which I worked that the proposal was to extend the Voting Rights Act without change. Your position at the time was that the intent test that the Supreme Court had determined was in Section 2 should be changed to the effects test, and that was the position that eventually prevailed.

There was no disagreement—

Senator KENNEDY. Judge Roberts, the effects test was the law of the land from the *Zimmer* case to the *Mobile* case. It was the law of the land.

Judge ROBERTS. Senator—

Senator KENNEDY. That was the law of the land. Court after court decided about the impact of the effects test. The *Mobile* case changed the *Zimmer* case.

Judge ROBERTS. Well, Senator, you disagree—

Chairman SPECTER. Senator, let him finish his answer.

Senator KENNEDY. Okay. Well, I would just like to get his view of whether the *Zimmer* case was not the holding and the law of the land prior to the *Mobile* case.

Judge ROBERTS. Well, this is the same debate that took place 23 years ago on this very same issue, and the administration's position—you think the Supreme Court got it wrong in *Mobile* v. *Bolden*.

Senator KENNEDY. No, that's not what I think. It was wrong, but I also think the law of the land decided in the *Zimmer* case upheld in court after court after court after court was the effects test.

Judge ROBERTS. Well, and the Supreme Court—

Senator KENNEDY. And that is all—

Chairman SPECTER. Let him finish his answer, Senator Kennedy.

Judge ROBERTS. The point is, and again, this is revisiting a debate that took place 23 years ago—

Senator KENNEDY. Well, I am interested today in your view. Do you support the law that Ronald Reagan signed into law and that was cosponsored overwhelmingly by the—

Judge ROBERTS. Certainly. And the only point I would make, this is the same disagreement and the same debate that took place then over whether the Court was right or wrong in *Mobile* v. *Bolden*, and the point I would make is two-fold, that those like President Reagan, like Attorney General Smith, who were advocating extension of the Voting Rights Act without change, were as fully committed to protecting the right to vote as anyone.

Senator KENNEDY. Could I—

Chairman SPECTER. Let him finish his answer, Senator Kennedy.

Judge ROBERTS. And the articulation of views that you read from represented my effort to articulate the views of the administration and the position of the administration for whom I worked, for which I worked, 23 years ago.

Senator KENNEDY. Well, after President Reagan signed it into law, did you agree with that position—

Judge ROBERTS. I certainly—

Senator KENNEDY.—of the Administration?

Judge ROBERTS. I certainly agreed that the Voting Rights Act should be extended. I certainly agreed that the effects test in Section 5 should be extended. We had argued that the intent test—that the Supreme Court recognized in *Mobile* v. *Bolden*—I know you think it was wrong, but that was the Supreme Court's interpretation—should have been extended. Again, as you said, the compromise that you and Senator Dole worked out was enacted into law and signed into law by President Reagan and the Voting Rights Act has continued to be an important legislative tool to ensure that most precious of rights which is preservative of all other rights. There was never any dispute about that basic proposition.

Senator KENNEDY. Well, what I am getting to is after it was overwhelmingly passed by the House and the Senate, signed into law, we have the memorandum that you said the fact we were burned last year—this is the following year, because we did not sail in with the new voting rights legislation does not mean we will be hurt this year if we go slowly on housing legislation. What did you mean when you said that we were burned last year by not getting the Voting Rights Act?

Judge ROBERTS. Well, I think the legislative debate between those who favored extending the Voting Rights Act as is and those who favored changing the Act because they disagreed with the Supreme Court decisions, the legislative judgment was that the administration's proposal didn't succeed because they had waited—rather than coming out in favor of an extension right away, they waited for the Congress to come up with its proposals which turned out to be different than the administration proposals.

On the housing discrimination, I would note that the administration did get its ducks in a row, and in a matter of months after the date of the memo that you just read from had its housing proposal there and submitted to Congress and it was enacted.

Senator KENNEDY. Nineteen Eighty-Eight Fair Housing Act.

Judge ROBERTS. The administration's proposal was submitted, I believe, months after the date of the memo that you read from.

Senator KENNEDY. Let me, if I could, go to the Civil Rights Restoration Act. In 1981, you supported an effort by the Department of Education to reverse 17 years of civil rights protections at colleges and universities that receive Federal funds. Under the new regulations, the definition of Federal assistance to colleges and universities would be narrowed to exclude certain types of student loans and grants so that fewer institutions would be covered by the civil rights laws. As a result, more colleges and universities would legally be able to discriminate against people of color, women, and the disabled.

Your efforts to narrow the protection of the civil rights laws did not stop there, however. In 1984, in *Grove City* v. *Bell*, the Supreme Court decided, contrary to the Department of Education regulations that you supported, that student loans and grants did, indeed, constitute Federal assistance to colleges for purposes of triggering civil rights protections.

But in a surprising twist, the Court concluded that the non-discrimination laws were intended to apply only to the specific program receiving the funds and not to the institution as a whole.

Under that reasoning, a university that received Federal aid in the form of tuition could not discriminate in admissions, but was free to discriminate in athletics, housing, faculty hiring, and any other programs that did not receive the direct funds. If the admissions office didn't discriminate, if they got the funds through the admissions office, they could discriminate in any other place of the university.

A strong bipartisan majority in both the House and the Senate decided to pass another law, the Civil Rights Restoration Act, to make it clear that they intended to prohibit discrimination in all programs and activities of a university that received Federal assistance. You vehemently opposed the Civil Rights Restoration Act. Even after the *Grove City* Court found otherwise, you still believed that there was—and this is your quote—"a good deal of intuitive appeal to the argument that Federal loans and grants to students should not be viewed as Federal financial assistance to the university." You realize, of course, that these loans and grants to the students were paid to the university as tuition. Then even though you acknowledged that the program-specific aspect of the Supreme Court decision was going to be overturned by the congressional legislation, you continued to believe that it would be "too onerous" for colleges to comply with nondiscrimination laws across the entire university unless it was "on the basis of something more solid than Federal aid to students."

Judge Roberts, if your position prevailed, it would have been legal in many cases to discriminate in athletics for girls, women; it would have been legal to discriminate in the hiring of teachers; it would have been legal not to provide services or accommodations to the disabled.

Do you still believe today that it is too onerous for the Government to require universities that accept tuition payments from students who rely on Federal grants and loans not to discriminate in any of their programs of activities?

Judge ROBERTS. No, Senator, and I did not back then. You have not accurately represented my position.

Senator KENNEDY. These are your words.

Chairman SPECTER. Let him finish his answer.

Judge ROBERTS. Senator, with respect—

Chairman SPECTER. You had quite a long—

Judge ROBERTS.—you have selected—

Chairman SPECTER. Wait a minute, wait a minute. Senator Kennedy just propounded a very, very long question. Now, let him answer the question.

Judge ROBERTS. Senator, you did not accurately represent my position. The *Grove City College* case presented two separate questions, and it was a matter being litigated, of course, in the courts. The universities were arguing that they were not covered at all by the civil rights laws in question simply because their students had Federal financial assistance and attended their universities. That was their first argument.

The second argument was, even if they were covered, all that was covered was the admissions office and not other programs that themselves did not receive separate financial assistance.

Our position, the position of the administration—and, again, that was the position I was advancing. I was not formulating policy. I was articulating and defending the administration position. And the administration's position was, yes, you are covered if the students receive Federal financial assistance, and that the coverage extended to the admissions office. That was the position that the Supreme Court agreed with. We were interpreting legislation. The question is: What is the correct interpretation of the legislation? The position that the administration advanced was the one I have just described. The universities were covered due to Federal financial assistance to their students. It extended to the admissions office.

The Supreme Court in the *Grove City* case agreed with that position. So the position the administration had articulated, the Supreme Court concluded, was a correct interpretation of what this body, the Congress, had enacted.

Congress then changed the position about coverage, and that position was, I believe, signed into law by the President and that became the new law. The memo you read about Secretary Bell's proposal, if I remember it, was, well, he said, if we're going to cover all of the universities, then we shouldn't hinge coverage simply on Federal financial assistance. And the position I took in the memorandum was that, no, we should not revisit that question. We should not revisit the question that Federal financial assistance triggers coverage.

Senator KENNEDY. I have the memo here. I have 22 seconds left. And your quote is this, "If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students." I think most of the Members of the Congress feel that if the aid to the universities, tuition, loans and grants are going to be sufficient to trigger all of the civil rights laws—your memorandum here, "If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students." That is your memorandum.

Judge ROBERTS. Well, Senator, again, the administration policy was as I articulated it, and it was my job to articulate the administration policy.

Senator KENNEDY. My time is up, Mr. Chairman.

Chairman SPECTER. Yes, thank you very much, Senator Kennedy.

This is a good time for a 15-minute break.

[Recess 11:31 to 11:47 a.m.]

Chairman SPECTER. We will reconvene our hearing. We will take three more rounds of questions so that we will go until approximately—there will be two more rounds of questions until 12:45, and we will then break for lunch. Both Republicans and Democrats have their policy luncheons, and we will then reconvene after lunch until 2:15. I have been asked how late we are going to go, and let's see how it feels. We want to move ahead with the hearings, but we do not want to wear everybody out.

Senator Grassley?

Senator GRASSLEY. Judge Roberts, for a second time I would congratulate you and your family on your nomination. I would also for a second time thank you for the time you spent in my office for me to talk privately with you several weeks ago. I am impressed by your record, your public service, and obviously you demonstrate your intellect very well, and we ought to be satisfied with that.

Let me remind everybody that Judge Roberts was confirmed unanimously to the D.C. Circuit Court just 2 years ago by the Senate and that the ABA, the American Bar Association, has recommended him to be, in their words, "unanimously well qualified" for this position on the Supreme Court. So I believe with everything we have seen demonstrated, you are obviously as qualified a nominee as I have seen in the 24 years that I have been on this Committee.

In addition, I want to thank you for a great deal of candor you have in answering questions and giving information. The Judiciary Committee has received from you or from Government agencies that you have been affiliated with thousands of documents on your record—thousands of documents. And we all have combed through the documents, the briefs, and opinions that you have offered to assess your qualifications to the Supreme Court. I think that we have been provided with a vast amount of information, more than I think any other candidate to the Supreme Court.

This confirmation process is very important, however, not so that we can seek to obtain your commitments on specific cases but, rather, to more fully understand your approach to deciding cases. In addition, you have been nominated to be Chief Justice, so I am going to be interested, in some of my questioning today or tomorrow, about your priorities for the Federal judiciary and what you think about the administration of justice and some of those questions you might anticipate do not involve cases coming before the Supreme Court. And maybe on administering that branch of Government, you could be a little more concrete what you support and do not support. And, of course, lastly, I appreciate your candor and thoughtfulness.

Our conversation now will not only tell us more about your judicial method, but will also, I hope, educate the public on the proper

role of a judge in our democratic society. Most people who will be following these hearings will be, like me, a non-lawyer, and I think it is important that the bulk of our society, particularly those who are not in the law, understand limits on judicial power in our system of checks and balances of Government.

Judge Roberts, I believe that we should be filling the Federal bench with individuals who will be fair, who will be unbiased, devoted to addressing facts and the law before them, without imposing their own values and political believes in reaching a decision. You made clear that you agree with that—I am not asking you, but I think you made clear that you agree with that with your umpire analogy that you used yesterday. Our Founding Fathers clearly intended the judiciary to be the least dangerous branch of Government. Alexander Hamilton, in fact, in *Federalist Paper 78* cautioned against judges substituting their own belief for constitutional intent when he wrote these words: "The Courts must declare the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequences would be the substitution of their pleasure for that of the legislative body."

I think that this standard is important for all judges, even more so with Supreme Court Justices, and I hope at the end of our hearings that we feel, as I am beginning to feel now, that you share that.

So, Judge Roberts, beyond your umpire analogy, what do you understand to be the role of a judge in a democratic society? And I would like your reaction to a quote of Justice Cardozo on the nature of the judicial process, and he said this, not paraphrasing but direct quote: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is not to yield to spasmodic sentiment, to vague or unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains."

What do you think Justice Cardozo meant by that passage? And do you agree with it?

Judge ROBERTS. I know I agree with it. Now let me figure out what he meant by it.

[Laughter.]

Judge ROBERTS. I think what he meant was that judges operate as judges when they are confined by the law. When I became a lawyer, the proclamation they read for the graduates, they referred to the law as "the wise restraints that make men free." And judges are the same way. We don't turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It's because we want him or her to apply the law. They are constrained when they do that. They are constrained by the words that you choose to enact into law in interpreting the law. They are constrained by the words of the Constitution. They are constrained by the precedents of other judges that become part of the rule of law that they must apply. And that cabining of their discretion, that is what Hamilton referred to in *Federalist 78*. He said judges should not have an absolute discretion; they need to be bound down

by rules and precedents—the rules, the laws that you pass, the precedents that judges before them have shaped. And then their job is interpreting the law. It is not making the law. And so long as they are being confined by the laws, by the Constitution, by the precedents, then you're more comfortable that you're exercising the judicial function. It's when you're at sea and you don't have anything to look to that you need to begin to worry that this isn't what judges are supposed to do.

Senator GRASSLEY. Well, is there any room in constitutional interpretation for the judge's own values or beliefs?

Judge ROBERTS. No, I don't think there is. Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't look to your own values and beliefs. You look outside yourself to other sources. This is the basis for, you know, that judges wear black robes, because it doesn't matter who they are as individuals. That's not going to shape their decision. It's their understanding of the law that will shape their decision.

Senator GRASSLEY. Some legal scholars claim that when the political branches of Government are slow to act, the broad and spacious terms of the Constitution lend themselves to Court-created solutions. So you agree with this role of the Court?

Judge ROBERTS. I have said that it is not the job of the Court to solve society's problems, and I believe that. It is the job of the Court to decide particular cases. Now, sometimes cases are brought and the courts have to decide them even though the other branches have been slow to act, as you say. *Brown* v. *Board of Education* is a good example. The other branches and society were not addressing the problems of segregation in the schools. They were not just slow to act. They weren't acting. But that didn't mean the courts should step in and act. But when the courts were presented with a case that presented the challenge, this segregation violates the Equal Protection Clause, the courts did have the obligation to decide that case and resolve it, and in the course of doing that, of course, change the course of American history.

Senator GRASSLEY. Your reference to *Brown* would be a good time to throw in this question. Do you agree with the view that the courts, rather than the elected branches, should take the lead in creating a more just society?

Judge ROBERTS. Again, it is the obligation of the courts to decide particular cases. Often that means acting on the side of justice as we understand it, enforcing the Bill of Rights, enforcing the Equal Protection Clause. But it has to be in the context of a case, and it has to be in the context of interpreting a provision that's implicated in that case. They don't have a license to go out and decide I think this is an injustice and so I'm going to do something to fix it. That type of judicial role I think is inconsistent with the role the Framers intended. When they have to decide a case, it may well from time to time in particular cases put them in the role of vindicating the vision of justice that the Framers enacted in the Constitution, and that is a legitimate role for them. But it's always in the context of deciding a proper case that's been presented.

Senator GRASSLEY. Judge Roberts, during the Souter nomination, I questioned—and I didn't go back and check the record just to see exactly what I said, but I questioned in some way about how he

would interpret statutory law. Justice Souter responded to some of my questions by talking about vacuums in the law, specifically that the courts—and these are his words—"fill vacuums that are maybe left by Congress."

This concept was troubling to me then and remains so today, and if Justice Souter is listening, I would like to say to him, well, you know, maybe Congress intended to leave some vacuums.

So I would like to know how much filling in of vacuums in the law left by Congress will you do as a Supreme Court Justice. Do you think this is the way for the Court to be activist in that courts will be deciding how to fill in generalities and resolve contradictions in law?

Judge ROBERTS. Well, I don't want to directly comment on what Justice Souter said. He's either going to be a colleague or continue to be one of my bosses.

[Laughter.]

Judge ROBERTS. So I want to maintain good relations in either case. But I do think it's important to recognize in construing legislation that sometimes a decision has been made not to address a particular problem. That isn't a license for the courts to go ahead and address it because that would be overriding a congressional decision. At the same time, as is always the case, courts are sometimes put in the position of having to decide a question that Congress has left deliberately or inadvertently unanswered. We see that in the issue of what remedies are available under an implied right of action when Congress has not spelled them out and the courts sometimes have to address that sort of question. And if it's presented in a case, it's unavoidable.

But, again, I resort back to the bedrock principle of legitimacy in the American system for courts, which is that any authority to interpret the law, any authority to interpret the Constitution, derives from the obligation to decide a particular case or controversy.

Senator GRASSLEY. In your questionnaire to the Committee, you stated that, "Precedent plays an important role in promoting stability of the legal system." I think we would all agree. You also said that a judge operates within "a system of rules developed over the years by other judges equally strident to live up to their judicial oath." It is also true that, as Justice Frankfurter explained, "The ultimate touchstone of constitutionality is the Constitution itself, not what we have said about it. Erroneous interpretations of the Constitution can be corrected only by this Court." I suppose by constitutional amendment as well. The Court has done so many times, and most famously—you have referred to it—the *Brown* case, which overruled separate but equal, a precedent that stood for 58 years.

So, Judge Roberts, I would like to ask you a few questions on the issue of precedence and its value in our legal system. History has provided many examples of the dangers of Government by the judiciary, such as the Court's decision in *Dred Scott*. Do you share President Lincoln's concerns that I am going to quote here from his first inaugural: "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court the instant they are made in ordinary litigation, the people will have ceased to be their own rulers"?

Judge ROBERTS. Well, President Lincoln, of course, was referring to one of the—perhaps the most egregious examples of judicial activism in our history, the *Dred Scott* case, in which the Court went far beyond what was necessary to decide the case, and really, I think historians would say that the Supreme Court tried to put itself in the position of resolving the dispute about the extension of slavery, and resolving it in a particular way that it thought was best for the Nation. And we saw what disastrous consequences flowed from that. And Lincoln's comment about it—and he had several comments, because even when he was running for Senate, a big part of the famous debates were, well, this is what the Supreme Court has said, are you going to follow it or not? And Lincoln was a very careful lawyer in his responses. And the reason it was such a problem is because he was dealing with such an overarching Supreme Court decision. They didn't even just decide the particular case. The Court decided to take upon itself, opining more generally on how the whole issue should be resolved. And, of course, as I said, it was a disaster.

So, yes, to the extent Lincoln's criticism is how broad and overreaching the Court opinion was and that that in itself presented a very difficult problem in terms of adherence to the decision, I do agree with that.

Senator GRASSLEY. Let me carry that one step further beyond his quote. You now as an appeals court judge obviously are bound by Supreme Court precedent. But on the Supreme Court, a Justice has much more freedom to re-evaluate prior Supreme Court decisions. I would like to explore the approach that you would take in your examination of Supreme Court precedents. Could you tell us what you believe is the appropriate judicial role describing for us the value of precedent in our legal system?

Judge ROBERTS. Certainly, and here, again, we're guided by the Court. It has precedent on precedents. It has cases talking about when you should revisit prior precedents and when you shouldn't. And, of course, some of the cases say you should in the particular instance and others that you shouldn't. You begin with a basic recognition of the value of precedent. No judge gets up every morning with a clean slate and says, well, what should the Constitution look like today? The approach is a more modest one. You begin with the precedents. Adherence to precedent promotes evenhandedness, promotes fairness, promotes stability and predictability. And those are very important values in a legal system. Those precedents become part of the rule of law that the judge must apply.

At the same time, as the Court pointed out in the *Casey* case, *stare decisis* is not an inexorable command. If particular precedents have proven to be unworkable, they don't lead to predictable results, they're difficult to apply, that's one factor supporting reconsideration. If the bases of the precedents have been eroded—in other words, if the Court decides a case saying because of these three precedents we reach this result, and in the intervening years two of those are overruled, that's another basis for reconsidering the precedent.

At the same time, you always have to take into account the settled expectations that have grown up around the prior precedent. It is a jolt to the legal system to overrule a precedent, and that has

to be taken into account, as well as the different expectations that have grown up around it.

There are different other aspects of the rules. For example, property decisions are far less likely to be reconsidered because of the expectations that grow up around them. Statutory decisions are less likely to be reconsidered because Congress can fix it if it's a mistake.

Again, the Court's decisions in cases like *Casey* and *Dickerson*, *Payner* v. *Tennessee*, and *Agostini*, *State Oil Company* v. *Khan*, it's an issue that comes up on a regular basis, and the Court has developed a body of law that would guide judges and Justices when they decide whether to revisit a case.

The fundamental proposition is that it is not sufficient to view the prior case as wrongly decided. That's the opening of the process, not the end of the process. You have to decide whether it should be revisited in light of all these considerations.

Senator GRASSLEY. Given your views on judicial restraint, can you tell us to what extent you feel obliged to uphold a decision which you found not to be based on the original intent of the Constitution? Could you explain what factors or criteria you might use to evaluate to see whether a decision deviated from original intent and whether it should be overruled?

Judge ROBERTS. Well, again, you would start with the precedents of the Court on that decision. In other words, if you think the decision was correctly decided or wrongly decided, that doesn't answer the question of whether or not it should be revisited. You do have to look at whether or not the decision has led to a workable rule. You have to consider whether it's created settled expectations that should not be disrupted in the interest of regularity in the legal system. You do have to look at whether or not the bases of the precedent have been eroded. Those are the main considerations that the Court has articulated in a case like *Dickerson*, *Payner* v. *Tennessee*, and the others. These are all the factors that the Court looks at.

Obviously, a view about the case presents the question, but the Court has emphasized it's not enough to think that the decision is wrong to take the next step to revisit it and overrule.

Senator GRASSLEY. In your confirmation for the D.C. Circuit, you answered a question, asked by another member, whether you supported the originalist approach to constitutional interpretation by saying this, so I hope I am quoting you accurately: "I do not have an all-encompassing approach to constitutional interpretation. The appropriate approach depends to some degree on the specific provisions at issue. Some provisions of the Constitution provide considerable guidance on how they should be construed; others are less precise. I would not hew to a particular school of interpretation but would follow the approach or approaches that seem most suited in the particular case to correctly discerning the meaning of the provision at issue."

Could you explain what approaches you are talking about? I am not sure in your quote what you are getting at. Secondly, can you give some examples? And, three, I would like to know when you do not believe that the originalist approach is the right approach.

Judge ROBERTS. Well, I think it's very important to define these terms. Let's take "the originalist approach." I do think it's the—that the Framers' intent is the guiding principle that should apply. However, you do need to be very careful and make sure that you're giving appropriate weight to the words that the Framers used to embody their intent.

I think in particular of the 14th Amendment and the Equal Protection Clause. There are some who may think they're being originalists who will tell you, well, the problem they were getting at were the rights of the newly freed slaves, and so that's all that the Equal Protection Clause applies to. But, in fact, they didn't write the Equal Protection Clause in such narrow terms. They wrote more generally. That may have been a particular problem motivating them, but they chose to use broader terms, and we should take them at their word, so that it is perfectly appropriate to apply the Equal Protection Clause to issues of gender and other types of discrimination beyond the racial discrimination that was obviously the driving force behind it. That is an originalist view because you're looking at the original intent as expressed in the words that they chose, and their intent was to use broad language, not to use narrow language.

There are some areas where a very strict textualist approach makes the most sense. Obviously, the example I gave earlier, two-thirds means two-thirds. You don't say, well, their purpose was to apply some super-majority requirement, and now that we have more Senators, three-fifths will give effect to that intent. Nobody would apply that approach. You stick to the language.

In other areas, the Court's precedents dictate the approach. This is not something that is purely a matter of academic exercise. For example, on the Seventh Amendment, the right to a jury trial, the Court has been very specific. We have a historical approach there. The job of a judge is to sort of look at whatever action is and try to analogize it. What would that be most like in 1787? And if you got a jury trial for that, you get one today; and if you didn't, you don't. It's a purely historical approach.

So the approaches do vary, and I don't have an overarching view. As a matter of fact, I don't think very many judges do. I think a lot of academics do. But the demands of deciding cases and the demands of deciding cases by committee, either a group of three or a group of nine, I find with those demands the nuances of academic theory are dispensed with fairly quickly, and judges take a more practical and pragmatic approach to trying to reach the best decision consistent with the rule of law.

Senator GRASSLEY. I am going to go to an issue that Senator Kennedy left off with regarding the *Grove City* case. And I have the memo that was involved in this issue before me. And I see the memo being a summary of former Education Secretary Bell's views on this issue. But Senator Kennedy left out what your assessment was on it, and you wrote these words: "As a practical matter, however, I do not think the administration can revisit the issue at this late date."

Can you tell us what your position was in this memo? And Mr. Chairman, I would like to have this entire memo submitted for the record.

Chairman SPECTER. Without objection, it will be admitted as part of our record.

Judge ROBERTS. The issue was the—in the *Grove City* case, the Court had said that receipt of financial aid by students triggered coverage under the civil rights statutes, limited to the admissions office, the admissions policies. The Civil Rights Restoration Act changed that result to say that the limitation was not to the admissions office but applied more generally to the institution.

Secretary Bell submitted a proposal. He said, well, if it's going to apply more generally to the institution, then the trigger of simply having students who receive financial aid shouldn't be enough. And the position that we took in response to Secretary Bell's proposal was no, that we weren't going to revisit it. We had argued earlier in *Grove City* that financial aid was enough to trigger coverage and we weren't going to revisit that question. The position was that coverage of the entire institution based on receipt of financial aid was appropriate.

Senator GRASSLEY. So Senator Kennedy's words were not quoting you but quoting words that Secretary Bell had in this memo, and you were reacting to those.

Judge ROBERTS. Well, it's, again, 23-some years ago. But my recollection is that that was his proposal. Our response was that, no, we're not going to do that, we're not going to change the position we've taken in light of the new legislation.

Senator GRASSLEY. Some outside groups have claimed that you are hostile to civil rights. Others have suggested, in my view incorrectly, that you have an off-the-mark view of the Voting Rights Act. I believe these allegations to be inaccurate, and I would like for you to set the record straight. As you may know, I have long been a supporter of the Voting Rights Act. I appeared at a news conference with Senator Dole and Kennedy and some others in 1982 with that compromise that you have referred to. The Voting Rights Act has had a very significant impact on racial discrimination, probably more than anything else that Congress has done since the adoption of the Civil War Amendments.

Your critics take issue with some of your memos which outline the arguments in the debate over whether Section 2 should have an effects test or an intent test. Specifically, there was a debate in Congress over concerns that the effects test could lead to legal requirements that racial quotas be mandated for legislatures and other elected bodies. Ultimately, the Voting Rights Act was reauthorized with a provision expressly prohibiting parts from requiring racial quotas. We were able to craft a good compromise that gave greater protection to minority voters while not requiring quotas.

Judge Roberts, could you tell us what your role was as an assistant to Attorney General Smith in developing the Reagan policy on the Voting Rights Act?

Judge ROBERTS. Well, President Reagan's policy and the Attorney General's policy was to support the longest extension of the Voting Rights Act in history without change. Some in the Congress wanted to amend the Voting Rights Act Section 2 to overturn the Supreme Court's decision in *Mobile* v. *Bolden*. And that's what the debate was about, whether it should be an intent test under Section 2 or an effects test. Everybody agreed that Section 5, the pre-

clearance provision, which applied to jurisdictions with a history of discrimination, had an effects test and should continue to have an effects test.

The debate was about Section 2 and whether it should be an intent test or an effects test. But there was no disagreement among President Reagan, Attorney General Smith. Those of us on Attorney General Smith's staff, like myself, thought that the protection of the right to vote was critical, that the Voting Rights Act had been extraordinarily effective in preserving that right and should be extended. The debate was solely over whether or not Section 2 should be changed. And Senator Dole, working with other Members of the Senate, crafted a compromise that resolved that dispute. As you said, it put an effects test in Section 2, put in additional language to guard against the sort of proportional representation that was certainly the concern of Attorney General Smith and President Reagan, and that was enacted into law with the President's support.

But there was no disagreement about the critical nature of the right to vote, the notion that it was preservative of all other rights, and the question was simply about how it should be extended, whether extended as is or extended with the change that was enacted under the compromise.

Senator GRASSLEY. My time is just about out so I will ask a very short question. During your tenure at the Solicitor General's office, didn't you sign on to a number of briefs that urged the Supreme Court to adopt a broad interpretation of the Voting Rights Act, its new requirements, and to require expansive remedies when States violate the Act? And didn't some of those briefs take the same side as the ACLU, the Mexican-American Legal Defense and Education Fund, and the Lawyers Committee for Civil Rights Under the Law?

Judge ROBERTS. Yes. It was the responsibility of the Justice Department and, before the Supreme Court, of course, the Office of the Solicitor General to enforce the civil rights laws, in particular the Voting Rights Act, as vigorously as possible. And that's what we did.

Senator GRASSLEY. Thank you.

Chairman SPECTER. Thank you, Senator Grassley.

Senator Biden?

Senator BIDEN. Thank you very much. Hey, Judge, how are you?

Judge ROBERTS. Fine, thank you.

Senator BIDEN. You know, to continue your baseball analogy, I would much rather be pitching to Arthur Branch, sitting behind you there, on "Law & Order," than you. It is like pitching to Ken Griffey. I am a little concerned here. I would like you to switch places with Thompson. I know I know as much as he does; I don't know about you.

[Laughter.]

Senator BIDEN. But Judge, look. I am going to try to cut through some stuff here if I can. I said yesterday this shouldn't be a game of gotcha—you know, we shouldn't be playing a game, the folks have a right to know what you think, you are there for life, they don't get to—this is the democratic moment. They don't get a chance to say, you know, I wish I'd known that about that guy, I

would have picked up the phone and called my Senator and said Vote No. Or Vote Yes. Whichever.

And so what I would like to do is stick with your analogy a little bit because everybody has used it—baseball. By the way, to continue that metaphor, you hit a home run yesterday. I mean, you know, everybody—I got home and I got on the train and people were saying, "Oh, he likes baseball, huh?" Seriously. The conductors, people on the train. And it is an apt metaphor because, you know, you just call balls and strikes, call them as you see them, straight up.

But as you well know—I would like to explore that philosophy a little bit because you got asked that question by Senator Hatch, about what is your philosophy, and the baseball metaphor is used again. As you know, in major league baseball, they have a rule—Rule 2.00 defines the strike zone. It basically says from the shoulders to the knees. And the only question about judges is, "do they have good eyesight or not?" They don't get to change the strike zone. They don't get to say that was down around the ankles, you know, and I think it was a strike. They don't get to do that.

But you are in a very different position as a Supreme Court Justice. As you pointed out, some places of the Constitution define the strike zone—two-thirds of the Senators must vote, you must be an American citizen, to the chagrin of Arnold Schwarzenegger, to be President of the United States—I mean born in America to be a President of the United States. They are all—the strike zone is set out. But as you pointed out in the question of Senator Hatch, I think you said unreasonable search and seizure; what constitutes unreasonable?

So, as much as I respect your metaphor, it is not very apt because you get to determine the strike zone. What is unreasonable? Your strike zone on reasonable or unreasonable may be very different from another judge's view of what is reasonable or unreasonable search and seizure.

And the same thing prevails for a lot of other parts of the Constitution. The one that we are all talking about and everybody here from left, right, and center is concerned about is the Liberty Clause of the 14th Amendment. It doesn't define it. All the things we debate about here, and the Court debates, the 5–4 decisions, they are almost all on issues that are ennobling phrases in the Constitution that the Founders never set a strike zone for. You get to go back and decide. You get to go back and decide, like in the *Michael H.* case, do you look at a narrow or a broad right that has been respected? That is a strike zone.

So, as Chris Matthews last night said, let's play hardball here. And I was, like, it is a little dangerous to play hardball with you, like I said. But really and truly, it seems to me maybe we can get at this a different way.

The explicit references in the Constitution are, you know, there is nothing anyone would suspect you or any other judge would do anything about. You wouldn't say, you know, that's a really bad treaty they're voting on, so you ought to make it require 75 votes in the Senate. You can't do that. But again, you know, as Justice Marshall said, and I quoted him yesterday, he said that—Marshall's prescription that the Constitution endure through the

ages—I might add, without having to be amended over and over and over again. After the first ten amendments, we haven't done this very much in the last 230 years.

So, many of the Constitution's most important provisions are not the precise rules that I have referenced earlier. And sometimes, the principles everyone agrees on are part of the Constitution are, as the late Chief Justice, your mentor, said, "tacit postulates." He used that, as you know, in a case just before you got there, *Nevada* v. *Hall*. But he used the phrase "tacit postulates." He said that these tacit postulates are as much ingrained in the fabric of the document as its express provisions. And he went on to conclude that—this case is not particularly relevant, but the point is, I think. The case in which Chief Justice Rehnquist made this vital point was about States' rights and language that didn't speak directly to them in the Constitution. And he concluded the answer was a rule he was able to infer from the overall constitutional plan.

So Judge, you are going to be an inferer. You are not going to be an umpire. Umpires do not infer. They do not get to infer. Every Justice has to infer. So I want to figure out how you infer. I want to figure out how you go about this. So let me get right to it.

And I want to use the Ginsburg rule. I notice I am quoted all the time about Ginsburg—"Judge, you don't answer that question." I might point out that Justice Ginsburg, and I submit this for the record, commented specifically on 27 cases, 27 specific cases. I will just speak to a couple of them here.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator BIDEN. I thank you very much.

Now, you have already said to the Chairman that you agree that there is a right to privacy. And you said that the Supreme Court found such a right, in part, in the 14th Amendment. My question is do you agree that there is—not what settled law is. What do you think? Do you agree that there is a right of privacy to be found in the Liberty Clause of the 14th Amendment?

Judge ROBERTS. I do, Senator. I think that the Court's expressions, and I think if my reading of the precedent is correct, I think every Justice on the Court believes that to some extent or another. Liberty is not limited to freedom from physical restraint. It does cover areas, as you said, such as privacy, and it's not protected only in procedural terms but it is protected substantively as well. Again, I think every member of the Court subscribes to that proposition. If they agree with *Bolling* v. *Sharpe*, as I am sure all of them do, they are subscribing to that proposition to some extent or another.

Senator BIDEN. Do you think there is a liberty right of privacy that extends to women in the Constitution?

Judge ROBERTS. Certainly.

Senator BIDEN. In the 14th Amendment?

Judge ROBERTS. Certainly.

Senator BIDEN. Now, I assumed you would answer it that way. Let me suggest to you also that I asked—I asked Justice—or I am not sure whether I asked or one of our colleagues asked Justice Ginsburg the question of whether or not it would be a ball or a strike if in fact a State passed a law prohibiting abortion. And she said that's a foul ball. They can't do that. And let me quote her.

She said, in response to Senator, former—I was going to say "Brownback"—Senator Brown when he was here, when she was up, of Colorado. She said, quote: "Abortion prohibition by the State controls women and denies them full autonomy and full equality with men." It would be unconstitutional.

What is your view, according to the Ginsburg rule?

Judge ROBERTS. Well, that is in an area where I think I should not respond.

Senator BIDEN. Why?

Judge ROBERTS. Because—

Senator BIDEN. You said you would abide by the Ginsburg rule.

Judge ROBERTS. Then-Judge Ginsburg and now Justice Ginsburg explained that she thought she was at greater liberty to discuss her writings. She'd written extensively on that area and I think that's why she felt at greater liberty to talk about those cases.

In other areas, where she had not written, her response was that it was inappropriate to comment. In particular, I remember her response in the *Mayer* and the *Harris* cases. She said those are the Court's precedents; I have no agenda to overrule them, and I will leave it at that.

And I think that's important to adhere to that. Let me explain very briefly why. It's because if these questions come before me, either on the court on which I now sit or, if I am confirmed, on the Supreme Court, I need to decide those questions with an open mind on the basis of the arguments presented, on the basis of the record presented in the case, and on the basis of the rule of law, including the precedents of the Court, and not on the basis of any commitments during the confirmation process. The litigants have a right to expect that of the judges or Justices before whom they appear.

And it's not just Justice Ginsburg who adhered to that rule. I've gone back and read—

Senator BIDEN. Well, she obviously didn't adhere to it with regard to—

Judge ROBERTS. Well, I explained why she felt at liberty to comment—

Senator BIDEN. Well, how is that different? That, I would suggest, Judge, is a distinction without a difference in terms of litigants, the way you just explained it. Does a litigant in fact say because a judge wrote about it and then spoke to it as a judge that somehow I am going to be put at a disadvantage before that judge on the court? That is a stretch, Judge.

Judge ROBERTS. Well, that's how Judge Ginsburg explained it at her nomination hearings. She said she could talk about the issues on which she had written.

Senator BIDEN. Did that make sense to you?

Judge ROBERTS. I think it does make sense that she can be questioned about the articles that she'd written because they raised certain questions and she felt at liberty to discuss those. I think it's something entirely different if you talk about an area that could come before the Court. This is an area that cases are pending before the Court and they will be pending in the future.

Senator BIDEN. Well, let's try some things she didn't write about that she talked about. Let's see if you can talk about them.

One is she talked about *Moore* v. *East Cleveland*. You are much more familiar with the case than I am. That is a case where the city came along—and I am going to do this shorthand in the interest of time—and said a grandma living in an apartment with her blood grandchildren who were cousins, not brothers, violated the law. And the Chief said, in the minority opinion, your mentor, he said, the interest that grandmother may have "in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to [the level of a constitutional right]. To equate this interest with fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours [of the Constitution] beyond recognition."

Do you agree with his statement?

Judge ROBERTS. You know, I have no quarrel with the majority's determination and—

Senator BIDEN. Not my question, Judge.

Chairman SPECTER. Let him flesh his answers out.

Judge ROBERTS. I understand that. And I'm concerned about ramifications in which the issue could come up. But I have no quarrel with the majority's determination—

Senator BIDEN. Justice Ginsburg answered the question. She never wrote about it. She answered it specifically.

Judge ROBERTS. Well, I think—

Senator BIDEN. She went on to say that—and let me quote. She said, "Yes, he goes on—" This is quoting Justice Ginsburg. "He goes on to say that 'history counsels caution and restraint,' and I agree with that. He then says—this is referring to the majority opinion—'but it does not counsel abandonment,' abandonment of the notion that people have a right to make certain fundamental decisions about their lives without interference from the State. And what he next says is 'history doesn't counsel abandonment, nor does it require what the city is urging here,'—cutting off the family right at the first boundary, which is the nuclear family. He rejects that. I'm taking the position I have all the time—" and she goes on to say—

She says uh-uh. She thinks your old boss was dead wrong. She said so. And she said the majority was dead right. Ginsburg rule. What do you think? She never wrote about it.

Judge ROBERTS. Senator, I think nominees have to draw the line where they're comfortable. It's a matter of some—

Senator BIDEN. Well, you are admitting you are not applying the Ginsburg rule.

Chairman SPECTER. Senator Biden, let him finish.

Senator BIDEN. I don't have much time. But go ahead.

Judge ROBERTS. It's a matter of great importance not only to potential Justices but to judges. We're sensitive to the need to maintain the independence and integrity of the Court. I think it's vitally important that nominees, to use Justice Ginsburg's words, no hints, no forecasts, no previews. They go on the Court not as a delegate from this Committee with certain commitments laid out and how they're going to approach cases. They go on the Court as Justices who will approach cases with an open mind and decide those cases in light of the arguments presented, the record presented, and the rule of law. And the litigants before them have a right to expect that and to have the appearance of that as well.

That has been the approach that all of the Justices have taken.

Senator BIDEN. That is not true, Judge. Justice Ginsburg violated that rule, according to you. Justice Ginsburg said precisely what positions she agreed on. Did she in fact somehow compromise herself when she answered that question?

Judge ROBERTS. She said no hints, no forecasts—

Senator BIDEN. No, no.

Judge ROBERTS.—no previews.

Senator BIDEN. Judge, she specifically, in response to a question whether or not she agreed with the majority or minority opinion in *Moore* v. *East Cleveland*, said explicitly, I agree with the majority. And here's what the majority said and I agree with it.

My question to you is, do you agree with it or not?

Judge ROBERTS. Well, I do know, Senator, that in numerous other cases—because I read the transcript—

Senator BIDEN. So did I, Judge.

Judge ROBERTS.—she took the position that she should not comment. Justice O'Connor took the same position. She was asked about a particular case—

Senator BIDEN. Aw, Judge, Judge—

Judge ROBERTS. She said, It's not correct for me to comment.

Now, there's a reason for that, Senator.

Senator BIDEN. But you are going from—

Chairman SPECTER. Wait a minute, Senator Biden. He has not finished his answer.

Senator BIDEN. He's filibustering, Senator.

[Laughter.]

Senator BIDEN. But okay, go ahead.

Chairman SPECTER. No, he's not. No, he's not.

Judge ROBERTS. That's a bad word, Senator.

Senator BIDEN. That's what we do, too. Go ahead. Go ahead and continue not to answer.

[Laughter.]

Judge ROBERTS. Senator, my answer is that the independence and integrity of the Supreme Court requires that nominees before this Committee for a position on that Court not forecast, give predictions, give hints about how they might rule in cases that might come before the Court.

Senator BIDEN. I got that. Did Justice Ginsburg give a hint?

Judge ROBERTS. I'm not going to comment on whether or not a particular nominee adhered to the approach that they announced.

Senator BIDEN. Well, let's make it clear. She did not. Let's stipulate she did not adhere to the approach. I don't have time because we don't have as much time, but I could list for you for half an hour the questions she answered, the questions Kennedy, Souter—all the Justices, almost, with one exception, answered specific questions, which you are not answering and—

Judge ROBERTS. Senator—

Senator BIDEN. Let me go on to my next question. Violence Against Women—and I realize it is a bit of a hobby horse for me since I wrote the legislation, and I know people say they wrote things. I mean, I actually did write that my little old self, with my staff. And no one liked it, I might add, at first—women's groups or anybody else.

But in 1999, you said, in response to a question—you were on a show. It was 1999. You were talking about a number of things, and you said, and I quote, "You know, we've gotten to a point these days where we think the only way we can show we're serious about a problem is if we pass a Federal law, whether it's the Violence Against Women Act or anything else. The fact of the matter is conditions are different in different States, and State laws are more relevant. It is, I think, exactly the right term. More in tune to different situations in New York as opposed to Minnesota, and that's what the Federal system is based upon."

Judge, tell me how a guy beating up his wife in Minnesota is in any different condition in New York.

Judge ROBERTS. Senator, I was not speaking specifically to any piece of legislation there. That was making a very—

Senator BIDEN. Well, you mention Violence Against Women, don't you?

Judge ROBERTS. That was the issue that had come up on the show, and the general issue that was being addressed is a question of federalism. I think it was part of the genius of the Founding Fathers to establish a Federal system with a national government to address issues of national concern; State and local government more close to the people to address issues of State and local concern; obviously, issues of overlap as well. I was not expressing a view on any particular piece of legislation. And I think the statement you read—

Senator BIDEN. Well, let me ask you—

Judge ROBERTS.—confirms that.

Senator BIDEN. Okay. Judge, is gender discrimination, as you have written in a memo, a "perceived" problem or is it a real problem?

Judge ROBERTS. The memo you talked about, Senator, I've had a chance to look at it. It concerned a 50-State inventory of particular proposals to address it. "Perceived" was not being used in that case to suggest that there was any doubt that there is gender discrimination and that it should be addressed. What it was referring to was a vast inventory, and I was not sure if the particular proposals in each case were supported in every State of the 50-State survey that was involved.

Of course, gender discrimination is a serious problem. It's a particular concern of mine and always has been. I grew up with three sisters, all of whom work outside the home. I married a lawyer who works outside the home. I have a young daughter who I hope will have all of the opportunities available to her without regard to any gender discrimination.

There is no suggestion in anything that I've written of any resistance to the basic idea of full citizenship without regard to gender.

Senator BIDEN. Let me ask you a question then, Judge, and I am glad to hear that. Do you think that if a State law distinguishes between a right that your daughter may have and your son may have or your wife may have or your sister may have and your brother may have that the Supreme Court should engage in heightened scrutiny, not just look and see whether or not it makes any sense, but take an extra special look? You and I know the terms, but the public listening here—the Supreme Court has said since

1971, you know, when a State passes a law that treats in any way different a woman than a man, there may be a rationale for it, but the Supreme Court is going to take a very close look—not strict scrutiny, which means you can hardly ever get over that bar, like race, but can take a heightened look, they are going to look at it more closely. Do you think that that needs to be done, that the Constitution calls for that?

Judge ROBERTS. Yes, Senator, I do. And I, again, always have. The confusion is in the use of the term. There are those who use the term "heightened scrutiny" to refer to what you just called "strict scrutiny," which is generally limited to issues of race or similar issues. The discrimination on the basis of gender, distinctions on the basis of gender, is subject to what the Supreme Court has called "intermediate scrutiny." There has to be a substantial Government interest—an important Government interest and a substantial connection in the discrimination. But the Supreme Court's equal protection analysis has three tiers now—

Senator BIDEN. I understand. My time is running out. I would love to hear the explanation of the three tiers, but let's stick to this one for just a second. Then explain to me what you meant 10 years after the decision laying out this level of scrutiny when you wrote in a 1981 memo to your boss, you wrote that gender "is not a criterion calling for heightened judicial review." What did you mean by that?

Judge ROBERTS. Referring to what you called strict scrutiny.

Senator BIDEN. He didn't know the difference between heightened and strict?

Judge ROBERTS. Well, I was about to lay it out, and you said you didn't want to hear about it.

[Laughter.]

Judge ROBERTS. Strict scrutiny is the—

Senator BIDEN. No, I know what that is. I wonder what you meant by—

Chairman SPECTER. Senator Biden, let him finish his answer.

Senator BIDEN. But I have no time left, Mr. Chairman. I understand the answer.

[Laughter.]

Senator BIDEN. I understand the Supreme Court has three levels of scrutiny. My point was, in the context of this memo, in the context of this memorandum, the question was whether or not the Court should, in fact, have a heightened scrutiny.

Judge ROBERTS. And, Senator, the memorandum is using "heightened scrutiny" the way you used "strict scrutiny," which is the scrutiny that's limited to the basis of race. The gender discrimination is, as you know, subject to what is called "intermediate scrutiny," and that is not what the memo is referring to with respect to heightened scrutiny. It's referring to the strict scrutiny that's restricted to issues of race and ethnicity.

Senator BIDEN. Well, I will come back to that in the second round because that is not my reading of what you said. But let me get on another issue here, again, in the sex discrimination area.

The Attorney General for Civil Rights, a former Delawarean, not viewed as a darling of the left, Bradford Reynolds, decided that the Federal Government should take action against the State of Ken-

tucky, and they said that there is a very strong record that the Kentucky prison system discriminates against female prisoners. And I am going to finish my whole question. And you wrote to the Attorney General, "I recommend you do not approve intervention in this case." And then you set out three reasons why you shouldn't approve of it—not that there wasn't discrimination. You said, one, that private plaintiffs are already bringing suit; secondly, the United States' argument would have been based upon giving higher scrutiny to claims of gender classification; and, thirdly, that we need to be concerned about tight prison budgets, you say, and you go on to explain that if, in fact, you hold them to the same standard, they may get rid of the program for the men.

Now, explain to me your thinking there. That seems to me—

Judge ROBERTS. I'm sorry. What was the date of the memo, Senator?

Senator BIDEN. The date of the memo was February 12, 1982. I will give you a copy, ask them to bring you down a copy of the memo.

Judge ROBERTS. I can't elaborate on—I can't elaborate beyond what's in the memo. I just—

Senator BIDEN. Well, I hope you don't still hold that view, man. I mean, if the idea that you're not going to—that a conservative civil rights—the head of the Civil Rights Division in the Reagan administration says it is pretty clear Kentucky is discriminating against women in their prison system, and you say, in effect, that may be but, look, we shouldn't move on it, I recommend we don't do anything about this, and the reason we shouldn't do anything this is three-fold: one, private citizens already went ahead and filed suit on this; number two, if, in fact, you go ahead and do this, they may do away with the system for the men because there's tight budgets—and I forget the third one. You now have the memo.

Judge ROBERTS. Well, I have the memo and see that one of the areas that you mentioned I say that—and this is to the Attorney General, and I say the reason we shouldn't do this is because "you have publicly opposed such approaches." So, again, it would have been—

Senator BIDEN. It was only his idea, then? I mean, you were just protecting him so he wouldn't be inconsistent?

Judge ROBERTS. I was a lawyer on his staff, and according to this memorandum—and, again, I don't remember anything independently of this 23 years ago. But the memorandum suggests, a staff lawyer to his boss, that this is inconsistent with what you have said. And, again, I guess I would regard that as good staff work rather than anything else.

Senator BIDEN. I regard it as very poor staff work, with all due respect, Judge, because it seems to me you insert your views very strongly in here. You don't say you said this. You say, "And, by the way, there's other reasons why we shouldn't do this. Assume you're saying you wouldn't go this route before, but I want to give you more ammunition here, Brad. Private plaintiffs have done this; it is inconsistent with three themes in your judicial restraints effort: equal protection claim, relief of a well-involved judicial inference, et cetera; and, by the way, the end result may be with tight budgets they may do away with this."

My time is running out. I will come back to this. I hope you get a chance to study it between now and the time we get back to the second round.

The next question. You know, I find it fascinating, this whole thing about Title IX and whether or not by Title IX—you and I know what we are talking about, but for the public at large who really has an interest in all of this as well, the issue was whether or not when a student gets aid, whether or not it only goes to the admissions piece of it.

Now, you said something that was accurate but I don't think fulsome to Senator Kennedy, and correct me if I am wrong. You said, look, we were arguing that it did apply—Title IX did apply. If a student got aid, it applied to the university. That was one of the questions, whether or not you have no application or a narrow application. And you argued that it should apply to the admissions process.

But there is a second issue in that case, and the second issue is: Do you apply it narrowly only to do with the admissions policy or do you apply it to if they are discriminating in dormitories?

I got your answer on the first part. You thought it should apply, at least narrowly. Were you arguing that it should apply broadly? And this was before—let me make it clear. The district court, I say to my friends—because I had forgotten this. The district court had ruled that this only applies to admissions, and there was a question. The Chairman of Reagan's Commission on Civil Rights said we should get in on the side of the plaintiff here, and we should appeal this to the Supreme Court or to a higher court and say, "No, no, this applies across the board, this applies if you don't put money in sports programs, you don't put money in dormitories, et cetera."

What was your position on Reagan's Civil Rights Chairman, Clarence Pendleton, suggesting that we appeal the decision of the circuit court narrowly applying it only to the admissions office?

Judge ROBERTS. Senator, I was a staff lawyer. I didn't have a position. The administration had a position, and the administration's position was the two-fold position you've set forth. First, Title IX applies. Second, it applies to the office, the admissions office.

Senator BIDEN. Only to the office, right? It applies narrowly.

Judge ROBERTS. The question—

Chairman SPECTER. Now, wait a minute. Let him finish his answer, Senator Biden.

Senator BIDEN. The answers are misleading, with all due respect.

Chairman SPECTER. Well, they—

Senator BIDEN. Let me get—

Chairman SPECTER. Wait a minute, wait a minute. They may be misleading, but they are his answers.

Senator BIDEN. Okay, fine.

Chairman SPECTER. You may finish, Judge Roberts.

Senator BIDEN. Fire away, Judge. At least I am misunderstanding your answers.

Judge ROBERTS. With respect, they are my answers, and, with respect, they're not misleading. They're accurate. This is a—

Senator BIDEN. I have now a minute and 45 seconds.

Judge ROBERTS.—dispute that was 20-some years ago. The effort was to interpret what this body, Congress, meant. The administration position was Federal financial aid triggers coverage. It's limited to the admissions office. The United States Supreme Court agreed on both counts.

Senator BIDEN. I understand that.

Judge ROBERTS. So I would say that the administration correctly interpreted the intent of Congress in enacting that legislation.

Senator BIDEN. Well, let me read what you wrote in that memo. You said you "strongly agree." Now, when my staff sends me a memo saying, "Senator, I recommend you do the following. . .and I strongly agree," that usually is a pretty good indication what they think. Now, maybe they don't. Maybe they just like to use the word "strongly." They said "strongly agree." It usually means they agree. Number one.

Number two, you went on to say, and I quote, that if you have the broad interpretation, it will be—the Federal Government will be rummaging "willy-nilly through institutions." So you expressed not only that you strongly agree, but you thought that if you gave them this power to broadly interpret it, to apply to dormitories and all these others things, that they would willy-nilly—they would rummage willy-nilly through institutions.

It seems to me you had a pretty strong view back then. Maybe you don't have it now.

Judge ROBERTS. Well, and the Supreme Court's conclusion was that that administration position was a correct reading of the law that this body passed. So if the view was strongly held, it was because I thought that was a correct reading of the law. The Supreme Court concluded that it was a correct reading of the law.

Senator BIDEN. Thanks, Judge.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator Biden.

We will recess now until 2:15.

[Whereupon, at 12:48 p.m., the Committee recessed, to reconvene at 2:15 p.m., this same day.]

AFTERNOON SESSION [2:16 p.m.]

Chairman SPECTER. We will resume the confirmation hearing. I have been asked to delay by two minutes the starting time so the electronic media can make appropriate introductions, and then I have also been told that my watch is a minute fast, and so we are going to correct all those miscues.

For 30 minutes, Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

There are several preliminary things I would like to do and then get into a couple of questions that I wanted to ask you, Judge.

First, to my colleagues, with reference to some questions that attacked policy positions of the Reagan administration when you were working there as a lawyer, Judge Roberts, I tend to agree with you that it wouldn't be appropriate in your role as a current judge, not to mention your service on the Supreme Court, to be put in the position of defending policy positions of the previous administration. But to the extent my colleagues would like to engage in that debate, probably not in this forum, I would be happy to accommodate them in that matter.

Judge, as to your role, I appreciate, frankly, your candor and the clarity of what you have said, and you have said a great deal here. Obviously, you have drawn the line at issues that may come before the Court, but I think you have already added to what we knew about your approach to judging. That is the key question here, and I appreciate what you have added to that, and I will get into a little bit more of that in a moment.

There are a couple of other items that I would like to clarify. Our colleague, Senator Biden, had engaged you in a colloquy regarding some testimony given by Justice Ginsburg and he suggested that Justice Ginsburg was asked about a specific case called *Moore* v. *City of Cleveland* and that even though she had not written about that case, she volunteered to speak about it.

Now, I think, appropriately, you are not going to be a judge or umpire in this case as to whether she did or did not exceed the rule that she set down. That would be highly inappropriate. But I would like to correct the record because that isn't what transpired.

I won't read the entire transcript here, but would ask that the relevant portions be inserted in the record at the conclusion of my remarks.

But just to set the background, she is testifying here in response to questions by Senator Hatch and she said, "I have said to this Committee that the finest expression of that idea of individual autonomy and personhood and of the obligation of the State to leave people alone and to make basic decisions about their personal life, Justice Harlan's dissenting opinion in *Poe* v. *Ullman*." Senator Hatch said, "Right."

And then Judge Ginsburg said, "After *Poe* v. *Ullman*, I think the most eloquent statement of it, recognizing that it has difficulties, and it certainly does, is by Justice Powell in *Moore* v. *City of East Cleveland*, the case concerning the grandmother who wanted to live with her grandson. Those two cases more than any others, *Poe* v. *Ullman*, which was the forerunner of the Griswold case, and *Moore* v. *City of East Cleveland*, explain the concept far better than I can." And then there are other things that occur in the transcript.

My point here is to note that she was not asked a specific question about this case. She volunteered it as one of two cases that had interesting language that expressed what she wanted to express with regard to the principle of individual autonomy and personhood.

And then further down in the transcript, she said, "Senator Hatch, I agree with the *Moore* v. *City of East Cleveland* statement of Justice Powell." She goes on to describe how he reached it. And later, Senator Hatch said, "You mean with the position of Justice Powell?" And Justice Ginsburg said, "The position I have stated here. You asked me how I justify saying that *Roe* has two underpinnings, the equal dignity of the woman idea and the personhood idea of individual autonomy and decision making. I point to those two decision opinions as supplying the essential underpinning."

And then she said, "In taking the position I have in all of my writings on this subject, I must associate myself with Justice Powell's statements. Otherwise, I could not have written what I did."

The point is, this is a matter on which she had written extensively and, therefore, it is not the case, (A) that she was asked about the case and was responding, but rather, she brought the decision up; and (B) she used it to illustrate what she had already written about extensively. So I think that will help to clarify the record. We will put those portions of the transcript in the record and people can judge for themselves whether she violated the rule which she has laid down, a rule which you subscribe to with respect to giving hints or ideas about how you might rule in future cases.

If you would like to comment on any of that, you certainly may, but I doubt that you would want to do so.

The other item that I would like to insert in the record is a memorandum, and this was discussed, I believe, in Senator Biden's questioning, regarding a memorandum dated February 12, 1982 addressing proposed intervention in *Canterino* v. *Wilson*, and there were excerpts of that memorandum read to you and you were asked to respond. I would like to have the entire memorandum inserted in the record at this point so that people can judge for themselves.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator KYL. Thank you very much, Mr. Chairman.

Now, Judge Roberts, one of the themes in the statements of my colleagues, particularly on the other side of the aisle, yesterday was an expression of concern that you might, as a Supreme Court Justice, undo what they described as progress. This progress is represented for my colleagues by some of the Court's decisions over recent decades and also by some legislation. My colleagues expressed a heartfelt concern for preserving this progress. Another one of my Democratic colleagues endorsed a standard that a past member of this Committee articulated for evaluating nominees. He asked, will the nominee expand or contract freedom? You recall that.

Progress and freedom. I think any American would find it quite difficult to quibble with these two ideals. I do not think that you will find a Member of the Senate who would not express support for both progress and freedom, and for many of the specific reforms that have been discussed.

But as I thought about those two words last night and about my colleagues' genuine concern for protecting what they understand as progress and freedom, I began to ask myself what those two words actually mean in the context of your nomination and the Court's function more generally.

When can we say that a particular decision by the Supreme Court expands or contracts progress or freedom? Actually, it is a little more complicated as you stop and think about it. For example, earlier this year, the Supreme Court issued a decision that allows the government to take one private individual's property to transfer that property to another private individual or entity. The Court's majority held that such an action is consistent with the Constitution's public use requirement for takings of property so long as there is some indirect benefit to the government, so long as, for example, the government expects to receive more tax revenues from the second party's use of the property.

All of the most commonly described liberal members of the Supreme Court joined in the opinion, and I am certain that the types of involuntary government-engineered development projects that this decision allows will be viewed by many as progress. I am not so sure. Is it really progress for one more politically influential private party to be able to use the government's power of eminent domain to take another, less politically connected, individual's property that this is constitutional so long as the government anticipates increased tax revenues? I don't think this precedent represents an advance of either progress or freedom, in other words.

In 1975, the Court issued an important decision giving public school students the right to a hearing before they are suspended for disciplinary decisions, and the net effect of these decisions, as many school administrators and teachers have told me, has been to make school discipline much harder to implement and enforce. The procedures, for example, for removing a disruptive student from the classroom have become sufficiently involved that in many cases, the school simply doesn't do it. The student remains in class and the other students' learning suffers.

The writer David Frum has described this line of Supreme Court decisions as the "Bad Kid's Magna Carta." Many older teachers, in particular, can describe the decline in school discipline and order that followed from these decisions, and I am not sure that even though many would subscribe to the decision of the Court, that it really represents an advance of freedom or progress, especially if most children are less free in their school environment.

In 2003, the Supreme Court issued a decision that effectively prevents the government from outlawing child pornography if that pornography is made with computer-generated images of children. The effect of these decisions is that a whole class of child pornography effectively can't be prohibited. Many of those who work in the criminal justice system, particularly those familiar with sex offenders and their mindset, have expressed grave concern about the decision. They believe that the existence and availability of this kind of pornography can affect the behavior of certain sex offenders, that it sends them the message that their impulses are not shameful, but rather that they are shared by others and can be indulged.

Again, I have no doubt that some view this decision as an advance of freedom, and again, I would disagree. A world where these types of sexual crimes occur with frequency is a world where parents are constantly afraid for their children, afraid to let them play outside alone, to go outside of their sight, even afraid to let them go on the Internet, and I don't see this as an advance of freedom.

The conclusion that I have, and there are other decisions we could point to, but what I have come to conclude is that it is not your function as a judge to decide how best to advance progress and freedom, that these are decisions that all Americans need to be involved in making, sometimes through their elected representatives. The formula for creating progress and freedom in society is not predetermined, but rather both of these values require a balance of competing values. Society needs order and stability on the one hand, individual autonomy on the other: there are few absolutes.

So really the question here is how you view your role as a judge with respect to this concept of advancing freedom and progress, especially since you cannot, for the most part, choose what cases come before you to decide. What is your take on your role if you were to become the Chief Justice of the United States Supreme Court in considering this notion of advancing freedom and progress through your decision making?

Judge ROBERTS. Well, Senator, judges and Justices do have a side in these disputes. They need to be on the side of the Constitution, and in most of these areas, what the Constitution provides is that these sorts of policy debates, which approach is better suited to promote freedom or to promote progress are vested in the legislative branch. There are areas where the Constitution sets aside certain areas, in the Bill of Rights and other protections of liberty, and says that these areas are beyond the reach of the policymaking branches and judges and Justices have the responsibility to enforce those provisions in the Constitution. But outside of that, judges and Justices should not take sides in these disputes.

I think people on both sides need to know that if they go to the Supreme Court that they're going to be on a level playing field, that the judge is going to interpret the law, that the judge is going to apply the Constitution and not take sides in their dispute. That's what this body is for in Congress and in the State legislatures, to resolve those types of policy disputes. So long as the resolution is consistent with the Constitution, that's what the judges are there to ensure, and so long as they ensure that, the Framers' notion was that freedom and progress would be advanced by allowing those decisions to be made by the people's elected representatives.

Senator KYL. I appreciate that. You said in response to another question, you used the phrase "as applied." Most of the lawyers appreciate what you meant by that, but I wonder if you could elucidate, particularly for those who are not learned in the law, what the difference is between dealing with a case, an issue of constitutionality, per se, or an "as applied" context, and how it is possible, for example, in Case No. 1 to uphold the constitutionality of a law on its face, and yet in Case No. 2, a court comes down a few years later to declare that in that situation, the statute is unconstitutional as it is applied to the facts of that case. How can that be?

Judge ROBERTS. Well, the distinction is a basic one in constitutional law. If you have a facial challenge to a law, as we call it, or a per se challenge might be another way to put it, you're basically saying the law is unconstitutional without regard to the facts of the case, without regard to the record, whatever the application might be, whoever the parties challenging it might be, there's something about the law so fundamentally flawed that it's unconstitutional however it's going to be applied. That's a fairly narrow category of cases.

The other category is so-called as-applied challenge. You have a law that you know is not facially unconstitutional, but it may be applied in an unconstitutional manner. An easy example, you have a normal statute that's perfectly constitutional. If it's applied in a discriminatory manner, it may be unconstitutional as applied in that case. If it can be applied in a constitutional manner, you know, so long as the facts are a certain way, and if the facts turn

out in the record not to meet those requirements, then it can be unconstitutional as applied, and in those situations you do need to know what the record is, you do need to know what the facts are, because the challenge might be, this law may be fine for other cases, but when you apply it to this case, when you apply it to this record or these facts, then it's unconstitutional. So a statute that is constitutional on its face can always be applied in an unconstitutional way, and so you can't give a categorical determination that there is no way in which that statute could ever be unconstitutionally applied.

Senator KYL. This is another reason why, when you are asked, "Well, would you agree that a certain decision is a good decision and should be maintained as part of our jurisprudence and so on?" In addition to not wanting to give a hint as to how you might rule on a case, to some extent it is impossible to say because you do not have the facts of the case before you and the facts of Case A could cause you to render a different decision than the facts of Case B.

Judge ROBERTS. Well, that's right, and particular precedence obviously could be applied to variations on the fact situation that gave rise to that precedent, and sometimes those facts lead to a different results, sometimes those facts don't. And it makes sense to continue to apply it in a particular manner. But again—and I think most judges are of this view—that the facts are a critical part of the resolution of any dispute.

Senator KYL. I know perhaps to non-lawyers this can cause frustration, "just tell me one way or the other," but judges have got to be fair to make sure that they do not treat all cases the same because the differences of fact could make the difference between your ruling one way or another in a case, and every litigant probably feels that their case is a little bit unique. Judges need to think about that and certainly need to be willing to consider that this person's case might be unique, and therefore, it has to be looked at in a different way than a similar but perhaps not identical case.

Judge ROBERTS. And of course, that's a lot of how the law develops, and as lawyers arguing in court, a lot of what I used to spend my time doing was saying, "This precedent doesn't apply," and the reason it doesn't apply is because these facts are different, and so you should reach a different result, or arguing that this precedent does apply even though these facts are different. The reasoning still covers that situation, and then that leads to the next case and so on, and it's that sort of gradual development of the law that helps shape the rule of law.

Senator KYL. Now, you have seen that each one of us have a couple of soap boxes that we like to mount, and after about 5 minutes of our opinion, then we ask you a question. I have one of those for you, something that has been bugging me.

There has been a lot of discussion about the Supreme Court's reliance, or even reference to foreign law to determine the meaning of the United States Constitution. I just wanted to note a couple of the cases in which this was done recently.

A case this year, *Roper* v. *Simmons*, in which the Supreme Court reversed a prior precedent and decided that it would be unconstitutional to execute a man who was 17 at the time that he brutally murdered a woman by throwing her off a bridge. In deciding the

case, the Supreme Court not only, in my view, engaged in a questionable analysis of American law, it spent perhaps 20 percent of its legal analysis discussing the laws of Great Britain, Saudi Arabia, Yemen, Iran, Pakistan, Nigeria and China. The Court claimed that we ought not "stand alone" on this issue, and that we should pay attention to what other nations do when we interpret our Constitution.

In 1999, Justice Breyer argued that the Court should consider whether a long delay in executing a convicted murderer, a delay, by the way, caused by his repeated and arguably frivolous appeals, should be deemed cruel and unusual under the Eighth Amendment. And he relied on the legal opinions of courts in Zimbabwe, India, Jamaica and Canada.

The trend, if it is to become one, is greatly troubling to me and to many of my colleagues. Our Constitution was drafted by the Nation's Founders, ratified by the States, and amended repeatedly through our constitutional processes that involve both Federal and State legislators. It is an America Constitution, not a European or an African or an Asian one, and its meaning, it seems to me, by definition, cannot be determined by reference to foreign law.

I also think it would put us on a dangerous path by trying to pick and choose among those foreign laws that we liked or didn't like. For example, many nations have a weak protection for freedom to participate in or practice one's religion. Iran and some other Middle Eastern nations come immediately to mind, but even a modern western nation like France has placed restrictions on religious symbols in the public square. That would be highly unlikely to pass muster in U.S. Courts. Should we look to France to tell us what the Free Exercise Clause means, for example?

Even nations that share our common law tradition, such as Great Britain, offer fewer civil liberty guarantees than we do, and the press has far less freedom. Nations such as Canada have allowed their judges to craft a constitutional right to homosexual marriage.

There is a lot more to say on this subject, but I wanted to hear from you, so my question is this: what, if anything, is the proper role of foreign law in U.S. Supreme Court decisions? Of course we are not talking about interpreting treaties or foreign contracts, but cases such as those that would involve interpretations of the U.S. Constitution?

Judge ROBERTS. Well, I don't want to comment on any particular case, but I think I can speak more generally about the approach. I know Justices Scalia and Breyer had a little debate about it themselves here in town, and it was very illuminating to get both of their views. And I would say as a general matter that a couple of things that cause concern on my part about the use of foreign law as precedent—as you say, this isn't about interpreting treaties or foreign contracts, but as precedent on the meaning of American law.

The first has to do with democratic theory. Judicial decisions in this country—judges of course are not accountable to the people, but we are appointed through a process that allows for participation of the electorate, the President who nominates judges is obviously accountable to the people. The Senators who confirm judges

are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed.

The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.

In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.

Senator KYL. I appreciate that. We have precious little time to discuss you personal career and views and I want to take just a couple of minutes to give you an opportunity to talk to us about a couple of things.

I see by the record that you have represented at least one death row inmate on a pro bono basis, and I would love to hear about how you took that case and how you dealt with that case.

Judge ROBERTS. I don't want to overly expand my role. It was consistent with what I've done in other cases. There was a particular appellate issue that arose. The firm had been representing the inmate for some time. One of the senior leading partners at the firm, Barrett Prettyman, had been heavily involved in his case for many years. A particular appellate issue came up and I was asked to get involved, and I was happy to do that, and assist in that way. Again, it was kind of consistent with the general approach. It was in an area in which I was—had some experience and was happy to pitch in and help in that area.

Senator KYL. There is a story. It may be apocryphal, and if so, you can disabuse us of it now, but is it really true that you were required to argue a case before the Supreme Court on 2 days notice, and on that same day argued a case in the District of Columbia Circuit Court, or is that not a correct story?

Judge ROBERTS. No. That's the way it happened. I was scheduled to argue in the D.C. Circuit, and what happened is the Friday before the Monday argument, the clerk of the court called. We had a new lawyer who was not yet a member of the Supreme Court bar in the office, and I think we considered it kind of a pro forma matter, we were moving his admission pro hac vice so he could argue that day. And I think this was the Supreme Court's way of telling us that they didn't consider it a pro forma matter. So we got notified the Friday night before the Monday argument that they were not going to grant the pro hac motion, which is of course to let him

argue the case even though he wasn't a member of the bar, and it fell to me to pick up that case to be prepared to argue it Monday morning. Then in the afternoon I went and did the argument in the D.C. Circuit, which had been previously scheduled.

Senator KYL. How did you do in the two cases?

Judge ROBERTS. Well, the Court got it right in each case.

[Laughter.]

Senator KYL. Enough said. You know, another thing that fascinated me, in clerking for two of the most incredible jurists in United States history, Judge Friendly and Justice Rehnquist—I was going to ask you privately but I just have to ask you, and perhaps it would be illuminating for folks, particularly law students. What did you learn from those two very erudite men?

Judge ROBERTS. Well, I think different things, you pick up different things. With Judge Friendly, it was he had such a total commitment to excellence in his craft at every stage of the process, just a total devotion to the rule of law and the confidence that if you just worked hard enough at it, you'd come up with the right answers. And it was his devotion to the rule of law that he took the most pleasure in. He liked the fact that the editorialists of the day couldn't decide whether he was a liberal or a conservative, and he would be chastised for the same opinion, depending on which paper had read it, as either that conservative judge or that liberal judge, and because he wasn't adhering to a political ideology, he was adhering to the rule of law.

And his devotion to it went to the extent—and I know other of his clerks had the same experience. I do remember one time where he was assigned the opinion, and he kept writing it and writing it, and he finally decided it was not right. And so he wrote a dissent. And he circulated the best majority he could come up with and said, "I don't agree with it, here's my dissent." And of course, as you might imagine, the other two judges were persuaded by his dissent, and it came out that way, a sort of open-mindedness at every stage, the appreciation that it may not be the argument, it may not be the briefs, it may be down to the actual writing that reveals what he thinks the right answer is.

And also he did have an essential humility about him. He was an absolute genius. I mean there's no doubt about it, and certainly whatever he was reviewing, the decision of an agency, the decision of its legislature, the notion of saying, you know, we defer to them because it's their responsibility, I think everybody would have agreed we would have a better result if we just let him make the decision, regardless of what it was. But he had the essential humility to appreciate that he was a judge, and that this decision should be made by this agency or this decision by that legislature.

And when you read his opinions, he doesn't just sort of, you know, knock the pieces off the board. He marches through in a very careful way to let you know exactly how he reached the decision, why he went this way if there was a difference among the precedents, why he chose that one if there was a question of who has the responsibility, why he went that way, and lays it all out in such a way that you can understand the result.

To this day, lawyers will say, when they get into an area of the law and they pick up one of his opinions, that you can look at it and it's like having a guide to the whole area of the law.

With the then-Justice Rehnquist, who I clerked for the next year, I do remember doing a draft for him once, and coming in and he had thought that it was sort of the first topic sentence of each paragraph was good, and the rest of it could be junked. You know, I pushed back a little bit as I hoped was appropriate, and he said at that point, he said, "Well, I'll tell you what. Why don't we put all this other stuff down in footnotes? We'll just keep sort of the first sentence of each paragraph, put the rest down in footnotes." And I figured, well, that was a fair compromise.

So I would go back and rework it, and hand it to him with some pride, and he looks at it and he says, "Well, all right. Now take out the footnotes."

[Laughter.]

Judge ROBERTS. So one thing I learned from him was, I hope, to try to write crisply and efficiently, that a lot of extra stuff could be dispensed with, and just—so many people mentioned it during his eulogies and at the sort of gathering of the clerks, his general approach to the balance between work and family life. I think that was a very important lesson to learn at an early age.

Senator KYL. Judge, thank you. I think that tells us not only something about you as a person, about your style of judging, but probably some good lessons for all of us. So thank you very much.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Kohl?

Senator KOHL. Thank you, Mr. Chairman.

Judge Roberts, yesterday you described your role as a judge as just an umpire, as you called it, calling balls and strikes. That is an interesting analogy for me as I have more than most some personal experience with umpires and referees. But as all of us with any involvement in sports know, no two umpires or no two referees have the same strike zone or call the same kind of a basketball game, and ballplayers and basketball players understand that, depending upon who the umpire is and who the referee is, the game can be called entirely differently.

When we look at real legal cases, I wonder whether or not your analogy works. For example, in our private conversation, I asked you whether the words of the Constitution must always be interpreted in the same way as the authors originally intended. For example, the 14th Amendment, which guarantees equal protection under the laws to all citizens, was written at a time when schools were, in fact, segregated based on race. And yet in *Brown* v. *Board of Education*, the Equal Protection Clause was interpreted to find segregation schools unconstitutional, and you, of course, have endorsed that decision.

No one disagrees with that conclusion today, but would a neutral umpire, as you described yourself yesterday, have decided back in 1954 to expand the words of the Constitution outside of the strike zone? Would a neutral umpire have overturned a 58-year-old Supreme Court precedent and gone against the understanding of the authors of the 14th Amendment and also the views of almost half

of the State legislatures at that time in making the decision that they made?

Judge ROBERTS. Well, Senator, I think the answer to your question is yes. The research into the original understanding of the drafters of the 14th Amendment has expanded and changed quite a bit, and I think a very good case can be made about their views. But, more importantly, the issue was the institution of public education wasn't as established at the time as it was in 1954, the time of the crafting of the amendment. And, you know, the Framers spoke in broad language, and whether they specifically addressed the question of public education or not isn't the limitation. Their intent was not limited to the particular problem. They chose broad language, and they should be held to their word. And I think it is perfectly consistent with an original understanding to argue and to conclude that their original understanding meant that segregated schools were unconstitutional, not just in 1954 but at the time they enacted the amendment. I think a strong case can be made there.

And what was interesting about the *Brown* case—maybe it's my own perspective, but if you look at the arguments in that case, yes, John W. Davis arguing for the Board was arguing on the basis of precedent in *Plessy* v. *Ferguson*, saying this is the established law. But so was Thurgood Marshall. He went in and he was arguing on the basis of more recent precedent, *Sweatt* v. *Painter*, a more recent decision of the Court about law school separate but equal. And he was saying you need to build on that more recent precedent in addressing this case.

So the Court was not changing the strike zone. That wasn't the way Marshall presented his argument. And it wasn't necessary for them to say we're changing the rules of the game. What was necessary for them to do and what Marshall was urging them to do was to get it right when they had gotten it wrong in *Plessy*.

Senator KOHL. Judge, back in 1954, clearly the Supreme Court Justices were willing to step outside the box, to break new ground, to do something that no one, no Court, no legislature, no President had done before, and strike out in an entirely new and positive direction for this country. They were not umpires simply calling balls and strikes. They were breaking new ground, and they did so in the best interest of our country, didn't they?

Judge ROBERTS. Well, of course, it was a dramatic shift, and the overruling of *Plessy* v. *Ferguson* was exactly that. My point is simply that if you look at the *Brown* decision, it is more consistent with the 14th Amendment and the original understanding of the 14th Amendment than *Plessy* v. *Ferguson*, and it's based on the conclusion that the separation of the races in the schools was itself a violation of equal protection. In other words, it's not a departure from the 14th Amendment. It was a departure from the—

Senator KOHL. But it was ground-breaking.

Judge ROBERTS. Certainly.

Senator KOHL. One more observation, Judge, about your analogy of the judge as an umpire, neutral umpire. You are 50 years old. You bring great life experience to the bench, Judge, and don't you and all judges bring their own life experiences, their philosophies to the bench in deciding cases? Or would you have us believe—and

if not, you can correct that—that judges merely operate as automatons?

Judge ROBERTS. Not automatons, no, Senator. I appreciate that, that judges don't. And, of course, we all bring our life experiences to the bench. But I will say this: that the ideal in the American justice system is epitomized by the fact that judges, Justices, do wear the black robes, and that is meant to symbolize the fact that they're not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs. That's the ideal.

Senator KOHL. And isn't it also true that, to a large extent, the greatest men in our history, judicial, executive, legislative, have been men and women with both great minds and great hearts?

Judge ROBERTS. Absolutely.

Senator KOHL. Judge, in the aftermath of Hurricane Katrina, we all saw that those who suffered the most were those who have not been able to take advantage of the great opportunities that our great country has to offer. As we found out, those without employment opportunities and educational opportunities simply did not have the means to escape the storm and the flooding.

As you seek to become the head of the judicial branch, as you seek the position of Chief Justice of the United States of America, what role would you play in making right the wrongs revealed by Katrina? And what role do you and the judicial branch play in making sure that we as a Nation keep on moving forward towards providing equal opportunity to all Americans?

Judge ROBERTS. The last part of your question, Senator, is, of course, really what's carved on the entrance to the Supreme Court: "Equal Justice Under Law." That is the commitment physically embodied in the Supreme Court, and it's the commitment in the Constitution. And I think the most important thing the Supreme Court can do and the judicial branch can do is to uphold the rule of law. That is the—I tried to point this out in my statement yesterday. That is the key to making all the rights that are in the Constitution, all the rights that legislators may confer on citizens, that's the key to making them meaningful. The difference between our system and our Constitution and the Soviet constitution that President Reagan used to talk about—it has wonderful rights in it, too. It didn't mean a thing because there was not an independent Supreme Court, an independent judiciary to enforce those rights.

We do have that, and that's the reason that we have been able to make progress in the area of rights and not had just empty paper promises.

So to the extent you're talking about the injustices in society and the discrimination in society, the best thing the courts can do is enforce the rule of law and provide a level playing field for people to come in and vindicate their rights and enforce the rule of law.

Senator KOHL. But in spite of all of our laws and all of our rules, we still saw what happened down in New Orleans, and the people who were left behind were people who had not had educational or employment opportunities. And the question I asked was whether you as a person who aspires to become the Chief Justice of the United States see a particular role other than continuing the role

that you observe we are following now, a particular role for improving our ability to respond to the needs of those people who live under those circumstances.

Judge ROBERTS. Well, the courts are, of course, passive institutions. We hear cases that are brought before us. We don't go out and bring cases. We don't have the constitutional authority to execute the law. We don't have the constitutional authority to make the law. Our obligation is decide the cases that are presented.

Now, I'm confident, just in the nature of things, that there will be cases presented arising out of that horrible disaster of all sorts, and many of those will be Federal cases, I'm sure. Others will be in the State courts, and, again, the obligation of the Federal judiciary and the State judiciary is to make sure they provide a place where people can have their claims, their litigation decided fairly and efficiently according to the rule of law. That's the appropriate role for the judicial branch.

Senator KOHL. All right. Judge, do you believe that reasonable people can disagree on *Roe* v. *Wade*? Regardless of what you think of the decision, do you believe that there is an intellectually honest approach on the other side that is worth respecting?

Judge ROBERTS. I certainly agree that reasonable people can disagree about that decision, yes.

Senator KOHL. And you do, obviously, respect people on the other side of the issue?

Judge ROBERTS. Yes.

Senator KOHL. In *Rust* v. *Sullivan*, as Deputy Solicitor General, you signed a brief in which you wrote, and I quote, "The Court's conclusions in *Roe* that there is a fundamental right to an abortion and that Government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution."

So does this quote jibe with your statement that you understand that reasonable people can disagree?

Judge ROBERTS. I think so, Senator. The position that you're reading from there was the position of the administration. I was one of nine lawyers on the brief in that case. It was reflecting the position that had been advanced in four prior cases up to that point by the administration, and we were reiterating that position. This was before the Supreme Court issued its decision in *Casey*. That was the view of the administration and the conclusion.

I don't think there's anything in there that suggests we think or thought that anybody at that time who disagreed was unreasonable. That was our legal position. The other side was obviously presented in those cases.

Senator KOHL. But you are saying here that there is no support in the text, structure, or history of the Constitution for that position. That is pretty flat-out, pretty straight, pretty black and white.

Judge ROBERTS. And in those cases, the other side argued that there was. And I don't think there's anything in either of those views that suggests you don't think that reasonable people can take different positions on those questions.

Senator KOHL. You have today suggested on numerous occasions that the things that you represented in writing or in opinion back in the 1980s and into the 1990s, working for the Reagan adminis-

tration and working for the Attorney General and then finally working as Deputy Solicitor General, were in many cases the opinions of people for whom you worked, not necessarily your own. I assume, therefore, there are those opinions that you are prepared to disavow.

Judge ROBERTS. My view in preparing all the memoranda that people have been talking about was as a staff lawyer. I was promoting the views of the people for whom I worked. In some instances, those were consistent with personal views; in other instances, they may not be. In most instances, no one cared terribly much what my personal views were. They were to advance the views of the administration for which I worked.

Senator KOHL. Well, I appreciate that, and not that we are talking about you in an entirely different situation, of course, our curiosity is which of those positions were you supportive of or are you still supportive of and which would you disavow?

Judge ROBERTS. Well, at this point, of course, we are now 23, 24 years later. I would not—I would have to address each of those positions anew. I wouldn't try to transport myself back 24 years and say, What did you think 24 years ago? And that would require me to look at and examine all those things. And, of course, it's not how I would look at the issue if I were a judge. If I were a staff lawyer advancing a particular view, it's one thing. As a judge, I would want to confront the issue with an open mind, to fully and fairly consider the briefs and arguments of all parties, to consider the record—we've talked today about how important a record is in a particular case—consider the law and the precedents. And, of course, the law and the precedents have changed in many of these areas dramatically over the past 24 years.

I'd have to consider all those before reaching a conclusion in any of those particular areas.

Senator KOHL. Sure. It would be helpful to many of us to know which of those positions you took then no longer represent the position that you would take today. I think that would show a change as we grow and develop and experience life. That would be illuminating and enlightening to many of us to hear what some of those positions you took then no longer are represented in your thought process today.

Judge, as we all know, the *Griswold* v. *Connecticut* case guarantees that there is a fundamental right to privacy in the Constitution as it applies to contraception. Do you agree with that decision and that there is a fundamental right to privacy as it relates to contraception? In your opinion, is that settled law?

Judge ROBERTS. I agree with the *Griswold* Court's conclusion that marital privacy extends to contraception and availability of that. The Court since *Griswold* has grounded the privacy right discussed in that case in the liberty interest protected under the Due Process Clause—that's the approach that the Court has taken in subsequent cases—rather than in the penumbras and emanations that were discussed in Justice Douglas' opinion. And that view of the result is, I think, consistent with the subsequent development of the law, which is focused on the Due Process Clause and liberty rather than Justice Douglas' approach.

Senator KOHL. Well, I am delighted to hear you say that because, as you know, many, many constitutional scholars believe that once you accept the reasoning of *Griswold* and find that the Constitution does contain a right to privacy and a right to contraception, you have essentially accepted—scholars have said this, essentially accepted the basis for the Court's reasoning and decision on *Roe*, that a woman has a constitutionally protected right to choose. These scholars reason that it follows logically that if a woman's right to privacy and her control over her body includes the right to contraception, it also includes a woman's right to choose to terminate her pregnancy. I am not sure whether you wish to comment on that. I just wanted to point out to you something that I am sure you are familiar with, that there is in constitutional thought a logic connected from *Griswold* to *Roe*.

Judge ROBERTS. Well, I feel comfortable commenting on *Griswold* and the result in *Griswold* because that does not appear to me to be an area that is going to come before the Court again. It was surprising when it came before the Court in 1965, I think, to many people. The other area is an area that is, to quote Justice Ginsburg from her hearings, "live with business." There are cases that arise there, and so that's an area that I do not feel it appropriate for me to comment on.

Senator KOHL. I appreciate that.

Judge, as we all know, you were originally nominated to replace the first woman ever to sit on the Supreme Court, Sandra Day O'Connor. There was a lot of speculation when she announced her retirement that the President might choose a woman to replace her, and she even suggested a little disappointment, not with you but with the fact that a woman was not chosen.

Had the President told you that the selection was down to you and an equally qualified woman for the post but that he thought a woman was needed, would you have seen that as a reasonable conclusion on his part?

Judge ROBERTS. I certainly think Presidents have and will consider a broad range of issues and characteristics and qualifications in selecting their nominees, and that's certainly one for a President to consider.

Senator KOHL. All things being equal in terms of qualifications, would you be pleased if the President chose a woman to replace Sandra Day O'Connor?

Judge ROBERTS. For the upcoming vacancy?

Senator KOHL. Yes.

[Laughter.]

Judge ROBERTS. I just wanted to make clear we weren't talking about this one.

I don't think it's appropriate for me to comment in any way about the President's future selections, other than to say that I'm happy with his past ones.

[Laughter.]

Senator KOHL. You are not an automaton.

Judge Roberts, in an October 3, 1983, memo, you wrote that while you served as Associate White House Counsel for the Reagan administration, you expressed support for judicial term limits. You did specifically support the idea of limiting judicial terms to 15

years, and you said, I quote, "to ensure that Federal judges would not lose all touch with reality through decades of ivory tower existence." And do you still support in theory the idea of judicial term limits?

Judge ROBERTS. You know, that would be one of those memos that I no longer agree with, Senator.

[Laughter.]

Judge ROBERTS. I didn't fully appreciate what was involved in the confirmation process when I wrote that.

You know, the sentiments that were expressed there I think are certainly something that's worth discussing, perhaps. My basic point was when the Framers establish a system of life tenure, people didn't live as long as they do now. You know, I do think there are concerns, though, that I may be a little more, a bit more sensitive to now than I was then, and they have to do with sort of a definite cut-off point. I'm not sure that's healthy for the institution of the judiciary, for people to know, for example, well, it's sort of like—as you say, term limits—that if we wait another year, this judge will be gone or that Justice will be gone. I'm not sure today from where I sit that that is a good or healthy thing for the judiciary.

Senator KOHL. So you do not support term limits anymore?

Judge ROBERTS. I have to say I do not because I do think that that restriction at the end, so litigants could look and shape their litigation in light of who they think the judges or Justices might be, I think that's not a healthy development.

I would note that, if I'm remembering the memo correctly, I think it was a proposed constitutional amendment, which I am not sure, but I think that obviously is a policy choice that the Constitution allows to be pursued through that process.

Senator KOHL. All right. Judge, as you know, confronted with a legal problem, most American families, unlike wealthy families and very large businesses, lack the resources to hire the largest and most preeminent law firms to do their bidding. Do you agree that for our Nation's working people securing civil justice is often rendered substantially much more difficult because it simply does cost too much? Do you have suggestions for addressing this issue? Do you worry that captivating national events, such as the O.J. Simpson and Michael Jackson trials, reinforce the view that in this country justice can be for sale and available to those who can afford it?

Judge ROBERTS. You know, I do think that the availability of legal services is not as broad and widespread as it should be. There are so many things and areas where I think lawyers could make a valuable contribution, but it's too expensive. And there are a number of responses that I think the bar should be taking. Obviously, for those at the lowest end of the income scale, I think there's an obligation to provide pro bono legal services. I think the big firms, little firms, medium firms—everybody needs to get involved in that. There's not enough appreciation about how you can do that.

For example, everybody thinks in terms of bringing a big case, litigation. You know, lawyers who do estate work can provide extremely valuable pro bono services. Lawyers who do tax work can

provide extremely valuable pro bono services, the whole range of services, corporate work. I know lawyers in my old firm would do a lot of pro bono services helping set up nonprofit organizations, ensuring that they're complying with the law. People need to be a little more creative in the ways in which they can help.

I regard that as an obligation of the bar and I do think—in fact, in many cases, the situation you get is the people at the lowest end have access to pro bono services. People at the highest end can pay. It's the people in the middle who are left without legal services that could be extremely valuable, and I do think the bar needs to do more. I think firms need to do more. Individual lawyers need to do more.

Senator KOHL. Judge Roberts, as you know, over the last two decades or so, there have been several bills introduced in Congress to strip the Supreme Court and all other Federal courts of their jurisdiction over many issues. These bills are generally sponsored by people who are unhappy with various court decisions, including decisions on things like school prayer, remedies for school desegregation, and even a woman's right to choose.

While you served in the Justice Department and in the White House Counsel's Office in the Reagan administration in the 1980s, you did state that you believed that bills stripping the Court's jurisdiction were constitutionally permissible. Do you still hold this view? Do you think it is the right way for us to go, to allow legislatures to strip your authority to review cases?

Judge ROBERTS. Well, I know the memos to which you're referring make the point, answer your second question. I said that they were a bad idea. They were bad policy.

I'd been asked earlier when I was—back in 1981, I believe, when I was working in the Attorney General's office, to present to him an affirmative case for the proposition that these proposals were constitutional. He was getting an opinion that they were unconstitutional. He had to make that decision for the Department's position. He wanted me to argue the other side and I did. I prepared a memorandum presenting the best argument I could that these proposals were constitutional.

The two memos to which you refer in the White House where I suggested I thought they were suggest that my memo persuaded me, if nobody else. The Attorney General adopted instead the contrary position. And I think my views may have had something to do with the proximity to my own advocacy at the time.

As I say, I did say they were a bad policy. The reason I thought they were a bad policy is because they lead to a situation where there's arguable inconsistency and disuniformity in Federal law. If you don't have the Supreme Court with jurisdiction to address that, then you get different decisions, and that's bad policy.

If I were to look at the question today, to be honest with you, I don't know where I would come out. I think one of the questions I would have is whether these concerns I had that I labeled as policy concerns might more appropriately be considered legal arguments, in other words, not a policy dispute but a legal argument.

That's the way the opinion of the Office of Legal Counsel that the Attorney General agreed with viewed it. They said these—the fact of disuniformity and inconsistency is a legal argument against the

constitutionality. It's not simply a bad policy decision. I'm not sure where I would regard that determination today.

Senator KOHL. Really? Are you saying that you're not sure where you would come out if you were faced with the decision to go along with or to fight legislative attempts to take away the Court's authority?

Judge ROBERTS. Well, I don't think—on the question of legislative attempts, I think my view is the same now as it was 24 years ago, which is that these are—it's a bad idea. It's bad policy.

I was talking about the other question about whether it's constitutional or not, and on that, of course, I don't think I should express a determinative view because, as you know, these proposals do come up and one may be enacted, and if that is the case, then I'd have to address that question on the court. It could be on the court I'm on now or another court.

Senator KOHL. Well, in that case, or in this case, your heart might tell you that it's a bad idea. Your mind might tell you it is constitutional.

Judge ROBERTS. Well, I don't know what my mind would tell me—

Senator KOHL. I mean, theoretically. It is possible.

Judge ROBERTS. Yes, but I feel comfortable with the conclusion, as I was 24 years ago, that it's a bad idea. They're bad policy.

Senator KOHL. All right. Judge, since your nomination, literally, as you know, tens of thousands of pages of your writings as a young White House aide have been released and looked at very carefully. In some of these writings, you took very pointed positions, as we discussed, some political, some constitutional, and some that have raised eyebrows.

I also think about myself when I was in my 20s and then when I was at the age which you are now and who I have become today and how I have changed, matured, and hopefully grown as I have gotten older. I am sure when you have had a chance to review some of your old work as part of this process that there are things that you wrote back then that make you cringe, perhaps, today.

Are there positions you took back then as a 20-something lawyer that you would not take today? Can you give us a couple of examples of positions that you took then that, as you have grown and developed, and as you are now sitting before us to be the Chief Justice of the United States of America, that you are today not the person that you were back when you were 20-something?

Judge ROBERTS. Well, we've talked about the term limits for judges. More generally, as I look at all of these documents, and the numbers, somebody said 80,000 pages. It's a little daunting. I don't know that there are particular issues. I mean, you have to remember, this is 23, 22, 24 years ago. In many of these cases, not only have I changed, the law has changed dramatically in more than two decades.

You know, I'm sure—and again, of the many that have been released, I will say that it's really only a handful that have attracted attention for one reason or another, and I do think if you look at the whole body of work, that I would hope people would leave that with a favorable impression.

Certainly, there are many areas where it appears that I knew a lot more when I was 25 than I think I know now when I'm 50. I had a lot of different experiences in the intervening period that give you valuable perspective. In that intervening period, for example, I left the government, went out in the private sector, litigated a lot of cases against the government. You do get a different view of things when you're on the other side. I think that's extremely valuable.

I hope, as you suggest, I've grown as a person over that period, as well, and that that also gives you some perspective and that type of a perspective might cause somebody to moderate their tone with respect to some issues and in some areas, and I'm sure that's the case. I certainly wouldn't write everything today as I wrote it back then, but I don't think any of us would do things or write things today as we did when we were 25 and had all the answers.

Senator KOHL. I thank you, Judge Roberts.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Judge, good afternoon.

Judge ROBERTS. Good afternoon.

Senator DEWINE. Judge, the good news is that I represent the halfway point.

[Laughter.]

Senator DEWINE. The bad news is, it is the first round.

[Laughter.]

Senator DEWINE. Judge, I want to ask you about one of your more important, probably least understood, not by you, but least understood by the public, your role if you are confirmed as the Chief Justice, and that is your job to appoint the members of the FISA Court.

Judge, as you know, in 1978, Congress passed the Foreign Intelligence Surveillance Act. This law, of course, set up the FISA Court. As you well know, this is the court that our intelligence agents go to when they want to obtain wiretaps or search warrants against terrorists and foreign spies, a very important court, a court that meets in secret, a court that deals with the most important national security matters that we have really in our country, but also a court that deals with our precious civil liberties. And Judge, because it is a court that meets in secret, it doesn't have the public scrutiny, doesn't have the glare of publicity, and quite candidly, does not have much oversight.

So I would like to know, besides what is in the statute, the statute sets out your job to select the 11 judges who sit on the FISA court and three judges who sit on the FISA Court of Review. There are certain guidelines in the statute. But besides that, I wonder if you could tell us what your criteria will be when you select these men, these women who will serve on the court, and I wonder if you could give me your personal assurance that this will be something that will be very important to you, that you will take a hands-on approach, and that you will be very personally involved in, because really, it is a question of the utmost national security. These are

people who are going to make sometimes life and death decisions for our country.

Judge ROBERTS. I appreciate that, Senator. If I am confirmed, that is something that I will address and take very seriously. I think, as in many areas, my first priority is going to be to listen, to learn a little bit more about what's involved.

I'll be very candid. When I first learned about the FISA Court, I was surprised. It's not what we usually think of when we think of a court. We think of a place where we can go, we can watch the lawyers argue and it's subject to the glare of publicity and the judges explain their decision to the public and they can examine them. That's what we think of as a court.

This is a very different and unusual institution. That was my first reaction. I appreciate the reasons that it operates the way it does, but it does seem to me that the departures from the normal judicial model that are involved there put a premium on the individuals involved.

I think the people who are selected for that tribunal have to be above reproach. There can't be any question that these are among the best judges that our system has, the fairest judges, the ones who are most sensitive to the different issues involved because they don't have the oversight of the public being able to see what's going on.

Again, to be perfectly honest, it is a very unusual situation and I do think it places a great premium on making sure that the best-qualified people for that position are selected.

Senator DEWINE. I appreciate your personal attention to that. I know how important you know it is, Judge, and I would just add one more comment, that that court, as all courts do, but even more so, not only makes decisions, not only decides whether to issue the warrant or not, but it is the feedback that the Justice Department gets and that law enforcement agencies get that tells them what they can do and can't do, and that feedback is unbelievably important and it affects the intelligence operations in this country and is just vitally, vitally important.

Let me move, if I could, to something that is very important to me and to all of us and that is the First Amendment. Certainly, Judge, there is no right in our Constitution that is any more important than the freedom of speech. In a sense, it is the foundation of our democracy. It is the right upon which other rights are built. It is the right that guards our liberty and preserves our freedom.

At the heart of the First Amendment is the idea that people have a right not only to speak their mind, but also to be heard. I would like to talk to you a little bit about that and ask you a question.

The case I think that most eloquently talks about the public square where we engage in speech is *Hague* v. *CIO*, a 1939 case which you are well familiar with, and I want to quote it very briefly.

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has from ancient times

been a part of the privileges, immunities, rights, and liberties of citizens," end of quote.

Judge, I want to be honest with you and say that as of late, I feel that we are seeing a disturbing trend when it comes to speech in the public arena. I want to give you some examples.

In a recent case, a Wisconsin woman was kicked off a city bus, and this is what she was kicked off a city bus for doing. She was trying to distribute a book containing Bible stories to individuals sitting next to her.

Another case that is repeated time and time again across this country and has been for many years in towns and cities and villages across the country, individuals are prohibited from placing political signs, and it could be not just for candidates, it could be for a school levy, against a school levy, on their own property—on their own property—except during specified times and in specified ways. The government tells them, so many days before the election. You can't put that up there until so many days before the election, not just for candidates, but for bond issues, whatever the issue that they want to talk about, do their own political speech, on their own property.

Another example, in many public—people who wish to exercise free speech in many public places, these individuals are forced into so-called "free speech zones," which many times are far away from the event that they wish to protest about, so far away that they can't ever been seen or ever be heard, out of sight. Again, we go back to the issue of you have to be heard.

In one recent case, the New York City Housing Authority refused to let a woman conduct Bible studies in the community center of a housing project, even though the community center was used for a host of activities, even weddings. I must say, in that case, she actually won the case.

So I am concerned when I see these restrictions. I think at the core of the First Amendment is the idea that individuals should be able to speak and be heard in public places.

Now, Judge, I know you can't tell us how you will decide any particular case. I am not asking you to do that. But it is important to me that you talk to us a little bit about how you will evaluate these cases involving the right to speak in public places, public places such as buses, metro stations, city sidewalks, public parks, and tell us, if you could, Judge, what factors will you consider when deciding restrictions on speech in the public square as we traditionally know it and what is proper under the First Amendment and which ones are not. What tools will you use to decide that?

Judge ROBERTS. Well, again, of course, without commenting on any of the particular hypotheticals or actual cases—

Senator DEWINE. That is right. I am not asking—and they are all real cases, but I don't want you to talk about that.

Judge ROBERTS. I do think, though, first as a general matter and then to get into the law, that it is important that people keep a basic principle in mind when they're addressing these types of concerns. It's not a provision in the Constitution, it's not a provision in the law, but it's a basic American approach that I think is important, and that's captured in the expression, you know, it's a free

country. And when you're talking about what people can say, what people can—signs they can put up, what they can do, I think people, as a general matter, need to appreciate that it's a free country and it's a wonderful thing that people can say things in the public that you may not agree with because you, of course, have the same right.

Now, the particular mode of analysis that the Supreme Court uses in addressing these types of public speech issues is to some extent unsettled. The public forum doctrine, as it's called, for many years you've tried to characterize an issue. Is this a public forum? Is it a quasi-public forum? Is it a private forum? And the different definition sort of carried with it the conclusion about what could be allowed, and many of the Justices thought that the reasoning was awfully circular.

I remember years ago I argued one of the cases in the Supreme Court about post office and what could be done in a post office area and whether the restriction of that area to postal business meant they could exclude people who wanted to engage in political speech. I remember thinking at the time that the precedents were very unsettled and I'm not sure that the Court has made much progress since then.

But you do try to focus a little bit on whether you're dealing with a public forum, one that has traditionally been open to expression, and if it has, then any restrictions on expression are going to be subject to a very exacting standard before they'll be upheld. If it's a more limited public forum, it's only been open for certain types of speech or the nature of the forum requires there to be a restriction—that was the government's argument in the post office case I litigated—then it's a less-demanding standard in those situations.

Senator DEWINE. Judge, let me just follow up with that with a short question, if you would give me just a reaction to this, if I could. Do you think the First Amendment is flexible enough in the year 2005 to account for what I believe, at least, is the shrinking public square? I know we have the Internet, we have TV, we have radio, a lot of things that we didn't have when our Founders wrote the Constitution. But I think there is a shrinking public square.

What do I mean by this? Someone who wants to run for school board today, someone who wants to support a school levy, oppose a school levy, when you and I were growing you—you are younger than I am, but when we were growing up in the Midwest, you could go downtown. If you supported a school levy, let us say, you could go downtown and pass out literature in front of the hardware store or the grocery store and that was a public place because there was a sidewalk and you knew everybody in town was probably going to go by there. And if you lived in a city, there were communities in the city where you could do the same thing.

Today, most people—we just don't live that way. Most people don't. Some do, but most don't. Today, people get in their car and if they go to the grocery store, they go to a strip mall and they go to a grocery store that is surrounded all by private property, and the people who own that strip mall say you can't come—usually say you can't come on and distribute any literature of any kind on this facility, and basically they are upheld in that right because it is private property. Or they go buy their clothes or everything else or

their hardware, they go in a big mall and that mall clearly—there is a Supreme Court case right on point that says that they can be excluded.

So the traditional public forum as we know it has really shrunk. Does the Court take that into consideration when they look at the precedents, they look at all the decisions that have been made? How does that—without citing any case or talking about any specifics—

Judge ROBERTS. Well, I do know—

Senator DEWINE. It is a different world we live in today.

Judge ROBERTS. I appreciate the point, and I do know that even the analysis in this particular area, one of the factors that the Court considers is the availability of alternative avenues for expression, and a concern, if they are cutting off a particular mode of expression, a particular avenue, are there alternatives available? And I think that's a very important consideration.

I think you're quite right that this is one of those areas in which technology is going to figure in a very prominent way, and the question of whether this type of analysis that grew up when you're talking about a public square or a town hall type thing, applies in the Internet situation, and whether there's changes that do need to be made in the analysis.

Senator DEWINE. Since you talked about the Internet, let me turn to a disturbing trend in regard to the Internet, and that has, quite frankly, to do with pornography. We have passed several bills in Congress, the Communications Decency Act to protect our children. The Supreme Court struck it down. I am not going to ask you to comment about that. A few years later we passed the Child Online Protection Act, again, with the intent to protect our children. Again the Court struck it down.

Unlike the traditional public square, the Internet has really become a place for the distribution of some, I find, very troubling materials, and that is pornography. I guess what bothers me about these cases is they fail to account for something that to me at least is very relatively simple, and that is that at the core of the First Amendment is, to me at least, the protection of political speech, speech on matters of public concern, I have talked about before. But it seems to me that pornography is different, particularly pornography that children can easily access. It seems to me that that should be treated differently than political speech.

Famous case, *Young* v. *American Mini Theaters*. In that case the Court upheld zoning regulations on adult theaters. Justice Stevens, hardly a right-winger, had this to say, and I quote: "Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate." Few of us would march our sons and daughters off to war to preserve the citizen's right to see "specified sexual activities" exhibited in the "theaters of our choice."

Judge, in light of that quotation, here are my questions. Are there or should there be different levels of speech under the First Amendment? Should pornography, for instance, be treated with

less regard than Mark Twain's *Huck Finn*? And how would you, if confirmed to the Supreme Court, decide what protection, if any, certain kinds of expression are entitled to under the First Amendment?

Judge ROBERTS. Well, Senator, it's my understanding under the Supreme Court's doctrine that pornographic expression is not protected to the same extent at least as political and core speech, and the difficulty that the Court has addressed in these different areas of course is always defining what is or is not pornography and what is entitled to protection under the First Amendment and what is not.

That question is sort of antecedent to the question of what the level of protection is. We determine whether it's entitled to First Amendment protection in the first place. In certain types of speech, like child pornography, the Court has determined are not entitled to protection under the First Amendment. There are different categories, and the Court has struggled over the years in figuring out how to determine those categories and what belongs in what category, and beyond that, I don't think I can give a more precise answer.

Senator DEWINE. Judge, let me turn to the area of congressional power. It has been talked about before here, but I want to talk about it a little bit more. Really, this has to do with federalism cases. As you know, the Court has handed down a number of cases that have restricted the power of Congress to pass important legislation. The Court has struck down portions of the Violence Against Women Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Religious Freedom Restoration Act, just to name a few.

In some of these cases the Court restricted Congress's power under the Commerce Clause. In some it relied on the 11th Amendment, and in some it cited Section 5 of the 14th Amendment. The particular provision is not that important for this discussion. Let me be perfectly frank. I think there are some problems with these decisions. I think it is wrong for judges to take on the role of policymaker. I realize that if a statute is blatantly unconstitutional, a judge has to do their duty. But I think for the reason I am going to discuss in a minute, that was not true in these cases.

I want to cite one example, and that is—because of time I can only go through one—and that is the *Garrett* case, a 5–4 decision, *Board of Trustees* v. *Garrett*. As you know, this case involved a woman who said that she had been discriminated against because she was disabled. She was employed by the State of Alabama. She sued the State under the Americans with Disabilities Act. The Supreme Court threw out the suit, holding that there was no evidence that the State discriminated against the disabled in employment decisions. I think the problem with *Garrett* is that the Court ignored findings by Congress.

There were other cases that have been decided, where we did not have findings, and you are familiar with those. I understand the Court's decisions. I might like them or not like them, but I understand them.

This case we made findings. While we were considering the Americans with Disabilities Act we held 13 hearings and we set up

a task force, a task force that held hearings in every State. It was attended by more than 30,000 individuals. Based on these hearings we found 300 examples of disabled individuals being discriminated against in employment decisions. We found that two-thirds of all disabled Americans between the ages of 16 and 64 were not working at all, even though a large majority of them were capable of doing so. We found that this discrimination flowed from stereotypic assumptions about the disabled, as well as, quote, "purposeful, unequal treatment," all findings by this elected Congress of the United States.

In *Garrett*, however, the Court said this was not enough. They rejected our fact findings, holding that we had not pointed to any evidence that the States discriminated in employment decisions against the disabled.

Judge, you have stressed repeatedly in your writings and your opinions—and I have a great deal of respect for you and appreciate these writings and opinions—you stressed the limited role that judges must play in our system of Government. I applaud you for that approach. It is important for me to ensure that you still hold to this belief. In your opinion, what role should a judge play when reviewing congressional fact findings? In your view, how much deference do congressional fact findings deserve? I understand you are not going to talk about this case, or any of the cases I have just cited. I wanted to lay that kind of as a predicate. I wanted to tell you where I am coming from.

But just talk in general about when you see fact findings by Congress, when we have held hearings, when we have established a record, how do you approach? What are the tools that you use, Judge, based on the precedents and based on what you think the role of the judge is?

Judge ROBERTS. Again, and of course, without getting into the particulars, the reason that congressional fact finding and determination is important in these cases is because the courts recognize that they can't do that. Courts can't have, as you said, whatever it was, the 13 separate hearings before passing particular legislation. Courts—the Supreme Court can't sit and hear witness after witness after witness in a particular area and develop that kind of a record. Courts can't make the policy judgments about what type of legislation is necessary in light of the findings that are made. So the findings play an important role, and I think it is correct to say under the law in this area and others, they're neither necessary nor necessarily sufficient. But I know as a judge that they're extremely helpful when there are findings.

And judges know when they look at those, that they're the result of an exhaustive process of a sort that the Court cannot duplicate. We simply don't have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the fact finding that is made. It's institutional competence. The courts don't have it. Congress does. It's constitutional authority. It's not our job. It is your job. So the defence to congressional findings in this area has a solid basis.

Now, the particular area you're talking about under Section 5 of the 14th Amendment, the *Garrett* case, there are of course more recent cases that you know of, *Tennessee* v. *Lane* and the *Hibbs* case

in *Nevada* v. *Hibbs*, where the Court did defer to the fact finding in those cases, and particularly in the *Hibbs* case focused on the legislative recognition based on its examination of the factual record developed at hearings about the statute that was at issue there, and the particular approach that they were taking to remedy discrimination under the 14th Amendment, which is the authority that Congress has.

Now, the legal requirement that the Court has articulated there came of course from the *City of Boerne* case, that the remedial approach has to be congruent and proportional. Justice Scalia signed on to that approach in the *City of Boerne* case. In the *Lane* case he said he had changed his mind and he no longer agreed with that. Any area of the law where Justice Scalia is changing his mind, has got to be one that is particularly difficult, and one that I think is appropriately regarded as still evolving and emerging. And so I don't know if the more recent cases in *Lane* and *Hibbs* represent a swinging of the pendulum away from cases like *Garrett* and *Kimmel* on the other side, or if it's simply part of the process of the Court trying to come to rest with an approach in this area.

But it is an area that the Court has found difficult, and just as a general matter, I think when you get to this point of reweighing congressional findings, that starts to look more like a legislative function, and the courts need to be very careful as they get into that area, to make sure that they're interpreting the law and not making it.

Senator DEWINE. Judge, I appreciate your answer, and I am going to move on. I would just say that one of the more disturbing things to me about *Garrett* is that the dissent and the majority opinion got into a dispute, a verbal dispute about what the facts were, and a dispute about the facts, it seems to me that is not usually what the Supreme Court gets involved in, and it seems if there is a dispute in the facts, you would normally defer to the fact finder, Congress.

Let me take off on *Garrett* and maybe talk about another way to get at this. Rather than focus on the problem caused by Garrett, maybe there is another way to solve some of the problems that would be raised by this.

Congress still has the power to protect the disabled under the Spending Clause of the Constitution. We have the power of the purse. In *South Dakota* v. *Dole* we wanted to establish a national drinking age of 21. You are well aware of that. It was upheld by the Court. We did it through the power of the purse in the *Dole* case. I just wonder if Congress might be able to use this approach to require the States to waive their immunity from suit under statutes like the Americans with Disabilities Act. It seems to me that under the Spending Clause, we have at our disposal the power to protect the disabled, to protect other groups, and effectively overturn cases like *Garrett* and these other cases that limit legislative power.

You seem to take that approach in a case entitled *Barber* v. *Washington Metropolitan Transit Authority*. That case concerned a disabled person who was suing a State entity under the Rehabilitation Act. In that case, you held that the suit could go forward even though the State entity was immune from suit under the 11th

Amendment. In your view, the State entity had agreed to waive its immunity in exchange for receiving Federal mass transit dollars.

I think this case is important. It is important to me, at least, Judge. It seems to show us what you think about Congress's power under the Spending Clause, and it also gives us a model, I think, for how we might be able to protect those who are discriminated against under the Americans with Disabilities Act.

Could you just take a moment—I have got 2 minutes left. Could you take a moment and tell us about the issue in the *Barber* case and what was your reasoning for permitting a disabled person to sue in Federal court for discrimination in that case?

Judge ROBERTS. Certainly.

Senator DEWINE. It was your case. You were involved in the case. You were in the majority opinion.

Judge ROBERTS. It was a divided decision.

Senator DEWINE. Right, 2–1.

Judge ROBERTS. The argument was whether Congress had the authority under the Spending Clause as a condition of the receipt of Federal funds that WMATA—the Metro here in D.C.—receives, that they waive their sovereign immunity to suit under the disability provisions, and the argument was that Congress lacked that authority, that they could not impose a waiver of sovereign immunity as a condition for the receipt of Federal funds to allow an individual alleging discrimination on the basis of disability to sue.

There was no issue about whether there was sovereign immunity in the absence of a waiver, and the WMATA governing body was opposing the suit on the ground that it had not waived immunity. And they were arguing that Congress lacked the authority to condition the receipt of funds on a waiver of immunity.

It was a divided decision, a 2–1 vote. The dissenter argued that this was an inappropriate exercise of the Spending Clause power. The majority concluded that, no, this was within Congress's authority. It could condition the receipt of Federal funds on a waiver of sovereign immunity that allowed an individual alleging he was discriminated against in employment because of his disability to proceed with the suit. The arguments we rejected were arguments of germaneness. The idea was the funds were for transportation, not for employment, and so that it wasn't a germane condition. The majority rejected those arguments. The dissent would have ruled the other way.

Senator DEWINE. Judge, thank you very much.

Thank you, Mr. Chairman.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator DeWine.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much.

Chairman SPECTER. We are going to take a 15-minute break when Senator Feinstein concludes her questioning at about 4:15.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Good afternoon, Judge Roberts. I want to follow up on something that Senator Kohl said in his last question, which was sort of asking you to do a look-back into some of the things you have written and said. And you have written—and this involves women—either in margin notes or in comments or in memos, and I want to list

for you some of the comments and ask you what do you think of them, what do you think of them today.

In a memorandum to Fred Fielding, White House Counsel under President Reagan, about the nomination of a woman to be recognized for moving from homemaker to lawyer, and your response to nominating this woman for an award was this: "Some might question whether encouraging homemakers to become lawyers contributes to the common good, but I suppose that's for the judges to decide."

In a memo responding to a letter from three Republican Congresswomen that raised concerns about the pay gap that women experience, you said, and I quote, "Their slogan may as well be 'From each according to his ability, to each according to her gender.'"

You also wrote that the Congresswomen's concerns "ignore the factors that explain that apparent disparity, such as seniority, the fact that many women frequently leave the workforce for extended periods of time," et cetera.

In another memo, you implied that it is a canard that women are discriminated against because they receive 59 cents, at that time, to every $1 earned by men.

In a September 26, 1983, memo to Fred Fielding, you rejected an alternative proposed constitutional amendment guaranteeing equal rights to women.

In 1982, you wrote a memo to the then-Attorney General in which you refer to the task force which was to conduct a governmentwide review to determine those laws which discrminate on the basis of gender as "the Ladies Task Force."

I mention these examples to highlight what appears to be either a very acerbic pen or else you really thought that way. Did you really think that way? And do you think that way today?

Judge ROBERTS. Senator, I have always supported and support today equal rights for women, particularly in the workplace. I was very pleased when I saw, for example, the report of the National Association of Women Lawyers who went out and talked and interviewed with women lawyers who've worked with me, who've appeared before me, and the conclusion was that I not only always treated women lawyers with respect and equal dignity, but that I had made special accommodations for life-work issues to ensure that women could continue to progress, for example, at my law firm, and had already treated women who appeared before me in a perfectly professional way.

Senator FEINSTEIN. Then why say those things?

Judge ROBERTS. Well, let's take the first one you mentioned. It is to me obvious in the memo that I wrote to Fred Fielding that it was about whether or not it's good to have more lawyers. Whether they were from homemakers, from plumbers, from artists or truck drivers had nothing to do with it. The point was: Is it good to have more lawyers? That's the way I intended it, and I'm sure that's the way—

Senator FEINSTEIN. And you don't think it was good to have more lawyers.

Judge ROBERTS. I think there were probably—the point that Mr. Fielding and I had commented on, on many occasions, was that in

many areas there were too many lawyers, and that's a common joke that goes back to Shakespeare. It has nothing to do with homemakers. The notion that that was my view is totally inconsistent and rebutted by my life. I married a lawyer. I was raised with three sisters who worked outside the home. I have a daughter for whom I will insist at every turn that she has equal citizenship rights with her brother.

Senator FEINSTEIN. Okay. I don't want to belabor it. I am just trying to understand how you think, because you speak about modesty and humility, and yet none of these comments are modest or humble.

Judge ROBERTS. Well, those comments were in the nature of the tone that was encouraged in our office. It was a small office. They expected we turn projects around very quickly. We were expected to be candid, and if making a joke about lawyers would make for a more enjoyable day on the part of the people in the office, that's what we did.

Senator FEINSTEIN. So it is fair to say you don't think that way; is that correct?

Judge ROBERTS. Well, I don't think in any way that is based on anything other than full equal citizenship rights on the basis of gender. I might tell a lawyer's joke that there are too many lawyers today, but that's all it was back then.

On the memo you quoted with respect to the issue of comparable worth, the one thing the memorandum made clear is that the position of the administration was there must be equal pay for equal work. That wasn't the issue in that case. The issue there was whether there should be equal pay for different work and whether judges should determine what type of work was equal.

Senator FEINSTEIN. I am not arguing that. I am just arguing what you said—or bringing to your attention what you said then. But I don't want to belabor it. I think you have answered the question.

Let me ask you a question on *Canterino* v. *Wilson*. This is about the same time, in 1982. And you pointed out in answers to prior questions that you were staff and you generally did what people asked you to do. In this case, William Bradford Reynolds, the top attorney in the Civil Rights Division, indicated that there had been substantial, he thought, discrimination in prisons in Kentucky and that the Justice Department had done an investigation and they found that male prisoners were given training for higher-paid jobs, for a greater variety of jobs, and were given training for longer periods of time. Your memo contradicted his recommendation to intervene.

Why would that be if you just follow the policy of the office?

Judge ROBERTS. My understanding there was that there was a question whether intervention in that case—the case was being pursued by private litigants already—a question whether intervention by the Federal Government in that case was consistent with the Attorney General's approach to institutional litigation. That was an approach that he had laid out in several speeches, memoranda, and, as a staff member, it was my job to call to his attention areas where I thought there may be inconsistencies in areas where he wanted to set policy priorities.

Senator FEINSTEIN. In response to the Chairman's question this morning about the right to privacy, you answered that you believe that there is an implied right to privacy in the Constitution, that it has been there for some 80 years, and that a number of provisions in the Constitution support this right, and you enumerated them this morning.

Do you then believe that this implied right of privacy applies to the beginning of life and the end of life?

Judge ROBERTS. Well, Senator, first of all, I don't necessarily regard it as an implied right. It is the part of the liberty that is protected under the Due Process Clause. That liberty is enumerated—

Senator FEINSTEIN. Part of liberty.

Judge ROBERTS. Yes, and the exact scope of it with respect to the beginning of life and the end of life, those are issues that are coming before the Court in both respects. And I don't think I should go further to elaborate upon whether or not it applies in those particular situations. Obviously, it has been articulated by the Court in both contexts, the *Cruzan* case with respect to the end of life, the *Glucksberg* case following *Cruzan*. But I don't think it's appropriate for me, given the fact that cases arise on both of those questions, to go further.

Senator FEINSTEIN. All right. Let's move right along.

This morning, there was a discussion about *stare decisis*, and you pointed out that there were factors in consideration of *stare decisis*. And I think one of the things you said was workability of framework is one of the main principles you look for in *stare decisis*.

Well, in its decision in *Casey*, the Court specifically affirmed the doctrine of *stare decisis* as it applies to *Roe*. The Court reviewed prudential and pragmatic considerations to gauge the respective costs of reaffirming and overruling that case. In doing so, the Court unambiguously concluded that *Roe* has in no sense proven unworkable.

Do you agree with this conclusion?

Judge ROBERTS. Well, that is—that determination in *Casey* becomes one of the precedents of the Court entitled to respect, like any other precedent of the Court, under principles of *stare decisis*. I have tried to draw the line about not agreeing or disagreeing with particular rulings, but that is a precedent of the Court. It is a precedent on precedent; in other words, it has examined *Roe*—

Senator FEINSTEIN. So you agree that the Court said that, obviously.

Judge ROBERTS. Well, it said that, and that is a precedent entitled to respect under principles of *stare decisis*, like any other precedent of the Court. But in terms of a separate determination on my part whether this decision is correct or that decision is correct, my review of what other nominees have done is that that is where they draw the line and that is where I have drawn the line.

Senator FEINSTEIN. So workability is clearly one thing. Is another one reliance?

Judge ROBERTS. Certainly, or as it is often expressed in the Court's opinions, settled expectations. People expect that the law is going to be what the Court has told them the law is going to be. And that's an important consideration.

Senator FEINSTEIN. And in *Casey*, again, the Court stated, and I quote, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," and that this ability to control their reproductive lives was enough of a reliance to sustain *Roe*, correct?

Judge ROBERTS. That's what the Court—I think you're reading from the plurality, the joint opinion in the case.

Senator FEINSTEIN. That is correct.

Judge ROBERTS. Yes.

Senator FEINSTEIN. That is correct. Now, unlike my experience, there are now entire generations of women who know a world only where their reproductive rights are protected. Do you agree with the Court that this reliance is sufficient?

Judge ROBERTS. Well, again, I think that's asking me whether I think the decision was correct or not on that point. It certainly was the analysis of the joint opinion in the Court, entitled to respect as precedent like any other decision of the Court under principles of *stare decisis*. And that would certainly be where I would begin if any of these issues come before the Court if I were to be confirmed. I would begin with the precedent that the Court has laid out in this area.

Senator FEINSTEIN. One other question on *Casey*, and I would like to quote from something that Justice Ginsburg said in the transcript in her confirmation hearing in a discussion with then-Senator Brown. "The *Casey* majority understood that marriage and family life is not always what we might wish them to be. There are women whose physical safety, even their lives, would be endangered if the law required them to notify their partner, and *Casey*, which in other respects has been greeted in some quarters with great distress, answered a significant question, one left open in *Roe*. *Casey* held a State could not require notification to the husband." Do you agree?

Judge ROBERTS. That is what *Casey* held, yes, and that, as I said before, the precedent of the Court, like any other precedent of the Court, is entitled to respect under principles of *stare decisis*.

Senator FEINSTEIN. Thank you. One other reading from Justice Ginsburg's testimony. "Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. That was the idea I tried to express in the lecture to which you referred. The two strands, equality and autonomy, both figure in the full portrayal." Do you agree or disagree?

Judge ROBERTS. Well, I think Justice—then Judge Ginsburg felt at greater liberty to discuss that precisely for the reason you noted, that she'd given a lecture on the subject. Those are issues that come up again and again before the Court. Consistent with what I understand the approach to have been of other nominees, I don't think I should express a view on that.

Senator FEINSTEIN. Thank you. I would like to move on. In *Bray*, you argued on behalf of the Government as Deputy Solicitor General that the right to have an abortion is not specific to one gender. Specifically, your brief stated, quote, "unlike the condition of being pregnant, the right to have an abortion is not a fact that is specific to one gender," end quote. In your oral argument, you went on to

make this point by comparing Operation Rescue's attempts to prevent a woman from exercising her privacy right to make decisions about her pregnancy to an ecologist's efforts to block an Indian tribe from using their exclusive fishing rights. Do you think that is an appropriate analogy?

Judge ROBERTS. Well, Senator, it was a position and an argument that the administration made that was accepted by the Supreme Court by a vote of six to three. The point, underlying point was that under the statute at issue in *Bray*, the Ku Klux Klan Act required under the Supreme Court's precedents that people engaged in the challenged activity must be motivated by a discriminatory animus. Obviously, under the Ku Klux Klan Act, the classic case, racial hostility.

And the issue was, are people opposed, in the *Bray* case, opposed to abortion opposed to women, and the determination of the Court was that, no, that there are people who are opposed to abortion and that does not constitute opposition or discriminatory animus against women and, therefore, that the Ku Klux Klan Act didn't apply. Many other provisions obviously apply in the case of abortion protestor violence, including State law and other provisions of Federal law. But the Supreme Court concluded six to three that there is no discriminatory animus based on opposition to abortion.

Senator FEINSTEIN. Thank you. I would like to move to another subject because my time is moving on, and that is what has been happening in the Court in the last 10 years. As I mentioned, for 60 years, the Court didn't strike down a single Federal law for exceeding congressional power under the Commerce Clause. Yet in the last decade, the Court's reinterpretation of the Commerce Clause has been used to strike down more than three dozen cases. The Court's future decisions will determine whether the Congress will be able to take necessary action to stop child pornography, combat violent crime, ensure child support payments, prevent discrimination, improve our schools, and protect our environment.

My question is, do you agree with the direction in which the Supreme Court has moved in more narrowly interpreting congressional authority to enact laws under the Commerce Clause?

Judge ROBERTS. Well, of course, I tried to avoid saying whether I agree or disagree with particular cases. But I would point out in this area, in particular, I think it's very important to look at the most recent case, which is the *Raich* case, the medical marijuana case, because the argument there was that these two decisions that you're talking about that were the first in the 60 years, *Lopez* and *Morrison*, the argument there was based on *Lopez* and *Morrison*, Congress lacks the power in this area.

And what the Supreme Court said in the *Raich* case, which I think is very important, it said there are a lot more precedents on the Commerce Clause besides *Lopez* and *Morrison*, and the appropriate way to regard those is two decisions in the more than 200-year sweep of decisions in which the Supreme Court has given extremely broad—it's recognized extremely broad authority on Congress's part, going all the way back to *Gibbons* v. *Ogden* and Chief Justice John Marshall, when those Commerce Clause decisions were important in binding the Nation together as a single commercial unit.

So again, without commenting on whether particular decisions are correct or not, I do think it's important to recognize that the Court itself in its most recent decision has said we need to focus on the broad sweep and not just on those two decisions.

Senator FEINSTEIN. Let me move to the case of the hapless toad, known more commonly as *Rancho Viejo* v. *Norton*. Do you believe there is a basis for sustaining the Endangered Species Act other than the Commerce Clause?

Judge ROBERTS. Well, the opinion I wrote there noted that the panel decision that I thought should be reheard en banc looked at one ground for under the Commerce Clause and the concluding paragraph in my opinion said that we ought to rehear the case to look at other grounds that were also under the Commerce Clause, but they were not the particular prong of the Commerce Clause analysis that the panel opinion had relied on, and the reason was that, as I explained in the opinion, another circuit court has suggested pointedly that the approach in the panel opinion was inconsistent with the Supreme Court.

And I thought if there was another basis for sustaining the Endangered Species Act that was not inconsistent in the view of another circuit court, that we ought to look at that and try to do it. It really reflects a restrained and minimalist approach. If there's a ground that doesn't cause another circuit court to say, you're violating the Supreme Court precedents, we ought to look at that and see if we could rest the decision there.

Senator FEINSTEIN. I guess the point I am trying to get at is you are saying that the fact that the toad was almost only found in California means that it was an impermissible use of the Endangered Species Act. Well, then that raises a question. What if the toad strays across the border, or what if this is the last remaining toad, and—

Judge ROBERTS. Right, but the one point I would emphasize is my opinion did not conclude that there was no authority under the Commerce Clause in just that situation. There was another dissenting opinion that was filed by another judge who said this violates the Commerce Clause. I did not join that opinion. I wrote separately to say that we should hear this en banc with all the judges because there are other ways of sustaining this Act that don't implicate the concern that has caused the other circuit to question our approach that had caused the dissenting judge to conclude there was no authority, and I thought we ought to look at those other grounds because if we could sustain it without implicating that objection, that would be better all around.

I did not take the position that it was outside the scope of the Commerce Clause. It was a question of which ground under the Commerce Clause we ought to look at.

Senator FEINSTEIN. There is a great deal of concern as what this then means for the implication for all environmental law—the Clean Water Act, the Clean Air Act. But if I understand you correctly, what you are saying is that you do not believe that the Commerce Clause should prohibit legislation in this area, is that correct?

Judge ROBERTS. I have not had occasion to decide that. I did not decide it in the *Rancho Viejo* case. One of the other judges did and

I did not join that opinion. What I said is we should consider these other grounds. Now, I didn't have the opportunity, because there was a dissent from rehearing, to consider those other grounds.

Those other grounds were what other courts, the Fifth Circuit in the *GDF* case, had used to sustain application of the Endangered Species Act in the cases that came before them. They didn't get into the question of whether you look at the regulated activity, the building or the actual what was prohibited, the taking of the toad. They analyzed the protection of the endangered species as implicating a commercial activity, and that allowed them to sustain the Act without regard to whether it had an interstate effect itself.

Senator FEINSTEIN. Thank you very much. I would like to ask a question or two on church and state. I mentioned in my opening statement that for centuries, people have been persecuted for their religious beliefs, and our country grows more diverse every day and tensions among different beliefs have grown. I really believe that there is a brilliance in what the Founding Fathers did in drafting the First Amendment and how it protected an individual's right to practice their belief, whatever it may be, but also protect against using religion against individuals by prohibiting the government from becoming and/or imposing religion.

In 1960, there was much debate about President John F. Kennedy's faith and what role Catholicism would play in his administration. At that time, he pledged to address the issues of conscience out of a focus on the national interest, not out of adherence to the dictates of one's religion, and even said, "I believe in an America where the separation of church and state is absolute."

My question is, do you?

Judge ROBERTS. Senator, I think the reason we have the two clauses in the Constitution in the First Amendment reflects the Framers' experience. Many of them or their immediate ancestors were fleeing religious persecution. They were fleeing established churches. And it makes perfect sense to put those two provisions together, no establishment of religion and guaranteeing free exercise. That reflected the Framers' experience.

Senator FEINSTEIN. If you can, answer my question yes or no.

Judge ROBERTS. Well, I don't know what you mean by absolute separation of church and state. For example, recently in the Ten Commandments case, the Court upheld a monument on the Texas capitol grounds that had the Ten Commandments in it. They struck down the posting of the Ten Commandments in a Kentucky courthouse. Is it correct to call the monument on the Texas capitol grounds with the Ten Commandments, is that an absolute separation, or is that an accommodation of a particular monument, along with others, that five of the Justices found was consistent with the First Amendment?

So I don't know what that means when you say absolute separation. I do know this, that my faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don't look to the Bible or any other religious source.

Senator FEINSTEIN. It has been reported that during your meeting with Senator Wyden, while discussing end-of-life issues, you cited the dissent of Justice Brandeis in *Olmstead*. I would like to

quote from it. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the Government the right to be left alone, the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Do you agree with Justice Brandeis?

Judge ROBERTS. I agree with his expression that it's a basic right to be left alone and I think that animating principle is a very important one. With regard to particular restrictions he was talking about, wiretapping, or I forget how the interception actually at issue there, I don't think it's appropriate to comment on.

But as a general statement of the principle, and again, it reflects just the basic understanding that it's a free country and the right to be left alone is one of our basic rights. I do agree with that.

Senator FEINSTEIN. I do think the implication of what you said to Senator Wyden, and I have discussed this with him, was that one has the right to make their end-of-life decision.

Judge ROBERTS. Well, that's an issue that is before the Court in particular cases and I can't comment on a case that's coming before the Court. If I am confirmed, I would have to confront that case with an open mind in light of the arguments presented, in light of the precedents of the Court, and the litigants in those cases are entitled to have judges that haven't expressed views on that particular case.

Senator FEINSTEIN. Well, let me ask you this question, then. In an interview on PBS after the Court ruled in *Washington* v. *Glucksberg*, a case involving a State statute that banned assisted suicide, you said, "I think it's important not to have too narrow a view of protecting personal rights." What did you mean by that?

Judge ROBERTS. Well, I went on to explain that the right—any time there's an assertion of a right, there's quite often an assertion of a contrary right. I think it was similar to a point Senator Kyl was making earlier, that, for example, if you're asserting a right against government regulation, then the right of the people to regulate through their elected representatives that's being struck down, that right is being restricted.

So it's usually not—it's often not, we could view that as a right on one side and there's nothing on the other side. But there's often an assertion of a right on the other side. And what the courts have to do is make sure they provide a level playing field in which people disputing the impact of the Constitution, on whose right prevails, have judges who will decide that case according to the rule of law, and not according to whether they think one right should prevail or another.

Senator FEINSTEIN. But do you believe then that the Federal Court should become involved in end-of-life decisions?

Judge ROBERTS. Well, Senator, that is exactly one of the questions that's before the Court, and I can't answer that in the abstract. I have to answer that on the basis of the parties' arguments, on the basis of the record in the case, on the basis of the precedents. An abstract opinion that would prejudge that case would be inappropriate for a nominee to express.

Senator FEINSTEIN. Let me ask it another way. Do you believe that the Court should have a limited role in that situation?

Judge ROBERTS. I think courts have a limited role in general, and that is that they only interpret the law, they don't make the law, they don't shape the policy. Now, the application of that basic principle, which is very important to me, in a particular case is obviously something that hospitable to wait for the litigation of that case, the arguments in that case, the arguments of the lawyers about whether it's consistent with the precedents or inconsistent with the precedents, but the basic principle, the courts should not be shaping public policy—that's for the legislators—is a fundamental principle with which I agree.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Thank you.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Feinstein.

Since I announced the break at 4:15, I have been advised that there is a vote at 4:30. So Senator Sessions has graciously agreed to split his 30-minute round, 15 minutes, and then we will go vote. So we will now turn to Senator Sessions for 15 minutes, and we will break at that time and take a 15-minute break to go vote.

Senator SESSIONS. Thank you very much, Mr. Chairman.

Judge Roberts, I want to congratulate you on your excellent testimony. You have validated the President's confidence in you. Many people said President Bush obviously looked around and looked around and finally decided to choose the best, and I think you have proven that correctly. The ABA has rated you unanimously, American Bar Association, in their formal rating process, unanimously rated you "well-qualified," the highest possible rating that they give. They have quite a number of lawyers that vote on that, so to get a unanimous vote is not that frequent. And for a higher office, they have a higher standard, and I think that is particularly worthwhile that you received that recognition.

I note that some of our legal professional journals have given you remarkable accolades. The American Lawyer, in 2004, wrote that you were "one of the Supreme Court's finest practitioners." And the Legal Times said you are "one of the top appellate lawyers of your generation." And the Legal Times also said that you are "viewed by many as the best Supreme Court advocate in private law firm practice." Those are high praise, and I think today we have seen why people would think that of you.

I also would offer for the record, Mr. Chairman, a letter from former Democratic Attorney General Bill Baxley from Alabama. He prosecuted the first prosecution of the church bombing cases in Birmingham successfully. He is a lifelong Democrat. As he notes, an elected member of the State Democratic Executive Committee.

Chairman SPECTER. Without objection it will be made a part of the record.

Senator SESSIONS. He said this, "Senator, I know Judge Roberts well. I have entrusted three important appellate matters to him. In each instance I met with him and engaged him in extensive conversation upon a wide range of topics because he is a man of such remarkable intellectual brilliance. I sought him out on private as well as professional topics, enjoyed more than one meal with him, and was each time overwhelmed not only by his intelligence, but also his innate sense of fairness, by his sensitivity to every aspect and angle of consideration of every issue addressed by him, and by his somber sense of decency and justice." A somber sense of decency and justice, pretty good phrase.

"My love of my country surpasses politics," Mr. Baxley says. "It compels me to support Judge Roberts in every possible way in order that justice might most effectively prevail in the United States Supreme Court. I am confident in the ability of Judge Roberts to fairly, and without any agenda of any kind, address each legal issue which comes before him. I am equally confident of his ability to lead the Supreme Court in an administrative capacity. I have no doubt that the diverse opinions of each Associate Justice sitting on the United States Supreme Court will receive greater deference and consideration under his leadership than under any other Chief Justice with whom they have ever served. This wise and circumspect man deserves this office."

So I think we have seen a great bipartisan recognition of your capabilities, and the respect that you have reaches broadly.

Also recall, Judge Roberts, that in my opening statement, I suggested that the pattern around here is to take out old statements and memoranda and bring them up out of context, and that particularly the outside groups and sometimes Senators would get confused, or sometimes these groups I think deliberately have attempted to paint a picture of you or the positions you took that are not fair or accurate.

I just would want to go over a few cases and deal with some of the issues that you have already been questioned with to make sure that we are square about it.

On the *Gwinnett* case, the Title IX, the women's education case, the position you took that would deny the right to sue a State entity, a government entity for money damages, was that not a position consistent with the position of the court of appeals that had written the only opinion on that subject?

Judge ROBERTS. Yes, that was the court of appeals position.

Senator SESSIONS. So you, in advocating that position, were expressing a view that was the view of the highest Federal court in the land at that time?

Judge ROBERTS. Yes.

Senator SESSIONS. With respect to the *Grove City* case, it was good that Senator Grassley from Iowa knew about that, and I think he clarified that question well here.

With regard to *Bolden* v. *City of Mobile*, you and Senator Kennedy had an exchange. Well, I am from Mobile. I was not involved in the litigation, but know something about that litigation. When the exchange ended, as I recall, Senator Kennedy was insisting that the *Zimmer* case was the established law, and there are a number of cases had said that effects tests applied, whereas you

were contending that at the time you took the position you did, that the Supreme Court had ruled that an intent standard was required, and that *Bolden* set the decision on that. I guess the question for us today, who was right, you or Senator Kennedy?

Judge ROBERTS. Well—

Senator SESSIONS. I did not want to ask you, but go ahead.

Judge ROBERTS. No. I don't—

Senator SESSIONS. If I say the—

Judge ROBERTS. It was a renewal of a debate that was had between the administration and Senator Kennedy 20 plus years ago, and certainly the issue of whether the Supreme Court had interpreted Section 2 and what it had said and whether or not it was correct, was mooted. Senator Kennedy's position eventually prevailed as a matter of legislation. Through the good offices of Senator Dole and others, the compromise was worked out, and the totality of the circumstances test enacted under Section 2.

Senator SESSIONS. But the truth is, is it not, that *Bolden* v. *City of Mobile* had been decided by the Supreme Court, and the *Bolden* v. *City of Mobile* said that you had to show, when you consider a form of a local government, that before you could throw it out, create a new government for that city, you had to show that it was designed in a way to intentionally deny equal rights to the minority citizens.

Judge ROBERTS. That was my understanding of, and certainly the administration's understanding of *Mobile* and its interpretation of Section 2. And as I said, the debate was largely mooted by the legislative change that was enacted.

Senator SESSIONS. I am just trying to get this thing straight because I do not want anybody to be misinterpreted. *Bolden* v. *City of Mobile* quoted *Zimmer*. It was the final word on the matter, and it ruled that before the Federal Government could throw out a government of a city and require a new government to be established, there had to be an intent to discriminate, and that was consistent with the Voting Rights Act. And then when the Voting Rights Act came up for reauthorization, the legislature, the Congress passed a law and changed the law that in effect said the effects test, if it had the effect of discriminating or keeping African-American citizens from being elected to office, that that could justify the removal of the existing form of government and establish a new government.

Judge ROBERTS. That's right, and it is in many areas—well, certainly every area involving interpretation of the statute—the final say is not with the Supreme Court. The final say on a statute is with Congress, and if they don't like the Supreme Court's interpretation of it, they can change it, and that's what happened in this case.

Senator SESSIONS. Well, the Voting Rights Act, let me say, is a tremendous critical, historical event. It transformed the South. I think Senator Kennedy or others said that grandchildren and children today are being able to vote because of this right, and that is true. Not only are they being able to vote, they are being able to be judges who supervise elections, sheriffs, mayors, city councilmen, county commissioners. Alabama has more elected African-American officeholders than any other State in America, and we

are proud of that. But this was a powerful Act, and it did change the makeup of county commissions, city commissions, statewide boards, all over Alabama, all over America, and it was a big step. But the Congress made that, and you were correct when you said that your position was consistent with what the Supreme Court ruled at that time.

With regard to the question of comparable work, I think Senator Feinstein was clear about this, but I would like to make it a little bit clearer. You have consistently favored equal pay for equal work, have you not, and did not President Reagan also favor that explicitly and openly?

Judge ROBERTS. Absolutely.

Senator SESSIONS. It is the question of this comparable worth theory that apparently one district court found in favor of, but that every circuit court and every other court that considered it, rejected it, that said that some body, some commission, I guess, would decide whether a secretary should be paid as much as a truck driver and make those kind of value judgment decisions. Is that not the difference between those two aspects?

Judge ROBERTS. That's right. Yeah, there is no question of equal pay for equal work. It's the idea that someone should decide that different jobs are of comparable worth and that therefore they should be paid the same. And the district court adopted that approach, was reversed by the Ninth Circuit Court of Appeals in an opinion by then-Judge Anthony Kennedy.

Senator SESSIONS. That is right. I know he did right on that, and I think that the Sixth, Seventh, Tenth and Ninth Circuits all rejected that idea, and frankly, it has not been heard from since. I am glad that you and President Reagan did not agree to that at the time. We would have commissions of incredible complexity trying to decide very important matters. The National Academy of Sciences, in fact, found and declared it did not believe that the value of worth of jobs could be determined by fair and scientific methods. So I think that is important.

Judge Roberts, I tried a lot of cases in Federal district court. I have written appeals to the Federal appellate courts and argued a few times in the court of appeals. I would like for you to help explain to us how this court system works and what an appellate judge does. I mean appellate judges do not go about to set policy in America. They do not go out to supervise and superintend the legislative and executive branches. They decide cases that come before them. So is it not true that normally a case would be initiated in a Federal district court of a State trial court, and a trial would be held, often with a jury, and a judgment is rendered?

Judge ROBERTS. That's what most people, most of us think of when we think of going to court. You're there. You know, you bring in the witnesses. They testify, they're cross-examined by the other side. There's one judge supervising the trial. If it's a jury case the jury is there. That's where most of the fact finding takes place. People have different versions of events, you know, who was there, what did they do? And people tell different stories, and that is where you try to sort that out, either before the jury or the single judge.

Senator SESSIONS. And a judge has to rule, he has to rule on evidentiary matters or legal matters, and sometimes a judge is in the midst of trial and maybe he makes an error maybe he does not make an error. But every word of that trial is put down, is recorded. And so after the trial if the losing party is unhappy, they can take an appeal, and when they do that, it goes to the Federal court of appeals for that circuit, and they point out to the court of appeals where they think the judge made an error. And they say, this was wrong and we want a new trial judge, or *remittitur*, or some other remedy. Is that not what happens?

Judge ROBERTS. That's right. The big difference, when you get up to the court of appeals, is that the facts are not really in play any more. Somebody's been determined—they think you're guilty or they buy your version of events. The court of appeals usually just looks at the legal issues. Somebody says, "The judge made a mistake. He shouldn't have let that witness testify, or he should have recognized that the police had no authority to conduct that search" in a criminal case. And that's appealed to the court of appeals, where in the Federal system there are three judges, and they're just looking at that legal question. And they just go back and look at the law, the precedents, and determine whether or not the law was correctly applied in the trial court of if mistake had been made and they need to do it over again.

Senator SESSIONS. And if they appeal, the lawyers write sometimes beautiful, carefully written briefs that point out the reasons why they think an error may or may not have occurred; is that not correct?

Judge ROBERTS. As a court of appeals judge, that's exactly the kind of brief you're looking for, and every now and then you get one.

[Laughter.]

Senator SESSIONS. And sometimes when you read the first brief, you are persuaded, and when you read the second brief you think maybe it was not as clear as you thought it was when you read the first one.

Judge ROBERTS. Not just sometimes, Senator, quite often that's my reaction. That's part of the adversary system, and you need to have lawyers doing a good job presenting the best arguments on either side so you can feel comfortable that you're making as good a decision as you can.

Senator SESSIONS. So the lawyers in the case and the clients and the parties want a judge who will carefully read those briefs and be fair and careful in analyzing whether or not they got a fair trial to ensure justice took place.

Judge ROBERTS. That's what I was always looking for when I was a lawyer, Senator, yes.

Senator SESSIONS. Mr. Chairman, I see the clock is going around in circles down there, I think. What do you want to do about time?

Chairman SPECTER. Well, they have not started the vote, and we all know that that is not totally predictable even when they say 4:30. Would you care to continue until the vote starts?

Senator SESSIONS. I would be pleased if the Chairman—do you know what my time is now?

Chairman SPECTER. You can run the red to—well, it just went off.

Senator SESSIONS. This is like a football referee, put so much time back on the clock. It says a minute left.

[Laughter.]

Chairman SPECTER. You can run the red till 7 minutes and 30 seconds.

Senator SESSIONS. All right, very good.

[Laughter.]

Senator SESSIONS. Who am I to disagree with the Chairman?

Chairman SPECTER. Senator Sessions, if you would—

Senator SESSIONS. I will have 15 minutes after this?

Chairman SPECTER. You have 15 minutes left, yes. Start the clock back at 15 minutes.

Senator SESSIONS. Okay, good. Thank you. The doctor down here is good at mathematics.

[Laughter.]

Senator SESSIONS. Businessman, too.

But it is even more complicated than that in doing justice, and on the Supreme Court if a case comes up to you, you will probably have briefs from both parties. You will receive the transcript of the trial that the issue arises from, and you will study that. And you have several law clerks who will help you study that. And every one of the 9 Supreme Court Justices are also studying this same record and all these briefs. Is it not true that friends of the Court can submit briefs?

Judge ROBERTS. At Supreme Court level that's very common, and in some cases there are quite literally hundreds of so-called "friends of the Court" or amicus briefs. Different organizations that are interested in a particular ruling and have a particular perspective, a few of them are even helpful.

Senator SESSIONS. So you review that, and then you frequently set the case, or normally set the case for oral argument.

Judge ROBERTS. If the Supreme Court decides to—this is of course a very big part of their function. They get some 10,000 petitions every year, people saying, "I want you to hear my case." You know, all lawyers say they're going to take it all the way to the Supreme Court, 10,000 people try to do that every year. These days the Court hears about 80 of those, 80 of those 10,000. And the selection of which 80 to take is obviously a big part of the Court's function.

But once they have selected those 80 cases, then they go in and have new briefs on the merits, and all these amicus briefs are filed from different organizations presenting their arguments or their particular perspective, and then it's set for argument.

Senator SESSIONS. So the lawyers from both sides then appear before the Court over in the Supreme Court Building, and they answer questions and make their presentations as to why they think the Court should rule the way they would like it to.

Judge ROBERTS. They usually get an hour for the whole case, so each side gets a half-hour, and that half-hour is taken up almost entirely by the Justices' questions. I went back once and counted the questions during my half-hour, and there were over a hundred questions. Obviously some of them are rapid-fire questions, and if

you follow the Court, you could probably guess who was asking those, and others were more elaborate questions, but more than a hundred in a half-hour.

So the job of the lawyer there is to be totally prepared to answer all of those questions. And, of course, some of them are going to lead into traps, and you have to be careful about that. Others are going to be the very difficult questions that the Court is eventually going to base its decision on. But it's a very both exhilarating and demanding process to go through an oral argument before the Supreme Court.

Senator SESSIONS. And I think there is little doubt that you are the best practitioner of it in the country. But with regard to that, you then finish, and do the judges then meet in conference to discuss the case?

Judge ROBERTS. They do. The Justices, each of whom has prepared the case by not only reading all these briefs and attending the argument, talking it over with their law clerks, but also reading back over the cases, the precedents that the lawyers have been arguing about, they go back and look at those, and then just the Justices in the conference room—no clerks, no staff, just the nine Justices sit in the conference room and talk about it, thrash out the case, eventually get to a point where they take a vote on what they think the disposition should be, the decision should either be affirmed or reversed, or sometimes something else in between, half affirmed, half reversed, sent back, whatever. And then the opinion is assigned, and that's still very much part of the process, the writing of the opinion, because quite often—or maybe not quite often, but often enough, the Justices find out that as they try to write a particular opinion, different problems come up. It doesn't seem as—it's not writing as they thought it would, and sometimes they have to go back and revisit the case because the Justice assigned the opinion decides that it's not—it should come out the other way or there should be a different reason, a different basis for the decision.

And then once the Justice who's writing it is comfortable with the opinion, they send it around to all the other chambers, and the individual Justices, if they agree with it, they send a memo around to everybody else that says, "Please join me." That's just the jargon the Justices use. It means, "Please join my name to your opinion." And sometimes they will have suggestions. You know, I'd be happy to join your opinion, but I disagree with this section, or I disagree with this footnote, or I disagree with this line of reasoning. If you could change that, I'd be able to join.

Well, if you're a Justice who's getting—this is the first reaction you've gotten, the first vote back, you might be a little more willing to make a change to accommodate that suggestion. If you've got seven votes already in the bank and somebody says please change this or change that, maybe you're a little less willing because maybe then some of the others say, well, now I'm not happy with that change. And it can obviously get to be a very complicated process as the memos fly back and forth and the Court tries to come to some consensus around an opinion.

Often, maybe too often, there's not total agreement, and somebody will write a dissent and send that around. And others will join that.

Concurrence, you know, I can't agree with your reason, but I agree with the result, and so I'm writing separately to give you my reasons.

And the balance changes. Somebody can write a concurrence, and all of a sudden they've got five votes, and it's the majority, and the other majority, the original majority becomes the concurrence. But it's a—the analysis is done at—and this has been my experience on the court of appeals as well—a very high level, and I think it's critically important that it's just the Justices alone who go into the conference room, just as on my court now it's just the judges who go into their conference room, because judges and Justices in that situation can be a lot more open with their views. And it's been quite common in my experience over the past more than 2 years to have a judge say, "This is how I view the case," and then another judge say, "Well, what about this?" And the judge can say, "Well, I hadn't thought about that" or "The record says this." And you get out the record, put it out there and look at it.

Senator SESSIONS. But at some point you agree to sign on an opinion, one way or the other.

Judge ROBERTS. Right.

Senator SESSIONS. And that becomes a decision of the judge and maybe the majority of the Court, or maybe a dissent, but that is a decision that is made. Isn't that why you should not in this hearing today blithely start expressing opinions on complex matters when you haven't been through that process and start prejudging matters before you have read the briefs, before you have read the transcript, before you have heard the arguments, before you have talked to your clerks, before you have discussed it with other judges? Isn't that the essence of what justice is, this careful process that leads us to as fair a result as humanly possible?

Judge ROBERTS. I think that's perfectly accurate, and if you've had the experience, as I know every judge and every Justice has, of having your original view changed when you read either the other side's brief in a case, after reading the opening brief, or had your view changed as a result of the discussion at conference, or had your view changed when you tried to write the opinion one way and it came out the other way, then you appreciate the significance of that process. And it's a total distortion and a perversion of that process to start out by saying, well, you know, I testified under oath that I thought this decision was correct, so I'm done, you know, no need to read the briefs, no need to listen to the arguments, no need to go into conference and talk with the other judges on the bench, I've already given my view under oath. Or even if you are going to be open to reconsideration, to start with that barrier, I testified under oath that this is the correct approach, that this is the right result, now maybe you can persuade me otherwise, well, that's not the burden that the litigant should have to take. The litigant should be able to know that all of the judges, all of the Justices that that person is arguing before have an open mind and are fully open to the process.

Senator SESSIONS. You wouldn't want to call Senator Biden and ask his permission to change the commitment you made, would you? Just a joke there a little bit.

[Laughter.]

Senator SESSIONS. You don't want to have to read a transcript of this hearing about the time when you try to decide how to rule on a case to make sure you didn't make some commitment. I mean, I think that is all I wanted to—the point I would like to make there.

You know, Senator Specter came right out of the chute asking you about *stare decisis* and *Roe* and other related type matters, and that is an important question. As I understand it, you committed to Senator Specter that you would bring no hidden agendas to this matter, that you would consider any case that came up under *Roe* or any other case that might impact *stare decisis*, and that you would apply a reasonable, professional analysis to that, drawing on the history of courts and their opinions in dealing with these cases, and would try to make a fair and honest and objective decision. Is that what I understood you to say?

Judge ROBERTS. That's what I understood my testimony to be, yes, Senator.

Senator SESSIONS. And you are not saying one way or the other how you would rule on *Roe* or some of the other cases that have been—

Judge ROBERTS. No. I feel that it would be very inappropriate for me as a nominee to tell how I would rule on a particular case that might come before the Court.

Senator SESSIONS. Well, I would like to know how you would rule on a lot of those cases, too, but I didn't ask you when you came and talked with me, and I don't think it is appropriate. I don't think those of us who are politically conservative ought to look to the courts to promote our conservative agenda through the manipulation of interpreting words of the Constitution or statutes. I don't think liberals have a right to ask the Court to promote their agenda by twisting the plain meaning of words to accomplish an agenda.

What we need is what you said, an umpire, fair and objective, that calls it like they see it based on the discrete case that comes before the judge. And I think that is most important.

I would just say I don't know the answer to those questions legally, how it will all come out, but I would just offer that polling data continues to show that young people and numbers in general are showing that the people are more hostile to abortion than they used to be. Perhaps it is seeing the sonograms and those kind of things. Seventy-five percent, according to a Harris survey, said that they didn't think an abortion was proper in the second trimester; 85 percent said they didn't think it was proper in the last trimester.

I just saw an interesting article by Mr. Benjamin Wittes. He writes for the Washington Post. He declares he is pro-choice, and he says, "Let go of *Roe*." And he goes into an analysis of it. He said, "I am not necessarily thinking *Roe* ought to legally be overturned, but if it does die, I won't attend its funeral, nor would I lift a finger to prevent a conservative President from nominating a Justice who might bury it once and for all." This was in Atlantic Monthly, January of this year. And he goes on to say, "*Roe* puts liberals in the position of defending a lousy opinion. It disenfranchised millions of conservatives on an issue about which they care deeply, while free-

ing those conservatives from any obligation to articulate a responsible policy that might command majority support." And he goes on, as have others, to say this: "The right to an abortion remains a highly debatable position, both jurisprudentially and morally." And he also noted that, "In the years since the decision, an enormous body of academic literature has tried to put the right to an abortion on firmer legal ground, but thousands of pages of scholarship notwithstanding, the right to abortion remains a constitutionally shaky proposition. Abortion policy is a question that the Constitution, even broadly construed, cannot convincingly be read to resolve."

So that is one opinion. I am just saying you will have to deal with this, and I just don't think that we ought to take the view that that matter is open and shut, and I hope that you—we will take you at your word that your mind is open and you will evaluate the matter fairly according to the high standards of justice that you can bring to bear to that issue, and any others like it that come up. Will you give us that commitment?

Judge ROBERTS. Absolutely, Senator. I would confront issues in this area as any other area, with an open mind, in light of the arguments, in light of the record, after careful consideration of the views of my colleagues on the bench. And I would confront these questions just as I would any others that come before the Court.

Senator SESSIONS. Well, I am of the view that the Constitution is a contract with the American people, that developments will occur that clearly fit within the ambit of a fair reading of that Constitution that were never contemplated by the Founders. Things do change, and we have to apply new circumstances. But wouldn't you agree a judge should never make an opinion that is beyond what a fair interpretation of the Constitution would call for?

Judge ROBERTS. Yes.

Senator SESSIONS. Judge Roberts, thank you for responding to my questions and to those of the other members of this body. You have been open, honest, and direct in providing a great view of your judicial philosophy and how you approach cases. I appreciate the fact you have correctly avoided some questions, some you should not answer. You haven't read the briefs and heard the arguments and thought about it. But you have carefully answered the appropriate questions, and we respect you for it.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

The vote is now in process. We will recess until 5:05, at which point we will call on Senator Feingold for his 30 minutes of questioning.

We stand in recess.

[Recess 4:50 to 5:14 p.m.]

Chairman SPECTER. The hearing will resume. We are just a little late in coming back because we were on the floor trying to figure out what the Senate schedule is going to be, when we would vote next. While that is uncertain, I believe it is reasonable to conclude that we will not vote until 7:30. That gives us latitude to move ahead with five more rounds, where we will finish at about 7:30, a little later because we are not starting quite at 5:00, 7:45.

So we will proceed with Senator Feingold now, and then Senator Graham from 5:30 to 6:00, Senator Schumer from 6:00 to 6:30, Senator Cornyn from 6:30 to 7:00, and Senator Durbin from 7:00 to 7:30. That is back by 15 minutes because we are 15 minutes slow coming out of the gate.

Senator LEAHY. Did you notice the look of sheer, undisguised glee on the face of Judge Roberts at the idea of going another three hours at this? Two hours?

Chairman SPECTER. I consulted with Senator Leahy, Judge Roberts, and the empirical evidence is overwhelming, without consultation, that you are fit to go indefinitely.

Judge ROBERTS. I'm ready to go.

Chairman SPECTER. Is that judgment satisfactory to you—

Judge ROBERTS. Absolutely.

Chairman SPECTER.—Judge Roberts?

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Judge Roberts, the eyes of America are on you this week thanks to what our generation called the miracle of live television. Television plays an enormous role in providing information and bringing the country together in times of national pride, like the liftoffs and the landings of spacecrafts and Presidential inaugurations, political conflict like the 2000 election and the 1999 impeachment trial of President Clinton, the great tragedy of September 11 and the devastation wrought by Hurricane Katrina. Americans can watch virtually every significant event of national importance on television except for oral arguments and announcement of decisions at the Supreme Court.

If you are confirmed, you will essentially disappear from public view. This hearing will, in some ways, be the last time that the Nation will see you at work. The possibility of televising trials raises some complicated issues. We have to consider the safety and rights of criminal defendants and witnesses and jurors. But such concerns are not so present in the case of appellate proceedings. There is no doubt that there is enormous public interest in Supreme Court oral arguments, but not very many seats in the courthouse.

I think it would benefit the country and the Court if all Americans had the chance to see the Court conduct its work, so I would like to know if you, as Chief Justice, will support televising the Court's public proceedings.

Judge ROBERTS. Senator, it's not something that I have a settled view on and I do think it's something that I would benefit from the views of my colleagues, and I know that some of them have particular views and some may not. I noticed the last time there was a formal response by the Court to a request to televise a particular argument, the Chief Justice referred the matter to the whole Court and then reported back on it.

I'm also aware that there are—I'm not sure if the right word is experimental or trial efforts going on in some of the courts of appeals, the Federal courts of appeals, to televise arguments there, and I know I've watched them so I appreciate that opportunity. And I don't know yet if there's been an evaluation of how that experiment proceeded, whether the judges thought it went fine, the lawyers, or whatever. I just don't know.

At the Supreme Court level, I do know they experimented recently in a few cases with releasing the audio tapes immediately after the conclusion of the argument. Again, I listened to those on occasion, not every case, but selected cases of particular interest. I know that on our court, my court, I'm sorry, on the court of appeals for the D.C. Circuit, we broadcast at least within the courthouse simultaneously the oral arguments, so I know that the technology is there to do that and I certainly understand the interest and I understand how—I know it was very well received to have the audio tapes immediately available in some of those cases—

Senator FEINGOLD. I hope you will seriously consider this. What has changed from our good conversation we had about this before is that now you will be the principal decision maker on this as the Chief Justice, and I hope you will give it serious consideration.

Judge Roberts, on September 11, 2001, obviously an event occurred that had a profound effect on all of us in this country. We all have our own memories of that day. During those first few hours after the attacks, I kept remembering a sentence from a case we both probably studied in law school." Those words were, "while the Constitution protects against invasions of individual rights, it is not a suicide pact."

I took those words as a challenge to my concerns about civil liberties at that horrible time in our history. We have to be careful not to take civil liberties so literally that we allow ourselves to be destroyed. But then when I actually tracked down the case itself, not remembering what case it was from, it was *Kennedy* v. *Mendoza-Martinez*, I found that Justice Arthur Goldberg made this statement, but then went on to rule in favor of the civil liberties position in this case. He actually affirmed the importance of civil liberties in wartime.

So I would like to start this part of my questions by asking you what kind of impact that day had on you and your belief system and whether it changed your view of the importance of individual rights and civil liberties and how they can be protected.

Judge ROBERTS. Well, I remember the day vividly, Senator. I think I was one of the last people in the country to find out about it. I had entered—gone into a hearing. It was actually in an original action in the Supreme Court. The Special Master was at G.W. Law School and we had a hearing. I think it was starting a little before nine that day. We went in there.

I remember just as I was leaving getting a report that a plane had struck the World Trade Center, but it was—at the time, I thought it was, like, you know, one of those tour planes that was—I had no idea what they were reporting. I went into the proceeding and we conducted the hearing. It lasted several hours. Nobody notified us and we didn't know about it.

I remember leaving and trying to walk back to my office—I was at the law firm then—and the street was blocked off and I figured, well, there's something going on at the White House. I remember walking down further and it was still blocked off and still blocked off. I finally went up to one of these guards and I said, "What's going on?" and he looked at me like, "Where have you been?" Only then did I begin to appreciate it. I went back to my office, because there was no way to get out of town by then—

Senator FEINGOLD. But at what point did you start thinking about the implications of this in terms of civil liberties and the challenges—

Judge ROBERTS. Well, it was when I went back to the office and saw the smoke rising from the Pentagon. As you can imagine, that was a chilling sight. The basic issue of how you address the question of civil liberties in wartime, in times of crisis, is a critically important one.

The Bill of Rights doesn't change during times of war. The Bill of Rights doesn't change in times of crisis. There may be situations where demands are different and they have to be analyzed appropriately so that things that might have been acceptable in times of war are not acceptable in times of peace. I think everyone appreciates that. But the Bill of Rights is not suspended and the obligation of the courts to uphold the rule of law is not suspended.

Senator FEINGOLD. Did you recognize at that moment that this might become a time when it would be harder to protect civil liberties?

Judge ROBERTS. I think—I don't recall recognizing that in particular, but that is, of course, always the challenge in times of war and in times of stress, whatever the cause. I think it is the obligation of the courts to remember, just as really the model of the D.C. Circuit, from our earliest case, when the treason trial of Aaron Burr, to calmly poise the scales of justice. The emphasis is on calmly. It requires a certain dispassion, a certain separation from the passions of the moment.

Senator FEINGOLD. That is absolutely right and that is why I want to follow up on what Senator Leahy asked about earlier—a different time, a different challenge. As a Nation, we can now look back at wartime Supreme Court decisions like *Korematsu* v. *United States* with something like bewilderment. We talked about it earlier. To me, it seems inconceivable that the United States Government would have decided to put huge numbers of citizens in detention centers based on their race and that the Supreme Court would have deferred to the President's decision to do so.

Do you believe that *Korematsu* was wrongly decided?

Judge ROBERTS. It's one of those cases that I don't think it's technically been overruled yet, but I think it's widely recognized as not having precedential value. I do think the result in that case—*Korematsu* was actually the—considered the exclusion and not the actual detention, but the exclusion of individuals based on their ethnic/racial background from vast areas. It's hard for me to comprehend the argument that that would be acceptable these days.

Senator FEINGOLD. It is often included, if you list decisions that are sort of considered some of the worst decisions in the history of the Supreme Court—

Judge ROBERTS. Yes.

Senator FEINGOLD.—with *Plessy* v. *Ferguson* and *Dred Scott* and others. Is that a fair characterization of your view—

Judge ROBERTS. Yes.

Senator FEINGOLD.—of *Korematsu*?

Judge ROBERTS. Yes.

Senator FEINGOLD. Are there any elements of the Government's response to September 11 that you think 50 or 60 years from now we as a Nation will look back on with regret?

Judge ROBERTS. Well, I'm sure there are some, Senator, and when you have the benefit of 50 or 60 years to look back as opposed to the particular demands of the moment and the perceived demands, I'm sure it's a different perspective. I'd hesitate to mention any in particular because so many of these issues are coming before not only the Supreme Court, but the court on which I now sit, and I will have to confront those cases, I think, regardless of what happens here. So I'd hesitate to identify particular areas of concern.

Senator FEINGOLD. I understand your caution. I don't think we need to wait 50 or 60 years for some. For example, do you have any concerns about the practice of extraordinary rendition, of our Government secretly sending people to countries that we know use torture?

Judge ROBERTS. Again, Senator, that is something that could come before the Court in one form or another and I think I have to refrain from commenting on it.

Senator FEINGOLD. How about the Federal Government using immigration laws to round up and detain people for months, often without regard for whether they had any connection to the September 11 investigation, which actually in this case the Justice Department Inspector General later heavily criticized? Does that trouble you?

Judge ROBERTS. Well, yes, certainly, at a basic level of appreciating that this is a reaction in a particular way that raises serious questions. I'm very hesitant, though, again, to express a view on legality because those issues could come before the Court. They are coming before the Court, and they're coming not only before the Supreme Court, but the court on which I now sit.

Senator FEINGOLD. Let's go to one that has already come before the Court, the *Hamdi* case. It is one of the most significant recent decisions restraining executive branch power. In that case, eight members of the Court found that the Government had gone too far in claiming the right to detain and hold a U.S. citizen incommunicado within the United States without access to a lawyer and without being charged with a crime. The case actually resulted in four different opinions with four different views on the President's power to detain a U.S. citizen indefinitely and without trial, ranging from Justices Souter and Ginsburg, who found that the President does not have any authority to detain citizens as enemy combatants because such detentions had not been congressionally authorized, to Justice Thomas, who would defer entirely to the executive branch.

Which of the four opinions in *Hamdi*, a case that has already been decided, would you say best approximates your views on the Executive power to designate enemy combatants: the prevailing opinion, the Souter-Ginsburg opinion, the Scalia-Stevens dissent, or the Thomas dissent?

Judge ROBERTS. Well, Senator, that does get into the area of asking me to comment on which opinions I think are correct that I don't feel it's appropriate for me to go. I do know that the approach

in this area is the approach set forth by Justice Jackson in his concurring opinion in the *Youngstown* case. That has set the framework for consideration of questions of Executive power in times of war and with respect to foreign affairs since it was decided.

And as you know, the issue in those cases and in many of the cases in the Supreme Court is whether Congress has endorsed the Executive action, in which case the President has his powers and the powers of Congress; whether Congress has prohibited the Executive action, in which case all he has is whatever residual authority he has less the power of Congress; or what often happens, that vast middle area where it's impossible to tell or there's argument about whether Congress has approved the action or not.

The *Dames and Moore* case that was decided in 1981 is an example of that, when to resolve the Iranian hostage crisis the President abrogated claims and relegated those with claims to the Iranian Claims Tribunal. The issue there, the Court looked back at a variety of congressional enactments going way back to the Civil War to try to determine if this type of exercise of authority is something Congress endorsed or opposed.

Senator FEINGOLD. But with regard to these opinions, and I understand you are hesitant to comment on a particular opinion or the nature of the reasoning, but which of the approaches in terms of the actual finding of the opinion, do you find closest to your view?

Judge ROBERTS. Well, again, I don't remember which of those opinions follows the *Youngstown* analysis the most closely. My understanding of the appropriate approach in this area is that it is the *Youngstown* analysis, the one set forth in Justice Jackson's concurring opinion, and I think that is the most appropriate way to flesh out the issues. You do need to understand, because this is an area in which judges need to understand, there is often conflict between the branches and you do need to at least set the table correctly to understand, is the President acting with congressional support, against it, or do we have to try to determine which of those areas it is? And I think you do need to lay that analysis out before deciding the case.

Senator FEINGOLD. Last month when I was home in Wisconsin, a constituent came up and said to me that he believed the D.C. Circuit decision in the *Hamdan* case, a different case, which you joined in, to uphold the Government's ability to try a Guantanamo Bay detainee by military commission, should disqualify you from being on the Supreme Court. This is apart from the issue that Senator Schumer and I wrote you about, which I will turn to later.

I want to know, with regard to the substance of the decision, why do you think someone would think that your decision in that case—why would somebody come up to me and say that your decision in that case should disqualify you from consideration as a Supreme Court Justice?

Judge ROBERTS. Well, Senator, you've touched upon an area in which I cannot comment under the—that case is still pending. It's pending before the Supreme Court. Under the Judicial Canons of Ethics, Canon 3–A(6), I'm not supposed to comment publicly in any way about a case that's still pending.

Senator FEINGOLD. I'm not asking you to comment on the case. I am asking you why you think somebody who I represent would care enough about this issue that they would say this should be a disqualifier—in other words, characterize what is the issue in the case that would make somebody that concerned that they would make such a statement?

Judge ROBERTS. Well, the issue involves the same sort of issues that you began the discussion with, the question of civil liberties in wartime, and certainly I understand people having strong views on that particular question. But whether the decision on the merits was correctly resolved or not, or anything about it, I'm just absolutely prohibited from talking about it by those judicial canons. There's even an advisory opinion that explains that that canon applies to a Senate confirmation hearing. So my ethical obligation not to comment publicly on a case that's still pending prevents me from saying anything more.

Senator FEINGOLD. Of course, I respect your judgment on these matters, but I believe that it's important that the nominee indicate a sense of why people in this country might have some anxiety on this point.

Judge ROBERTS. Well, certainly—

Senator FEINGOLD. The difficult events that have occurred since September 11th create a climate sometimes of fear, in particular, fear of Government power, that I think it is important not only for Members of Congress but even members of the Supreme Court to help minimize, and I am just trying to get a sense if you feel that concern in the Nation.

Judge ROBERTS. Well, I certainly don't minimize the significance of a decision by a court of appeals or by the Supreme Court about the scope of Executive authority in this area, about its impact on individual liberties, about the issues of separation of powers and whether the relation between the Congress and the Executive—whether the Executive is acting with congressional endorsement and support or in the face of congressional opposition. Those, of course, are very sensitive issues and always have been throughout our history. I certainly appreciate that. Those are significant matters. It's just that I'm prohibited from talking about the substance of the case.

Senator FEINGOLD. Let me talk to an aspect of the case that I think you can speak to. Many people were surprised to learn in your questionnaire submitted to the Committee that you were interviewed by the Attorney General in connection with a possible vacancy on the Supreme Court on April 1st of this year, just 6 days before you sat on the panel that heard oral arguments in the *Hamdan* case, and that while the case was still pending, before a decision was issued, you had additional interviews in May with the Vice President, the White House Counsel, Mr. Karl Rove, and other top officials.

I am going to give you an opportunity to explain why you think it was not necessary for you to recuse yourself from the case, but first I would like to know: Did the possibility of recusal because you were under serious consideration for the Supreme Court occur to you, or was it raised with you at any point prior to the oral argument in the case?

Judge ROBERTS. Senator, that, again, is a question I can't answer for you. I can't address that. There's a motion pending in the Court seeking to file a petition to recuse, and that motion is pending. It's a matter I can't talk about outside of the judicial process.

In addition, because the *Hamdan* case itself is still pending, I don't think that's appropriate for me to address that.

Senator FEINGOLD. Judge, I am a little disappointed with that answer. As you know, Senator Schumer and I sent you a letter asking questions about this issue, and then we received a letter on September 1 from the Assistant Attorney General for Legislative Affairs at the Department of Justice on your behalf. It says, "Your August 24th letter requests that Judge Roberts answer certain questions regarding the D.C. Circuit's recent decision in *Hamdan* v. *Rumsfeld*. As you know, Chairman Specter has scheduled hearings on Judge Roberts's nomination to begin immediately after Labor Day. At that time, Judge Roberts will be available to respond to questions from all Senators on the Committee."

Now, I took that to mean a little more than telling me you couldn't talk about it. Are you now refusing to answer a question even about when this issue—

Judge ROBERTS. Senator—

Senator FEINGOLD.—came to your attention?

Judge ROBERTS. Senator, we're talking about the canons of judicial ethics. They're quite clear on the subject. They say I may not talk about a matter that's pending before the Court.

Senator FEINGOLD. Even when it first came to your attention?

Judge ROBERTS. That matter is still—is pending before the Court. My hands are tied. It's not something I can discuss under the canons of ethics.

Senator FEINGOLD. I guess I will have to move on. Let's go to voting rights. I want to follow up to Senator Kennedy's questions about the Voting Rights Act and, in particular, about your opposition to amendments to the Act in 1982 when you were an adviser to the Attorney General in the Reagan Administration's Justice Department.

In 1982, Congress voted overwhelmingly to amend Section 2 to reinstate the test for vote dilution that many lower courts had used prior to the *City of Mobile* case, one that looked, as we talked about earlier, at the effects of an electoral scheme on the ability of minorities to elect candidates of their choice rather than on the intent behind this scheme.

While you were in the Reagan Justice Department, you seemed to have done almost everything in your power to thwart that congressional effort. Your view was that the intent test should stand. This was the policy position of the Justice Department, as you have indicated, and you wholeheartedly supported it at the time. Your memos make that very clear.

In one memo, you lamented that the House bill then under consideration would make it much easier to attack "such widely accepted practices as at-large voting." Now, those practices, of course, were among the most commonly used systems to prevent the election of any minorities to local government bodies. We know that the effects test put into place in the 1982 amendments to the Vot-

ing Rights Act has been very successful in improving minority representation in Congress and at all levels of Government.

Do you believe today that those gains have been good for the country?

Judge ROBERTS. I think the gains under the Voting Rights Act have been very beneficial in promoting the right to vote, which is preservative of all other rights. The issue about how to extend the Voting Rights Act, again, my position was a member of the staff in the Justice Department. The administration position of extending the Voting Rights Act for the longest period in history, as is, without change, was in no sense reflective of any disagreement with the proposition that the Voting Rights Act was extremely valuable in securing not just the right to vote but all other rights—

Senator FEINGOLD. Well, what I am trying to get at here, Judge, obviously, is this distinction between effects and intent. Let's follow up on the fact that you said that these gains have been good for the country. Do you believe that these gains we have seen in minority representation would have occurred if your view supporting the intent approach had prevailed in 1982?

Judge ROBERTS. Well, I think some of them would have. I don't know if all of them would have. It's obviously impossible to tell, to go back and determine whether a particular application of a different approach would have had the same results or different results. I think that's very hard to tell.

Senator FEINGOLD. Do you still believe that the intent test was the more appropriate standard by which to evaluate vote dilution claims?

Judge ROBERTS. Senator, my personal view of the Voting Rights Act was not something somebody was interested in. You have people who serve on your staff, and their job is to help you implement your views as a Senator. I am just—

Senator FEINGOLD. I am not questioning what your view was then. I am asking what you think now having—and this is pretty settled area, I think you would agree—having seen all this, having been intimately involved in it, knowing it as well as you do. Do you believe that the intent test is still the more appropriate standard by which to evaluate vote dilution claims?

Judge ROBERTS. Senator, I haven't studied the Voting Rights Act to determine whether the intent test or the effects test would have different results in different cases under Section 2. I'm in no position to make a judgment on that.

Senator FEINGOLD. It would be my sense that you would be a person who would—with your enormous abilities and background—to have some sense about that. Obviously, you understand that requiring a voter to prove any additional factor makes it harder for the voter to win the case and that to prove the intent of an entire legislative body can be very difficult, especially when a voting system was put in place many years ago. Requiring African-Americans and Latino voters, many of whom have had limited financial resources, to find evidence of intent was adding an enormous hurdle for them to overcome. And the *Mobile* v. *Bolden* case itself, which was pursued after the Supreme Court's decision in 1980 and before Congress amended the law in 1982, makes it very clear, I think clear to all of us over the years, how difficult that standard was.

African-Americans from Mobile, Alabama, have been unable to elect any candidates to the position of city commissioner for every election cycle for something like seven decades. They challenged the method of electing city commissioners that allowed the same majority to choose all the commissioners all the time in at-large elections. And the evidence was very clear that, as a practical matter, although African-Americans could register and vote, they couldn't elect anyone. But to get relief under the Supreme Court standard which you appear to have supported, they had to go to enormous effort and financial expense to prove discriminatory intent, including hiring a historian who could piece together the motivations of city officials who had designed the electoral system almost a hundred years earlier.

In this situation, the administration was not bound by a Supreme Court decision in deciding what position to take under the proposed Voting Rights Act amendments. So why at that point did you want to make Section 2 cases so difficult to prove?

Judge ROBERTS. Senator, you keep referring to what I supported and what I wanted to do. I was a 26-year-old staff lawyer. It was my first job as a lawyer after my clerkships. I was not shaping administration policy. The administration policy was shaped by the Attorney General on whose staff I served. It was the policy of President Reagan. It was to extend the Voting Rights Act without change for the longest period in history at that point, and it was my job to promote the Attorney General's view and the President's view on that issue. And that's what I was doing.

Senator FEINGOLD. I recognize that. What I am trying to figure out is given the fact that you have followed this issue for such a long time, I would think you would have a view at this point about whether you were right about—or the Department, let's say, since you were working for them, whether the Department was right on seeking to keep the intent test or whether time has shown that the effects tests is really the more appropriate test.

Judge ROBERTS. Well, Senator, I haven't followed the issue or the particular litigation. I had involvement in some litigation when I was in the Solicitor General's office, in which we were effective in proving violations under the Voting Rights Act. Many of those cases arose under issues under Section 5, pre-clearance issues, and not under Section 2.

I as a judge had a case, a three-judge district court case, again, arising under the pre-clearance provisions, but I'm certainly not an expert in the area and haven't followed and have no way of evaluating the relative effectiveness of the law as amended or the last as it was prior to 1982.

Senator FEINGOLD. Well, with all respect, I realize I should move on to another topic, but it just seems given how strongly you stated some of these memos—and I understand you were doing your job—I would think you would have a view today whether or not those strong statements still make sense. But let me move on.

As you know, 42 U.S.C. 1983 is a Federal law that allows Americans to sue those who deprive them of their rights under the Constitution or Federal statutes. Section 1983 is a very important law because it has enabled individuals who are deprived of their rights to such things as Medicaid, public housing, child support enforce-

ment, and public assistance to enforce those rights in Federal court. And I am a little concerned that you seem to have consistently argued for making it harder to bring Section 1983 lawsuits. In briefs you have filed, you advanced a series of arguments to effectively reverse decades of Supreme Court decisions and restrict Americans' ability to enforce Federal statutory rights under Section 1983.

As Deputy Solicitor General, you co-authored an amicus brief and argued in front of the Supreme Court in a case called *Wilder* v. *Virginia Hospital Association*. You said that individual Medicaid providers should not be able to sue under Section 1983 to enforce a provision of the Medicaid statute which requires States to reimburse them for services at reasonable rates. One of the arguments you made is that in order for a statutory right to be enforceable under Section 1983, the Court must find that the Congress clearly intended "to authorize private enforcement of that right in Federal court." You repeated this argument in another case you later argued when you were in private practice, *Gonzaga University* v. *Doe*.

The Supreme Court rejected your arguments in *Wilder* and found that the Medicaid providers could sue. In the later *Gonzaga* case, the Supreme Court specifically rejected your argument and found that it was not necessary for plaintiffs in a Section 1983 case to show that Congress intended to create a private right of action to bring a lawsuit, and Section 1983 already supplies a cause of action.

What role did you play in deciding that the Government would participate as amicus in the *Wilder* case? And what role did you play in developing the argument that it made? And did you agree with the position that the Government took in the case?

Judge ROBERTS. Well, I'll answer that question, but before I do so, the position I advanced in the *Gonzaga* case prevailed. The argument that we made on behalf of the university—I was obviously representing the university's position, and they prevailed before the Supreme Court.

In the *Wilder* case, the determination to participate as an amicus was made by the Solicitor General, and I don't recall a particular role in that case. I worked on the brief. I presented the argument. We lost that case 5–4. It was a close issue. All of these issues go to the question of what Congress intended to do. If Congress had spelled out whether or not a right should be enforceable in Court, that is what the determination would be in Court. These issues arise only because of confusion over whether or not Congress has spelled out that a right should be enforceable in Federal court for damages or not. And in the *Wilder* case, the Court determined 5–4 that the right should be enforceable in Federal court. We were as an amicus supporting one of the States. I don't remember which one it was. And the State was making the argument that there is—the right is—the issue in all of these cases is whether the right should be enforceable administratively as opposed to—

Senator FEINGOLD. Excuse me. I am just about to run out of time. Let me point out the Supreme Court did not accept the argument that the plaintiffs had to show that Congress intended to create a private right of action. And I am wondering now, do you now agree with the argument that you have consistently made, both as

a Government lawyer in *Wilder* and while in private practice in *Gonzaga*, that individuals should not be able to sue under Section 1983 to enforce a right unless the Supreme Court finds that Congress clearly intended to authorize private enforcement of that particular right in Federal court?

Judge ROBERTS. Well, the *Gonzaga* decision, which resulted—there were various arguments made in the brief. The ruling of the Court was in favor of the university that I was representing. And the determination in the *Gonzaga* case about what should be shown and what has to be shown is one of the precedents of the Court that I would follow, as any other, consistent with rules of *stare decisis*. That's not an area in which I have any particular view. I've argued both sides of that issue. On behalf of plaintiffs, I argued in favor of it, and on behalf of defendants, against it.

Again, the issue is not the enforceability, as in *Gonzaga*. The issue was should individuals be allowed to bring suit as opposed to action by, in that case, the Department of Education.

Senator FEINGOLD. Thank you for your answers, Judge Roberts.

Chairman SPECTER. Thank you, Senator Feingold.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

I imagine the reason that you argue different positions is because people paid you, is that correct?

Judge ROBERTS. That's how I made my living, Senator.

Senator GRAHAM. I can relate to that.

[Laughter.]

Senator GRAHAM. I imagine it must be very hard to figure out what Congress intends. Do you agree with that?

Judge ROBERTS. Sometimes it's easier than others.

Senator GRAHAM. Yes.

Judge ROBERTS. And sometimes it's hard to read the tea leaves.

Senator GRAHAM. I can relate to that also.

I want to read an excerpt from the National Association of Women Lawyers and their evaluation of you, 8–30–05. "As a lawyer and judge, based on interviews the Committee conducted, Judge Roberts has treated individual women lawyers fairly and with respect, has fostered careers of women lawyers, has been helpful in enabling women to address worklife balance issues while advancing professionally, and has been consistently described as respectful to female colleagues, female lawyers appearing before him, and female employees."

You have been asked about every case I think ever written by anyone. I would like to talk to you a little bit about life. The idea of judging you based on this section of the Commerce Clause and that section of the Commerce Clause is important, but I think most Americans want to know a little bit about you. From what I can tell, the people who have worked with you and against you generally like you, and that you have been described as brilliant, one of the best legal minds of your time, well-qualified, the adjectives go on and on, and I want the record to reflect that comes from people who know you the best. The best indication of a good lawyer is how people on the other side think of you, and we will get some excerpts from the record to put that into the record.

Apparently, from what I can tell, you conduct your life in a noble, honorable manner, that you have been a good litigant, and that you have fought for your causes, and you have done so to earn respect of those on both sides of the aisle.

But there is a greater issue here about who you are. Justice Rehnquist was your mentor; is that correct?

Judge ROBERTS. He is certainly someone from whom I learned a great deal, yes.

Senator GRAHAM. So if I was trying to figure out who John Roberts is, and a little bit about him, I will ask this question. Write the legacy of Justice Rehnquist for a minute or two. What would you say if given that task?

Judge ROBERTS. Well, you know, I think if you were able to ask him, he would talk about being a grandfather, being a father, being a husband.

Senator GRAHAM. I am asking you.

Judge ROBERTS. But the important point is that those were important things in his life, and he appreciated the need to recognize that those are the most important things.

With respect to the law, to which he devoted his professional life, I think a big part of the legacy that he leaves is a Supreme Court in which all of the members respected and admired him because of his fairness in administering the Court and conducting the important responsibilities like managing the Conference, and assigning opinions.

You can go back in history and look at what other Chief Justices did. Some were, in terms of that administrative responsibility, some were disasters. You look at Harlan Stone. His idea of running the Conference, he said what he thought, then the next senior Justice said what he thought, then Justice Stone critiqued that. Then the next Justice, and then Justice Stone critiqued that. And the result was the conferences went on for days, and everybody ended up hating each other.

Senator GRAHAM. So he ran a good ship. I think we all agree with that. And his colleagues respected him whether they disagreed with him or not. But the basic question is, when you write about the legacy of a Supreme Court Justice, you write more than about being a grandfather and more about running a tight ship, especially Chief Justice. Would you agree with the idea that from a conservative point of view, he was the gold standard?

Judge ROBERTS. I think he was a very effective advocate on the bench for a view of the Constitution that is one of limited and separated powers—

Senator GRAHAM. Do you share that view?

Judge ROBERTS. I do. I think that the—now, I have to tell you that whether as a judge on the court of appeals, or if I am confirmed on the Supreme Court, I will certainly be my own man, and there are—

Senator GRAHAM. No one is doubting that. No one is doubting that you will not try to be fair. But the big theme, 30,000-foot view of you, is that when you look at Judge Roberts, you are looking at someone in the mold of a Rehnquist. Is that a fair assessment?

Judge ROBERTS. Well, you know, I admire the late Chief Justice very much, but I will have to insist that I will be my own man,

and I hesitate to be put in anybody's mold, and I would certainly approach the cases according to the judicial philosophy that I have developed over the years. In many respects it's similar to his, in its recognition I think of the limited role that judges should have, and of sufficient and appropriate modesty and humility, a recognition that—

Senator GRAHAM. The idea of a dramatic departure under your watch from the Rehnquist era is probably not going to happen, is that true?

Judge ROBERTS. Given my view of the role of a judge, which focuses on the appropriate modesty and humility, the notion of dramatic departures is not one that I would hold out much hope for.

Senator GRAHAM. I know people do not like being labeled, put me in that category, but I am in a business where people label me all the time. But I ask for it, I run for office. But we do tend in our business of politics to try to label people, particularly when we are talking about judges. When the President introduced you to the United States, to the people of the United States, he said you were a strict constructionist. Do you know what he meant by that and why he chose to use those words?

Judge ROBERTS. Well, I'd hope what he meant by that is somebody who's going to be faithful to the text of the Constitution, to the intent of those who drafted it, while appreciating that sometimes the phrases they used, they were drafting a Constitution for the ages to secure the blessings of liberty for their posterity, they were looking ahead, and so they often used phrases that they intended to have a—

Senator GRAHAM. Does that term make you feel uncomfortable?

Judge ROBERTS. No.

Senator GRAHAM. Now, from a 30,000-foot view of things, it seems to be that we are going to have a referendum on the Reagan era here, which I welcome. I sort of enjoyed it. He won 49 States. He did pretty good. You were a part of the Reagan era as a young lawyer. When I use the word, term, "Reagan revolution," what does it mean to you?

Judge ROBERTS. Well, it means to me generally a change in attitude. President Reagan always presented an optimistic view. He always told us that the best days of our country were ahead of us, and he reasserted basic fundamental truths in areas like foreign relations. We were going to stand up to the Soviet Union. We're proud of our system of Government. That's the right approach, not the Soviet approach. And people who have come of age after the Berlin Wall has fallen sometimes don't understand what it meant at that time.

Senator GRAHAM. When it comes to the law, what does the term "Reagan revolution" mean to you?

Judge ROBERTS. I think it means a belief that we should interpret the Constitution according to its terms, that judges don't shape policy, that judges interpret the law, and that legislators shape policy. The executive branch executes the law.

Senator GRAHAM. Does it also mean that when you talk about affirmative action and you set up a quota system, that is not right?

Judge ROBERTS. President Reagan's policy was opposed to quotas, which were much more rigid at the time. People need to ap-

preciate, 24 years ago the idea of a quota was a rigid set aside. We now have the recent Supreme Court decisions talking about consideration of particular factors as one factor in an affirmative action program. President Reagan was in favor of affirmative action, and he was opposed to quotas.

Senator GRAHAM. When it comes to voting rights, as I understand—and we have talked a lot about it, and we probably know more than all of us ever dreamed we would know about the Voting Rights Act—the you were implementing a policy of President Reagan that wanted to pass the Voting Rights Act in its form that you received it; is that correct?

Judge ROBERTS. The proposal was to extend it for the longest period in history without change.

Senator GRAHAM. And we have been through a long discourse about the effect and intent test. I think you have explained yourself very well, that the Supreme Court in the *Mobile* case said the intent test applies to Section 2; is that right?

Judge ROBERTS. Section 2.

Senator GRAHAM. Politics took over after that, did it not? Because the effect test no longer—that is not the test. Is it not some compromise between Senator Kennedy and Senator Dole?

Judge ROBERTS. There was a compromise in the test under Section 2, which is articulated in a paragraph describing what the criteria are and including a caution that this should not be read to promote proportional representation which was some of the concern that the Attorney General and President Reagan had.

Senator GRAHAM. So between Dole, Senator Kennedy and President Reagan, a new test was called the "Totality of the Circumstances?"

Judge ROBERTS. Yes.

Senator GRAHAM. When you said that you—Senator Kennedy said something I thought was very important, that courts should not stand in the way of elected officials who are trying to right wrongs. The point I am trying to make here is that you were picked by a conservative President because you have associated yourself with conservative administrations in the past, advising conservative Presidents about conservative policies. And there is another selection to be made, and you are going to get the same type person. You can—I am not even talking to you now.

[Laughter.]

Senator GRAHAM. To expect anything else, is just unfair. I do not expect, I did not expect President Clinton to pick you, not because you are not well-qualified, not because you are a good person, just a different political, legal philosophy. That is what we are going to have to come to grips with here. Justice Scalia—do you consider him conservative?

Judge ROBERTS. Yes.

Senator GRAHAM. Do you think you are more conservative than he is?

Judge ROBERTS. I don't know. I mean I wouldn't—

Senator GRAHAM. He got 98 votes. I think you are conservative, but I think you are one of the great minds of our generation, of our time, and I am dying to find out if you get any votes on the other side. Time will tell.

Let us talk about righting wrongs here. I think it stinks that somebody can burn the flag and that is called speech. What do you think about that?

Judge ROBERTS. Well—

[Laughter.]

Judge ROBERTS. We had the Flag Protection Act after the Supreme Court concluded that it was protected speech.

Senator GRAHAM. Show me where the term "symbolic speech" is in the Constitution.

Judge ROBERTS. Well, it's not, and—

Senator GRAHAM. It is not. They just made it up, did they not? I think it stinks that a kid cannot go to school and say a prayer if he wants to voluntarily. What do you think about that?

Judge ROBERTS. That's something it's probably inappropriate for me to comment on.

Senator GRAHAM. What do you think Ronald Reagan thought about that?

Judge ROBERTS. His view was that voluntary school prayer was appropriate.

Senator GRAHAM. I think it is not right for elected officials to be unable to talk about or protect the unborn. What do you think about that?

Judge ROBERTS. Well, again, Senator, these are issues that are likely to come before the Court, and I cannot comment on those particulars because—

Senator GRAHAM. Why are judges more capable of protecting or talking about the unborn than elected officials?

Judge ROBERTS. Well, again, those are issues that come before the Court on a regular basis in particular cases, and whether on my current court or the future court, I need to be able to approach those cases with an open mind and not on the basis of statements I make during a confirmation hearing.

Senator GRAHAM. The point is that righting wrongs is a very subjective thing, and you will be asked to decide the fate of people, with individual needs and individual desires, based on particular fact patterns and legal briefs. I am confident you can do that, and that you will do that, and I do not think you need to make a bargain with me to right all the wrongs that I see in life to sit on the Supreme Court.

What is it like to go through the nominating process in 2005 from a personal point of view? I have been watching television, channel flipping, and I see some awful things said about you. Have you seen those things?

Judge ROBERTS. I have seen some things, yes.

Senator GRAHAM. How does that make you feel?

Judge ROBERTS. Well, some of the mischaracterizations, you know, you get annoyed at them. I don't like them. Some of the things you see, you get pretty upset about.

Senator GRAHAM. How does it make your family feel?

Judge ROBERTS. They're—I would say they get upset about some of the things, as well—

Senator GRAHAM. But you know it is a free country and that is just the way it is, right?

Judge ROBERTS. It is and it's an expression I've been using a lot lately. It is a free country and it's a good thing that it is.

Senator GRAHAM. Let's not talk about you now, but I would like you to comment to us, give us some advice here. We are always trying to advise the President through you. What is the long-term effect on the quality of candidates that we will be able to recruit for jobs like the Supreme Court if the current process continues and grows over time?

Judge ROBERTS. I think it is a very serious threat to the independence and integrity of the courts to politicize them. I think that is not a good development, to regard the courts as simply an extension of the political process. That's not what they are.

I've been fortunate for the past 2 years to serve on a court in which all of the judges, and they come—in the D.C. Circuit, they come from very active careers and public life, sometimes very identified politically, but it's a court where those judges put aside those ties and those views and become judges all focused on the same mission of vindicating the rule of law.

And if you look at the decisions on the D.C. Circuit, you'll see that we are almost always unanimous. We almost always come out the same way. And to the extent there are disagreements, they don't shape up along political lines. That is an ideal. But the more and more that the process becomes politicized, the less likely that that's going to happen.

Senator GRAHAM. Another line of inquiry that's been disturbing to me is that we talk about the clients you represent, whether it be the Ronald Reagan Administration or some private sector client, and we tend to hold that maybe unpopular position against the lawyer. There is more and more of that happening. We have had court of appeals nominees that were accused of being insensitive to the disabled population when they won their case nine-to-nothing in the Supreme Court defending a university from the idea that they were not covered under the Americans with Disabilities Act.

I really do worry that in the future, that if we up here start holding who you represent against you, that young lawyers in the future will pass on the hard cases. What are your thoughts about that?

Judge ROBERTS. You know, it's a tradition of the American Bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients. The most famous example probably was John Adams, who represented the British soldiers charged in the Boston Massacre. He did that for a reason, because he wanted to show that the Revolution in which he was involved was not about overturning the rule of law, it was about vindicating the rule of law.

Our Founders thought that they were not being given their rights under the British system to which they were entitled, and by representing the British soldiers, he helped show that what they were about was defending the rule of law, not undermining it, and that principle, that you don't identify the lawyer with the particular views of the client, or the views that the lawyer advances on behalf of the client, is critical to the fair administration of justice.

Senator GRAHAM. Do you believe it is being eroded?

Judge ROBERTS. I do think there is an unfortunate tendency to attack lawyers because of the positions they press on behalf of clients and I think that's unfortunate.

Senator GRAHAM. I am going to give you some examples of a sitting Supreme Court Justice and her positions and basically take us back to the good old days where you could have what I think are extreme positions and still make it.

Are you familiar with the ACLU?

Judge ROBERTS. Certainly.

Senator GRAHAM. In the conservative world, how does that rank on the food chain?

[Laughter.]

Judge ROBERTS. I don't know that I could comment on that, but it's—they have a consistent position of promoting civil liberties and a particular view on that.

Senator GRAHAM. If you came to the Reagan administration and the top thing on your resume was the General Counsel for the ACLU, do you think they would hire you?

Judge ROBERTS. It might make it a little harder.

[Laughter.]

Senator GRAHAM. I think that is a good observation. Well, we have on the sitting Supreme Court now the former General Counsel for the American Civil Liberties Union, who is a very nice lady, extremely qualified. I don't agree with her hardly at all, but a great lawyer. She has written that the age of consent for women should be 12, that all prisons, to have gender equality, men and women should be in the same prison because when you separate them, women prisoners somehow are discriminated against. She wanted to do away, or argued the idea that Mother's and Father's Day should be done away with because it stereotypes men and women, that there is a constitutional right to prostitution.

I can give you, and I will introduce into the record, writings from her point of view that most conservatives would find totally unacceptable. But this person, this lady, the former ACLU Executive Counsel, is sitting on the Supreme Court and she got 96 votes. She said that there should be Federal funding for abortion. Ninety percent of our caucus is pro-life, is that about right? Pretty close? I can assure you that if a Republican was going to make their vote based on abortion thinking, she would have gotten no votes. Most Americans don't want Federal funding of abortion even though they are divided on the issue of a woman's right to choose. She has argued that the Equal Protection Clause guarantees a right to abortion.

Now, I completely differ with that, and I am sure the conservatives in the Senate at the time of her confirmation completely differed with that, the idea that the age of consent should be 12, that bigamy statutes are discriminatory to women. I can go on and on and on.

The point I am trying to make is that all of that was put aside, who she represented and what she believed and the positions she took, and somehow back then they were able to see in Justice Ginsburg a well-qualified, brilliant legal mind, and they deferred to President Clinton because he won the election. Whether that happens to you, I don't know, but for the sake of the country and the

rule of law, I hope it does. I hope you can be in the ballpark of where she wound up.

My last two questions. In your opening statement, you articulated the rule of law in a way that I thought was just outstanding. It was emotional. It made sense. Average people could understand it, that the courtroom is a quiet place, Judge Roberts, where you park your political ideology and you call the balls and you call the strikes and you try to give every American a fair shake and you put politics in its perspective.

What is your biggest concern, if any, about the rule of law as it exists in America, and what are the biggest threats to the rule of law as we know it today?

Judge ROBERTS. Well, you know, the rule of law is always vulnerable because the Supreme Court, as has been pointed out often in history, has only the persuasive power of its opinions to command respect. There have been famous episodes in the past, you know, President Jackson, Chief Justice Marshall has given his opinion, let's see him enforce it, other episodes of that sort. But over time, the legitimacy of the Supreme Court has been established and it's generally recognized across the political spectrum that it is the obligation of the Court to say what the law is and that the other branches have the obligation to obey what the Supreme Court says the law is.

The one threat, I think, to the rule of law is a tendency on behalf of some judges to take that legitimacy and that authority and extend it into areas where they're going beyond the interpretation of the Constitution, where they're making the law. And because it's the Supreme Court, people are going to follow it even though they're making the law. The judges have to recognize that their role is a limited one. That is the basis of their legitimacy.

I have said it before and I will just repeat myself. The Framers were not the sort of people, having fought a revolution to get the right of self-government, to sit down and say, let's take all the difficult issues before us and let's have the judges decide them. That would have been the farthest thing from their mind. The judges had the obligation to decide cases and the authority to interpret the Constitution because they had to decide cases and they were going to decide those cases according to the law, not according to their personal preferences.

Judges have to have the courage to make the unpopular decisions when they have to. That sometimes involves striking down Acts of Congress. That sometimes involves ruling that acts of the Executive are unconstitutional. That is a requirement of the judicial oath. You have to have that courage. But you also have to have the self-restraint to recognize that your role is limited to interpreting the law and doesn't include making the law.

Senator GRAHAM. What would you like history to say about you when it is all said and done?

Judge ROBERTS. I'd like them to start by saying he was confirmed.

[Laughter.]

Judge ROBERTS. Whether they say that or not, I would like it—the answer is the same. I would like them to say I was a good judge.

Senator GRAHAM. Thank you very much. I have no further questions.

Chairman SPECTER. Thank you very much, Senator Graham.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman, and thank you, Judge. It has been a long day, and I guess we have a little bit longer to go. But you have been talking something about baseball. We have been talking about it this morning. I will start out by pitching you something of a softball, an issue, I think, on which reasonable Americans can agree, and those are the recent and abhorrent attacks on the Federal judiciary.

Many Americans have become concerned that the judiciary has come under escalating and, many would say, inappropriate and unjustified criticism from certain quarters, not just criticism of the legal reasoning, it goes way beyond that. The rhetoric gets pretty hot. And as you know, one of your mentors and our late Chief Justice Rehnquist was a passionate defender of the independence of the judiciary. I did not agree with him on a whole lot of things, but I sure respected that. And he did a good job, both with our Committee and everywhere else, making sure that the independence of the judiciary was defended.

So you will be Chief Justice. We have not talked much here about your role as Chief Justice. The Chief is the leader of the courts, the head of the judiciary, and I think one of your important roles is to defend the independence of the judiciary. So I am going to read you a few statements that were made about Federal judges in recent months.

Televangelist Pat Robertson has claimed that "an out-of-control judiciary is the single greatest threat to democracy," that judges are creating a "tyranny of oligarchy," and that the threat posed by the Federal judiciary is "probably more serious than a few bearded terrorists who fly into buildings."

Do you find that—do you disagree with that statement?

Judge ROBERTS. I do disagree with that conclusion, Senator. I think it's perfectly appropriate for people to criticize decisions of judges. That comes with the territory. It's a healthy thing. That type of criticism and analysis, saying the judge got it wrong, the court got it wrong, is healthy and good. And the only thing I would say is I'm not sure whether that criticism is along that line or—but personal attacks on judges for doing their best to live up to the judicial oath, that is something that I don't think is appropriate.

Senator SCHUMER. Well, isn't this language—I am asking about this language. This does not seem to be a legal didaction about a court case. When somebody says—

Judge ROBERTS. Oh, it's not an analysis—

Senator SCHUMER.—judges are probably more serious—the threat posed by Federal judges is "probably more serious than a few bearded terrorists who fly into buildings," isn't that kind of quote abhorrent and inimical to our system?

Judge ROBERTS. I don't agree with that, and all I'm saying is that I think people have a right to be critical of judges, but attacks on judicial independence are not appropriate because judges—and certainly even judges with whom I disagree on the results or particular merits, they should not be attacked for their decisions. The

decisions can be criticized, but attacking the judges I think is not appropriate.

Senator SCHUMER. Would you be a little stronger than that in terms of language like this? I mean, "not appropriate" is kind of mild in these kinds of inflammatory statements about the judiciary that you may soon be entrusted with protecting.

Judge ROBERTS. Senator, I said yesterday that, if confirmed, I would be vigilant to protect the independence and integrity of the Supreme Court and the judicial branch, and that is true. An independent judiciary is one of the keys to safeguarding the rule of law. Again, I said that yesterday, and I believe that. And to the extent the judiciary is attacked, I will be vigilant to respond and defend it.

Senator SCHUMER. Let me read you two more and just tell me how you would characterize them. Conservative lawyer and author Edwin Vieira suggested that Justice Kennedy, an appointee of Ronald Reagan, ought to be impeached for his decisions and quoted Stalin's infamous problem-solving solution of "no man, no problem." And Tony Perkins of the Family Research Council said, "The Court has become increasingly hostile to Christianity, and it poses a greater threat to representative government more than anything, more than budget deficits, more than terrorist groups."

Do you strongly disagree? Don't those statements turn your insides a little bit?

Judge ROBERTS. You know, again, I don't agree with them, but it's a free country. They're free to say what they wish. But the issue of impeachment was resolved in the Salmon Chase hearings. The basic principle was established. You don't impeach judges if you disagree with their decisions. That's not what the impeachment provision is.

Senator SCHUMER. I take it—and just answer. If you became Chief Justice, you would do whatever you could to dispel these kinds of notions and oppose people who said things like this when they say these things?

Judge ROBERTS. Well, I would do what I can, Senator, to make it clear to people—and I do think it's an important educating function that what judges do promotes the rule of law and that the rule of law preserves liberties for all Americans. I'm obviously not going to infringe anybody's First Amendment rights. People are free to say what they—

Senator SCHUMER. I am not asking that. I am asking just your First Amendment opinion of these kinds of things, and the most I guess you said is you disagree.

Judge ROBERTS. Senator, people from all across the political spectrum have attacked judges. They do it now. I've seen some very virulent attacks from all over the political spectrum, and certainly throughout history. Again, judges can stand the criticism of their opinions, but personal attacks I think are beyond the pale.

Senator SCHUMER. Okay. I would like to go over some other things here. I have to say I have been pleasantly surprised by some of your answers today. As you know from our private meetings and my opening statement yesterday, my principal concern is ensuring that we do not have people on our Court who will dismantle the structural protections that have guaranteed our most fundamental

constitutional rights. And what troubles me and why I think many people are bothered by this right now is that the President has openly stated that nominees will be chosen in the mold of Justices who have stated repeatedly their desire to roll back the clock on some of these basic protections.

In my view, over the past 60 or 70 years, maybe longer, three legs have sustained our constitutional rights: the 14th Amendment's guarantees of equal protection and substantive due process, the right to privacy, and a broad delegation of authority to Congress to pass legislation, usually under the Commerce Clause, necessary to protect our Nation's security, the environment, Americans' health, and workers' civil rights.

On these first two, you have given answers that I think show that you want to protect those rights, and I just want to repeat them and just make sure that you are on the record for them. To Senator Biden, he asked, "Do you agree there is a right to privacy to be found in the Liberty Clause of the 14th Amendment?" And you responded, "I do, Senator. Liberty is not limited to freedom from physical restraint. It does cover areas, as you said, such as privacy, and it's not protected only in procedural terms, but it's protected substantively as well." That accurately states your view.

Judge ROBERTS. Yes.

Senator SCHUMER. And on the *Griswold* case and the right to privacy there, you said in reference to Senator Kohl's question, "I agree with the *Griswold* Court's conclusion that marital privacy extends to contraception and availability of that. The Court since *Griswold* has grounded the privacy right discussed in that case in the liberty interest protected under the Due Process Clause." That is your accurate view.

Judge ROBERTS. Yes.

Senator SCHUMER. Okay. Just one question. I know this could take the rest of our time, but if you could answer it succinctly, just tell me how—I am interested in how you will divine what that right to privacy means. I mean, this is going to be an issue in the 21st century that is before us in many, many different ways, and there are no words in the Constitution.

Judge ROBERTS. Well, the Court, for example, I think most recently in the *Glucksberg* case, talked about the necessity of considering our Nation's history, traditions, and practices. As Justice Harlan always explained in his opinions, you need to do that with an appropriate sensitivity to the limitations on the judicial role. Again, you need to recognize that it is not your job to make policy, either under the Constitution or under the statutes. You are interpreting the Constitution. And the appropriate judicial role focuses on those considerations, tradition and history and practice, as developed in the Court's precedents. And that's where I would start.

In any case where the issue came up as to whether or not a particular issue was presented under the Due Process Clause, you begin with the precedents. You analyze them under principles of *stare decisis*, the precedents in this area, just like precedents in any other area, and analyze them in light of those different factors.

All the Justices recognize that in this area they are—you need to be especially careful about the source of the content that you're giving to the right at issue, because it is an area in which the dan-

ger of judges going beyond their appropriately limited authority is presented because of the nature of the sources of authority. You're not construing the text narrowly. You're not looking at a particular statute with legislative history.

All of the Justices recognize that it presents particular challenges.

Senator SCHUMER. Okay. Thank you.

Now, as I said, there are a few things that I think many of us were pleasantly surprised about. There are some that we are troubled about. I think you have answered some questions, but not answered a whole lot of others. And I am going to get into that at another point. But I do find it very perplexing—and I am not going to ask you to comment on this—your use of the so-called Ginsburg precedent. It seems you cite it when you don't want to answer something, but a few times here, when Ginsburg had actually answered those specific questions, you didn't want to answer them, and you ignored the precedent. And I don't think that is what precedents are, even in this more unique role. So I hope you will think about that overnight because I will get back to that tomorrow.

The other thing that has troubled me is the issue of civil rights. Many of us consider racism the Nation's poison. De Toqueville wrote about that in 1832. And we know you wrote these series of memos 20 to 25 years ago. Some of them are written in a tone that suggests you may have been insensitive to discrimination and hostile to equal rights. And I have talked to people who might have felt just that. People have said that.

So my question is not the substance, but do you regret the tone of some of these memos? Do you regret some of the inartful phrases you used in those memos or reference to "illegal amigos" in one memo?

Judge ROBERTS. Well, Senator, in that particular memo, for example, it was a play on the standard practice of many politicians, including President Reagan, when he was talking to a Hispanic audience, he would throw in some language in Spanish. Again, the memos were from me to Fred Fielding. I think Mr. Fielding always found the tone—

Senator SCHUMER. You don't regret using that term? Could you think that some people might find it offensive?

Judge ROBERTS. It was meant to convey the notion—again, as I've described—that when politicians speak to a particular audience in that language, is that offensive to the audience? It was meant to convey that. It was an issue concerning a particular radio interview.

You know, the tone was, I think, generally appropriate for a memo from me to Mr. Fielding, and I know that he never suggested that it was anything other than appropriate.

Senator SCHUMER. I would have to disagree with you, but we will leave it at that.

On a more substantive level, in light of where we are in 2005—admittedly we have progressed in civil rights since 1982—can you identify any policy or piece of legislation you argued for or supported in the Reagan era that you now believe went too far, that you now believe would not be good enough for America? I am not

challenging that you were representing somebody else than, as you have said to us before, but I am asking in hindsight—it is now 2005, you are almost double the years on this Earth. Any of those policies that you think now, using hindsight, shouldn't have been done?

Judge ROBERTS. Well, Senator, I think some 80,000 pages have been released of memoranda that I wrote—

Senator SCHUMER. You can just pick one or two.

Judge ROBERTS. Well, I don't—you know, I have not gone back and re-evaluated all those policies, no. I do know, though, for example, in the area of civil rights, people have talked about memos I wrote about the administration's policy against busing or the administration's policy against quotas. Being against busing and being against quotas is not the same as being against civil rights. President Reagan was against busing. President Reagan was against quotas. But he was in favor of civil rights, and that was the administration position that I was advancing in those memoranda.

Senator SCHUMER. I understand you were advancing someone else's position. I was asking your own view, if there were any regrets or changes in viewpoint of you personally. But we will leave it at that if you don't want to mention any.

Okay. I would like to go to the third leg of protection now and probably spend the rest of my time on this, constitutional rights, the Commerce Clause. Now, just to briefly encapsulate—you have said this—you agree that the Constitution gives the Supreme Court the power to review and invalidate Acts of Congress as was held two centuries ago in *Marbury* v. *Madison*.

Judge ROBERTS. Yes.

Senator SCHUMER. And you also said in questions, I guess, with Senator Kennedy that you agree with the Court's conclusion that segregation of children in public schools solely on the basis of race was unconstitutional, as in *Brown*.

There is a third case that I would like to bring up, and it is the third leg of the framework in a lot of ways, and that is *Wickard* v. *Filburn*. Do you agree with the principle that the Congress has the power under the Commerce Clause to regulate activities that are purely local so long as Congress finds that the activities "exert a substantial economic effect on interstate commerce?" In other words, can Congress regulate commerce that does not involve an article traveling across State lines?

Judge ROBERTS. Well, that's obviously the Court's holding in *Wickard* v. *Filburn*, and reaffirmed recently to a large extent in the *Raich* case. But I would say that because it has come up again so recently in the *Raich* case that it's an area where I think it's inappropriate for me to comment on my personal view about whether it's correct or not. That's unlike an issue under *Marbury* v. *Madison* or *Brown* v. *Board of Education*, which I don't think is likely to come up again before the Court. This was just before the Court last year, and so I should, I think, avoid commenting on whether I think it's correct or not.

Senator SCHUMER. This is not a recent case. This is *Wickard* v. *Filburn*. It is from 1942, I guess it was. It is a basic bedrock of our constitutional law, law after law, the civil rights laws of 1982 and

1965 and 1964 that you talked about previously, are based on the Commerce Clause, not necessarily on *Wickard*.

Judge ROBERTS. No, not on *Wickard*.

Senator SCHUMER. And I understand that, but so much of what we do is based on the Commerce Clause, and you know that there is a movement to greatly cut back on the Commerce Clause, led by Professor Epstein. One of the Justices that the President said he wanted to appoint more Justices like, Justice Thomas, doesn't really believe in the holding of *Wickard*.

And at a time with Hurricane Katrina, in the midst of the war on terror, where we need a strong national Government, I find it—I am not asking you—there has been a holding that has been accepted, and it was accepted in *Raich*, as well, but just about everybody with a few exceptions I mentioned that says you don't need the article to cross State lines to be regulatable under the Commerce Clause by the Federal Government. That seems to me to be as little in dispute as *Griswold*, as *Brown*, in terms of its broad acceptance, in terms of a term that you have used, in terms of the stability of our Government.

I am really surprised that you are unwilling to simply say—I am not asking you for all the variations on the theme, but a fundamental bedrock, which is that Congress can regulate under the Commerce Clause things that don't cross State lines is something that is in some doubt.

Judge ROBERTS. Well, Senator—

Senator SCHUMER. You know, you said that—excuse me. You said that there would be unanimity, just about, or close to it, on issue after issue. Obviously, there are dissents. I think Learned Hand in 1958 said he didn't agree with *Marbury*, but you said you had no problems going along with *Marbury*. In *Brown*, I suppose there are still some people who don't believe in *Brown* here and there.

And here is a bedrock principle, admittedly under attack by what I would call an extreme few, that if we didn't unequivocally back it, not the variations on the theme but the fundamental, the fundamental principle that Congress can regulate if the article doesn't actually cross, the Congress can regulate manufacturing because of its dramatic effect on interstate commerce. And you are unwilling to give Wickard the same status that you give *Griswold*, which was decided 22 years later, or *Brown*, which was decided 12 years later. I mean, I know about *Morrison* and *Lopez*, but they don't challenge the fundamental precept.

I didn't ask you if you fully support *Wickard*. I asked you if you support the proposition that under the Commerce Clause, you don't need the actual article crossing the State line, and you are not willing to say that is settled law, that that is a part of our established way of law?

Judge ROBERTS. Well, Senator, all you have to do is look at the arguments, the briefs in the *Raich* case where that was the issue that was argued, whether or not *Wickard* v. *Filburn* was still good law, whether or not *Wickard* v. *Filburn* should be applied in that situation.

Nobody in recent years has been arguing whether *Marbury* v. *Madison* is good law. Nobody has been arguing whether *Brown* v.

*Board of Education* was good law. They have been arguing whether *Wickard* v. *Filburn* is good law. Now, it was reaffirmed in the *Raich* case and that is a precedent of the Court, just like *Wickard*, that I would apply like any other precedent. I have no agenda to overturn it. I have no agenda to revisit it. It's a precedent of the Court.

But I do think it's a bit much to say it's on the same plane as a precedent as *Marbury* v. *Madison* and *Brown* v. *Board of Education*—

Senator SCHUMER. Or *Griswold*?

Judge ROBERTS. Or *Griswold*. The fact that it was just reconsidered and reargued last year in the *Raich* case suggests that it's not that same type of case, and that's why I'm uncomfortable commenting on it. I have gone farther than many other nominees in talking about cases like *Marbury*, like *Brown*, like *Griswold*, because I thought it was appropriate given the fact that those issues are not, in my view, likely to come before the Court again.

Here's an issue that was just before the Court last year, so I can't say that it's unlikely to come before the Court again and, therefore, I think it falls in the category of cases in which I should tell you I recognize it as a precedent of the Court. I have no agenda to overturn it or revisit it. But beyond that, I think it's inappropriate to comment.

Senator SCHUMER. Well, I would say that—well, let us go to a few more Commerce Clause issues. Again, I think *Wickard* is as accepted, is as part—not *Wickard* per se, but the idea that crossing State lines is not the only thing that you need for the Commerce Clause, that you don't have to have the article cross State lines to be able to regulate it is a bedrock of law after law after law that the Federal Government has passed. Your inability to concede that—

Judge ROBERTS. And I'm not expressing—

Senator SCHUMER. I understand, but—

Judge ROBERTS. I'm not expressing any hostility to the proposition at all. All I'm telling you is that this is a case that was challenged, the application, in the *Raich* case last year. And to say that it's in the same category as *Marbury* or *Brown*, I think is inaccurate.

Senator SCHUMER. But sir, *Griswold* came up in *Lawrence*. I don't known how many years ago that was. You can make the argument that even, somehow or other, somebody challenged precepts that flow from *Marbury*. I certainly—

Judge ROBERTS. And so perhaps I should have taken the approach Justice Scalia took. He wouldn't tell this Committee whether *Marbury* was correctly decided.

Senator SCHUMER. I am glad you didn't do that.

Judge ROBERTS. Well, and then the reward for not doing that is to have additional cases that are very current in terms of the litigation before the Court, and the idea, as well, you said what you thought about *Marbury*. What do you think about the *Raich* case, which just reaffirmed *Wickard* v. *Filburn*? There are two very different parameters.

My approach has been a practical one, not an ideological one, but a practical one, but saying—

Senator SCHUMER. I am sorry. Just explain to me why you can say it about *Griswold*, which I am glad you did, but not about *Wickard*. Both of them have been litigated, tangentially, at least, in the last five or six years.

Judge ROBERTS. Well, *Wickard* was litigated directly in the *Raich* case. I don't think the issue in *Griswold* is likely to come before the Court. It was unlikely—

Senator SCHUMER. Wasn't *Lawrence* an outgrowth of *Griswold* in terms of what the right of privacy is to consenting adults in their bedroom?

Judge ROBERTS. Well, that's one of the issues, but the difference between the issue that was presented in *Griswold* and its ramifications of the analysis, those are two very different issues.

Senator SCHUMER. Okay. Let me ask you just a little bit about—a little more on the Commerce Clause. We have all talked about the hapless toad and the need—the fact that the toad didn't cross State lines didn't lead you to reject the Endangered Species Act under the Commerce Clause but to go seek another possibility. So let me give you a couple of hypotheticals.

Let us say we figured out that somebody could make botulism, or a lot of people could make botulism, a deadly, deadly poison—I think it is one of the seven poisons that the FBI looks for in terms of doing danger to us—that they could make it with materials completely within the State. There was no material that crossed State lines. It is a little bit like the toad. Would you think that the Federal Government, if Congress ordained, would have the ability to regulate that activity?

Judge ROBERTS. I think that sounds a lot like the *Raich* case, where the Court determined the medical marijuana issue even though the regulation of marijuana as an illicit drug—it had interstate impact even if the medical provision of it did not, and so they were willing to look beyond and apply the *Wickard* case, which they reaffirmed the suitability, and conclude that that had a significant effect on commerce, the regulation in general. You didn't have to look at the specific regulation.

It would seem to me that that—

Senator SCHUMER. Would you different that from *Viejo*?

Judge ROBERTS. Well, in *Viejo*, you're dealing with particular species, and the difficulty—and again, it was what another court had looked at, not the activity that was regulated, the interference with the species, but the activity that was taking place and having that impact, the building of a housing development.

Other courts, the Fifth Circuit in the *GDF* case, had argued that the approach of looking at the housing development rather than the particular activity was inconsistent with the Supreme Court's decisions, and what I said is that if there's another basis on which to evaluate it, and there was, and the panel opinion noted, we don't have to reach these other grounds because of our conclusion, that we should focus on those other alternative grounds and see if we could base and uphold the Act on those.

Senator SCHUMER. I understand, and my time is getting close to the end, so—I'm not sure I agree with the large difference between *Raich Viejo*, and the hypothetical that I gave. I think the *Viejo* case

and the hypothetical I gave were limited, but let me just conclude with this.

You know, people wonder, what is all the fuss about? The answer is very simple, and that is that, if certain viewpoints became majority viewpoints on the Supreme Court, we could see the dismantling of the entire apparatus to protect our rights through the narrowing of the Commerce Clause, which I said Justice Thomas already agrees should be narrow, and we have a President who may have—he at least has one more nomination—who said he wants to appoint people in the mold of Thomas.

Not only would the Endangered Species Act go, Title VII would go. OSHA would be gone. The Controlled Substances Act and prohibitions against personal possessions of biological weapons could all be unconstitutional.

Justice Thomas's views on this issue are similar to others. He is against any substantive due process right under the 14th Amendment. He believes that the Establishment Clause would allow the establishment of State religions—of religions in the States. And so this is a—these are serious, serious things. He would invalidate campaign finance laws. He would eliminate affirmative action.

Now, he is just one Justice, but I think it is our job here in the Senate on both sides of the aisle, if we feel that that kind of judicial philosophy, that kind of legal reasoning does not belong in the Court, to find out if nominees ascribe to it, and if they do, look at them warily.

I am not saying you do. As I said, some of the things you have said, I found pleasantly surprising today. But I do think it is our job and I think we are going to continue to do it.

Chairman SPECTER. Thank you very much, Senator Schumer.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Judge Roberts, I appreciate your stamina. I particularly appreciate your responding to the call to public service and I want to say that I would be remiss if we didn't express—if I didn't express what I know all members of the Committee and the Senate feel is the appreciation for your family and their support—

Chairman SPECTER. Senator Cornyn, before you proceed, there has been a request for a short break, so let us take one, 5 minutes.

[Recess 6:43 p.m. to 6:52 p.m.]

Chairman SPECTER. We will resume. The clock has been reset at the full 30 minutes, Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Judge Roberts, let me start on a couple of items that I think will be relatively noncontroversial. Believe it or not—and maybe people watching this proceeding will not believe it—but members of this Committee and Members of the Senate actually do try to work together in a bipartisan basis to pass legislation that we believe is in the best interest of the people who sent us here and the American people.

One area of bipartisan agreement, I just want to reiterate Senator Feingold's comments about cameras in the courtroom. I am a strong supporter of cameras in the courtroom as long as they are unobtrusive and they do not disturb the proceedings or prejudice the rights of the litigants, but I do agree with him that it is impor-

tant. And Senator Grassley, I know is—each Congress introduces legislation on this. I do believe it is important to let the people of the United States know what happens in courtrooms. I think they could learn a lot about their Government. I think it would make them more sensitive to the nature of the decisions that are made there, give them confidence that there are dedicated public servants who serve in the judiciary, who are doing the job of a judge day in and day out in a dignified and distinguished and professional manner.

Along the lines of what Senator Kyl mentioned earlier, there is another area that I think is noncontroversial and bipartisan, but it is something, frankly, that we need your help with if you are confirmed as Chief Justice, and that has to do with the bar to the courtroom presented by excessive cost and time delays inherent in modern litigation. These impediments to access to justice are just as effective as if you had an armed guard at the door of the courthouse or had somebody put a padlock on the front door, because frankly, not many people can afford access to the courthouse, to justice, to jury trials because the costs are just so prohibitive. I remember that Chief Justice Burger, when he was Chief, took on the cause of alternative dispute resolution, and this cause of excessive delay and cost as being an impediment to access to justice with quite a bit of success.

But it is a cause that needs a lot of work. It needs the attention of the Chief Justice of the United States and the prestige that you would bring to that, because frankly, it worries me a great deal. Just like it concerns me that we see with the length of time of modern jury trials—of course when many people think about jury trials, they think about the O.J. Simpson trial where the jury was empaneled for months on end, and wonder how in the world can a jury still represent the conscience of the community and be a cross section of the community when so many people are precluded from serving because of the economic or other hardship associated with that. So these are hard issues that I hope you will take a look at and work with the Judiciary Committee and the Congress if necessary, or where necessary, I should say, to try to address, because I think that would be a great service to the American people.

As a good lawyer, you know the danger of analogies, and yesterday we started talking about judges as umpires. And you were quite eloquent in saying that you wanted to be an umpire, you did not want to bat or pitch, and I think it was a very succinct and appropriate way to describe exactly the role that you thought judges ought to play, not as partisans, but as impartial and disinterested in the outcome, but nevertheless, interested in providing access to justice.

I happened to be looking at my computer last night, one of the blogs, and it is always frightening to put your name in search and look at the ways it is mentioned. I suggest you do not do that, if you have not, until this hearing is over, because this hearing is the subject of a lot of activity and interest in the blogosphere. But one of these blogs said that your comparison of a judge to a baseball umpire reminded him of an old story about three different modes of judicial reasoning built on the same analogy.

First was the umpire that says, "Some are balls, and some are strikes, and I call them the way they are." The second umpire says, "Some are balls and some are strikes, and I call them the way I see them." The third said, "Some are balls and some are strikes, but they ain't nothing till I call them."

Well, I do not know whether it is a fair question to ask you, which of those three types of umpires represents your preferred mode of judicial reasoning, but I wonder if you have any comment about that.

Judge ROBERTS. Well, I think I agree with your point about the danger of analogies in some situations. It's not the last, because they are balls and strikes regardless, and if I call them one and they are the other, that doesn't change what they are. It just means that I got it wrong. I guess I like the one in the middle because I do think there are right answers. I know that it's fashionable in some places to suggest that there are no right answers and that the judges are motivated by a constellation of different considerations, and because of that it should affect how we approach certain other issues. That's not the view of the law that I subscribe to.

I think when you folks legislate, you do have something in mind in particular, and you put it into words, and you expect judges not to put in their own preference, not to substitute their judgment for you, but to implement your view of what you are accomplishing in that statute.

I think when the Framers framed the Constitution it was the same thing, and the judges are not to put in their own personal views about what the Constitution should say, but they are supposed to interpret it and apply the meaning that is in the Constitution, and I think there is meaning there, and I think there is meaning in your legislation, and the job of a good judge is to do as good a job as possible to get the right answer.

Again, I know there are those theorists who think that is futile, or because it is hard in particular cases, we should just throw up our hands and not try in any case, and I do not subscribe to that. I believe that there are right answers, and judges, if they work hard enough, are likely to come up with them.

Senator CORNYN. Well, as a good lawyer you also know the danger of an analogy is that people will take it and run away with it, perhaps use it against you, and I heard today that yesterday we were talking about baseball, but today we are talking about dodge ball. Some have suggested that you have been less than forthcoming about your answers to the questions, and I just could not disagree with that more, and I want to go over this just a minute because I think it bears some repetition.

First of all, you were confirmed by the United States Senate by unanimous consent just a little over 2 years ago to the District of Columbia court of appeals, what some have called the second most important or powerful court in the Nation. So you have been before the Committee before. You have been thoroughly investigated, examined and scrutinized, perhaps more than anyone else in history. The reason I say that is because since your nomination first as Associate Justice and now as Chief Justice, there have been more than 100,000 documents produced about your background and

record, some in the Government sector, some in the private sector. Of course, we have heard today how perhaps a line or a word or a choice of phrase can be used perhaps out of context to try to create an impression that may or may not be borne out by looking at the entire context of your record or even the document.

But I do believe you have been forthcoming. I know before we had the last two rounds of questions, you had answered 35 questions on civil rights, 10 on following precedents. You answered 40 questions about the role of a judge, 25 on abortion and privacy rights, and 11 on Presidential powers. So I would just disagree with the characterization that someone might make. I do not think it is fair or accurate that you have been anything less than completely forthcoming, and that we frankly know an awful lot about you. And that has not been a bad thing. I think from my point of view, the more that we have learned about you, the more confidence many of us have in the judgment of the President in your selection.

But of course, you are not there yet. We still have a lot of questions to ask before voting. I want to also talk to you a little bit about one area of questioning. I believe it was Senator Biden who was asking you about Justice Ginsburg and the fact that she answered some questions, but declined others. And we have talked about the Ginsburg standard. I think Senator Schumer referred to that as well. What I understand that to mean, what I mean by that when I say it is that she has recognized that there is a line that a nominee cannot step over in terms of prejudging cases or issues that may come back before the Supreme Court, and that is the line I understand you to have drawn.

But to Justice Ginsburg, as I believe Senator Graham pointed out, had an extensive paper trail and record, and she did feel at some liberty to talk about issues where her views were already public or where she had already written. Is that the distinction? Could you explain your understanding of the distinction she was making or how she handled questions, perhaps in a way that is different from the way you are handling questions?

Judge ROBERTS. My understanding, based on reading the transcript, not just of Justice Ginsburg's hearing but of the hearings for every one of the Justices on the Court, is that that was her approach, that she would generally decline to comment on whether she viewed particular cases as correctly decided or not. She at one point said that that was the Court's precedent, she had no agenda to reconsider it, and that was all she was going to say. And in areas where she had written, she thought it was appropriate to discuss more fully because it was an area that she had already publicly commented on, and I understand that to be the distinction as to why she commented on particular areas but not others.

Senator CORNYN. To your knowledge, is the line that you have attempted to walk in these proceedings about being as forthcoming as you can, but recognizing that you have a responsibility not to jeopardize your impartiality, either the perception or the reality, or the impartiality and independence of the judiciary; has that been the line that you have attempted to walk and as you understand previous nominees have attempted to walk?

Judge ROBERTS. It is, Senator, with an exception, and the exception is that I have tried to be—to share more of my views with respect to particular cases. I know other nominees have declined, for example, to comment on even a case like *Marbury* v. *Madison* because they thought as a theoretical matter it could come before the Court. I tend to take a more practical and pragmatic approach to things, rather than a theoretical or ideological approach. I think as a practical matter, an issue about *Marbury* v. *Madison* is not likely to come before the Court, the same with *Brown* v. *Board of Education*, so I have gone farther than many nominees and have been willing to talk about my views on those particular cases.

But I do think when it gets into an area where the correctness or incorrectness or my agreement or disagreement with a particular precedent is an area that is likely to come before the Court or could well come before the Court, I do have to draw the line there, and it is not out of any interest to dodge questions or anything. My views on cases that I think are not likely to come before the Court, I'm perfectly willing to discuss. It's based on the concern that the independence and integrity of the Supreme Court depends upon Justices who go there and will decide the issues there with an open mind based on the judicial decisional process, not based on prior commitments they made during the nomination hearing.

All of the Justices have adhered to that approach for that reason, and if I am to join their number, I need to be able to look them in the eye in the conference room and say, "I kept the same faith with the independence and integrity of this Court."

Senator CORNYN. I think it also may reflect the fact that you seem to be quite comfortable responding to questions from the Committee. You have had a lot of experience responding to questions from the bench and having to distinguish cases, answer hypothetical questions and the like, and I think we have gained an appreciation, a greater appreciation for the skills that you have acquired and your ability, but I understand the line you are walking, and I think it is really a constitutional standard that you are trying to observe, and I applaud you for it.

A couple other areas I want to ask you about, but first let me ask you this. Judges are not in the business of picking winners and losers before they have actually heard the case, of course. I mean that is fundamental to our concept of justice, that a judge be open-minded, be willing to listen to the facts and arguments of counsel, and then make a decision.

And the process that you use is by applying neutral principles. In other words, when you make a decision based on the Commerce Clause or even based on *stare decisis*, does that really have anything to do with the ultimate result? In other words, do you start with the results you want to reach first and then go back and try to rationalize it or justify it by the way you read the Commerce Clause of the Constitution, or apply the legal doctrine of *stare decisis*?

Judge ROBERTS. No, Senator. It's saying a judge is result oriented, that type of judge. That's about the worst thing you can say about a judge.

Senator CORNYN. Those are almost fighting words.

Judge ROBERTS. It's about the worst thing you can say because what you're saying is, you don't apply the law to tell you what the results should be. You don't go through the judicial decisional process. You don't look to the principles that are established in the Constitution or the law. You look to what you think the result should be, and then you go back and try to rationalize it, and that's not the way the system is supposed to work.

Senator CORNYN. Well, I know that we have heard today about a number of terms from *stare decisis* to *pro hac vice*, to *pro forma*, to—the only one we have not heard is *res ipsa loquitur* and a number of other Latin phrases that we learned in law school.

Let me ask you about *stare decisis*. I have heard fascinating discussion back and forth about precedent and how you would deal with a case, let's say for example, *Roe* v. *Wade*, and some have suggested, law professors and maybe others, that somehow that is a super precedent, or in the words of our inimitable Chairman, a super-duper precedent. I think we are introducing new words to the legal lexicon as this hearing goes on. But in all seriousness, if—well, let me ask you this. Is *stare decisis* an insurmountable obstacle to revisiting a decision based on an interpretation of the Constitution?

Judge ROBERTS. What the Supreme Court has said, in the *Casey* decision, for example, is that it is not an inexorable command. In other words, it's not an absolute rule, and that's why they have these various cases that explain the circumstances under which you should revisit a prior precedent that you think may be flawed and when you shouldn't, and—

Senator CORNYN. I can—excuse me. I did not mean to interrupt you.

Judge ROBERTS. I was just going to say there are significant cases in the Court's history, in the Nation's history, where the Court has revisited precedents like *Brown* v. *Board of Education*, like the cases that overruled the decisions of the *Lochner* era.

Senator CORNYN. You started to make the point I was going to try to make next, and that is, *stare decisis* did not prevent the United States Supreme Court from revisiting *Plessy* v. *Ferguson*, which established the separate but equal doctrine, or otherwise *Brown* v. *Board of Education* would never be the law of the land. *Stare decisis* did not prevent the Supreme Court from overruling *Bowers* v. *Hardwick* in *Lawrence* v. *Texas* or *Stanford* v. *Kentucky* in this recent term of the Court, where they said the death penalty for 17-year-old murderers was unconstitutional in *Roper* v. *Simmons*.

So would you agree with me, Judge, that this is a neutral principle? In other words, it is not a result-oriented principle, if there is such a thing, and you have pledged to apply neutral principles, not result-oriented processes in arriving at your decisions if confirmed.

Judge ROBERTS. That's right. It is a neutral principle. The factors that the Court looks at in deciding whether to overrule prior precedent or not do not depend upon what the decision is or what area it's in, other than some areas, things we've talked about, for example, a statutory decision is much more likely to be overturned than

a constitutional decision just because Congress can address those issues themselves.

But the principles of *stare decisis* are neutral and should be applied in a neutral way to cases without regard to the substance of the decisions being considered.

Senator CORNYN. When you said this morning in response to questions about *Roe* v. *Wade* that it is settled as a precedent of the Court, entitled to respect under principles of *stare decisis*, you were saying that—just that. In other words, that it is a precedent of the Court. There has to be a strong case made for why that issue should be revisited, if at all, but you were not making any commitment one way or another about the outcome of any challenge brought under that or any other legal doctrine, were you?

Judge ROBERTS. No, Senator, and I've tried as scrupulously as possible today to avoid making any commitments about cases that might come before the Court.

Senator CORNYN. I agree you have, and I just wanted to make sure that we were all on the same page in that understanding.

Senator Schumer asked about the Commerce Clause, and I have just been fascinated by this debate about the Commerce Clause. Of course, you know, when this Nation got started, of course first we had the Articles of Confederation, where the States were supreme and they could not—the Nation could not function unless all States agreed. And so the Federal Government was essentially impotent, which led of course to the Constitutional Convention and a Federal form of Government, where States and the Federal Government shared powers.

And now it is interesting to hear—of course we have seen a growth of national power over the years through a series of court decisions, and Congress, frankly, has pushed the envelope and tried to argue that Congress has virtually unlimited power to legislate, and can crowd out State governments completely out of any field it wants to.

Isn't it true that there are specific jurisdictional bases upon which the Congress can legislate? In other words, under the 14th Amendment, Section 5, under the Commerce Clause? In other words, the Constitution of the United States was supposed to be a Constitution of delegated or enumerated powers, and interstate commerce being one of those enumerated powers. Of course, there are other provisions like the Necessary and Proper Clause. There have been a lot of decisions over the years about whether it is only powers expressed or implied and the like.

But isn't it true that the Supreme Court in the last decade has finally said, in *Lopez* and in *Morrison*, for example, that Federal power is not unlimited, that there is some limit and the fight is really over where those limits are? Would you agree with that?

Judge ROBERTS. Yes, Senator, and I do think that a proper consideration of *Lopez* and *Morrison* has to take into account the more recent Supreme Court decision in *Raich*, where the Court made the point that, yes, we have these decisions in *Lopez* and *Morrison*, but they are part of a 218-year history of decisions applying the Commerce Clause, and they need to be taken into account in the broad scope. It's an appreciation, again, the first one in 65, 70 years that recognized a limitation on what was within the Congress's power.

But they're not sort of—they didn't junk all the cases that came before. They didn't set a new standard. That's what the Court said in *Raich*. It said, yes, we have those two cases, don't over-read them. Put them in the context and, you know, move on from there. And as the Court in *Raich* concluded, they upheld the exercise of Congress's authority.

Senator CORNYN. Well, I don't think it would come as any surprise to anyone who's listening to these proceedings outside of the Beltway that our Government was premised in part on the notion that all wisdom does not emanate from Washington, D.C., and that the States do have areas of competence and authority to the exclusion of the Federal Government. And one of the great things, I think, about this hearing is that a lot of people, I think, are learning and hearing about concepts that perhaps they had never heard about before, but really, these are debates that have occurred since the beginning of America itself and since the formation of our Government.

So I hope that this is an educational experience or maybe even a refresher course for many of us about some basic principles upon which our Government was founded. And, of course, the most important principle from my standpoint is that articulated in the Declaration of Independence itself that says that our laws are based on consent of the governed, which means that most of the debates we have about the laws and the policies that govern us and affect our families and our jobs are going to be decided in the political realm, where people can muster majorities and vote and have laws signed and people who are in the minority may live to fight another day and turn that law over in the political forum, and that very few cases, very few issues will be completely removed from that political forum. And those are the cases where the Constitution precludes legislative activity.

But I very much appreciate your expression of the role of a judge is one having a sense of humility and modesty. That is not to say from the way I look at it, or I am sure the way you look at it, that the job of a judge is unimportant. Being a judge is not easy all the time because you have to make tough decisions which may not be politically popular, but that is what goes along with the territory. But I appreciate the distinction that you have made and articulated for us here in preserving the vast majority of the debates and issues that affect each of us in America and our families and our jobs as one where we can govern ourselves through our elected representatives, and if we don't like the way that our elected officials are deciding things, we can throw the rascals out. But we can't do that when it comes to an appointed, lifetime-tenure Justice on the Supreme Court. And so I appreciate very much the distinction that you are drawing.

With that, Mr. Chairman, I will surrender back two and a half minutes. Thank you.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Durbin?

Senator LEAHY. I thank you, too.

[Laughter.]

Senator DURBIN. Thank you, Mr. Chairman.

Judge Roberts, Mrs. Roberts, family and friends, the end is near—at least for this leg of the race. Welcome to night court.

[Laughter.]

Senator DURBIN. I was struck by a question by Senator Grassley and your answer earlier today. The question was this: "Well, is there any room in constitutional interpretation for the judge's own values or beliefs?" And your response: "No, I don't think there is. Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't look to your own values and beliefs. You look outside yourself to other sources."

Judge Roberts, I recently finished a book about Justice Blackmun and his service on the Supreme Court, and it was a fascinating book about his life on the Court and his life on the Federal judiciary. And I found it interesting that near the end of his term on the Court, a couple cases occurred which really spoke to the heart of the man. One was *DeShaney* v. *Winnebago County*, involving a poor little boy who had been beaten and abused, and left retarded, by dereliction of duty by many of the county officials or State officials in Wisconsin, and an effort by his mother to hold them accountable. They failed in the Supreme Court. But Justice Blackmun wrote a dissent, in which he made reference to "Poor Joshua." And he said at one point, in response to someone who wrote him afterwards, about the Court, "Sometimes we overlook the individual's concern, the fact that these are live human beings that are so deeply and terribly affected by our decisions."

The other thing that occurred in Blackmun's judicial career was a real change in his view on the death penalty, and I think most of us are aware of the famous statement which he made: "From this day forward, I no longer shall tinker with the machinery of death."

The last case in which he participated involving the death penalty was a case that you were involved in, the *Herrera* case. You were Deputy Solicitor General at that time. It involved the case of an individual in Texas who had been accused of killing two police officers, and who tried to reopen his case offering evidence that his brother, who had since died, had actually been the killer. He turned to the Federal court because he had lost his time for reconsideration of the case by Texas law, and he argued a claim of actual innocence.

Justice Blackmun, in his statement at the end of this case, said, "Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder."

That was a dissent—that addressed your position that you had espoused as Deputy Solicitor General. Did you read that Blackmun dissent?

Judge ROBERTS. Yes, Senator, I did.

Senator DURBIN. Were you struck by the language there? And the reason I ask that question is it has been 11 years since we have had a Supreme Court nominee before us, and a lot of things have happened in relation to the death penalty in America. We have looked closely at defendants who were young, those who were

not mentally sufficient to stand trial, and we also now have the issue of DNA.

In my State of Illinois, we found 13 people on death row who were innocent people, and a Republican Governor pardoned them after the evidence came out.

Tell me in that context, as you look at this and talk about this, what appeared to be a very sterile and bloodless process as you answered Senator Grassley, tell me what goes through your mind and your heart when you think about addressing the death penalty, what happened in the *Herrera* case and what we should look to from the Court in the future when it comes to the Eighth Amendment and to the death penalty.

Judge ROBERTS. Well, I think it's important, first of all, to appreciate that the issue in the *Herrera* case I think was misportrayed as an issue of actual innocence. The issue in the *Herrera* case is at what point should new claims—in this case, the claim after his brother died, well, guess what, I didn't do it, my brother did it, and he's dead now. That is to some extent a claim of innocence, but it's the sort of claim that did not have, as the courts determined there, sufficient factual support to be taken seriously. That's quite different from a claim, for example, of DNA evidence. Now, that's an issue that's working its way up, and I don't want to comment on it, other than to say that it seems to me that that type of claim—that somebody who just died was the actual murderer is different from the scientific issue. They're just different cases. So I don't think that one should be taken as suggesting a view on the other.

Obviously, any case involving the death penalty is different. The Court has recognized that. The irrevocability calls for the most careful scrutiny. It is not an area in which I've had to consider cases as a judge up to this point, and I certainly know the magnitude of the concern and the scrutiny that all the Justices bring to that question. It's just different than other cases. There's no doubt about that. And DNA evidence obviously I think is a very important and critical issue. No one wants an innocent person executed, period. And the availability of that type of evidence, that opportunity in some cases, I think is something that's a very significant development in the law.

Now, as I said, there are cases coming up in there, so I don't want to say anything further.

Senator DURBIN. I understand that. It is unfortunate that the decision was made by the White House not to provide the memos and writings on the 16 cases when you served as Deputy Solicitor General. *Herrera* was one of the cases. And so we might have learned a little more about the thinking at that time that led to your conclusion.

Let me ask you, I have been here most of the day, and you have been here all day. And I have noted how often you have distanced yourself from the memos written as a 26-year-old staff attorney. And I understand that. That is a long time ago. When we met in my office, that is, I think, exactly what you said when I referred to one of those memos. But I would like to ask you this: When you were serving in the Reagan Administration and the first Bush administration, was there ever a time when you stood up to your con-

servative colleagues and advocated a position that was more favorable to victims of discrimination or the disadvantaged?

Judge ROBERTS. There certainly were internal disagreements and internal disputes about which approach to take, and in many cases, I'd be on one side; in other cases, I'd be on the other side, certainly.

Now, again, those are internal deliberations, but there was debate and disagreement on a regular basis. That's part of the nature of the job.

Senator DURBIN. But there was one case in particular that hasn't been mentioned today that I would like to ask you about, and that was the case involving Bob Jones University. That was one of the most troubling decisions of the Reagan Administration. It was a decision to argue before the Supreme Court that Bob Jones University should keep its tax-exempt status with the IRS even though it had an official policy that banned interracial dating, and denied admission to any applicants who engaged in interracial marriage, or were known to advocate interracial marriage or dating.

When the Reagan Administration took that position, it reversed the position of three previous administrations, including two Republicans, all of whom argued that Bob Jones was not eligible for this tax-exempt status. This sudden reversal by the Reagan Justice Department, which you were part of at the time, led to the unusual step of the Supreme Court appointing a special counsel, William Coleman, as a friend of the Court, to argue in support of the IRS. In 1983, the Supreme Court ruled 8–1 against the Reagan Administration and against Bob Jones University.

Judge Roberts, there was a heated debate within the Justice Department about whether or not to defend Bob Jones University and its racist policies. More than 200 lawyers and employees of the Civil Rights Division, representing half of all the employees in that division, signed a letter of protest. William Bradford Reynolds, the head of the Civil Rights Division, strongly supported defending Bob Jones. Ted Olson, another person well known in Washington, opposed this defense of Bob Jones.

Which side were you on? What role did you play in the decision to defend Bob Jones University policy?

Judge ROBERTS. Senator, I was ethically barred from taking a position on that case. I was just coming off of my clerkship on the Supreme Court, which ended in the summer of 1981. Supreme Court rules said that you could not participate in any way in a matter before the Supreme Court for a certain period of time—I think it was 2 years, or whatever it was—and it was within that period. This involved an issue before the Supreme Court. So I was ethically barred from participating in that in any way.

Senator DURBIN. The memo of December 5, 1983, that you wrote about the Bob Jones University leads one to believe in reading it that you were present during deliberations on this policy. Is that true?

Judge ROBERTS. No, Senator.

Senator DURBIN. You were not?

Judge ROBERTS. I was not involved in the policy because of the bar on the participation.

Senator DURBIN. There appears to be another memo which I am going to send to you dated September 29, 1982, with your hand-

writing on it relative to this same issue, and I don't want to surprise you with it. I will send it to you and if tomorrow we get a chance, we can revisit it.

Let me ask you this. When—

Chairman SPECTER. Senator Durbin, may we have the numbers there? The staff needs those in order to put the document into the record.

Senator DURBIN. Sure. I would be happy to. This is dated September 29, 1982.

Chairman SPECTER. And it has a number on it?

Senator DURBIN. No number, but we will give you a copy.

Chairman SPECTER. Okay. Thank you.

Senator DURBIN. We will share it with the Judge. I want you to have it; this is not a surprise.

Judge ROBERTS. Sure.

Senator DURBIN. I just want you to take a look at it.

We had a nominee for the Ninth Circuit court of appeals, Carolyn Kuhl. Do you know her personally?

Judge ROBERTS. Yes.

Senator DURBIN. You served in the Justice Department with her?

Judge ROBERTS. Right.

Senator DURBIN. When she came before this committee, Senator Leahy asked her several questions and she said when she testified, quote, "I regret having taken the position that I did in support of the Government's change of position [on Bob Jones]. The nondiscrimination principle and the importance of enforcement of the civil rights laws by the executive branch should have taken sway and should have been primary in making that decision." I appreciated her candor on that.

What is your belief? Was the Reagan administration position on Bob Jones University the right position to take?

Judge ROBERTS. No, Senator. In retrospect, I think it's clear. The people who were involved in it, as you say, themselves think that it was the incorrect position. I certainly don't disagree with that.

Senator DURBIN. Thank you. Let me move to another topic—

Senator LEAHY. I am sorry, Senator. I didn't hear the answer.

Judge ROBERTS. The answer is, no, I don't think it was the correct position to take.

Senator DURBIN. Thank you. Earlier, Senator Feinstein asked you about the separation of church and state and I would like to follow up on this. She asked whether you believed the separation of church-state was absolute, and I have your answer here relative to the two recent cases on the Ten Commandments. It appears now that there is debate within the Court as to whether or not they will stand behind the *Lemon* v. *Kurtzman* standards under the Establishment Clause, the three-part test, which I won't go through in detail.

As Deputy Solicitor General of the Bush administration, you coauthored two legal briefs in which you urged the Supreme Court to overrule the *Lemon* standard, *Board of Education* v. *Mergens* and *Lee* v. *Weisman*. You argued instead for what has been characterized in shorthand as the legal coercion test.

So I would like to ask you, what is your view on the Establishment Clause and the *Lemon* standard at this point in time?

Judge ROBERTS. Well, the *Lemon* test is a survivor. There's no other way to put it. When we wrote the brief in *Lee* v. *Weisman*, we had a long footnote explaining that, I think it was six different members of the current Court had expressed their criticisms of the *Lemon* test. They never got together at the same time and the test has endured.

The approach that we were advocating in *Lee* v. *Weisman* did focus on the question of coercion and argued that in certain circumstances, a recognition of ceremonial religious practices—an invocation at a graduation was the one at issue there—were permissible, and again, that, I think, lost five-to-four.

And the *Lemon* test to this day is the test that the Court applies. I think one of the Justices recently explained, you know, it's not so much how good the *Lemon* test is, it's that nobody can agree on an alternative to take its place, and there may be something to that. There are cases where the Court doesn't apply the *Lemon* test. It seems to follow a different approach.

The great benefit of the *Lemon* test, the three-part test that everybody's familiar with, of course, is that it's very sensitive to factual nuances. The disadvantage of the *Lemon* test, I think, is that it's very sensitive to factual nuances and you get a situation like with the Ten Commandments case, and again, I'm not commenting on the correctness or not, but those are two decisions and there is exactly one Justice that thinks they're both right.

Nobody would suggest that this is an area of the law where the Court's precedents are crystal clear, and I think there may be some inevitability to that. There is a tension of sorts between the Establishment Clause, on the one hand, and the Free Exercise Clause on the other, and the Court's cases in recent years have tried to consider when is an accommodation for religious belief—when does that go too far and become an establishment of religion? The Court has a case on its docket coming up.

I think the animating principle of the Framers that's reflected in both of the religion clauses is that no one should be denied rights of full citizenship because of their religious belief or their lack of religious belief. That is the underlying principle. That is, I think, what the Framers were trying to accomplish.

The jurisprudence, again, it's an area where the Court has adhered through thick and thin to the *Lemon* test, probably because they can't come up with anything better, but the results sometimes, I think, are a little difficult to comprehend.

Senator DURBIN. Now, of course, Justice Rehnquist had a different point of view, or at least he alluded to one when he appeared before this Committee in 1986. Senator Simon asked him a question. He replied as follows. "I have in my opinions read the Establishment Clause more narrowly than some of my colleagues. . . . But I also think, Senator Simon, that these are almost questions of degree and that there is not a tremendous amount of difference there as to the broad principles of the Establishment Clause are uncontroverted, and those kinds of cases do not get up to us because they are pretty well settled. It is these kinds of frontier-type cases that come up and reflect divisions among us and I certainly have read the Establishment Clause more narrowly than some of my colleagues."

Do you feel that you are reading the Establishment Clause from a narrow point of view or from the traditional *Lemon* point of view?

Judge ROBERTS. Well, I don't think I've had an Establishment Clause case. The cases where I have argued, I obviously was representing the position of the administration, which was that the *Lemon* test was regarded by the administration as too manipulable, not determinative, and in some senses inconsistent. So those—with the understanding of the Framers. So that was the position that we were advocating there. I haven't expressed my personal views on the Establishment Clause in any context.

Senator DURBIN. Well, let me read what you wrote in a memo on June 4, 1985, to Fred Fielding when you were serving as a staff attorney, related to *Wallace* v. *Jaffree*. Here is what you wrote in reference to Establishment Clause and the *Lemon* test:

"Thus, as I see it, Rehnquist took a tenuous five-person majority and tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided. In the larger scheme of things what is important is not whether this law is upheld or struck down, but what test is applied."

I know you have said over and over again that you were just doing what you were paid to do, to tell the administration what they wanted to hear. Is that what happened here?

Judge ROBERTS. I don't think I've said that.

Seenator DURBIN. Well, that's correct. Strike that from the record. Let me just say you were a staff attorney reflecting the views of the administration you worked for. Is that a correct characterization?

Judge ROBERTS. It's a correct view. The views of the administration were quite clear with respect to the moment of silence, which was the issue in *Wallace* v. *Jaffree*. It was the President's view that it was constitutional, through the Attorney General, that it was constitutional to observe a moment of silence.

Now, what the Court held in *Wallace*, of course, was that you couldn't look at just the moment of silence. There was a history there about school-led prayer, and to substitute it and suddenly say, well, now it is a moment of silence, they didn't look at it in those terms but looked at it in the long history and the issue of whether a real moment of silence without that kind of background and history, whether that would prevail or not was one that the Court didn't address in *Wallace*.

Senator DURBIN. Let me just wrap this up by asking, and I think you have alluded to this, is it your belief that what we are trying to establish in the constitutional protection on the exercise of religion is not only to protect minorities, religious minorities, but also non-believers?

Judge ROBERTS. Yes. The Court's decisions in that area are quite clear, and I think the Framers' intent was, as well, that it was not their intent to just have a protection for denominational discrimination. It was their intent to leave this as an area of privacy apart—a conscience from which the Government would not intrude.

Senator DURBIN. Thank you. The next topic I would like to talk about for a moment is Executive power, which has been addressed earlier. It has not been a major focus in previous hearings, but ob-

viously is now that we are at war. You have been asked a lot of questions about it because I think there is so much at stake. We will probably be involved in this war effort, as Senator Leahy said early this morning, for some time.

Throughout American history, even some of our greatest Presidents, including one from Illinois named Lincoln, tried to restrict liberty in an effort to provide more safety and security in our Nation. This administration is no exception. It has claimed the right to seize an American citizen in the United States and hold him indefinitely without charging him with a crime. It has claimed that the courts have no right to intervene. I think that threatens all of our freedoms.

Just last week, Judge Luttig of the Fourth Circuit court of appeals authored an opinion upholding the administration's position. If you are confirmed, you may have the final word on this question. You and others have compared the role of a judge to an umpire, and I promised I wouldn't get into the baseball analogy, so that is one thing I will spare you from.

But let me ask you this. When it comes to the use of Executive power, you have referred time and again to Justice Jackson in the *Youngstown* case. Here is what he said: "A judge, like an Executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of Executive powers as they actually present themselves."

So if you are confirmed, you will play a significant role in determining what limits, if any, the Constitution places on a President during times of war. That is why the American people have the right to know what you think about Executive power.

There was an exchange earlier today between you and Senator Kyl about a statement I made yesterday about whether, as a Justice, you will expand freedom in America, and Senator Kyl seemed to suggest it was a zero-sum approach, that you couldn't enlarge the freedom of one person or group in America without taking away the freedom of another group.

It is a curious point of view. It is the same point of view that Robert Bork had that he tried to defend unsuccessfully before this Committee many years ago.

But my point to you is this. What is in your background or experience that can convince the members of this Committee and the American people that you are willing to stand up to this President if he oversteps his authority in this time of war, even if it is an unpopular thing to do?

Judge ROBERTS. Well, Senator, I would just say that my demonstrated commitment to the rule of law, you can see that, I think, in my opinions over the past 2 years, you can see it in how I approach my job as a lawyer, arguing, and what types of arguments I make and how I make those arguments and how faithful they are to the precedents, and you can see it in my history of public service.

The idea that the rule of law—that's the only client I have as a judge. The Constitution is the only interest I have as a judge. The notion that I would compromise my commitment to that principle that has been the lodestar of my professional life since I became a lawyer because of views toward a particular administration is one

that I reject entirely. That would be inconsistent with the judicial oath, and Justice Jackson is a perfect example of that. He is someone who was a strong advocate for Executive power when he was FDR's Attorney General, one of the strongest, and yet he could issue a decision like the *Youngstown* decision not only concluding that President Truman lacked the authority, even in times of war, to seize the steel mills, but also setting forth the framework with the language of the sort that you just quoted, setting forth the framework about how to analyze these decisions in a way that is particularly sensitive to the role of Congress, as well. That is the key feature of his framework, the examination of where Congress is on the spectrum in determining whether the Executive has that authority.

Senator DURBIN. I hate to keep referring back to these ancient memos, but it is said that if a hammer is the only tool you have, every problem looks like a nail. And in this case, this is the only tool we have to try to find out what is going on in your mind and in your heart. And so in a memo of 1983 to White House Counsel Fred Fielding, you wrote about "the independent prerogative of the Chief Executive to determine that a given law is unconstitutional." You talked about the power of the Executive to determine that a law is unconstitutional.

We are going through this debate that Senator Leahy alluded to earlier about this torture memo and the idea that the administration would walk away from commitments that have been made under Geneva Conventions and under the Convention on Torture, and would instead establish a new standard. So my question to you is this: Would the anti-torture statute be unconstitutional simply because it conflicts with an order issued by the President as Commander in Chief?

Judge ROBERTS. No, Senator, not simply because of the conflict, and I have to say I don't know—that's one of the 80,000 memos I don't know about, so I'd have to understand what the point was, what the issue was, and the language you read in context before I could respond to that.

But, no, the President has an obligation. He takes an oath, as we all do, to uphold the Constitution and to make a determination, and his determination that certain things are either constitutional or unconstitutional can, of course, in an appropriate case be tested in court. And the ultimate arbiter of that under our system is the Federal judiciary.

Senator DURBIN. Justice Jackson thought the bottom line on Executive power was clear in *Youngstown*. He said, "No penance would ever expiate the sin against free government of holding that a President can escape control of Executive powers by law through assuming his military role." I assume you agree with that statement by Justice Jackson?

Judge ROBERTS. Yes, I do. It simply reflects the basic principle that no man is above the law, not the President and not the Congress. And that's why courts have the obligation and have had since *Marbury* v. *Madison* to say what the law is. And if that means that Congress has acted unconstitutionally, they strike down the law. And if it means that the Executive has acted unconstitutionally, they have the obligation to block the Executive action.

Senator DURBIN. We can imagine a hypothetical statute that would clearly intrude on a President's power as Commander in Chief, ordering the movement of troops and that sort of thing. On the other hand, the anti-torture statute is clearly within the area, I believe, where Congress can legislate. As you noted this morning, Article I, Section 8 of the Constitution enumerates Congress's powers. Speaking clearly, it says Congress shall have the power "To make Rules for the Government and Regulation of the land and naval Forces."

I think we have exhausted this topic, and I think we are in common feeling and agreement about it. I hope we are at least close.

Let me ask you one last question in the few minutes remaining here. I have listened to some of the questions asked about gender and sex discrimination. They have come up repeatedly during the course of this. And as you look at the standards that are applied to equal protection for a variety of different circumstances, there are different standards. I think you started to explain them at one point today. Maybe you got through the explanation, I am not sure. But under strict scrutiny, the suspect classifications include race and national origin, religion, alienage, and the like. Then there is, of course, the other standard of what is characterized as middle-tier scrutiny, which includes quasi-suspect classifications of gender and illegitimacy.

As you look back at the sweep of history that created these different standards, can you rationalize the difference between discrimination based on race and based on gender?

Judge ROBERTS. Well, I can tell you what the Court has done. There are Justices who aren't comfortable with the different tiers. They say there's one Equal Protection Clause. But the different tiers are fairly well establish as an approach to the different areas in discrimination. And the rationale for it is that there are areas in which you think it is almost never the case that distinctions that are drawn can be legitimate, distinctions based on race or ethnicity. And so they're subject to the most heightened scrutiny.

The rational relation test which applies across the board to any type of law, there it's quite often the case that distinctions drawn on whatever basis Congress wants are likely to reflect the different sorts of policy judgments.

Gender issues are in the middle tier because the Court thinks that there are situations where distinctions can be justified, and there are other situations—but it's more than just the rational relation, but not as suspect as the most heightened level because there may be other justifications. Cases throughout the Court's history where they have upheld distinctions under that analysis, like the all-male draft, for example, that was upheld.

Now, if you had applied strict scrutiny to that type of classification, perhaps the result would have been different and the all-male draft would have been struck down. It reflects the Court's determination that these are not sort of almost always inherently irrational and discrimination rather than legitimate governmental distinctions, but that it's entitled to a heightened degree of scrutiny beyond the rational relation test. Justice Ginsburg, I think, in her opinion in the VMI case said that the intermediate scrutiny had to be applied with—I forget the exact phrase—"exacting rigor" or

something along those lines, to indicate that it is well beyond the rational relation test, but it's not as inherently suspect as racial classifications.

Senator DURBIN. Judge Roberts, thank you today for your patience with the Committee and your responses to my questions.

Judge ROBERTS. Thank you, Senator.

Senator DURBIN. I think we all understand the gravity of this hearing, as you do, and we thank you very much for bringing your family and friends to be with you.

Thank you.

Chairman SPECTER. Thank you, Senator Durbin, and thank you all for sitting through a very long proceeding today. We are in our 11th hour. Thank you, Judge Roberts, thank you, Senator Leahy. You were here all day. And I thank all my colleagues, most of whom have been here practically all day. Senators have other responsibilities, and when we set the time and stick to it, they know when to come in to find the time. There has been, I think, a spirit of good will generally, dignified generally, contentious at times, but I think productive.

We will begin tomorrow morning at 9 o'clock, 9:00 a.m. instead of 9:30, begin at 9:00 a.m., and we will start with the questioning, 30 minutes to Senator Brownback.

That concludes our day's session.

[Whereupon, at 7:50 p.m., the Committee was adjourned, to reconvene at 9:00 a.m., Wednesday, September 14, 2005.]

# NOMINATION OF JOHN G. ROBERTS, JR., OF MARYLAND, TO BE CHIEF JUSTICE OF THE UNITED STATES

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**WEDNESDAY, SEPTEMBER 14, 2005**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:02 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. The Committee will now proceed with the confirmation hearing of Judge Roberts to be Chief Justice of the United States.

One preliminary statement. I noted after the session yesterday that there was some comment about my statement when I asked Senator Biden to allow you to continue to respond or to respond at all, and he then interjected that you were misleading the Committee. My statement was, "While they may be misleading, they are his answers." It was in the subjunctive, and I was not suggesting that your answers were misleading. But in that moment, the object was to let you answer.

If somebody wants to characterize them one way or another, they can do that, and you can respond. And I was not suggesting in any way, shape, or form that they were misleading. And you picked it right up and said that they were not misleading.

There are sometimes differences of opinion between the person asking the question and the person answering the question, but there was no doubt in my mind as to the fact that they were not misleading.

We now proceed with the final two Senators on the opening 30-minute round, and I recognize Senator Brownback.

Senator BROWNBACK. Thank you very much, Mr. Chairman, and I welcome you, Judge Roberts, Mrs. Roberts.

Judge ROBERTS. Good morning.

Senator BROWNBACK. Glad to have you here this morning. You are only two away from the end of this round, and we will see how much further it goes. I hope you had a good night's sleep, and I thought you had a great presentation yesterday. I want to compliment you on the number of areas that you answered. My colleague from Texas went through the number of areas and com-

mented about that yesterday, and I was very impressed with the breadth, obviously, of your knowledge and your forthcomingness, how many of these areas you answered where prior nominees had not put answers forth. And so I think you have revealed a great deal, and yet not gone into those areas of active judicial action where there could be a lot of things coming forward.

I also want to compliment the Chairman, Chairman Specter, who originates from my home State, on his stamina. He has been going through a lot lately, the Chairman has, and yet you have pressed this Committee so that many of us have difficulty keeping up with you. And I want to compliment you on that stamina and the ability that you show. You always set a fast pace.

Chairman SPECTER. Well, Senator Brownback, being a Kansan yourself, you know where that stamina came from, because I am a Kansan myself.

Senator BROWNBACK. It comes from standing in the wind all day long. You just have to lean into it. It strengthens you quite a bit.

I want to go to a few areas that you have not answered questions on yet. It may be a surprise to some watching that there are any areas left, but actually there are quite a few. And with your service on the Court, you are going to get such a range of issues and topics that are going to come up. It is noteworthy to me that a majority of Committee members have asked you about privacy and leading up to questions on *Roe*, which I think only strengthens the point that this is an issue that should be left into the political system and not into the judicial system where it is today. That is something you will have to resolve as issues like partial-birth abortion come up to you, but the very dominance of the question bespeaks of its interest within the political system and why it is best resolved within the political system and not the judicial one on a constitutional basis. But I will get to that later.

I want to take you first to the Takings Clause issue. There was a recent case that came up that really shocked the system, and you talked about shocks to the system when the judiciary acts. This is one that did it in the *Kelo* v. *City of New London* case. In perhaps no other area of the law is stability more important than in the area of private property and property rights. Even before the existence of the United States, William Blackstone, that famous English legal authority, stated this: "The law of the land postpones even public necessity to the sacred and inviolable rights of private property."

Mindful of the sentiment and the excesses of the King, yet aware of the needs of a new and growing country, the Framers of our Constitution established a strict limitation on the Government's ability to take private property. The Takings Clause of the Fifth Amendment of the Constitution provides that private property may not "be taken for public use, without just compensation." We all know those famous words.

Traditionally, this has meant that the Government had to pay fair value when it sought to confiscate a homeowner's property in order to build a road or other public good. But now the notion of public use has taken on a different hue to it. In the *Kelo* case, the Supreme Court decided whether a private economic development plan, which the city government believed would yield greater eco-

nomic benefits, qualified as a public use. So you had private property taken by the State and given back to private individuals, but it was having a greater economic use, and whether that was sufficient under the Takings Clause.

In the words of the Court, this economic development plan "was projected" not resulted, but projected "to create in excess of a thousand jobs to increase taxes and other revenues." On this basis, the Court upheld the Government confiscation as a public use, and there was an uproar across the country. We thought that private property rights were established and set. And now it appears as if it is not, that the system is different. You can take private property under the Government's eminent domain power and give it back to a private individual.

Justice O'Connor in her eloquent dissent said this: "Nothing is to prevent the State now from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

It is remarkable how this issue has stirred, as I mentioned, great criticism. I am pleased the Chairman is going to hold a hearing on it this next week. Judge Roberts, what is your understanding of the state of the Takings Clause jurisprudence now after *Kelo*? Isn't it now the case that it is much easier for one man's home to become another man's castle?

Judge ROBERTS. Well, under the *Kelo* decision, which, as you explained, was interpreting the public use requirement in the Constitution, the majority—and, of course, as you mentioned, it was a closely divided case. The majority explained its reasoning by noting the difficulty in drawing the line. Everybody would agree, as you suggest, to build a road or to build a railroad, to situate a military base, if that is the only suitable place, that the power of eminent domain is appropriate in those instances. And I think people agree further that when you're talking about a hospital or something like that, that satisfies public use. And I think the reason the Court gave, really, in the majority opinion was that it's kind of hard to draw the line.

The dissent, Justice O'Connor's dissent, didn't think it was that hard. She focused on the question of whether it was going to be a use open to the public as, you know, a road, a hospital, use for the public like in a military base, or private. And she would have drawn the line there and said even public benefits that derive from different private uses don't justify that aspect of it.

There was a caveat in the *Kelo* majority. They said they were only deciding this in the context of an urban redevelopment plan. They reserved the question—if it's just taking one parcel and giving it to everybody else, not part of a broader plan, that question was still open. And as you say, there's been a lot of reaction to it. I understand some States have even legislated restricting their power.

Senator BROWNBACK. And we are considering it here in the Congress.

Judge ROBERTS. And I think that's a very appropriate approach to consider. In other words, the Court was not saying you have to have this power, you have to exercise this power. What the Court was saying is there is this power, and then it's up to the legislature

to determine whether it wants that to be available, whether it wants it to be available in limited circumstances, or whether it wants to go back to an understanding as reflected in the dissent, that this is not an appropriate public use.

That leaves the ball in the court of the legislature, and I think it's reflective of what is often the case and people sometimes lose sight of, that this body and legislative bodies in the States are protectors of the people's rights as well. It's not simply a question of legislating to address particular needs, but you obviously have to also be cognizant of the people's rights and you can protect them in situations where the Court has determined, as it did 5–4 in *Kelo*, that they are not going to draw that line. You still have the authority to draw—

Senator BROWNBACK. I understand the authority we maintain. What I'm curious about is your view on whether that right exists. I would not think Blackstone would agree that that right exists for the public to take private property for private use.

Judge ROBERTS. Well, you know, the first year in law school we all read the decision in *Calder* v. *Bull*, which has the famous statement that the Government may not take the property of A and give it to B. And that certainly was quoted in the dissent, in Justice O'Connor's dissent. The Kelo majority, though, said if a legislature wants to exercise that power, basically that the Court's not going to second-guess the judgment that this is a public use. And I do think that imposes a heavy responsibility on the legislature to determine what they're doing and whether it is a public use or if it's simply transferring from one private party to the next. But—

Senator BROWNBACK. I take it you are not going to respond whether or not that right exists under the Constitution.

Judge ROBERTS. Well, the *Kelo* decision obviously was just decided last year, and I don't think I should comment whether it was correct or not. It stands as a precedent of the Court. It did leave open the question of whether it applied in the situation that was not a broader redevelopment plan. And if the issue does come back before the Court, I need to be able to address it without having previously commented on it.

Senator BROWNBACK. Let me take you to another area that is stewing here in legislative bodies, certainly across the United States and certainly in Congress, and that is the issue of checks and balances of the Court. Any civics student can talk about checks and balances within the executive, the legislative, and the judicial branch, and we all know that Congress, when it passes a bill, can be checked by a veto of the President. And we know the President's power can be checked by the power of the purse in the Congress. And when popular elected branches of Government enact bills contrary to the Constitution, the courts can strike the law down by exercising judicial review.

One curiosity, though, especially given the broad sweep of judicial power in America today and the angst that that stirs among so many people, is what check there is on the Court. And it seems to me critical that we have this discussion at this point in time.

The first check on the judiciary, of course, is the President's ability to populate the bench, to which you are a nominee, and our ability to offer advice and consent. A greater problem arises once

a Federal judge is on the bench and what is in Article III, section 1—and this is getting a lot of discussion now here in this body, where judges hold office during good behavior, which I know you will have, effectively have life tenure. But that is not really an effective check in the system.

There is also another area that you wrote about when you were working within the Reagan administration and that was the ability of Congress to limit the authority and the review of the courts, of what you would have, and I want to look at that in particular. It is the power to define jurisdiction that we would have. It is in Article III, section 2, and I just want to read this because I do not think it is well understood as the check and balance, and I want to get your reaction to it. This is Article III, section 2, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." No question there.

It goes on: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

That phrase, you know, is known as the Exceptions Clause. You wrote about this when you were in the Reagan White House, about this Exceptions Clause, and you stated this: "It stands as a plenary grant of power to Congress to make exceptions to the appellate jurisdiction of the Supreme Court. The clause, by its terms, contains no limit"—these are your words, and "this clear and unequivocal language is the strongest argument in favor of congressional power and the inevitable stumbling block for those who would read the clause in a more restrictive fashion."

Now, I also understand that you also argued on policy grounds this is not a good idea for the Congress to do, but would you agree with those earlier statements that you made about the nature of this power being a plenary power of the Congress, which stands as a clear standard in favor of the Congress ability to be able to limit the jurisdiction of the Courts?

Judge ROBERTS. Well, you know, Senator, that that writing was done at the request of the Attorney General, and he asked me specifically to present the arguments in favor of that power. He was receiving from elsewhere in the Department a memorandum saying that this was unconstitutional, the exercise of that authority. He wanted to see the other view before making up his mind for the Department, so I was tasked to present the arguments in favor of constitutionality. And as you say, they focus and start with the language in the Constitution, the Exceptions Clause, which is as you read it, and I went on to explain that it had been interpreted in the famous case of *Ex parte McCardle* around the time of the Civil War, which seemed to suggest that the Framers meant what that language says on its face. Also though, a later case, *United States* v. *Klein* suggested that there were limits on the power of Congress in this area.

It is a central debate among legal scholars, the scope of that authority. The argument on the other side, the one that the Attorney General adopted, rather than the argument he asked me to present, is that it is the essential function of the Supreme Court

to provide uniformity and consistency in Federal law, and that if you carve out exceptions in its constitutional area, that you deprive it of that ability and that that itself violates the constitutional scheme. It's an area in which most distinguished scholars line up on either side because it does call into question basic relationships between the Congress and the Courts.

Senator BROWNBACK. Could that language be any clearer though in the Exceptions Clause? I mean I understand how legal scholars maybe can debate what a single word means, but that language is pretty clear, is it not?

Judge ROBERTS. The argument on the other side says that it's intended to apply to—well, for example, we have clear situations in the lower Federal Courts like the amount-in-controversy, those cases are excluded. You can have rules about timing. The question is whether it was intended to address for constitutional areas or simply more administrative matters.

The argument on the other side says if you get into the core constitutional areas, that undermines the Supreme Court's authority that the Framers didn't intend that.

Senator BROWNBACK. Then what check is there on the Court's power?

Judge ROBERTS. Well, I think the primary check is the same one that Alexander Hamilton talked about in the *Federalist Papers*, because the exact argument was raising in the debates about the Constitution. People were concerned about a new judiciary, what was it going to do? They were concerned that it might deprive them of their rights. And of course, Hamilton's famous answer was that judiciary was going to be the least dangerous branch because it had no power. It didn't have the sword. It didn't have the purse. And the judges were not going to be able to deprive people of their liberty because they were going to be bound down by rules and precedents. They were going to just interpret the law. And if judges just interpreted the law, there was no threat to liberty from the judicial branch.

So I would say the primary check on the courts has always been judicial self-restraint, and a recognition on the part of judges that they have a limited task, that they are insulated from the people. They're given life tenure, as you mentioned, precisely because they're not shaping policy. They're not supposed to be responsive. They're supposed to just interpret the law.

Senator BROWNBACK. I guess that is the area that has so many people concerned: it is that the judiciary does not show restraint and if you do not restrain yourselves, then who does within this system? Obviously there are restraints on the Congress, there are restraints on the President. We like that system. We want that check and balance system. I think the Framers put that Exceptions Clause and other things in there for a clear purpose, for a clear reason.

Let me take you on to another area because that one I think you are going to see a lot of action as you get pushing back and forth between the three branches of Government, and a number of people feeling like the judiciary has not show judicial restraint in recent years.

I want to take you to the now probably most contentious social issues of our day, and you have been debating and discussing it a great deal here already, the issue of abortion. It is at the root of much of the debate taking place in the country today. It has inflamed people. It has gotten them involved in the political process, folks that probably would not have been previously, because the only way they aware that they could affect the system was get involved and try to elect a President and Senate. It was the President's lead applause line the last election cycle, was "I will appoint judges who will be judges, not legislators." That it is an applause line at a political rally should say something about people's angst towards what the courts have done, and particularly when it comes to this issue of abortion.

The very root of the issue is the legal status of the unborn child. This is an old debate, and whether that child is a person or is a piece of property, is at the root of that debate. Our legal system says you are one of the two, you are either a person or you are a piece of property. If you are a person, you have rights. If you are a piece of property you can be done with as your master chooses.

I believe everyone agrees that the unborn child is alive, and most agree that biologically it is a life, it is a separate genetic entity. But many will dispute whether it is a person. These may be legal definitions, but that is the way people would define it.

Could you state your view as to whether the unborn child is a person or is a piece of property?

Judge ROBERTS. Well, Senator, because cases are going to come up in this area, and that could be the focus of legal argument in those cases, I don't think it would be appropriate for me to comment on that one way or another.

I will confront issues in this area as I would confront issues in any area that come before the Court, and that would be to fully and fairly consider the arguments presented and decide them according to the rule of law. And I don't think it would be appropriate for me to express views in an area that could come before the Court.

Senator BROWNBACK. I would hope that you would agree with me that this is at the core of the issue, obviously the competition between the woman's right to choose and the legal status of the unborn, and it permeates so much of our debate, and that is why a lot of us believe it should be within the political system to discuss.

I want to point out one thing to you, and I do not think this probably needs to be addressed, but I want to point it out. My State is the proud home State of *Brown* v. *Board of Education*, and I personally knew two of the lawyers that practiced in that case, and they were noble, noble gentlemen.

In *Brown*, the Supreme Court overturned *Plessy*, as you knew and as you know, which was an 1896 case, so *Plessy* had stood for nearly 60 years. We had a discussion about this super *stare decisis* issue, and I just want to hold up a quick chart, if I could. If the notion is that because *Roe* has not been overturned in 30 some cases makes it a super precedent, well *Plessy* had not been overturned in a series of cases over a period of 60 years, where the Court at each time looked at it, discussed it, and decided against overturning it. Yet I do not think anybody would agree that *Plessy*

should not have been overturned, and certainly not anybody from my State. But the notion that by tenure it becomes a super precedent or by number of times that it has been looked at it becomes a super precedent, I do not think finds a basis in law, nor in practicality, as you noted. And some of these decisions up there, I would point out to you, are pretty onerous statements that the Court put forward itself in how they upheld *Plessy* for a number of years, and yet, thank goodness, that the Court overruled it in the *Brown* v. *Board of Education* case that it eventually decided.

I want to also point out to you something you talked a lot about yesterday, and I really appreciate this, that judges decide cases and cases are built on facts, so that while you have the facts and you have the law, the facts matter. There is no one in my State that would not be honored to show you the school building where *Brown* v. *Board of Education* was decided. We just dedicated it last year. The President was there, 50th year anniversary. You can see the path where the little girl walked to the school and had to walk by the all-white school to get there. You look at that set of facts and you say, "That's wrong," and you're ennobled that we no longer do that.

I held a hearing earlier this year on the factual setting of *Roe* v. *Wade* and *Doe* v. *Bolton*, the factual setting of these two cases. The two plaintiffs in those cases testified in front of the Judiciary Subcommittee. I was there and so was Senator Feingold. Both of the plaintiffs talked about the false statements of record that those cases were built upon. Listen to this statement by Sandra Cano. She's of *Doe* v. *Bolton.* This is what she said, June 23rd, 2005 in the Judiciary Subcommittee that I chaired. Quote: "*Doe* v. *Bolton* falsely created the health exception that led to abortion on demand and partial birth abortion." This is her statement now. "I, Sandra Cano, only sought legal assistance to get a divorce from my husband and to get my children from foster care. Abortion never crossed my mind, although apparently was on the mind of the attorney from whom I sought help."

Further quote: "At no time did I ever have an abortion, I did not seek an abortion, nor do I believe in abortion." This is Sandra Cano, of *Doe* v. *Bolton*.

And then she goes on to say, "*Doe* v. *Bolton* is based on lies and deceit. It needs to be retried or overturned," which she is trying to get it retried. "It is against my wishes. Abortion is wrong." That is *Doe* of *Doe* v. *Bolton*.

Here is Norma McCorvey, of *Roe* v. *Wade.* This is just the factual setting. "I believe I was used and abused by the court system in America. Instead of helping women in *Roe* v. *Wade*, I brought destruction to me and millions of women throughout the Nation." Norma McCorvey.

Quote: "This is really troubling too. I made up the story that I had been raped to help justify my abortion." Norma McCorvey.

Facts, facts, in *Roe* v. *Wade* and *Doe* v. *Bolton*, falsified statements. And upon this we have based this constitutional right that has been found, that we now have 40 million fewer children in the country to bless us with?

I want to take another point on that to you. We have talked a lot about the disability community, and well we should, and the

protection needed for the disability community. That is important, because I think it helps people that need help, but it also helps the rest of us to be much more human and caring.

Senator Kennedy is helping me with a bill because a number of children never get here that have disabilities. Unborn children prenatally diagnosed with Down syndrome and other disabilities—I do not know if you know this, but there was a recent analysis, and 80 to 90 percent of children prenatally diagnosed with Down syndrome never get here. Never get here. They are aborted, and people just say, "look, this child has difficulties." And we even have waiting lists in America of people today willing to adopt children with Down syndrome.

We will protect that child, as well we should under Americans with Disabilities Act and other issues when they get here. But so much of the time, and with our increased ability of genetic testing, they don't get here. Diagnosis in the womb, a system that encourages this child to be destroyed at that stage, and this is all in the records. We are the poorer for it as a society.

All the members of this body know a young man with Down syndrome named Jimmy. Maybe you have met him, even. He runs the elevator that takes the Senators up and down on the Senate floors. His warm smile welcomes us every day. We are a better body for him. He frequently gives me a hug in the elevators. I know he does Senator Hatch often, too, who kindly gives him ties, some of which I question the taste of, Orrin, but—

[Laughter.]

Senator BROWNBACK.—but he kindly gives ties.

Senator HATCH. This doesn't have to get personal.

[Laughter.]

Senator BROWNBACK. Jimmy said to me the other day after he hugged me, he said, "Shhh, don't tell my supervisor. They're telling me I'm hugging too many people."

And yet we are ennobled by him and what he does and how he lifts up our humanity, and 80 to 90 percent of the kids in this country like Jimmy never get here. What does that do to us? What does that say about us?

I would just ask you, Judge Roberts, to consider, and probably you can't answer here today, whether the individuals with disabilities have the same constitutional rights that you and I share while they are in the womb.

Judge ROBERTS. Well, Senator, I appreciate your thoughts on the subject very much. I do think, though, since those precise questions could come before the Court that that is in the area that I have to refrain from answering.

Senator BROWNBACK. I hope one thinks about people like Jimmy and a system now that scientifically can figure out the nature of this child's physical or mental state at an early point and is having many of them destroyed at that point in time. That is taking place in our country today.

I have little time left. I want to say one final thing to you, and I appreciate you and I appreciate your inability to answer some of these questions. They are tough questions and they are questions that are live in front of us as a society.

I would just ask you really about your mentor, one of your mentors, Chief Justice Rehnquist, who I admired greatly, admired for his demeanor. As you go on, and I anticipate you will be approved to be the Chief Justice of the United States, I would ask you just if you could briefly respond, how do you view his mentorship of you and your taking over, if you are confirmed, as Chief Justice? What does that mean personally to you and how will it impact you as Chief Justice?

Judge ROBERTS. Well, it makes the opportunity a very special one, as I've said before. The Chief was a mentor to many people, and like many great mentors, of course, he led by example, not by precept. His example of how he dealt with other people, not just other Justices but everybody in the courthouse, including the law clerks, in an open, friendly, balanced way was an example for everybody there.

Substantively, his approach to the role of a judge and the appropriate role of the Court is, I think, a very important example. He was somebody who appreciated the limits, the appropriate limits on the judicial role and the judicial power, and he was always careful and conscious of that. He was always asking whether or not this was something that it was appropriate for the courts to do.

I do think it's important for judges at every level to always ask that question, because as we had talked earlier, judicial self-restraint is the key check on the authority of the court, and if you're not asking yourself that question at every stage, is this an appropriate thing for me to do as a judge, then there's a great danger that you'll lose sight of that important judicial self-restraint.

Senator BROWNBACK. God bless you, your service to the country, and your family.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback.

Senator Leahy has a doctor's appointment this morning but will be joining us shortly. We now turn to Senator Coburn for his 30 minutes.

Senator COBURN. Thank you, Mr. Chairman, and again, welcome. Good morning.

Judge ROBERTS. Good morning.

Senator COBURN. There were so many legal terms yesterday bandied around that I was having trouble grabbing hold of, I thought I would start out with medical terms this morning and see if you could keep up.

[Laughter.]

Senator COBURN. I also thought it was interesting, since you have been prophesied to have 35 years, that is 12,675 days, that the Chairman prophesies that you will be there. You have passed three of them, and congratulations on number three.

I want to go to something that Senator Kyl talked with you about, and I was very pleased with your answer. He asked you about referencing and using preference to select and pick precedents from foreign law yesterday. I thought you gave a very reassuring answer to the American public.

You based your answer on two points. One is that the democratic theory is that in this country, with our law, the people are involved in that, both through the Senate, the House, and the President who

appoints you. The other point you made is that relying on foreign precedent does not confine judges.

I just want to kind of ask a couple of questions. Number one, the oath that you took for your appellate position and the oath that you will take states the following, that I, John Roberts, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me, John Roberts, under the Constitution and the laws of the United States, so help me, God.

My question relates to the Constitution and what is said in Article III, that judges both of the Supreme and inferior courts shall hold their offices during good behavior. My question to you is, relying on foreign precedent and selecting and choosing a foreign precedent to create a bias outside of the laws of this country, is that good behavior?

Judge ROBERTS. Well, I—for the reasons I stated yesterday, I don't think it's a good approach. I wouldn't accuse judges or Justices who disagree with that, though, of violating their oath. I'd accuse them of getting it wrong on that point, and I'd hope to sit down with them and debate it and reason about it.

I think that Justices who reach a contrary result on those questions are operating in good faith and trying, as I do on the court I am on now, to live up to that oath that you read. I wouldn't want to suggest that they're not doing that. Again, I would think they're not getting it right in that particular case and with that particular approach and would hope to be able to sit down and argue with it, as I suspect they'd like to sit down and debate with me. But I wouldn't suggest they're not operating in good faith to comply with—

Senator COBURN. Can the American people count on you to not use foreign precedent in your decision making on the Supreme Court?

Judge ROBERTS. You know, I will follow the Supreme Court's precedents consistent with the principles of *stare decisis*, and there are cases in this area, of course. That's why we're having the debate. The Court has looked at those. I think it's fair to say, in the prior opinions, those are not determinative in the sense that the precedent turned entirely on foreign law, so it's not a question of whether or not you'd be departing from these cases if you decided not to use foreign law. For the reasons I gave yesterday, I'm going to be looking—

Senator COBURN. I understand that, and I respect that and I know that you can't be in a position to make a judgment on that. But again, for the record, I want to read what the Constitution says, that judges both of the Supreme and inferior courts shall hold their offices during good behavior and that the oath that they take references only the Constitution and the laws of this country. If anything, I would like to send a message that that is what their oath says and this judicial restraint that you have spoken of, I believe includes that oath and the definition that our Founders believed when they said, here is what you should base your decisions on, is the Constitution of the United States and the laws.

The other thing, yesterday, you had an exchange with Senator Feingold on a case, and I think it was the *Gonzaga* case. You talked about congressional intent. I would like you for a moment to spend a minute giving us your opinion, and you may refuse to do so if you care to, that would be your privilege, but one of my observations is that oftentimes, we don't do a very good job with the laws that we write because we are not very clear. Sometimes we are lazy. Sometimes we are politically expedient. But oftentimes, the very problems that you as a Court make controversial decisions over are because we have not done a good job.

I would just like your thoughts as to if you were to critique things that we could do better to make your job easier and clearer, what would you have to say to that?

Judge ROBERTS. Well, sitting where I am, I am not terribly inclined to be critical of the Congress—

[Laughter.]

Judge ROBERTS.—and wouldn't be in any event. But a lot of what judges spend their time doing, not always in the momentous constitutional cases that we've been talking about, but sometimes in very mundane cases, is the effort to discern congressional intent, trying to figure out what Congress meant when it used specific words that were passed by both Houses and signed by the President into law.

Now, some of that is entirely unavoidable. The complexity of human endeavor is such that situations are going to arise that are not clearly answered by even the most specific language, and that's to be expected and judges have to address those situations.

But as you suggest yourself in your question, there are situations where sometimes Congress punts the issue to the courts. They can't come to an agreement about how a particular provision should be applied, and so folks who wanted to go one way and folks who wanted to go the other way just sort of leave it ambiguous or leave it out and take their chances in court.

Obviously, that's a different situation. I think all judges would tell you that to the extent Congress can address the issues and resolve the issues that are the policy questions entrusted to them, it makes it a lot easier for the courts to decide the cases that do come up because then it's just a question of looking at the facts and the law is clear and you apply the facts to the law. If the law is unclear, that makes it that much more difficult.

As I said, obviously, a lot of these situations are unavoidable, but there are certainly—and the Supreme Court has addressed many of these, the issue of implied rights of action in the past, and they were doing case after case after case and they finally adopted an approach in the early 1980s that said, look, we're not going to imply rights of action anymore. Congress, if you want somebody to have a right of action, just say so. But this is not a good thing for the courts to be doing, deciding whether a particular right of action should be implied or not.

And after the Court developed that jurisprudence in the early 1980s, the hope was, and I think it has been realized to a large extent, that there will be more addressing of that question in Congress, which is where it should be addressed.

Senator COBURN. And you would agree, we could do a better job?

Judge ROBERTS. Well, I'm sure everyone is doing as good a job as they can—

Senator COBURN. That is the first answer I worry about that you given through the whole testimony.

[Laughter.]

Senator COBURN. Let me go to another area. As I mentioned in my opening statement, I am a practicing physician, kind of an old-time GP. I have delivered 4,000 babies. I take care of people at the end of life, at the beginning of life. In all 50 States, death is recognized and defined as the irreversible cessation of the brain and heart activity. Do you have any reason to dispute that?

Judge ROBERTS. I don't know the medical terms or definitions, but no. I mean, if that's the law in the States—that's not to say that it has any particular legal significance in cases—

Senator COBURN. Right. I am not asking you about legal significance. Would you agree that the opposite of being dead is being alive?

Judge ROBERTS. Yes. Again—

[Laughter.]

Judge ROBERTS. I don't mean to be overly cautious in answering—

Senator COBURN. You know I am going somewhere.

[Laughter.]

Senator COBURN. One of the problems I have is coming up with just the common sense and logic that if brain waves and heartbeat signifies life, the absence of them signifies death, then the presence of them certainly signifies life. And to say otherwise logically is schizophrenic, and that is how I view a lot of the decisions that have come from the Supreme Court on the issue of abortion.

I won't press you on this issue. I know you can't. But for the listeners of this hearing, if, in fact, life is the presence of a heartbeat and brain waves, it is important for everybody in the country to know that at 16 days post-conception, a heartbeat is present, and that at 41 days, right now, we can assure ourselves that brain activity and brain waves are present. And as the technology improves, we are going to see that come earlier and earlier.

I make that point because so many of the decisions of the Supreme Court have been made in a vacuum of the scientific knowledge of what life is, when personhood is, when it begins, when it doesn't, when it exists, when it doesn't, and it belies the scientific facts and medical facts that are out there today, and so that was for your information and my ability to put forth a philosophy that I believe would solve a lot of the controversy in this country.

I want to cover one area that was discussed yesterday where the implication was made that you might have ruled on a case violating a judicial ethic, and that was the *Hamdan* v. *Rumsfeld* case. Senator Feingold asked you questions about the case. You invoked the cannon, the code of conduct of U.S. judges that prohibits you from talking about a pending case. I would like, Mr. Chairman, a copy of that canon to be placed in the record.

Chairman SPECTER. Without objection, so ordered.

Senator COBURN. Canon 3 provides that a judge should perform the duties of the office impartially and diligently. The judicial duties of a judge take precedence over all other activities. In per-

forming the duties prescribed by law, the judge should adhere to the following standards.

Adjudicative responsibilities—there is another one of those legal words I am having trouble getting my hands around. A judge should avoid public comment on the merits of a pending or impending action requiring similar restraint by court personnel subject to the judge's direction and control. The official commentary to Canon 3(a)(6) provides the admonition against public comment about the merits of a pending or impending action until completion of the appellate process.

I would also note that any criticism of your participation in this case is unwarranted. Numerous law professors who specialize in legal ethics have stated that you in no way have violated any ethics rules simply because you were considered for another judgeship. The opinion was finalized well before you met with the President—I believe that is correct—or was offered this nomination. Is that correct?

Judge ROBERTS. Yes.

Senator COBURN. The argument, the initial vote, and the drafting of the opinion all took place before there was a Supreme Court vacancy at all, is that correct?

Judge ROBERTS. Yes.

Senator COBURN. You did not write an opinion on that case, is that correct?

Judge ROBERTS. I joined Judge Randolph's opinion.

Senator COBURN. Right, but you did not write a separate opinion on that case?

Judge ROBERTS. No.

Senator COBURN. And I would like to also enter into the record the nonpartisan ethicists who agree that Judge Roberts did not violate any ethics rules—

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator COBURN. I want to go to one other area that I have some concern about. I know my concerns are opposite from some of those who have a different philosophy of life. Many of the questions posed to you have focused on our concerns about an activist judiciary. My opening statement expressed some of those concerns. However, I am equally concerned about an activist Congress that goes beyond its bounds, a Congress that routinely ignores its own constitutional boundaries. Historically the debate about the role and scope of Congress has focused on the General Welfare clause.

As we all know, Article I, section 8, clause 1 of the Constitution gives Congress the power to provide for the common defense and general welfare of the United States. The Tenth Amendment also spells out limitations on congressional power. We had the discussion yesterday on the toad, I believe. The Tenth Amendment states the power not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people.

I want to give you a quote that James Madison said, because in his wisdom he anticipated that we would try to stretch the definition of the Founders. And he wrote with respect to the words "General Welfare:" I have always regarded them as qualified by the de-

tail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character in which there is a host of proofs was not contemplated by its Creators.

In *Federalist Paper 45,* Madison writes: "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and infinite."

Do you agree with James Madison's interpretation of the General Welfare Clause, that the powers of the Congress should be fundamentally limited, or do you agree with the modern prevailing wisdom of both political parties, particularly appropriators, who believe Congress's role is fundamentally unlimited?

Judge ROBERTS. Well, I agree with Madison's view in general that the Constitution does contain limitations on the Federal authority. The General Welfare Clause, and in particular the necessary and proper clause, of course, would have been interpreted in many of Chief Justice John Marshall's early opinions to recognize though that the scope of authority given to Congress is broad, and broad enough to confront the problems that in Chief Justice John Marshall's case were confronted by a young Nation and helped to bind it together as a Nation and broad enough today to confront the problems that Congress addresses. But the notion that the Constitution was one of limited powers, albeit broad, under the Necessary and Proper Clause and even the General Welfare Clause is interpreted by Chief Justice John Marshall in these early opinions, that recognition doesn't undermine the Framers' essential vision that we are dealing with a Federal system in which vast powers reside with the States, and that the Federal Government is one of limited powers, broad in obviously particular areas and broad under the Necessary and Proper Clause, but limited powers nonetheless.

Senator COBURN. Thank you. I just have one other comment. As you have been before our Committee, I have tried to use my medical skills of observation of body language to ascertain your uncomfortableness and ill at ease with questions and responses. And I have honed that over about 23, 24 years. And the other thing that I believe is, is integrity is at the basis of what we want in judges.

I will tell you that I am very pleased, both in my observational capabilities as a physician to know that your answers have been honest and forthright, as I watch the rest of your body respond to the stress that you are under. But I am also pleased with our President, that he has had the wisdom to pick somebody of such stature and such integrity. Without integrity, what you say here means nothing, and that is the very foundation at which I believe you have based your life, and I am pleased to have you before us, and I thank you.

Mr. Chairman, I yield back the balance of my time.

Chairman SPECTER. Thank you very much, Senator Coburn.

Judge Roberts, before taking up the subject of the confrontation—we now proceed to the 20-minute round for each Senator. Before taking up the issue of the confrontation and clash between the

Congress and the Supreme Court, I want to pick up a few strands from yesterday's testimony.

Near the end of my questioning I had commented on the case of *United States* v. *Dickerson* where the Chief Justice had made a modification of his earlier objections to *Miranda* and said that the *Miranda* warnings ought to be upheld, contrasting his view in 1974 in a Supreme Court decision with his view in the year 2000, saying that *Miranda* should not be overruled because it has been embedded in routine police practices and become a part of our national culture, and that has all of the earmarks of a doctrine of a living Constitution.

Dissenting in *Poe* v. *Ullman*, Justice John Marshall Harlan made one of the famous statements on this issue, saying that the—commenting on liberty, quote, "The traditions from which it is developed," that tradition is a living thing. My question to you is, do you regard the evolution of various interpretations on liberty as a living thing, as Justice Harlan did and as Justice Rehnquist appeared to on the *Miranda* issue?

Judge ROBERTS. I think the Framers, when they used broad language like "liberty," like "due process," like "unreasonable" with respect to searches and seizures, they were crafting a document that they intended to apply in a meaningful way down the ages. As they said in the preamble, it was designed to secure the blessings of liberty for their posterity, they intended it to apply to changing conditions, and I think that in that sense it is a concept that is alive in the sense that it applies and they intended it to apply in a particular way, but they intended it to apply down through the ages.

Chairman SPECTER. Well, when you talk about intent, I think that is a pretty tough interpretation. When the Equal Protection Clause was passed by the Senate in 1868, the Senate galleries were segregated, blacks on one side and whites on the other. So that could not have been their intent. The interpretation which occurs later really is captured by Justice Cardozo in the case of *Palco* v. *Connecticut*, a case which impressed me enormously back in the law school days, when talking about the constitutional evolution referred to it as expressing values which are, "the very essence of a scheme of order to liberty," "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Would you agree with the Cardozo statement of jurisprudence which I just quoted?

Judge ROBERTS. Well, the general approach of recognizing the values that inform the interpretation of the Constitution, it applies to modern times. But just to take the example that you gave of the Equal Protection Clause. The Framers choose broad terms of broad applicability, and they state a broad principle, and the fact that it may have been inconsistent with their practice may have meant that they were adopting a broad principle that was inconsistent with their practice, and their practices would have to change, as they did, with respect to segregation in the Senate galleries, with respect to segregation in other areas.

But when they adopt broad terms and broad principles, we should hold them to their word, and imply them consistent with those terms and those principles. And that means when they have adopted principles like liberty, that doesn't get a crabbed or narrow

construction. It is a broad principle that should be applied consistent with their intent, which was to adopt a broad principle.

I depart from some views of original intent in the sense that those folks, some people view it as meaning just the conditions at that time, just the particular problem. I think you need to look at the words they used, and if the words adopt a broader principle, it applies more broadly.

Chairman SPECTER. Well, I will accept that as an indication of your view not to have a "crabbed interpretation" and applying the broad principles.

Let me refer you to a statement by Chief Justice Rehnquist in dissent in the *Casey* case, which surprises me. I ask you whether you agree with this. He said, "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause." Do you agree with that?

Judge ROBERTS. Well, that does get into an area where cases are coming up. The Chief in that position was referencing of course the holding in *Roe* v. *Wade*, and that was what the issue was in *Casey*. But I don't think I should opine on the correctness or incorrectness of particular views in areas that are likely to come before the Court.

Chairman SPECTER. I am going to move now to the confrontation between Congress and the Court, and what I consider to be denigrating comments about the Congress. In the Morrison case, in the face of a overwhelming factual record, the Court, 5–4 decision, said that parts of the legislation to protect women against violence unconstitutional because of the congressional "method of reasoning." And then the dissent picked up the conclusion that the majority's view was "dependent upon a uniquely judicial competence" with the other side of the coin being congressional incompetence. And then in the dissent in *Tennessee* v. *Lane* Justice Scalia says that the Court engaged in ill-advised proceedings to make itself the "task master" to see if the Congress has done its homework. You commented a few minutes ago that you would be respectful of Congress. Do we have your commitment that you won't characterize your method of reasoning as superior to ours?

Judge ROBERTS. I don't think it's appropriate—

Chairman SPECTER. In your particular case, maybe yours is, but—

Judge ROBERTS. No, no.

[Laughter.]

Chairman SPECTER. As a generalization—we have gone around this with other nominees, and after they have gone to the Court, they have not been mindful as to what they have said here. But I take umbrage at what the Court has said and so do my colleagues. There isn't a method of reasoning which changes when you move across the green from the Senate columns to the Supreme Court columns. And we do our homework, evidenced by what has gone on in this hearing, and we do not like being treated as schoolchildren, requiring, as Justice Scalia says, a task master.

Will you do better on this subject, Judge Roberts?

Judge ROBERTS. Well, I don't think the Court should be the task master of Congress. I think the Constitution is the Court's task master, and it's Congress's task master as well. And we each have

responsibilities under the Constitution. And I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record. Now—

Chairman SPECTER. On the record. In *U.S.* v. *Morrison*, the legislation to protect women against violence, the record showed that there were reporters on gender bias from the task force in 21 States and eight separate reports issued by Congress and its committees over a long course of time leading to the enactment and the characterization by the dissenters that there was a mountain of evidence.

What more does the Congress have to do to establish a record that will be respected by the Court? And this is where the five-person majority threw it over, not because of the record but because of the method of reasoning. Isn't that record palpably sufficient to sustain the constitutionality of the Act?

Judge ROBERTS. Well, Mr. Chairman, I don't want to comment on the correctness of incorrectness of a particular decision. What I will say—

Chairman SPECTER. Well, Judge Roberts, let me interrupt you there for a minute. Why not? The case is over. This isn't a case which is likely to come before you again. These are the specific facts based on the rape of the woman—alleged rape by the three VMI students. I liked your answers yesterday. You were willing to answer more questions about cases on the differentiation that they are not likely to come before the Court. This is not likely to come before the Court again. Isn't this record sufficient in *Morrison* to—

Judge ROBERTS. Well, Mr. Chairman, I must respectfully disagree. I have been willing to comment on cases that I think are not likely to come before the Court again. I think the particular question you ask about the adequacy of findings, make a determination of the impact on interstate commerce, is likely to come before the Court again. And expressing an opinion on whether the *Morrison* case was correct or incorrect would be prejudging those cases that are likely to come before the Court again. And that is the line—it's not just a line that I'm drawing. It's a line that, as I've read the transcripts, every nominee who's sitting on the Court today drew. Some of them drew the line far more aggressively and wouldn't even comment on cases like *Marbury* v. *Madison*.

What I can tell you is that with respect to review of congressional findings, that my view of the appropriate role of a judge is a limited role and that you do not make the law, and that it seems to me that one of the warning flags that should suggest to you as a judge that you may be beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings, because that doesn't look like a judicial function. It's not an application of analysis under the Constitution. It's just another look at findings.

Now, again, I don't feel it's appropriate to comment on *Morrison*. I do feel it's appropriate to tell you that I appreciate the differences between Congress and the courts with respect to findings, both

with respect to the issue of the capability and competence to undertake that enterprise, and also with respect to the issue of authority to make a decision based on the findings.

Chairman SPECTER. Judge Roberts, we will have to agree to disagree about that. I don't think the facts of *Morrison* are likely to come before the Court, but I ask the questions, you answer them.

Let me come now to the Americans with Disabilities Act, and you have 5–4 decisions going opposite ways. Ms. Garrett had breast cancer. The Court in 2001 said that the title of the Disabilities Act was unconstitutional, 5–4, on employment discrimination. Then 3 years later, you have the case coming up of *Lane*, the paraplegic crawling up the steps, accommodations, 5–4, and the Act is upheld. The record in the case was very extensive—13 congressional hearings, a task force that held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination. And in the *Garrett* case, the Supreme Court of the United States used a doctrine which had been in vogue only since 1997 in the *Boerne* case. You and I discussed this in my office. They came up with a standard of what is congruent and proportionate. Congruence and proportionality.

I was interested in your statement when we talked informally that you did not find those in the 14th Amendment. I did not either. Now, they plucked congruence and proportionality right out of thin air, and when Scalia dissented, he said that the congruence and proportionality test was a "flabby test," which is a "invitation to judicial arbitrariness by policy-driven decisionmaking."

Now, you said yesterday that you did not think that there was judicial activism when the Court overruled an Act of Congress. Isn't this congruence and proportionality test, which comes out of thin air, a classic example of judicial activism where the view of congruence—hard to find a definition for congruence. Proportionality, hard to find a definition for proportionality. I have searched and cannot find any.

Isn't that the very essence of what is in the eye of the beholder where the Court takes carte blanche to declare Acts of Congress unconstitutional?

Judge ROBERTS. Well, these questions arise, of course, under, as you know, section 5 of the 14th Amendment, where the issue is Congress's power to address violations of the 14th Amendment. And it's an extraordinary grant of power, and the Court has always recognized it as such. And their decisions in recent years—it's not just, as you point out, the *Garrett* case on the one hand and the *Lane* case on the other. You have the *Hibbs* case recently, which upheld Congress's exercise of authority. The most recent cases—*Lane* and *Hibbs*—uphold Congress's exercise of authority to abrogate—

Chairman SPECTER. But, Judge Roberts, they uphold it at the pleasure of the Court. Congress can't figure that out. There is no way we can tell what is congruent and proportional in the eyes of the Court.

Judge ROBERTS. Well, and that was Justice Scalia's position in dissent. He had originally—

Chairman SPECTER. Do you agree with Scalia?

Judge ROBERTS. Well, again, the congruent and proportional test—

Chairman SPECTER. Do you disagree with Justice Scalia?

Judge ROBERTS. I don't think it's appropriate in an area—and there are cases coming up, as you know, Mr. Chairman. There's a case on the docket right now that considers the congruence and proportionality test.

Chairman SPECTER. That is why I am raising it with you. I would like to see a sensible interpretation of the Court in that case.

Judge ROBERTS. Well, and if I am confirmed and I do have to sit on that case, I would approach that with an open mind and consider the arguments. I can't give you a commitment here today about how I will approach an issue that is going to be on the docket within a matter of months.

Chairman SPECTER. Judge Roberts, I am not talking about an issue. I am talking about the essence of jurisprudence. I am talking about the essence of a man/woman-made test in the Supreme Court which has no grounding in the Constitution, no grounding in the *Federalist Papers*, no grounding in the history of the country, comes out of thin air in 1997, and it is used in *Lane* and *Garrett*, two 5–4 decisions on identical records, on an identical Act, and the country and the Congress are supposed to figure out what the Court means. So I am really talking about jurisprudence.

Judge Roberts, let me move to one other subject in the 2 minutes that I have remaining, and that is, on the ability which you would have, if confirmed as Chief Justice, to try to bring a consensus to the Court. We have 5–4 decisions as the hallmark of the Courts. Not unusual. You commented yesterday about what Chief Justice Warren did on *Brown* v. *Board of Education*, taking a very disparate Court and pulling the Court together. As you and I discussed in my office, there are an overwhelming number of cases where there are multiple concurrences. A writes of concurring opinion in which B joins; then B writes a concurring opinion in which A joins and C joins.

In reading the trilogy of cases on detainees from June of 2004 to figure out what we ought to do about Guantanamo, it was a patchwork of confusion. I was intrigued by the comment which you made in our meeting about a dialogue among equals, and you characterized that as a dialogue among equals when you appear before the Court, and they are on a little different level over there. I am way behind you on Supreme Court arguments. It is 39–3. But I would have been an equal of theirs in any event. Perhaps you are. But I am intrigued by your concept, and I asked you how you would be able to be the Chief with Justice Scalia, who is 18 years older than you, and even Justice Thomas, who is 7 years older than you. Tell us what you think you can do on this dialogue among equals to try to bring some consensus to the Court to try to avoid this proliferation of opinions and avoid all these 5–4 decisions.

My time is up.

Senator LEAHY. I would like to hear the answer because that is a question I was going to ask, too.

Chairman SPECTER. Well, now we are on Senator Leahy's time. Go ahead.

Senator LEAHY. Oh, no, we are not on my time.

[Laughter.]

Senator LEAHY. We are not on my time. We are still on yours, Mr. Chairman. But I would like to hear this answer.

Chairman SPECTER. It is permissible to have the answer on the red light, just not the question.

Judge ROBERTS. Well, I don't want to be presumptuous about if I am confirmed, what I would do. I do think, though, it's a responsibility of all of the Justices, not just the Chief Justice, to try to work toward an opinion of the Court. The Supreme Court speaks only as a Court. Individually, the Justices have no authority.

And I do think it should be a priority to have an opinion of the Court. You don't obviously compromise strongly held views, but you do have to be open to the considered views of your colleagues, particularly when it gets to a concurring opinion. I do think you do need to ask yourself, what benefit is this serving? Why is it necessary for me to state this separate reason? Can I go take another look at what the four of them think or the three of them think to see if I can subscribe to that or get them to modify it in a way that would allow me to subscribe to that, because an important function of the Supreme Court is to provide guidance. As a lower court judge, I appreciate clear guidance from the Supreme Court.

I know the last thing Chief Justice Rehnquist said in Court, on the last day of the term he was reading the disposition in a case and said, you know, A reaches this conclusion, is joined by B, and then C has a separate concurrence joined by D and E, and he ended up by saying, "I didn't know we had that many Judges on the Court." That undermines the importance of providing guidance.

I do think the Chief Justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed.

Chairman SPECTER. Thank you very much, Judge Roberts.

Judge ROBERTS. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman. Thank you for asking that question because it was one I wanted to ask, too.

Last night, we welcomed you to night court. Welcome to daytime court.

Judge ROBERTS. Thank you, Senator.

Senator LEAHY. It will probably become night court before we get done.

[Laughter.]

Senator LEAHY. We talked just briefly about the First Amendment yesterday. It is written primarily in terms of speech, but in a free and democratic nation, access to information, I think, is extraordinarily important. Our Framers, surely understood the ancient maxim, "knowledge is power." Actually, that was the maxim the administration used as the model for what was a somewhat Orwellian Total Information Awareness program until a Republican Congress, and I supported this, shut it down. It was asking too much knowledge about individual Americans.

I also spoke about "we the people." If "we the people" know what our government is doing and why it is doing it, we can hold the government accountable, and should. So while I am not going to go

into a specific case, I worry about an administration that spreads misinformation and declares more things secret, spending billions of dollars doing so, far more than any administration in history—probably than all administrations put together. It punishes the whistleblowers. It bars the press and cameras from so many different events.

And I believe very strongly that if the people want to know what is going on, the courts are, if at all possible, supposed to take their side in making sure they know what is going on, because our government should not be able to hide things unnecessarily from the people. No matter who is in power, the people should know what is going on.

So I would like to know how you would approach such a case. Let me give you a few examples in the last couple of years. The administration fought to prevent the media from covering coffins returning from Iraq. It fought to keep disturbing images of U.S.-run prisons in Iraq from the media. And just last weekend, actually after a loss in court, the administration abandoned its zero-access policy regarding the scenes of devastation in New Orleans. As you know, most of America found out what was going on in New Orleans from the press, not from our government, at least in the first few days.

There have been a number of reasons, excuses, which seem to change day by day for why these things are being blocked. I am not going to ask you to evaluate them, but my question is this.

If the government seeks broadly to exclude media from access to images or events of public interest or concern, does the First Amendment require the government to justify that denial of access, and if so, applying what kind of standards? Not any particular case, but what kind of standards does the Court have to apply?

Judge ROBERTS. Senator, I haven't dealt with a lot of First Amendment access cases. I know I studied one about media access to prisons, for example, the issue about whether the media had a right of access to prisons if they wanted to report on it. So I am not terribly familiar with the precise levels of scrutiny that apply.

There is, obviously, a balancing of sorts between particular interests when you are dealing with governmental operations and there are some perfectly valid reasons for excluding media. On the other hand, simply disagreement about whether it's an appropriate issue for the public to see would not strike me as a very compelling governmental interest, and I think the courts regularly balance these sorts of things when they get an issue about a challenge by the media saying their First Amendment rights are being violated because of a particular exclusion.

Again, I'm not terribly familiar with the precise legal standards or how they've developed since the prison access case that I'm familiar with, but it does require a consideration and weighing, and the values of the First Amendment obviously are something that have to be given careful weight by the court for the very reasons that you have discussed, because the First Amendment is—it serves a purpose. It's not there just because the Framers thought this was in general a good idea. It serves a purpose with respect to the government. It provides access to information and allows

people in a free society to make a judgment about what their government is up to.

Senator LEAHY. Like the Chairman, I was a prosecutor, and if we move a little bit out of the prison situation, which raises all other kinds of questions related to the ability to limit access, let's just go to something that the public might easily have access to if they could just walk in there.

Suppose the government—I will use something like Katrina. Suppose they felt that the rescue operations of the government, whether it is State, local, or Federal, was being handled in an inept way or evacuees were being mistreated. Does that give the government a right to bar the media who may want to expose that?

Judge ROBERTS. Well, I think as a general—

Senator LEAHY. How would you analyze the claim, without citing a particular case, how would you analyze it? The media comes and says, look, the government screwed up and we are trying to get in there to take pictures to show how they screwed up and they say we can't come in. How would you analyze a claim like that?

Judge ROBERTS. Well, you know, I do start with a general principle in this area, and I think it was Justice Brandeis who talked about sunlight being the best disinfectant—

Senator LEAHY. Disinfectant.

Judge ROBERTS.—and I think that's a lot of what the Framers had in mind in guaranteeing freedom of speech and the other rights that go along with it. They appreciated the benefits that would come from public awareness. That's an important principle.

I also, and again, this is not an area that I feel completely up to speed on the precedents, and I obviously, if I were in a position as a judge and had to decide a particular case, would study them and become aware, but my recollection is that there is great difficulty whenever you try to distinguish between public rights and media rights and that if it's a situation in which the public is being given access, you can't discriminate against the media and say, as a general matter, that the media don't have access because their access rights, of course, correspond with those of the public.

And as you said, they're in a position—if there are a handful of people who might be able to have access, the media is in a position to make that information or knowledge, whatever, available on a broader basis and—

Senator LEAHY. I raise this not because I am trying to pin you down on a particular case. I think we are going to see more and more of this. We are in the digital age. A lot of information is readily available. At the same time, the bad part about that is our government can acquire more and more and more information on us, just as your credit card company or anybody else does on you. Some of us want to be in a position to be able to go in and find out what is being collected on us. To what extent are we giving up our privacy?

Usually, far more than the Congress or anybody else, it has been the media that has exposed when this has been overdone, when mistakes or violations have been made, and I would hope that you would be committed to protecting just as much access as possible rather than the other way around.

Let me go to an issue we discussed yesterday, or others did, the issue of capital punishment. We have held in this Committee a number of hearings that show some real flaws in the administration of capital punishment; sleeping lawyers, drunk lawyers, lawyers who didn't bother even to investigate or didn't have the funds to do it. More than 100 death row inmates have been exonerated, including some, though, who spent years on death row in the most horrible conditions for a crime they never committed.

I think Senator Durbin mentioned the situation out in Illinois where a Republican Governor had to, and did, courageously, I thought, extend clemency to a whole lot of people who had been on death row. Some say, and I think you have even said this, when people are exonerated, it shows the system works. Well, let me tell you about the system in that case.

One of the people was Anthony Porter. He spent 16 years on death row. He came within 2 days of being executed. The system didn't work on his behalf. A bunch of kids from Northwestern University had taken an elective course on journalism, and the teacher said, why don't you look into this case, and these kids went out and did it. The kids dug up the information that was there, available to the police, available to the prosecutor, available to the Feds. Nobody before had dug it up. They found it, and the State's Attorney dropped the case. They got somebody else to confess.

You said 2 years ago, and I remember being at that hearing, you said about the startling number of innocent men sentenced to death who were later exonerated, that it somehow showed the system worked in exonerating them.

I worry about that statement. I really do. It has bothered me—and, you know, I voted for you for the circuit court and it was a split vote in our party. But that one really bothered me, that statement. I found it almost mechanical, and I will tell you why.

While people may say the fact that innocent people have been freed after years on death row shows the system is working, it doesn't. I think Sandra Day O'Connor said a few years ago, if statistics are any indication, the system may well be allowing some innocent defendants to be executed. If that is the case, the system is not working.

*Herrera*, we discussed that. The court grappled with, but didn't ultimately decide, whether the Constitution permits the execution of a person who is innocent. As principal Deputy Solicitor General, you co-authored the amicus brief for the U.S. in the *Herrera* case. You said the claim of innocence does not state a ground for Federal habeas. Actually, you said, quote, "Does the Constitution require that a prisoner have the right to seek judicial review of a claim of newly discovered evidence instead of being required to seek relief in the clemency process? In our view, the Constitution does not guarantee the prisoner such a right."

So let me ask you this. Without going into the facts of *Herrera*, is it your current personal view that the death row inmate who can prove his innocence has no constitutional right to do so before a court before he is executed?

Judge ROBERTS. Well, Senator, and this is the basis of the disagreement in *Herrera*. *Herrera* was not a case about actual inno-

cence. It's a question of whether you're entitled to bring a new claim—

Senator LEAHY. But listen to my question. Is a death row inmate who can prove his innocence, they have no constitutional right to do so in a court of law before they are executed?

Judge ROBERTS. Well, prove his innocence. The issue arrives before you get to the question of proof and the question is, do you allow someone who has raised several claims over the years to suddenly say at the last minute, somebody who just died was the person who committed the murder, and does that mean you start the trial all over again simply on the basis of that last-minute claim, or do you require more of a showing at that stage? That's what *Herrera* was about.

Now, I don't think, of course, that anybody who is innocent should be—suffer as a result of a false conviction. If they've been falsely convicted and they're innocent, they shouldn't be—

Senator LEAHY. Well, does the—

Judge ROBERTS.—in prison, let alone executed.

Senator LEAHY. But does the Constitution permit the execution of an innocent person?

Judge ROBERTS. I would think not, but the question is never do you allow the execution of an innocent person. The question is, do you allow particular claimants to raise different claims a fourth or fifth or sixth time, to say at the last minute, somebody who just died was actually the person who committed the murder. Let's have a new trial. Or do you take into account the proceedings that have already gone on.

Senator LEAHY. I am looking for broad principles here. You said—let me read it again—"does the Constitution require that a prisoner have the right to seek judicial review of a claim of newly discovered evidence instead of being required to seek relief in the clemency process? In our view, the Constitution does not guarantee the prisoner such a right." Is that your view today?

Judge ROBERTS. Well, that's what the Court held in *Herrera*—

Senator LEAHY. Is that your view today?

Judge ROBERTS. Well, I'm not in a position to comment on the correctness or incorrectness of particular Court decisions. That's the Court's precedent in *Herrera*. It agreed with the administration position, which was not that innocent people should be subject to imprisonment or execution—

Senator LEAHY. That is the position you took. The Supreme Court is going to revisit this issue in *House* v. *Bell*. Because you stated a position on that, does that require you to recuse yourself in *House* v. *Bell*?

Judge ROBERTS. No, because the position was stated in a brief filed on behalf of the administration and we talked yesterday about the established principle that lawyers do not subscribe as a personal matter to the views they present on behalf of clients.

Senator LEAHY. Well, in this case, the client is the United States. I mean, you are stating the position as sort of the, what do they call it, the Tenth Justice.

Judge ROBERTS. Well, I was the Deputy Solicitor General on the brief. I didn't argue the case. The Solicitor General was the counsel

of record in the case. But the position presented in the brief as an advocate is not necessarily the position of every lawyer on the brief.

Senator LEAHY. I think you were more than just a lawyer on a brief. You were in one of the most sought-after jobs, picked because of your positions. I was very impressed when I talked with you about your use of Latin, for example, and French, and I am always impressed by somebody with that facility. There is a Latin phrase—and this is not a "gotcha." I will translate it: "Qui facit per alium facit per se." He who acts through another acts for himself. And that is not the case in *Herrera*?

Judge ROBERTS. He who acts for another acts for himself? Well, it's the client acting through the lawyer. And it's the client who's acting for themselves.

Senator LEAHY. You are the client in this case—the Solicitor General is the client, in effect.

Judge ROBERTS. No, Senator, I disagree with that.

Senator LEAHY. Okay.

Judge ROBERTS. The Solicitor General represents the interests of the United States, and those positions represent that client's position.

In the *Herrera* case, again, it was the Solicitor General who was responsible for the position that was advanced. I'm not suggesting in any way that I disagree with it or agree with it. I'm just saying that it is a basic principle in our system that lawyers represent clients, and you do not ascribe the position of the client to the lawyer. It's a position that goes back to John Adams and the Revolution.

Senator LEAHY. Let me ask you this, then. Let me ask you something that can be ascribed to a Justice of the Supreme Court, and it is something that both the Chairman and I have talked a lot about, and that goes to some of the mechanics. If you will let me take a moment to explain for the audience the so-called rule of four. It takes only four Justices to grant cert, but it takes five to grant a stay of execution. Usually the courtesy is that if you get four, a fifth one will sign on. That has not always been followed of late. Of course, we are dealing with life or death, and Senator Specter has called it a bizarre and unacceptable outcome and once introduced legislation to change it.

How would you feel, if you were Chief, and you had four—four of the Justices now voted for a stay of execution, do you feel as Chief you would do the courtesy of kicking in the fifth one?

Judge ROBERTS. It's an issue that I'm familiar with. I do know it arose. And I thought the common practice, the current practice was that if there are four votes to grant cert that the Court would grant the stay, even though that does require the fifth vote, so that you don't have a situation—

Senator LEAHY. Yes, but that is because one more says, okay, we got four—

Judge ROBERTS. Right.

Senator LEAHY.—we will put somebody else's name on here. But that hasn't been followed all the time recently. It usually was, and that is why both Senator Specter and I have raised concern. Do you feel the earlier practice of once you have four—

Judge ROBERTS. I think that practice makes a lot of sense. I don't want to commit to pursue a particular practice in an area that I'll

obviously have to look at in the future, but it obviously makes great sense that if you have four to grant and that's the rule that you will consider an issue if there are four to grant. You don't want to moot the case by not staying the sentence.

Senator LEAHY. And I appreciate that because I know we find a lot of cases where they are perfectly willing to grant cert on monetary damages, but here you can't get it right, it doesn't make much difference on appeal after the execution.

You wrote a memo back in 1983, as a White House lawyer, regarding proposals by then-Chief Justice Warren Burger to reduce the Supreme Court's caseload. In that memo, you volunteered the following: "If the Justices truly think they are overworked, the cure lies close at hand. For example, giving coherence to Fourth Amendment jurisprudence by adopting the good-faith standard and advocating the role of fourth or fifth guesser in death penalty cases would eliminate about a half dozen argued cases from the Court's docket each term."

Are you saying that judges are just too busy to pay attention to death cases?

Judge ROBERTS. No, Senator.

Senator LEAHY. What are you saying? How do you feel today? That was 1983. How do you feel now 22 years later?

Judge ROBERTS. Well, in 1983, of course, they were hearing about 150 cases a year. They hear about half that now. Again, I don't want to prejudge questions or even be presumptuous to look down the road, but it seems to me that there's the capability there to hear more cases today, not fewer. And I'm sure there are reasons for the reduction in the caseload that I'm not familiar with that I might become more familiar with, but they handled twice as many cases 20 years ago than they do today. And I think the capability to address more issues is there in the Court.

Senator LEAHY. My time is up, but I think you will find both the Chairman and the Ranking Member of this Committee believe they could handle more. Thank you, Judge.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch?

Senator HATCH. I think you have really acquitted yourself as well as anybody I have seen in the ten nominations for the Supreme Court that I have been part of. And I just have to—I want to correct the record a little bit. It isn't the Ginsburg rule, although that has been referred to by almost all of us, including me. It is the Thurgood Marshall rule, the Rehnquist rule, the Kennedy-Souter-Thomas-Ginsburg-Breyer, just to name a few, rule because in every case, as I stated in my original remarks, the individual nominee has to draw a line as to what they can discuss and what they cannot. And you have drawn, I think, a fair line here throughout these proceedings, and I commend you for it. And there is just no excuse for being pushed to try and answer questions about cases that are likely to come before the Court or presently are before the Court. And I think the American people are starting to really fully realize that now as a result of these hearings.

Now, Judge Roberts, as you know, the war on terror is a unique challenge in American history. As a consequence, many novel

issues regarding Presidential authority to prosecute the war on terror will doubtless come before the Supreme Court. I think we all recognize the need to be careful in our questioning so you are not placed in the position of pre-committing yourself to any particular viewpoints on Executive power that would compromise your ability to render a fair judgment as cases come before the Court.

But let me ask you a general question on terrorism. It is a question that many in Congress and the administration and the public have had to struggle with, particularly in the aftermath of the events of September 11, 2001. The question is this: What is the best way for our society to protect ourselves against terrorists not affiliated with a nation state, wear no uniforms, and really secrete themselves in ways that have never been done before? On the one hand, there are very specific international rules embodied in the Geneva Conventions that specify how enemies captured during traditional warfare are to be treated. On the other hand, we have the traditional criminal law protections contained in Title 18 of the United States Code that define the rights accorded to criminals such as the famous *Miranda* warnings—warning, I should say, and the right to obtain counsel.

What everyone is struggling with is how do we apply these two traditional methods against nontraditional enemies who clearly are nontraditional? Let us make no mistake. Their goal is to destroy our society and way of life, and they will use weapons of mass destruction if they can. I don't think anybody doubts that.

Now, let me just ask you this general question. Will you give us assurance that you will keep an open mind as the administration and Congress adopt and implement new policies and legal procedures that govern the apprehension, interrogation, and detention of suspected terrorists?

Judge ROBERTS. Yes, Senator, I will. I certainly am not qualified to comment on the best approaches in the war on terror or the most effective approaches. That is the responsibility, obviously, of the other branches. The responsibility of the judicial branch is to decide particular cases that are presented to them in this area according to the rule of law, and that is what I have tried to do, and that is what I will continue to do, either on the court of appeals or another court.

Senator HATCH. Well, thank you. Now, also yesterday the Democratic staff of the Committee released a press release stating that you failed to distance yourself from what it called your "earlier cramped positions on Title IX and women's rights." And after listening to you yesterday, I did not find your earlier positions cramped at all. In fact, as you explained here to the Committee, many of the documents that questioners relied upon reflected the positions of the Reagan administration for which you worked.

Now, what assurance can you give the Committee that you will fairly interpret the civil rights laws, including critical statutes such as Title IX, fully and fairly, consistent with the purposes Congress intended in passing these laws?

Judge ROBERTS. Well, I can give the commitment that I appreciate that my role as a judge is different than my role as a staff lawyer for an administration. As a judge, I have no agenda. I have a guide in the Constitution and the laws and the precedents of the

Court, and those are what I would apply with an open mind, after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench. That's the way I would approach cases in that area, as in any other area.

The approach of someone who is obviously a staff lawyer in an administration is very different. The approach of someone who is an advocate for a client before the Court is obviously very different. Those are positions that I have held in the past. I am now a judge, and I have had the experience and I think my record will establish that that is how I approach cases across the spectrum of issues that are raised before the courts.

Senator HATCH. And reasonable people can differ on some of these issues.

Judge ROBERTS. Oh, certainly.

Senator HATCH. And the *Grove City* case, you won that case, didn't you?

Judge ROBERTS. The administration's position prevailed before the Court.

Senator HATCH. That is right. In other words, the position that you had advocated prevailed. Then we did not like it up here on Capitol Hill, so we passed the Civil Rights Restoration Act and we changed it, right?

Judge ROBERTS. Yes, which, of course, is always the prerogative of Congress when you're dealing with a question of statutory interpretation, and that's part of a regular interchange between the Court and the Congress. Sometimes if the Court gets something wrong, Congress can fix it. Even if the Court gets it right but Congress thinks the approach ought to be changed, Congress is free to legislate for a different result.

Senator HATCH. So I find it strange to criticize you because you won a case in the Supreme Court and have not advocated against women's rights in any way, shape, or form ever in your career, as far as I can understand. Is that correct?

Judge ROBERTS. That's correct, Senator.

Senator HATCH. And, in fact, you are a strong supporter of women's rights and gender equality?

Judge ROBERTS. Yes, Senator.

Senator HATCH. Okay. Now, let me just ask you a question that relates to some of the answers you gave yesterday regarding the voting rights. Even as the hearing was unfolding, again, Democratic staffers of the Committee issued a press release that said that you had missed an opportunity to distance yourself from what the release called your "earlier narrow positions on the reach of the Voting Rights Act." Now, that is not what I heard you say, nor do I believe that is what the public heard. A Democratic press release said that you had resorted to vague generalities about the importance of voting.

Now, as I heard you, I heard you explain the vigorous debate that took place regarding reauthorization of the Voting Rights Act in the 1980s. By the way, I was part of that debate. I felt very deeply that the effects test should apply to section 5 to those States that had a history of discrimination. But I also felt very deeply at the time that the intent test should apply to all the other States in section 2, which was the position I think the administration took

that you had to do some research on and within the administration.

Now, I lost in Committee. I was arguing that all of the States that did not have a history of discrimination should not have—be burdened by the effects test, which basically says that the effects of what happens looks like discrimination, it therefore is, even if there was never an intent to commit discrimination. Now, I lost, but I fell that the Voting Rights Act is the most important civil rights bill in history, and I felt it then. I voted for the amended bill with the effects test language in section 2, and have been a strong supporter ever since.

Would that be fair to describe your feelings about that?

Judge ROBERTS. Well, yes, Senator. The debate as you remember was over whether or not Section 2 should be extended without change as interpreted by the Supreme Court in *Mobile* v. *Bolden*, or whether it should be changed to incorporate the effects test and later the totality of the circumstances test. The administration position at the time was to extend the Voting Rights Act for the longest period in history without change, and that was the position that I was working on at the time, and Congress eventually decided, with—Senator Dole and some of the other Senators developed a compromise position on Section 2, and that was enacted with the support of the administration.

The one thing that was clear to me throughout those extended debates was that the people on both sides of the issue, in good faith, supported extension of the Voting Rights Act, and recognized the importance of the Voting Rights Act in securing civil liberties for all Americans. It wasn't a dispute about the goal. It wasn't a dispute about the objective. It wasn't a dispute about the importance. It was a dispute about whether to extend the Act without change or whether to make changes in the Act, and that was what the debate was about.

Senator HATCH. And the difference was, is that the administration vehemently wanted to pass the Voting Rights Act as it existed that was somewhat difficult to pass originally when it was originally passed, and that was a decent, honorable position. But when it was changed through our democratic process up here on Capitol Hill, I felt for the worse at the time, but I feel like I was wrong at the time. Then we voted for it. In fact, it was my friend, Senator Kennedy, who insisted that I come down to the White House as part of the bill signing team because he knew how deeply I felt about this. But there was a legitimate reason to take the administration's position, and the administration, once the compromise was reached with Senators Dole and Kennedy, the administration accepted that as well, and so did you.

That was a point I just kind of wanted to make because I think it is important to realize that we can sometimes get to a point where we misconstrue the intentions of decent, honorable people, and I count myself one of those. Even though I lost in Committee, I voted for this bill because to me it is the most important civil rights bill in history, albeit, others are very important as well.

Now, I just want to tell you that, like I say, I have been here for 29 years, and I have been through 10 of these. I think 10 if I recall correctly. And in all of that time we have seen some really

sterling, brilliant, wonderful people before this Committee, but I have never seen anybody who has done a better job of explaining himself than you have. If people cannot vote for you, then I doubt that they can vote for any Republican nominee. You have made a very, very strong presentation here, and I hope the American people realize that, and I hope my colleagues on both sides of the aisle realize that, and I look forward to seeing you as Chief Justice of the United States Supreme Court, and will do everything in my power to see that you are confirmed.

With that, I have eight and a half minutes left, I reserve the balance of my time.

Chairman SPECTER. Thank you very much, Senator Hatch.

Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Good morning, Judge.

Judge ROBERTS. Good morning, Senator.

Senator KENNEDY. I would like to, if we could, come back, and perhaps in a follow-up round, to the issue of civil rights, because as has been mentioned here by others, it is the overarching issue, I think, for our country and our society. I think our Founders did not get it right at the time of the drafting of the Constitution. We have had a Civil War. This country went through an extraordinary period of time led by Dr. King in the 1950s, and then we had that extraordinary moment of Dr. King here at the Lincoln Memorial, which I think touched the conscience of the Nation, people from all over the country. We were stuck for months on the 1964 Act, as you probably remember. Everett Dirksen opened up the possibility for reaching a compromise on the public accommodations provision. We spent 8 hours, a number of us in the Judiciary Committee, with Nick Katzenbach over in the Capitol Office, and had an agreement at that time there would be no amendments on the public accommodations; we could amend other provisions. And the legislation went forward, and was monumental in its importance and consequence.

Then we came back and realized that the most important legislation that we could probably address—we still had a way to go on housing and employment, but although employment was included in the '64 Act, but not to a great extent—was in the Voting Rights Act. And we had extensive hearings. During the course of those hearings by this Committee, other Committees as well, we listened to Attorney General Katzenbach, who had been working with Senator Dirksen, really the architect, under the leadership of President Johnson, certainly, but the architect of the '64 Act. And he testified before this Committee about the Section 2 provisions, and in his testimony on the Section 2 provisions, he said, Section 2 applies to any voting practice or procedure if its purpose or effect was to deny or abridge the right to vote on account of race or color.

So many of us, including the civil rights community, believed that the effects test was operative at that time. That bill passed the House by 333–85, 77–19 in the Senate.

The next thing that happened is we had the series of cases, as you recall, and the overarching test case was the *Zimmer* case, but we had a number of other cases. It was the Fifth Circuit that dealt for the most part with the whole range of southern States where

many of these voting challenges had existed, although I certainly recognize we have a long way to go in my own State of Massachusetts. But the Fifth Circuit en banc, effectively in the *Zimmer* v. *McKeithen* case—issued the lead case on the effects test—and that was followed by a series of cases, for a long period of time.

You are aware of this history?

Judge ROBERTS. I am remembering it from when we addressed this debate 23 years ago, yes.

Senator KENNEDY. But it sounds familiar. Then we went up to 1980 and we had the *Mobile* case, which effectively put the intent test in. And after the *Mobile* case, as you well remember, the Justice Department dropped a whole series of cases that had been prepared under the effects test because they did not believe that they could make the case on the intent test, on the whole series.

This sent a very powerful message to individuals across the South, and other parts of the country, that the additional kind of a burden to demonstrate intention was going to be so substantial in terms of resources. To try and determine the intent of individuals that lived many years ago would be virtually impossible. That happened. The Justice Department dropped scores of cases.

It was one of the important reasons that the civil rights community and many of us believed that it was so important at the time of the extension of the Voting Rights case in 1982, that we put the effects test in.

You believed, as I remember, and as we have gone over, that it should have been a restatement of the existing law, as you correctly stated yesterday, which was the intent test. Am I correct so far?

Judge ROBERTS. That was the administration position.

Senator KENNEDY. The administration's position. I remember William French Smith testifying before this Committee to that effect at that particular time.

Every civil rights group in 1982 supported the effects test. Groups like the NAACP Legal Defense, National Urban League, Lawyers Committee on Civil Rights Under Law, Leadership Conference on Civil Rights, Mexican American Legal Defense and Education Fund, National Council of La Raza, League of United Latin American Voters, League of Women Voters, and Congressional Black Caucus, the list goes on.

And the House went ahead and passed the legislation with the effects test by 389–24, 389–24. The legislation included language which reflected the concern of the Administration about whether the intent test was going to lead to either proportional representation or to quotas. That language was included in the House legislation that passed, and it included the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population, should not in and of itself constitute a violation of this section. I thought this addressed, for all intents and purposes, the concerns that the Administration, and most of in the civil rights community had with regard to the issue of proportional representation.

You roughly remember that or are aware—

Judge ROBERTS. I certainly remember the provision in the House bill at the time.

Senator KENNEDY. So we also now included that language in the Senate bill. Now, the House bill passed. The Senate bill had 61 cosponsors prior to the time that we adopted the Dole amendment. That legislation was on its way. That legislation was good as done, quite frankly. The Dole amendment was effectively a restatement of what was in the House bill, and it had been included. But the Administration after that said, "Well, if they are going to include that as the Dole amendment, we will let up in our opposition and we will eventually support it."

Now, during the time after the passage of the House bill and prior to the passage of the Senate bill, even though the House had passed it, you still strongly maintained the Administration's position, did you not?

Judge ROBERTS. Well, I was still working for the administration, Senator. President Reagan's position was to extend the Act without change. As you mentioned, that was the Attorney General's position. I was a Special Assistant to the Attorney General, and I was doing my best to implement their views and support their views.

Senator KENNEDY. History shows that after the House bill, the Administration thought it should alter its position. Your memorandum to Attorney General Reynolds said, "Brad Reynolds has expressed some reservation about circulating any written statement on the question to the Hill. My own view is that something must be done." Maybe that is a staffer, but it is separating yourself from Brad Reynolds, who was the leader on this issue at the time. Then you—

Judge ROBERTS. Well, with respect, Senator, my understanding—and I looked at that memorandum recently—is that the issue was whether or not to circulate something explaining the administration position, and I didn't think Mr. Reynolds's view was, you shouldn't do that because you didn't support the position. It was a question whether or not to circulate something at that time.

And my view was whether or not—I thought if the administration was advocating its position, it ought to get the position out.

Senator KENNEDY. Well, I think that is good. You are a good advocate and a strong believer in this.

The reason in this memorandum that you circle—and I have it right here, and I submit it into the Committee record, in the last paragraph you said: On the issue of the effects standard nationwide on the strength of the record will be constitutionally suspect, but also contrary to the most fundamental tenets of the legislative process on which the laws of this country are based.

The reason that I bring this up is to find out what you believed then and what you believe today, because you have a phrase in your memorandum that this provision, the effects test, is constitutionally suspect. Is that still your position? Because if it is your position on an issue as important as the Voting Rights Act that and moved the whole democratic process forward, resulted in the elections of hundreds and thousands of local leaders of color in all parts of the country, and Representatives in the House of Representatives, then I think the American people are entitled to know.

So specifically, specifically, do you believe that the effects test in the Voting Rights Act, which is currently the law, is constitutional?

Judge ROBERTS. Well, Senator, I don't know what the analysis—you read a clause of a sentence and I would have to look at the whole memorandum to see exactly what the suggestion or the issue was in that case.

Chairman SPECTER. Senator Kennedy, would you make the memo available to him, please?

Senator KENNEDY. Sure. What I am interested in doing is asking now whether you believe that the effects test is constitutionally suspect. I am interested in today, quite frankly, more than what you had—

Judge ROBERTS. Certainly.

Senator KENNEDY.—written before, whether you believe that it is suspect today or whether you find that it is settled law. It is fine if you want to, obviously, refer to it, but I am interested in what is your view today.

Judge ROBERTS. What we're referring to—what I'm referring to in this paragraph is the Court's determination, if I'm looking at this correctly, under Section 5, its determination—the language you read notes the Supreme Court's conclusion under Section 5, which is the pre-clearance provision that applies to jurisdictions with a history of discrimination, and what the Court had said in that case was that requirement of pre-clearance was acceptable given the record that the Congress had established in the Voting Rights Act of 1965 of the practices in those jurisdictions. And the concern was that if you extend the effects test nationwide, that the record which had been established only with respect to particular jurisdictions in the South wouldn't apply nationwide, and that would be the basis for a constitutional challenge.

The application of the test under Section 2, which is, as you know, if we use the shorthand effects test, it's actually the totality of the circumstances test and it lays forth a number of considerations. I think there is some argument about how it closely attracts the effects test under Section 5 or if it's a different totality of the circumstances approach.

I'm not aware of any case that has questioned the constitutionality of the application of the totality of the circumstances case under Section 2 and if an issue on that were to be presented to me on the Supreme Court, which it may be, given the pending extension of the Voting Rights Act, I would, of course, confront that issue as a judge and not as a staff attorney for an administration with a position, and as a judge, I would come to the issue with an open mind and I would fully and fairly consider any arguments that might be presented.

I don't know if an argument is going to be presented about the application of the totality of the circumstances test nationwide. Again, I'm not aware of any challenges that have been presented to it since it was enacted. I don't know if any will be if or when the Voting Rights Act is extended again, but if it is, I would confront that as a judge and not as a staff attorney for an administration with a particular position on that issue.

Senator KENNEDY. Well, Judge, to my knowledge there hasn't been, in legal circles suspicion about the unconstitutionality of the effects test as it applies to Section 5. That is as grounded as it can be. I am asking the specific question that was the really at issue

with the extension, and really the most important part historically about the Voting Rights Act, whether you think that that provision is constitutionally suspect today.

This is the backbone of effective voting in our country and our society and I think the American people are entitled to know whether you believe or suspect that that particular provision, which has passed just overwhelmingly by the House and the Senate, signed by President Reagan, and has resulted in this historic march to progress, is constitutionally sound. That is what I am interested in.

Judge ROBERTS. I have no basis. I am not aware of any constitutional challenge that has been brought to Section 2 since it was enacted. I've not—I have no basis for viewing it as constitutionally suspect and I don't. If an issue were to arise before the Supreme Court or before the Court of Appeals, if I head back there, I would consider that issue with an open mind in light of the arguments. I've got no basis for viewing it as constitutionally suspect today and I'm not aware that it's been challenged in that respect since it was enacted. It may have been, but as I say, I'm not aware of it.

Senator KENNEDY. I gather—you've had an extensive answer—that from that answer, I did hear that it is not constitutionally suspect as far as your view today.

Judge ROBERTS. Yes.

Senator KENNEDY. Could I move on to the issue of affirmative action?

Judge ROBERTS. Certainly.

Senator KENNEDY. In the *Grutter* v. *Bollinger* case, the Supreme Court decided very close, in a five-four decision, with Sandra Day O'Connor the deciding Justice, the Supreme Court upheld the university practices that considered race as one factor in its admission decisions. No one is talking today about quotas. We are talking about affirmative action as defined in this *Grutter* decision. The Court found that there was a constitutional affirmative action program aimed at achieving a racially diverse student body.

In this decision, the Court expressly gave great weight to the representation by military leaders—military leaders—that said a highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principal mission and to provide national security.

What weight would you give to that kind of a comment or statement or testimony by the military in considering any issue dealing with affirmative action?

Judge ROBERTS. Well, the weight it was given was to help satisfy the test, because the Court, as you know, in *Grutter* applied strict scrutiny because it was dealing with considerations on the basis of race and that required a showing of a compelling governmental interest to support that legislative action. The testimony of the military officers, as the Court explained, helped substantiate the compelling nature of the interest in having a diverse United student body. That was the weight that the Court gave it.

There was, of course, the other case. There were two Michigan cases, the law school case and the university case, the *Gratz* case, where the Court did say that it looked too much like a quota in

that case because it was given determinative consideration as opposed to being one of a variety of factors that is considered.

The two cases together kind of show where the Court is coming out, at least in the area of higher education. The Court permits consideration of race or ethnic background so long as it is not sort of a make-or-break test.

Senator KENNEDY. Do you agree, then, with Justice O'Connor writing for the majority that gave great weight to the real-world impact of affirmative policies in universities? The reason—I have got 35 seconds left—you might say, well, this may eventually come on up before the Court, but the fact is, we know how every other Justice has voted because they have all voted and the American people would like to know where you stand on this very important public policy issue, particularly since Sandra Day O'Connor wrote such a compelling decision that was, I think, in the cause of fairness and justice.

Judge ROBERTS. Well, Senator, I think I can answer the specific questions you asked because as you phrased the question, do you agree with her that it's important to look at the real-world significance and impact, and I can certainly say that I do think that that is the appropriate approach without commenting on the outcome or the judgment in a particular case, that you do need to look at the real-world impact in this area, and I think in other areas, as well.

Senator KENNEDY. Thank you very much. My time is up. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

We will now take a 15-minute break. We will reconvene at 11:25.

[Recess 11:09 a.m. to 11:31 a.m.]

Chairman SPECTER. We will resume the hearings. We are just a few minutes tardy because we just finished a vote, and we now turn to Senator Grassley for his 20-minute second round.

Senator GRASSLEY. Thank you.

Once again, I compliment you on how you have handled yourself at these hearings. You have done very well. It is going to be very hard for people to cast a no vote against you.

Judge Roberts, do you believe that every citizen who meets the qualifications set forth in the Constitution and our laws should have the opportunity to cast a free and unfettered vote? And as a follow-up, will you on the Court fairly apply the Voting Rights Act?

Judge ROBERTS. Well, I certainly agree that every citizen who meets the qualifications not only has the right to vote but should vote. I think it's a problem that we don't have more people voting. And any issues that come before me under the Voting Rights Act, I will confront those with an open mind and decide them after full and fair consideration of the arguments, in light of the precedents of the Court, and in light of a recognition of the critical role that the right to vote plays as preservative of all other rights.

Senator GRASSLEY. Thank you.

The Supreme Court has repeatedly stated that the legislative history of a particular bill is critical to interpretation of the statute. Of course, Justice Scalia is of the opinion that most expressions of legislative history, like Committee reports or statements by the Senators on the floor, or in the House, are not entitled to great weight because they are unreliable indicators of legislative intent.

Presumably, Justice Scalia believes that if the members don't actually write a report or don't actually vote on a report, then there is no need to defer to this expression of congressional intent.

Now, obviously, I have great regard for Justice Scalia, his intellect and legal reasoning. But, of course, as I told you in my office, I don't really agree with his position.

So I would like to ask you five questions. They are relatively short, so I will ask them all at once. What is your opinion, how important is legislative history to you? How have you utilized it? And will it be any different from your use on the circuit court versus what you might do on the Supreme Court? And did you refer to any Committee reports or congressional debate in any of your 39 briefs before the Supreme Court? And to what extent do you—and don't start out with this last one. To what extent do you share Justice Scalia's view on unreliability of legislative history? Although that is important, I would like—and I can repeat those, if you forget what I have asked.

Judge ROBERTS. Sure. Well, if I leave one out, you can remind me at the end. But obviously when you are dealing with interpreting a statute, the most important part is the text. You begin with the text, and as the Supreme Court has said, in many cases, perhaps most cases, that's also where you end. The answer is clear.

I have, though, as a judge, relied on legislative history to help clarify ambiguity in the text. The Supreme Court stated once—and I think it's a very important principle—you look to legislative history to clarify ambiguity. You don't look to legislative history to create ambiguity. In other words, if the text is clear, that is what you follow, and that's binding. And you don't look beyond it to say, well, if you look here, though, maybe this clear word should be interpreted a different way.

On the other hand, we confront situations where the text is not clear, and the legislative history can be helpful in resolving that ambiguity. It requires a certain sensitivity to what you're dealing with. All legislative history is not created equal. There's a difference between the weight that you give a conference report and the weight you give a statement of one legislator on the floor. You have to, I think, have some degree of sensitivity in understanding exactly what you're looking at, appreciate where those comments were made in the legislative process, be careful to make sure that they're dealing with the same language that was eventually adopted. You have to, for example, be very skeptical about statements by opponents of the bill. It's quite a common thing saying, well, this bill would do this, this, and this, and so we shouldn't pass it. That's not always the best guide as to what the sponsors really intended in the language. So it does require a certain sensitivity to what you're dealing with.

But I have quoted and looked to legislative history in the past to help determine the meaning of ambiguous terms, and I would expect to follow that same approach on the Supreme Court. I don't think there's a difference there in terms of what things you think it is appropriate to look to, to help you do your job, which is to figure out what Congress intended.

Senator GRASSLEY. And you didn't address Justice Scalia, but let me put it another way so I don't put you in a bad position. You

would see, at least in some instances, where it needs to be used, reliability in legislative history.

Judge ROBERTS. In some instances, I think if you look at it carefully, you can make an assessment that this is a reliable guide. And one area I didn't touch on in my arguments, I've certainly relied on legislative history in presenting arguments because, of course, in the Supreme Court you need five votes and not just the one. So you tend to cast your net as widely as possible. And at argument sometimes, Justice Scalia would not be as receptive to an argument based on legislative history as some of the others, but, again, the name of the game is counting to five when you're arguing up there. And so I've certainly made arguments based on legislative history.

Senator GRASSLEY. In regard to how you view and use legislative history, I would like to discuss your opinion in the *Totten* v. *Bombardier Corporation* case interpreting the False Claims Act. The issue on appeal was whether *Bombardier* had met the presentment requirements of the False Claims Act. To violate the statute according to Section 3729(a)(1), a company must have presented its false claim to an officer or employee of the Federal Government. Importantly, Section 3729(c) explicitly provide that the term "claim" includes demands for payment submitted to Government contractors whether or not they are resubmitted to the Federal Government.

In your opinion, you wrote that those facts of that case did not consist of a false claims under the False Claims Act because there can only be a false claim if it is literally presented to somebody that is a Federal Government employee, I assume.

It seems to me that to reach this result, you inserted a resubmission requirement into the law in a place where it doesn't, in fact, appear, Section 3729(a)(1), and, in fact, gave short shrift to the legislative history, which spelled out what Congress intended when it amended the Act in 1986. The legislative history of the Act and the Senate Committee report—and I didn't refer to my authorship of the legislation, but, anyway, in our Senate Committee report explaining that liability under the False Claims Act attaches to a submission of, and I quote, "a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States."

The legislative history also states that Congress sought to ensure that "a false claim was actionable although the claim or false statements were made to a party other than the Government if the payment thereon would ultimately result in a loss to the United States."

So my question is whether, on reflection, that is a fair way to deal with the express wishes of Congress and whether it is possible that you misunderstood the statute when you decided the *Totten* case, and why did you reject legislative history if you referred to it—and maybe you didn't refer to it. But why did you reject legislative history regarding the resubmission requirement in the False Claims Act when you wrote the opinion in *Totten*?

Judge ROBERTS. Well, Senator, the answer to your question is it's certainly possible that the majority in that case didn't get it right and that the dissent that was a very strong dissent did get it right.

I think the majority got it right. There we focused on particular language. The issue in the case involved, as you know, a subcontractor claim. You have the United States giving money to—in this case, it was Amtrak, and then Amtrak using that money to hire a subcontractor—I think it was Bombardier—to do a particular part of the job. Everybody agreed that under the precedents that are applied, Amtrak is not the Government, can't be considered part of the Government. And the statute, as you noted, required—it was triggered by the presentment of a false claim to an officer or employee of the United States. And the majority's reasoning was that when—the false claim was one made by Bombardier to Amtrak, and the claim was submitted to Amtrak. And since Amtrak was not the Government, what Judge Rogers and I concluded was that that wasn't presentment of a false claim to an officer or employee of the United States.

There was an extensive discussion between the majority and the dissent. The view that you have articulated was certainly presented in a compelling way by Judge Garland, my colleague on the court of appeals, and we spent a great deal of time on the case, and I think it's reflected in the opinions. And that view was laid out. Judge Rogers and I thought that the statutory language that said the claim had to be presented to an officer or employee presented too high a hurdle for us to get over in looking at the legislative history.

But I'm happy to concede that it was among the more difficult cases I've had over the past 2 years. Anytime Judge Garland disagrees, you know you're in a difficult area. And the function of his dissent to make us focus on what we were deciding and to make sure that we felt we were doing the right thing I think was well served. But Judge Garland disagreed, and so it's obviously to me a case on which reasonable judges can disagree. And I just have to rest on the analysis in the majority opinion.

Senator GRASSLEY. Let me tell you something you might not be aware of, and that is that the Bush administration has filed an amicus brief in the Eleventh Circuit arguing that you had misread the False Claims Act in the *Totten* case, and in *Atkins* v. *McIntyre*, the administration has argued that there's no presentment requirement in Section 3738(a)(2) of the False Claims Act, and that "the *Totten* majority misconstrued the language and purpose of the False Claims Act in concluding that the Act does not encompass false claim records statements submitted to recipients of Federal funds absent resubmission to a United States officer or employee." And I assume if I ask you if you have an opinion on that you can't answer it.

Judge ROBERTS. Well, not on that one. I do know the Bush administration filed an amicus brief in our case as well. I guess this would be one of those cases I would cite in response to the question of whether I'm capable of ruling against the administration. We did in that case. Again, the arguments, I think, were well presented on both sides, and Judge Rogers and I gave it our best shot, and the opinion will stand or fall on its own.

Senator GRASSLEY. Well, I hope sitting in the marble palace you will remember that I have great pride in the success of the False Claims Act—$8 billion coming back to the Federal Treasury.

Judge Roberts, you filed an amicus brief in the case of *United States* v. *Halper*, a case which raised the question of whether a civil False Claims Act case could implicate the double jeopardy clause. The Supreme Court agreed with your arguments and held that the double jeopardy clause protects a convicted criminal defendant from a second punishment in the form of a civil sanction that "may not fairly be characterized as remedial" because it is "overwhelmingly disproportionate to the damage the defendant has caused." As you know, the *Halper* decision was later overturned by *Hudson*.

Judge Roberts, do you consider the False Claims Act treble damages provisions to be excessive, in the words of the Court, "overwhelmingly disproportionate," and also in the words of the Court, "not fairly characterized as remedial"?

Judge ROBERTS. Well, you've touched on a case that's very close to my heart, Senator. It was the first case I argued before the Supreme Court. I was appointed by the Court to argue it on behalf of Mr. Halper.

It was an unusual case. It arose—the conspiracy at issue was a slight inflation of—I believe it was Medicare or Medicaid claims that this individual was submitting. I think he added $1 or $2 to every claim. And yet under the law at that time, there was a minimum penalty for each false claim. These numbers won't be right, but he had something like 300 false claims for a grand total of maybe $700, but under the statute, he was assessed a civil penalty of several million dollars because each of the false claims was a separate penalty.

And the issue was, after having been sentenced criminally, would a civil penalty of several—and, again, I'm not sure of the numbers, but several million dollars for $700 or so of fraud, was that remedial and civil or was it punishment? And the Court agreed with my submission at the time that that was punishment. It led to some difficulty, I think, in administering civil and criminal laws down the line, and as you said, 8 years later they reversed course and overruled the *Halper* precedent.

But the provision that you specifically mentioned, treble damages, that is a little different. There it's a much closer connection, obviously just 3 times whatever the damages are. In the *Halper* case, it was a much more disproportionate impact, and that's what led the Court, I think, to conclude that that looks like punishment. Treble damages is something that's familiar in the law in a number of areas and is not regarded as impermissible punishment in this context.

Senator GRASSLEY. Are you familiar with the legal arguments that some opponents of the False Claims Act have made to the effect that its *qui tam* provisions are unconstitutional under Articles II and III, and if so, do you have an opinion on these arguments, and before you answer, I would like to remind you that at least since the first Congress was involved in this, I would like to assume that the Framers of the Constitution, because the First Congress enacted several *qui tam* statutes, that if that be any deference to you in giving—whether this factor would make any difference to you when assessing the constitutionality of *qui tam* statutes today.

Judge ROBERTS. I think, if my memory serves, that the Article III objections, and just so we're on the same page, the *qui tam* statutes, of course, are when a private individual brings suit on behalf of the government for fraud on the government and in return gets a percentage of the recovery. And as you noted, it's been under the False Claims Act very successful in securing recovery of funds on behalf of the government.

The Vermont case—and I'm not remembering it any more than that, it was a case from Vermont—I think addressed most of the Article III issues. The objection was that individual has no standing, I think, because he doesn't necessarily have an interest, and what the Court said was that the individual has standing as a result of the bounty, if you will, the percentage he gets. That satisfies the standing requirement, so those objections are out of the way.

I do know that some have raised additional objections under Article II, which goes to the fact that this might interfere with the Executive's authority to execute the law. In other words, you have private individuals bringing suit. I'm not sure that those issues have been finally resolved, and obviously, if those cases do come up, I'll want to keep an open mind.

The fact that you mentioned, obviously, about historic practice, that is something that the Court does look to in assessing constitutionality. If it's something that the Founders were familiar with or a practice that they engaged in and showed no disagreement with, that, while not determinative, that is a factor that the Court would look at. I don't know if any of those cases are going to come before the Court, but if they do, it's one of the considerations that'll have to be taken into account.

Senator GRASSLEY. Other than the *Totten* case and the *Halper* case, have you ever written or spoken publicly about the issue of the constitutionality of *qui tam*s or any other provisions of the False Claims Act, to your memory?

Judge ROBERTS. I don't remember any, no, Senator.

Senator GRASSLEY. Okay. Judge Roberts, in 1986, while serving as an Associate White House Counsel, you approved Reagan administration testimony regarding the Whistleblower Protection Act of 1986. You probably recall that the Reagan administration opposed that legislation, which is now law. Could you explain what role, if any, you had in formulating the administration's position on the Whistleblower Protection Act?

Judge ROBERTS. I don't recall any role, Senator. Our office—the Counsel's office would routinely review testimony that was about to be given. We were just looking out for particular constitutional concerns or issues. We generally did not get into the substance. The substance of that would have been shaped over in the Justice Department and we would have really been looking out for anything that we thought infringed on the constitutional authorities of the President or presented other consistency issues. But the substance of the testimony is not something I was involved in.

Senator GRASSLEY. Do you feel that you have any bias against the False Claims Act or Whistleblower Protection Act that would impact on your ability to fairly decide cases on those statutes?

Judge ROBERTS. No, Senator. I have had some whistleblower cases, different aspects I do recall coming up in the Court of Ap-

peals and I think in some cases, we ruled in favor and in some cases, we ruled against. So I have seen those cases and had no difficulty fairly and objectively deciding them.

Senator GRASSLEY. Are you against cameras in the courtroom like Justice Rehnquist was?

Judge ROBERTS. Well, you know, my new best friend, Senator Thompson, assures me that television cameras are nothing to be afraid of—

[Laughter.]

Judge ROBERTS.—but I don't have a set view on that. I do think it's something that I would have to—I would want to listen to the views of, if I were confirmed, to my colleagues—

Senator GRASSLEY. I would suggest then to the Chairman that we move quickly on that bill before he has got an opinion on it.

[Laughter.]

Chairman SPECTER. I intend to do just that, Senator Grassley, now that I have your support.

Senator GRASSLEY. Thank you.

Chairman SPECTER. Thank you, Senator Grassley.

Senator Biden?

Senator BIDEN. Good morning, Judge. How are you?

Judge ROBERTS. Good morning, Senator. Fine, thanks.

Senator BIDEN. I went back and looked at something you said yesterday, which I was reminded of by my son, who has done some appellate work—nothing like you—and he said, "I thought I heard him say this," and then I went to the staff and got it.

Yesterday morning you said, "I went back once and counted the questions during my half-hour. There were over 100 questions the Court asked." So you are not all offended by us interrupting you like we do. You are used to being interrupted, aren't you?

Judge ROBERTS. I am used to being interrupted before the court, that is for sure, Senator.

[Laughter.]

Senator BIDEN. Well, we are kind of the court here. We are kind of the court. You are not entitled to the job, God love you. You have been nominated and your job is to demonstrate that there is no presumption, as you well know. So I hope you won't mind some questions. I promise I won't interrupt if you give short answers, okay?

Judge ROBERTS. I'll try, Senator.

Senator BIDEN. All right. Great. I would like to follow up on yesterday. I asked you if you agreed there was a right of privacy to be found in the Liberty Clause of the 14th Amendment and you said, and I quote, "I do, Senator. I think that the Court's expression, and I think if my reading of the press is correct, I think every Justice on the Court believes that to some extent or another." Is that correct?

Judge ROBERTS. Yes.

Senator BIDEN. Now, one of the things that has been amazing—you are one of the best witnesses that I think has come before this committee, and I have been here 30-some years—is that you have convinced the folks who share Senator Brownback's view that you are going to be just right for them, and you have convinced the folks that share Senator Kennedy's view that you are going to be

just right for them. And I think I would like to plumb a little bit more closely this notion of how you view this right of privacy.

Now, if you take a look at Justice Scalia's comment about that right to privacy found in the 14th Amendment as it related to the *Casey* case, he said the issue is whether abortion is a liberty protected by the Constitution of the United States. I am sure it is not because of two simple facts. The Constitution says absolutely nothing about it and the longstanding traditions, et cetera.

Then, in that same case, the quote coming from—I have got to make sure I get the right Justice here—from the O'Connor, Kennedy, and Souter dissent, they said "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full-term is subject to anxieties to physical constraints, and to pain that only she must bear." Her suffering is too intimate and personal for the state to insist without more upon its own version of the woman's role. Two fundamentally different views of the right to privacy as it relates to that issue.

In *Cruzan*, the case relating to whether or not fully competent adults have the right to refuse unwanted medical treatment, Justice Scalia said in his opinion, quote, "that the Federal court have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life."

Justice Kennedy, in *Lawrence*, as you well—I know you know all this, but I just want to try to get a sense where you are. He said, "Liberty presumes an autonomy of self that includes freedom of thought, belief, certain intimate conduct. The instant case involves liberty of a person both in its spatial and more transcendent dimensions." Obviously, fundamentally different.

And then the same goes when O'Connor said, in *Cruzan* "I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions and that the refusal of artificially delivered food and water is encompassed within that liberty interest."

So the point I am making is obvious, that there are very, very, very disparate views. Can you tell me what side you come down closer on?

Judge ROBERTS. Well, Senator, first of all—

Senator BIDEN. I am not asking you to comment on any case.

Judge ROBERTS. Well, I can say that it is my view that all of the Justices—I think if a case like the *Glucksberg* case in which a majority subscribe to the view, there is an appropriate mode of analysis to determine the content of the Liberty Clause and it does include protection beyond physical restraint and that that protection applies in a substantive manner.

Now, there are legal theorists, there are judges and jurists who do not agree with that, who do not agree that there is a right of privacy protected under the Due Process Clause, who do not agree that the liberty protected extends beyond freedom from physical restraint. Their view is that it means you cannot be basically imprisoned or arrested without due process and that means only that you get some type of procedural protection.

That is not my understanding of where the Justices on the Supreme Court are and it's not my understanding. I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, that it includes certain other protections, including the right to privacy. As you know, the Court has tried to map out in a series of cases that go back to *Meyer* v. *Nebraska* and *Pierce* and all that and in various instances as the claims have arisen, and that it's protected not simply from procedural depravation. That is—

Senator BIDEN. If I may interrupt, that is not the question I asked you. Thank you for that lesson, and I understand what you are saying. I am asking you a specific question.

Judge ROBERTS. Well, and—

Senator BIDEN. Do you side more within that context with the views of Scalia and Thomas, which say that consenting adults do not have, if they are both male or female, do not have the right to engage in sexual conduct, the State can determine that—let me put it another way.

My family faced, I am sure many people in this audience's families have faced a difficult decision of deciding when to no longer continue the application of artificial apparatus to keep your father or mother or husband or wife or son or daughter alive. It is of great moment to the American public. There is a view expressed by Justice Scalia that there is no right that is absolute on the part—or no fundamental right that exists for a family member, assuming the person is not capable of making the decision themselves, to make that judgment. He says, and I am speaking in layman's terms, he says the State legislature can make that decision.

I firmly believe, unless there is some evidence that the family is incompetent, the husband or the wife, with the advice of the doctor, should be able to make that decision. What do you think?

Judge ROBERTS. Well, Senator, that does get into an area that is coming before the Court. There is a case pending on the docket right now that raises the question of whether or not State legislatures have a prerogative to lay down rules on certain end-of-life issues—

Senator BIDEN. It is suicide, isn't it, Judge?

Judge ROBERTS. Well, in that case, it's the application of the Federal Controlled Substance law.

Senator BIDEN. Right.

Judge ROBERTS. The issue of illness in those cases do come before the Court. The *Glucksberg* case raised a similar question. The *Cruzan* case that you mentioned, presented it in a very difficult context of an incompetent individual, no longer able to make a decision, and the question of how the State law should apply in that situation. Those cases do come before the Court.

Senator BIDEN. Do you think the State—just talk to me as a father. Do not talk to me—just tell me, just philosophically, what do you think? Do you think—not what the Constitution says. What do you feel? Do you feel personally, if you are willing to share with us, that the decision of whether or not to remove a feeding tube after a family member is no longer capable of making a judgment, they are comatose, to prolong that life should be one that the legislators in Dover, Delaware should make or my mother should make?

Judge ROBERTS. No, I'm not going to consider issues like that in the context as a father or a husband or anything else.

Senator BIDEN. Well, you did—

Judge ROBERTS. I think—

Senator BIDEN. Sorry.

Judge ROBERTS. I think, obviously, putting aside any of those considerations, these issues are the most difficult we face as people, and they are profoundly affected by views of individuality and moral views, and deeply personal views. That's obviously true as a general matter. But at the same time, the position of a judge is not to incorporate his or her personal views in deciding issues of this sort. If you're interpreting a particular statute that governs in this area, your job as a judge is to interpret and apply that according to the rule of law. If you're addressing claims of a fundamental right under the liberty, protected by the Due Process Clause, again, the view of a judge on a personal matter or a personal level is not the guide to the decision, and—

Senator BIDEN. Right. Well, Judge, let me ask you then, with your permission, about your constitutional view. Do you think the Constitution encompasses a fundamental right for my father to conclude that he does not want to continue, he does not want to continue on a life support system?

Judge ROBERTS. Well, Senator, I can't answer that question in the abstract because—

Senator BIDEN. It is not abstract, that is real.

Judge ROBERTS. Well, Senator, as a legal matter it is abstract because the question would be in any particular case, is there a law that applies that governs that decision? What does the law apply—

Senator BIDEN. That is the question, Judge.

Judge ROBERTS. Well, no.

Senator BIDEN. Can any law trump a fundamental right to die? Not to commit suicide, a right to decide "I no longer want to be hooked up to this machine, the only thing that's keeping me alive." "I no longer want to have this feeding tube in my stomach," a decision that I know I have personally made, and many people out here have made, and the idea that a State legislature could say to my mom, "Your father wants the feeding tube removed. He's asked me. The doctors heard it," and the State legislature's decided that, no, it can't be removed. Are you telling me that is even in play?

Judge ROBERTS. Well, Senator, what I'm telling you is, as you know, there are cases that come up in exactly that context so that it is in play, and the sense is that there are cases involving disputes between people asserting their rights to terminate life, to remove feeding tubes either on their own behalf or on behalf of others. There is legislation that States have passed in this area that governs that, and there are claims that are raised that the legislation is unconstitutional. Those are issues that come before the Court, and as a result, I will confront those issues in light of the Court's precedents, with an open mind. I will not take to the Court whatever personal views I have on the issues, and I appreciate the sensitivity involved. They won't be based on my personal views. They'll be based on my understanding of the law.

Senator BIDEN. That is what I want to know about because without any knowledge of your understanding of the law, because you

will not share it with us, we are rolling the dice with you, Judge. We are going to face decisions, you are, and the American public is going to face decisions about whether or not, as I said, patents can be issued for the creation of human life. You are going to be faced with decisions about whether or not there is a right to refuse extraordinary medical, heroic medical efforts that you do not want as an individual, and you are fully capable, mentally, of making that decision. The idea is that without a specific fact pattern before you, as keeps getting repeated here, the law is about life, it is about facts. We are not asking you—there is no fact situation before you—about whether or not a person, fully mentally capable of making a decision, chooses to say, "I no longer want this feeding tube in my stomach. Please remove it." And whether or not that is a fundamental constitutional right.

Judge ROBERTS. Senator, that's asking me for a opinion in the abstract on a question that will come before the Court. And when that question does come before the Court, the litigants before me are entitled to have a Justice deciding their case with an open mind, based on the arguments presented, based on the precedents presented. I have told you with respect how I would go about deciding that case. It begins with the recognition that the liberty protected by the Due Process Clause does extend to matters of privacy, that it is not limited to restraints on physical freedom, and that that protection is protected—it extends in a substantive way, and not simply procedurally.

I have also explained the sources that judges look to in determining the content of that privacy protected by the Liberty Clause. They're the ones that have been spelled out in the Court's opinion, the Nation's history, traditions and practices.

And I have explained how judges apply that history, tradition and practices in light of the limited role of a judge to interpret the law and not make the law. The limited role of the judge in light of the prerogatives of the legislature.

Senator BIDEN. Judge, I understand that. Justice Scalia says the same thing, and draws a very fundamentally different conclusion, and O'Connor. So you have told me nothing, Judge. With all due respect, look, this is—it is kind of interesting, this kabuki dance we have in these hearings here, as if the public does not have a right to know what you think about fundamental issues facing them. There is no more possibility that any one of us here would be elected to the United States Senate without expressing broadly, and sometimes specifically, to our public what it is we believe. The idea that the Founders sat there and said, "Look, here's what we're going to do. We're going to require the two elected branches to answer questions of the public with no presumption they should have the job as Senator, President or Congressman, but guess what? We're going to have a third coequal branch of Government that gets to be there for life, never, ever, ever again to be able to be asked a question they don't want to answer. And you know what? He doesn't have to tell us anything. It's okay as long as he is"—as you are—"a decent, bright, honorable man. That's all we need to know. That's all we need to know."

Look, I only have 3 minutes and 45 seconds left, and by the way, I would ask permission for the record to introduce the number of

questions asked by Senator Hatch and others, very specific questions to Justice Ginsburg with very specific answers on these very questions. I would like to ask for that to be submitted for the record.

Chairman SPECTER. Without objection, they will be made a part of the record.

Judge ROBERTS. Senator, could I—

Senator BIDEN. I still have the floor, and I will yield to you since you can speak after the clock is out and I cannot, okay? I am sure you understand that. And I am sure if I am ever before the Supreme Court, you will give me more time and you will not interrupt me.

[Laughter.]

Senator BIDEN. Look, here is the point I want to make. I asked—and I am sure you are not going to answer it—I asked Justice Ginsburg a question about footnote 6 in the *Michael H.* case, and the whole issue there is, as you well know, whether or not you keep talking—it sounds wonderful to the uneducated ear, the non-lawyer's ear—that you are going to look at history and tradition. You and I both know that how you determine history and tradition determines outcomes.

In that case, as you will recall, there was a question of a natural father—you could prove by a blood test and DNA that he was the natural father—of a child he wanted to see, that happened to be born to a woman who was living with her married husband, so the child was illegitimate. And so in determining whether or not there are any visitation rights, there is a famous footnote there. I am going to do this quickly, I have 2 minutes and 7 seconds.

The Court said, Scalia said in footnote 6, "Look, you go back and look at the specific historical precedent, in short—have bastards ever been protected in the law." And then said, "No, no, no, that's not how you go back. You go back and look at fatherhood. Was fatherhood ever something that was part of the traditions and part of the embraced notions of what we hold dear? Is that worthy of protection?"

Now, Scalia said, "No, no, no, no, no. I looked up the record. Bastards have never been protected in English common law; therefore, there is nothing going on here." "And, by the way, you should never go back," he says, "and look at the general proposition has fatherhood achieved a status of consequence. No, it is 'have bastards achieved?'"

So, Judge, how do you—I am not asking you about a case. How do you—do you look at the narrowest reading of whether or not such an asserted right has ever been protected, or do you look at it more broadly? What is the methodology you use?

Judge ROBERTS. I mean, I think you're quite right that that is quite often the critical question in these cases, the degree of generality at which you define what the tradition, the history, and the practice you're looking at. The example, I think, that I've always found it easiest to grasp was *Loving* v. *Virginia.* Do you look at the history of miscegenation statutes, or do you look at the history of marriage?

Senator BIDEN. Thirty-three seconds left. Do you agree with O'Connor then?

Judge ROBERTS. Well, I get extra time, you said.

Senator BIDEN. I know. But I don't. I've got to get it in now.

[Laughter.]

Chairman SPECTER. Judge Roberts, when his red light goes on, you will have as much time as you want.

Judge ROBERTS. Thank you. The point is that, again, the Court has precedents on precisely that question, about how you should phrase the level of generality. And you look at—

Senator BIDEN. But which precedent do you agree with? There are competing precedents.

Judge ROBERTS. Well, you do not look at the level of generality that is the issue that's being challenged. So, for example, in *Loving* v. *Virginia*, if the challenge is, it seems to me—and this is what the Court's precedents say. If the challenge is to miscegenation statutes, that's not the level of generality because you're going to answer it's completely circular.

Senator BIDEN. But that is specific, Judge. The generality was the right to marry. That is the generality.

Judge ROBERTS. Well, that's what I'm saying. The dispute is do you look at it at that level of specificity or broader. And I'm saying you do not look at the narrowest level of generality, which is the statute that's being challenged, because obviously that's completely circular. You are saying there is obviously that statute that's part of the history. So you look at it at a broader level of generality.

Now, the only point I was going to make earlier—because I do think it is an important one. You make the point that we stand for election and we wouldn't be elected if we didn't tell people what we stand for. Judges don't stand for election. I'm not standing for election, and it is contrary to the role of judges in our society to say that this judge should go on the bench because these are his or her positions and those are the positions they're going to apply.

Judges go on the bench and they apply and decide cases according to the judicial process, not on the basis of promises made earlier to get elected or promises made earlier to get confirmed. That's inconsistent with the independence and integrity of the Supreme Court.

Senator BIDEN. No one is asking for a promise.

Chairman SPECTER. Thank you very much, Senator Biden.

Senator BIDEN. Thank you. Thank you, Judge.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. I think this last exchange is important because it goes back to what we talked about at the very beginning when some of us in our opening statements pledged to defend you if you stopped short of answering every question the way that every Senator felt important based upon your view that the matter in question might come before the Court, that the Canons of Judicial Ethics preclude you from doing that.

A very wise Senator on this Committee once said something. Let me quote it to you. And, by the way, I contend that he is still wise.

Senator BIDEN. I bet I am the wise one.

Senator KYL. I am sorry?

And this is what he said: "Judge, you not only have a right to choose what you will answer and not answer, but in my view, you

should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms, probably over your tenure on the Court."

Now, as I said, that was wise then. It is wise now. It is the statement of then-Chairman Joseph Biden in the Ginsburg hearings, and in all sincerity, I do believe Senator Biden to be wise, and I believe that comment is wise. It is what has animated your approach to answering probably by now hundreds of questions that have been asked of you. And you have answered every question; in some cases, however, you have stopped short of advising us on what you believe the law to be because you felt that the matter was going to come before the Court. But you did not stop there. When permitted, you expanded to tell us why you thought it was a matter that might come before the Court and what your general approach to the case would be in terms of your judicial philosophy, how you would approach judging the case, but that you did not want to talk about your view of what the law was, both because the case could come before the Court and also because it is pretty hard to formulate in a question all of the factual considerations that would permit you to know what law would be specifically applicable to that particular case. And you and I talked a little bit about the facial challenge to statutes versus the "as applied" kind of problem.

So with respect to this last interchange you had with Senator Biden—and, by the way, I will say again to compliment my colleagues, if anybody ever contended that Senators were not both diligent in pursuing what they want to pursue and also very imaginative, they should watch this hearing because we have been blessed with the most creative ways of trying to pull out of you commitments on matters on which Senators would like you to make commitments.

But as Senator Biden just said—and I am paraphrasing here—he said without the knowledge of your personal views—he was talking at the time about end-of-life issues—we are rolling the dice. And your response to that, as I understand it, is: My personal views are irrelevant to a case that comes before me of Jones v. Smith, of X v. Y. What I personally think about issues has nothing to do with the resolution of the dispute between those two parties. And were I to let them intrude, I would not be doing my job as a judge—fairly taking the facts of their case and then applying the law as I understand it to be to reach a decision.

Moreover, Judge, isn't it the case that if you were to state your views on such subjects as they might pertain to a case that would come before the Court, wouldn't you actually have to recuse yourself from deciding that case and, therefore, all of the discussion, all of the effort to get you committed to a particular point of view, would be for naught, because if you expressed a particular point of view, you couldn't sit on the case anyway, or am I incorrect in that?

Judge ROBERTS. I think that's a concern that other nominees have raised in the past, particularly given the expression of views as part of the confirmation process. It's not supposed to be a bargaining process, and if you start stating views with respect to particular issues of concern to one Senator, then obviously everyone is going to have their list. And when that individual nominee, if con-

firmed, if the bargain is successful from his or her point of view and he gets confirmed, he will have to begin each case not with the parties' briefs and arguments but with the transcript of the confirmation hearing to see what he or she swore to under oath was their view in a particular area of the law or a particular case. And I think that would undermine the independence of the Supreme Court. It would undermine the integrity of the judicial process. Every one of the Justices on the Court today, every one of them refused to engage in that type of process. And if I am to sit with them, if I am confirmed, I feel I have to follow the same approach.

Now, I do think I have been more expansive than most nominees. I have gone back and read the transcripts, and some of them would not talk about particular cases even if it were unlikely that the case was going to come before the Court. And the reason they gave was, look, it is hard to draw the line. If I think this case is not going to come before the Court, what about this one? And maybe that will. And rather than trying to draw the line, I am just not going to do it. And those Justices were confirmed.

I have taken what I think is a more pragmatic approach.

If I think an issue is not likely to come before the Court, I have told the Committee what my views on that case were, what my views on that case are. You know, perhaps that means I am in—it is sometimes difficult to draw the line. Perhaps that's right. But, again, if I make the judgment—and other nominees may draw the line differently, may have drawn it differently in the past or differently in the future, the nominee I think has to be comfortable with the proposition that they're not doing anything that's going to undermine the integrity of the Court.

Senator KYL. And I noted yesterday in response to a question, you said, "Well, that is the reward for trying to be more expansive." You were talking about *Griswold* v. *Connecticut*, and I thought at the time, boy, he is expressing a view on a relatively recent case, and at least issues associated with it are clearly going to come before the Court. And I wondered, Does that go too far? Does that cross the line? But your point was the specific issue in the case and the precise holding of the case are not likely in your view to come before the Court, and, therefore, you expressed your opinion about that case and the law underlying the ruling in the case.

So I would agree with you that not only have you attempted to answer every one of our questions, but you have also ventured into expressing your personal views on matters that you didn't think would come before the Court, although, as you note, it is at least possible that some of them might. So hopefully you have not gone too far there.

This I think is a great civics lesson. Some of this hearing should be encapsulated in law school courses to remind us about the difference between elected officials, who make policy, and judges, who are not supposed to make policy. I thought the questioning—I believe it was by Senator Brownback—earlier was instructive. You noted that the primary check and balance on the judiciary was its own self-restraint. Many of us believe that the Court has not exercised appropriate self-restraint in all cases, and that when it does not, it naturally generates concern expressed by the citizens of the country as reflected certainly by their elected representatives. And

we do express that concern. I think the Court has failed to exercise appropriate restraint in several matters.

One of the things that appeals to me from your approach to the law is that it appears to be a very traditional approach, which is that I am not sent there to make law, I am sent there to take whatever case comes before us and just decide the case. And that element of self-restraint and modesty is one which I think should be more the rule than it is today in courts at all levels. And I would commend that philosophy to all of the judges.

I think you have expressed it very well, and while I appreciate my colleagues' desire to try to draw you out on your personal views about matters, I think you have drawn the line at an appropriate place. And you have certainly provided us with a great deal of information in the process—and, again, partly because you have explained to us, when you could not completely satisfy a Senator's curiosity, why that was the case, but still tried to inform us about the basic issues that might exist in the case, the basic arguments that would be made on either side, but without giving us a hint as to which one of those you thought you might come down on the side of.

And I also think it is important that you have totally eschewed ideology here, saying that your own personal views or ideology do not have a place in your decisionmaking, and, therefore, they are pretty irrelevant to the questions that are asked here.

I have a whole notebook of questions here that, to one extent or another, have been dealt with, I think, by my colleagues. And I do not think it serves a purpose to go over them again. Let me just conclude with kind of a general comment, but before I do, just try to correct the record on—not necessarily correct, but add to the record on one very narrow point. You were discussing, I believe with Senator Kennedy, the *Herrera* v. *Collins* case, and he talked about innocence claims being heard by the Court, that a prisoner should have the right to present innocence claims.

I just wanted to ask you: Is it not the case that in *Herrera* v. *Collins* the Court did not address the proper route for bringing claims based on newly discovered forensic evidence such as DNA testing? Which is, of course, a relatively new phenomenon now, but not the issue presented in that case.

Judge ROBERTS. That's right. There wasn't—I don't know if they had as much access to that type of evidence back then when it was argued, but it was certainly not that type of evidence. It was a new claim that somebody else did it, somebody who had just died. That was the new claim that they sought to raise at the last stage there. And I do think any issue arising with respect to DNA evidence—and those issues are working their way up through the Court. Those cases would have to be addressed on their own terms.

Senator KYL. Thank you.

Well, let me conclude with this point. Some who are watching might come to the conclusion that there is a lot of repetition here, and that to some extent there is a lot of "Senator talk" expressing concern to you about different issues that are important to them. Frankly, I think this is a once-in-a-lifetime opportunity. It is the only time that, before you take your position on the Court, you will have the opportunity to be directly lobbied in the political context,

in an appropriate way. We reflect the views of our constituents, and we have all got different issues on our minds. And there isn't a one of them that is not a legitimate issue or concern. I brought up the matter of applying foreign law to American decisions on our Constitution, for example.

To me it seems appropriate that you hear from us, the political branch, concerns that we have about the way that the Court approaches its job. We may be right, we may be wrong. But it is important for you to hear that. I know that Justices read the newspapers and so on. But this is a very good forum to have us express to you concerns that we have about various issues. And we would not be talking about them if we did not think that they would come before the Court. So, in a sense, virtually everything we are talking about, we are trying in some way to get a point across to you because we believe it is likely to be decided by you.

And I think that is fine. You need to hear from us what our concerns are, even though perhaps we are trying to draw you out in areas that you obviously cannot be drawn out in with respect to future cases.

It is also important for us to get the feedback from you. There will not be very many other times that we will have a group of Senators sit down with the person that will likely be the Chief Justice of the Supreme Court and have a legal conversation.

We will have to talk about matters relating to Court administration. That will be totally appropriate, and I am sure we will be doing that. But by and large, this is the only chance we have to have this kind of an interchange with you.

It is illuminating to me, as a student of constitutional law and someone who has practiced before the Court. I have learned a lot. Therefore, to those on the outside saying, well, it looks like a lot of Senators posturing, if they are listening very closely to your answers, I think they will find a great deal of meat, of knowledge, of the application of your wisdom to how you approach judging, and I find it very consistent with the traditions of our court and the rule of law in our country and this, therefore, becomes a very good reminder of what our rule of law is all about, what judging is based on, and the interrelationship between the representative bodies of our government and the third branch, which you represent.

I think this is all very instructive, very informative, and in my case, at least, with regard to your testimony, very comforting, because it seems to me that you are following the great tradition of the Court in your approach to the law, that you are careful, that you are cautious, and yet you are willing to look at the circumstances of our contemporary times in applying your judgment to the law that is before you.

Because I have that confidence, it is my intention to support your nomination, and because I think it unnecessary to delve into any other specific questions, I will yield back the remaining 5 minutes of my time.

Senator BIDEN. Mr. Chairman?

Chairman SPECTER. Senator Biden?

Senator BIDEN. A point of personal privilege, as we say in this body.

Senator KYL. On my time, since I had 5 minutes and I referred to Senator Biden. Please, take my time.

Senator BIDEN. Thank you. I have been quoted many times about what I said to Justice Ginsburg. With the permission of the Chairman, I will just take a second. I would like to read my whole quote, if I may, and then submit it all for the record.

Chairman SPECTER. Senator Biden, you may do that. You can even have more time. Senator Kyl has given—

Senator BIDEN. No, no, I don't want to use the time. Let me just say, here is what else I said. I said, "Now, I would hope, as I said to you very briefly, that the way in which you outline the circumstance under which you would reply and not reply, that you will not make a blanket refusal to comment on things because obviously everything we could ask you is bound to come before the Court. There is not a controversial issue in this country that does not have a prospect of coming before the Court."

Continuing, "[I]f a nominee, although it is their right, does not answer questions that don't go to what they would decide but how they would decide, I will vote against that nominee regardless of who it is," this is continuing the quote, "And you can thank Justice Scalia for that."

At the close of the testimony, I said, "I would also point out that my concerns about you not answering questions have been met. You have answered my questions the second day and third day. At least from my perspective, you have been as forthcoming as any recent witness we have had." I submit the entire statement for the record along with the answers to her questions from Senator Hatch, you, and others.

Chairman SPECTER. Without objection, they will be made a part of the record.

Senator BIDEN. I thank the Chairman for his courtesy and I thank the witness for listening.

Chairman SPECTER. It is now 12:30 and a vote, two votes have been scheduled at this time, so we will take a lunch recess until 1:45, a quarter of 2:00.

[Whereupon, at 12:30 p.m., the Committee recessed to reconvene at 1:45 p.m., this same day.]

AFTERNOON SESSION [1:46 p.m.]

Chairman SPECTER. The Committee will resume.

Senator Kohl, 20 minutes.

Senator KOHL. Judge Roberts.

Judge ROBERTS. Senator.

Senator KOHL. We spent quite a bit of time yesterday discussing how you would decide cases, and as we all know, it is your view that Supreme Court Justices are umpires who are neutrally deciding cases. I want to discuss with you another area where I believe your analogy falls somewhat short.

The Supreme Court not only, as you know, has the power to decide cases and to construe the Constitution, but it also has the sole and the absolute power to decide which cases it hears, which cases it decides, which parties get to be heard, and which parties do not get to be heard. So if you are confirmed, you will get to choose which cases will be placed on the Supreme Court's docket with the vote of yourself and only three other Justices, as you know. Making

this choice, your opinions, your perspectives, and your life experiences obviously matter quite a bit. Much more than an umpire calling balls and strikes, you are in that sense a manager who is really setting the field with players to decide what the menu is going to be like.

So this power is really quite important, and it is crucial and it is important that we understand that when we look at your role in terms of your own description.

In recent times, the Supreme Court has received appeals in nearly 7,000 cases a year, and as you know, in recent times, the Supreme Court has heard only about 80 cases a year. In other words, the Justices choose to hear only about 1 percent of the appeals that they receive.

My question for you, Judge Roberts, is: Should you be confirmed, how will you decide which cases will make the cut and will be heard by the Supreme Court? And what will guide your complete discretion to choose which cases to hear?

Judge ROBERTS. I appreciate the question, Senator. It is an area where I will happily concede that the Justices are not acting just like umpires in deciding which cases they're going to hear as opposed to how they're going to decide them. My perspective has changed a little bit in this area. Certainly when I was practicing law, a lot of what I spent my time trying to do was get the Supreme Court to take a case. As you know, you file these things called petitions for certiorari, which are really quite extensive arguments about why the Court should hear your case, having really not that much to do with the merits, whether it was right or wrong, but just why the Court needs to issue an opinion in this area. And I thought they weren't taking enough cases. When I became a court of appeals judge, I thought you didn't need to have more cases taken up for review.

But the considerations, some are pretty well established. The job of the Supreme Court is to ensure the uniformity and consistency of Federal law, in particular, interpretations of the Constitution. So the clearest case that the Court should hear, they should grant certiorari on, as they say, is when two different courts of appeals are interpreting a law differently. Obviously, the law should mean the same thing in every part of the country, and if two different courts take a different view of the law, that's the kind of case the Court ought to be taking.

I think the Court should, as a general matter—and, again, other Justices have expressed this view as well—grant review in cases in which a lower court strikes down an Act of Congress. I don't think that's an absolute rule, but certainly as a general matter, if an Act of Congress is going to be declared unconstitutional, I think the Supreme Court ought to be the one determining that as a final matter, and generally not leave it to a court of appeals.

So those are two categories: when there is a conflict, when an Act is found to be unconstitutional.

Beyond that—and this is where I agree with you the umpire analogy does not hold up—there is a lot of discretion in deciding whether it is the right time to grant review in a case. The people who practice before the Court talk about the Court letting an issue percolate a little bit, in other words, get more than just one or two

decisions from the courts of appeals, wait until others have had a chance to weigh in. The theory is that makes it more likely the Supreme Court will get it right if they have the benefit of several decisions from the lower courts rather than just one. Other cases the Justices determine that that's not appropriate. It's not appropriate to wait until the issue develops a little more; they want to look at it expeditiously. And it's hard to lay down categorical rules in that area.

I have expressed the view—and it may be a view that I'll have to be educated on further if I am confirmed, and I am not stating it as a solid view. I do think there is room for the Court to take more cases. They hear about half the number of cases they did 25 years ago. There may be good reasons for that that I will learn if I am confirmed, but just looking at it from the outside, I think they could contribute more to the clarity and uniformity of the law by taking more cases.

I have heard others say they could contribute to the clarity and uniformity of the law by taking fewer cases, but I don't subscribe to that view. I think there is room for additional cases on the docket.

Senator KOHL. I think we agree that it is an enormous power, that power of decision. It is a very active power. It is not benign in any way. If Justices, for example, decide not to hear a case, whatever the merits, that is the final decision. Is that not correct?

Judge ROBERTS. That's right. The decision of the court of appeals stands in that case. Now, it is true that I think the Justices generally look at their duty and obligation to ensure consistency in a fairly dispassionate and objective way. In other words, it doesn't matter how a particular case came out. If it's different in one part of the country than another, most of the Justices in my experience readily agree that that's the kind of case they need to address.

Senator KOHL. I will just refer to two that were taken up without any reference from any lower court. One was *Youngstown Sheet and Tube*, which was, you know, the ability of the Government to seize a steel mill during a time of war. And, of course, another one that I'm interested in your comment on is *Bush* v. *Gore*, in which the Court decided to directly insert itself into a Presidential campaign. I am interested in not what happened after they decided to do that, but that the decision they made in terms of its propriety, its impact on the courts, the Court's standing in the country, you must have thought about it, I am sure, a great deal when it happened.

I am sure you have an opinion on their decision to enter that case, and I think we would like to know what that opinion is.

Judge ROBERTS. You mentioned first the *Youngstown* case, and it is a category—and I think perhaps the *Bush* v. *Gore* case, that perhaps the Justices concluded it fell into that category. There are certain cases—they don't come along all that often—that are, by their importance, significant enough for the Court to take. In other words, they don't fit the description of a conflict among the Courts of Appeals or an Act of Congress held unconstitutional, but they are otherwise sufficiently important that the Court will grant review and take those cases.

Certainly, the *Youngstown* case was of that sort. It started out actually in the D.C. Court, the hearing was first there, and then the Court granted that. But the decision by a President to seize the steel mills based on—constitutionally, that's an important enough issue you want the Supreme Court to issue a final ruling on that.

On the decision in *Bush* v. *Gore* and the determination of whether to grant review in that case, again, that's not something that—you don't know on what basis the Justices make a decision to grant review. You just get an order that says "review is granted." In that case you had a decision of a State court that apparently the Justices thought should be reviewed, and obviously, expeditious treatment was needed, as I think it was in the *Youngstown* case as well. They're capable of moving expeditiously when an important matter requires them to do so.

Senator KOHL. I asked you what your opinion of that decision was at that time.

Judge ROBERTS. Well, that's an area where I have not been—I have not felt free to comment, whether or not I agree with particular decisions or—

Senator KOHL. It is not likely to come up again.

Judge ROBERTS. I do think that the issue about the propriety of Supreme Court review in matters of disputed electoral contests is a matter that could come up again. Obviously, the particular parameters in that case won't, but it is a very recent precedent, and that type of decision is one where I thought it inappropriate to comment on whether I think they were correct or not.

Senator KOHL. Judge Roberts, one of the most important constitutional events of our lifetime was the nomination of Robert Bork to the Supreme Court. Congress chose to exercise its role to advise, and in this case not to consent, based upon judicial philosophy and the strongly held opinions of the nominee. In effect, Congress told the President that we have an important role to play in the process as well. Do you believe that the Senate's rejection of Judge Bork in 1987 was a reasonable and respectable act, or instead do you view it as a period of unfair partisanship? What were your thoughts about that case as it unfolded?

Judge ROBERTS. Senator, I don't think it's appropriate for me as a nominee to comment on the Senate's treatment of other nominees, and I would respectfully decline to do that.

Senator KOHL. All right. Judge Roberts, when we met a few weeks ago in my office, we discussed the Supreme Court's recent property rights decision. In that case, *Kelo* v. *the City of New London*, the Court found it permissible under the Constitution for a city to seize private homes against the wishes of their owners so that a large pharmaceutical company could build a private industrial park and a research facility. A total of 15 homes were condemned, including a home lived in by an 87-year-old woman for her entire life, a home that her family had owned for over 100 years. Many people, including a majority I believe of people in my State, as well as myself, were quite disturbed by this ruling which appears to place much private property at risk by greatly expanding the eminent domain powers in local government.

We discussed this when you were in my office, and you told me that you were "surprised by the decision." So could you expand on it a bit this afternoon and explain why you were surprised?

Judge ROBERTS. Well, I did tell you that was my initial reaction. I remember hearing about the decision driving actually back from a Judicial Conference with another judge, and we all learn in law school, one of the first cases you study is called *Calder* v. *Bull*, has a basic proposition the Government cannot take property from A and give it to B. When I read the decision, I understood what the majority's position was, the difficulty of drawing a line between things that are obviously public use like a railroad, a road, things that are traditionally the subject of the exercise of eminent domain, and other activities that are not as clearly within that range of course.

Justice O'Connor, in her dissent, thought that a line could be drawn between whether it was available to the public or not, and that certainly was available. The majority did say that it was not ruling on the starkest example, in other words, just determining to take the property from A to B because you think B could make better use of it. The issue arose, as you noted in your question, in the context of an urban renewal redevelopment project, and that may be limited to that context or may not.

I do know there's been extensive legislative reaction to the decision. I know a number of States have passed laws already, saying, "We do not authorize the use of the power of eminent domain to take—for a use that's going to be from one private owner to another," and that's certainly an appropriate reaction to the Court's decision in this area.

What the Court is saying, what the majority is saying is because of the difficulty of drawing a line, this issue is really left up to the legislature, and if the legislature wants to draw the line in a particular place, it has that authority. But it certainly is a decision that was closely divided, 5–4, and it has gotten a lot of legislative reaction.

The point I would only make is that it's perhaps a good example of the fact that legislatures, legislators have a responsibility to protect the rights of the people just as much as courts, and one way they can protect the rights of the people in this area, if they think it appropriate, is to restrict themselves in saying, "We will not use the eminent domain power to the broadest extent that the Supreme Court has said we are authorized to do."

Senator KOHL. Did I understand from your opinion on whether or not that case was correctly decided, or are you not—

Judge ROBERTS. No. Again, that's—particularly since it's an area they do specifically leave open the question about whether it applies outside of a redevelopment project. That's an issue that could come before the Court. It's not one I feel appropriate to comment on.

Senator KOHL. It would or it would not surprise you if we had not heard the last of that?

Judge ROBERTS. It's certainly one of those areas that could come before the Court again, even in its present form. I know the author of the majority opinion has said it was an area where he, as a personal policy matter, wouldn't have exercised that authority, but, of

course, the issue there was the legal issue, not policy preferences. It could come before the Court again, yes.

Senator KOHL. You will have a decision to make if it does rise up to that level. Is it possible that your decision, along with three other Justices, might be to put that on the docket?

Judge ROBERTS. That would be one of the decisions that in the exercise of the cert process, as they call it, short for the certiorari decision, and that would certainly be an issue that could come before the Court, and they already have, of course, four dissenters who may be anxious to revisit it or not. I don't know. I don't want to presume how they would view it on an ongoing basis.

Senator KOHL. Judge Roberts, I would like to talk a little bit about antitrust. I am the Ranking Member on the Antitrust Subcommittee. To me, antitrust is not some mysterious legal theory that only lawyers can talk about or understand. Antitrust is just another word for fair competition. The laws that we use to protect consumers and competitors from unfair and illegal trade practice is what antitrust is all about.

Do you agree that government enforcement of antitrust law is crucial to ensuring that consumers are protected from anticompetitive practices, such as price fixing and illegal maintenance of monopolies?

Judge ROBERTS. Yes, I do, Senator. In fact, when I was in private practice, one of the cases I handled was the Microsoft antitrust case on behalf of government officials, the States in particular. A number of States retained me to argue that case before the D.C. Circuit en banc. So I certainly appreciate the role of governments, both State and Federal, in enforcing the protections of the antitrust laws, because as you know, there is concurrent authority in that area, the Sherman Act, of course, on the Federal level and then what people call the "Baby Sherman Acts" on the State level.

Senator KOHL. I am glad to hear you say that because on June 14, 1983, which is more than 20 years ago, in a memo to the White House Counsel Fred Fielding, you wrote, quote, "Enforcement of Federal rights is advanced most effectively by private suits in antitrust cases." So isn't it often true that individual consumers don't have the resources to pursue these private suits against large corporations, and isn't that why government enforcement of antitrust is essential? So you would, perhaps, not be feeling the same way today as you did 22 years ago when you made that comment?

Judge ROBERTS. Well, I think it depends on what area you're talking about. I do think that the system established under the Sherman Act of private antitrust enforcement, and, of course, the opportunity to recover additional damages and attorneys' fees and other aspects, has been an effective tool in enforcing the law. There are areas, as you mentioned. If the issue is mostly consumer rights as opposed to business rivals, government action may be more necessary in those areas as opposed to the others.

And I know that government antitrust regulators make those determinations every day, that their resources are best directed to areas where consumers or attorneys bringing class actions on consumers' behalf, whatever the reasons were, the incentive system for private litigation may not be as effective, and that's often the area

where State Attorneys General, the Justice Department, decide to get involved to supplement the private enforcement activity.

Senator KOHL. All right. I will just ask one more question before my time expires and that is on the important role that the Chief Justice plays as the head of the Judicial Conference, which is the organization of the entire Federal Judiciary. As head of the Judicial Conference, the Chief Justice makes policy recommendations as to legal reform, with respect to legal reform, reform of court procedures and advocates for the Federal courts.

What, if you are confirmed, would be your agenda, your plans, or your policy objectives to advance in connection with your role as the head of the Judicial Conference?

Judge ROBERTS. Well, I am familiar with how the Judicial Conference operates for at least part of its role. I've been on the Advisory Committee on Appellate Rules. I was there as a lawyer and I kept on as a judge. In fact, I was slated to be the Chairman of that Committee starting in October.

So I understand the role in promoting the forum of rules that apply in the Federal courts, both the appellate rules, the civil rules, criminal rules, and bankruptcy rules, and evidence rules, different committees there, and I'm familiar with the process. They go through the Advisory Committee, a broader Committee about rules in general. Then they're submitted to the Judicial Conference for consideration, and it's a very exhaustive process, but I think also a very responsive one. Particular problems are identified in practice by practitioners, by judges. They're submitted to the committees. They review them. They come up with proposals. It's a very important part of the functioning of the Federal system and it affects all the levels, not just the Supreme Court, of course, but courts of appeals and the trial courts.

Other issues of concern, obviously pressing issues, concerns with respect to security in light of different developments. Those are addressed at the Judicial Conference. Any need for legislative action that the courts feel is appropriate.

I have to tell you that if I were to be confirmed, as an initial matter, I think my primary posture is going to be one of listening because there's obviously much I have to learn about matters of concern to different judges, different courts around the country, and that's the good thing about the Judicial Conference, of course. They bring in judges from around the country to make sure that you get a national perspective on what needs to be done and you're not just focused on issues here in Washington or anywhere else.

But it's an area where I think I will have to listen a lot at the outset before being presumptuous enough to have a particular agenda.

Senator KOHL. I thank you, Judge Roberts. I thank you, Mr. Chairman.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Kohl.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Judge, good afternoon.

Judge ROBERTS. Good afternoon.

Senator DEWINE. As you know, Judge, our Constitution created Federal courts with limited powers. In fact, Article III of the Constitution only gives the Federal courts the power to decide cases and controversies. This case and controversy requirement means that Federal courts will only hear real lawsuits involving real parties with real injuries. We have talked about this in the last several days.

This has led to the development of a number of different rules about when people can bring lawsuits in Federal court and when they cannot. One of these rules, as you well know, is the principle of standing.

You talked about this in 1993 in a law review article you wrote in the Duke Law Journal. You said the following, and I am going to quote briefly from this. "The legitimacy of an unelected life-tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary's power in Article III to actual cases and controversies." You went on later to state the following. "The Article III standing requirement ensures that the court is carrying out its function of deciding a case or controversy rather than fulfilling the executive's responsibility of taking care that the laws be faithfully executed," end of quote.

Judge, could you elaborate on your statements today and maybe explain briefly what the doctrine of standing is and what that doctrine is really so important to our constitutional system?

Judge ROBERTS. Well, Senator, your question really brings—ties together a few things we've already touched on.

I don't remember if it was you or someone else who referenced Justice White's description of his obligation, what it was, and his answer was, "To decide cases."—

Senator DEWINE. That was me.

Judge ROBERTS. And the basis for the institution of judicial review, as explained by Chief Justice John Marshall in *Marbury* v. *Madison* is similarly grounded on the obligation to decide cases and controversies, because if you look at the Constitution it doesn't say in Article III that the judicial branch is established in order to tell us all what the Constitution means. It says that the judicial branch is established to decide cases and controversies arising under this Constitution and the laws.

And that is the basis for the authority to interpret the Constitution. As Marshall explained, we have to decide a case. If the argument is that it's inconsistent with the Constitution, we have to decide that. Therefore, we have that authority, and I believe that's consistent with the intent of the Framers.

But it does mean—and this is the point I was trying to make in that small little Law Review comment—that judges should be very careful to make sure they've got a real case or controversy before them, because that is the sole basis for the legitimacy of them acting in the manner they do in a democratic republic. They're not accountable to the people. As judges they have the obligation to decide cases according to the rule of law.

So first make sure you've got a real case, and a real case is not simply, you know, I'm interested in this area, I don't like what the Government's doing or I don't like this law, and so I'm going to go to court. What the standing doctrine requires is that you actually

be injured by what the Government is doing, injured by Congress's action. Now, the injury doesn't have to be economic. The Supreme Court has explained in cases like *Sierra Club* v. *Morton*, it can be aesthetic, it can be environmental, it can cover a wide range of injuries, but you do have to show some injury that separates you from the general public, so you're just not voicing a gripe, you're trying to get a case decided. That's the importance of the standing doctrine.

Senator DEWINE. Appreciate the explanation, Judge. Let me ask you a more personal question. Last time you appeared before our Committee you were a lawyer in private practice. Since that time you have spent approximately 2 years on the Court of Appeals for the District of Columbia, a new experience for even a experienced practitioner like you. What surprised you about the last 2 years of judging?

Judge ROBERTS. Well—

Senator DEWINE. If anything.

Judge ROBERTS. Well, I think I had the biggest surprise on the first day that I heard cases. Obviously, it's opening day and the first day of my career, so I prepared as well as I could. And the arguments were great. And went into the conference room, and I had my notes and all the books. It's just the judges, you know, just the three judges. We bring the record in. We're surrounded by the U.S. reports, by our Court of Appeals reports, by the United States Code that you folks have written.

And I was ready. I'm sitting there, and I remember the Chief Judge, who by tradition sits on a new judge's first day, and he was there and another judge. And I waited a while, and I looked and they were still waiting. I waited a while longer, and they were still waiting. And finally, the Chief Judge advised me that the tradition was that the junior judge goes first at these discussions, and so I was kind of put on the spot right off the bat.

And part of what that conference was like and throughout, really has—I don't know if I'd say a surprise, but it's been illuminating to me. The judges really do roll up their sleeves and try to find the right answer. It's just the judges. But as we say, "Well, we think this case is controlled by the *Smith* case," we get out the *Smith* case. We open it up and look at it, reading over each other's shoulders and seeing exactly what it says. If somebody says, "Well, but in this case under the record there was no evidence about this or there was no objection raised about that," well, you get out the record and you look, and there at page 223, you point to it and say, "Well, here's where the objection was raised."

And the judges are very open. It's a very encouraging part of the process from my point of view. Nobody goes in there with set views. They want the benefit of the collegial process, the benefit of each other's views, and you have to be able to substantiate your position. There's no place for rhetoric. People are pointing to the law, and I found that a very encouraging part of the process, what goes on in the conference room, which was of course a part of the process that I hadn't participated in before.

Senator DEWINE. That is something that we do not see either.

Judge ROBERTS. Right.

Senator DEWINE. No way of seeing that.

Judge ROBERTS. Right. And the positive part of that process to me was that nobody was invested in anything other than getting the right result, and they are prepared to be convinced, contrary to initial impressions, and I was as well. It's, I found, a very encouraging part of the process.

Senator DEWINE. Judge, let me ask you—moving to the administrative law issue. As you know, in the 18th and 19th centuries we really did not have the governmental agencies that have such a profound influence, for better or worse, on the lives of Americans today, daily lives of Americans. Today administrative agencies set workplace safety rules, establish environmental regulations, lay down traffic safety standards, just to name a few things.

As far as I know there is no specific article in the Constitution dedicated to the administrative state that we live in today. In your view, what is there in the text or history of the Constitution that supports the growth of this administrative state that we live in? Is the growth of the administrative state an example of the Constitution being amended simply out of necessity, or is the administrative state consistent with the Constitution as drafted by our Founding Fathers? How do we get to where we are from a constitutional point of view?

Judge ROBERTS. Well, you know, we all of course begin in high school civics with the notion of three branches of Government, the executive, the legislative and the judicial, and we study that. And then only occasionally do people look at the real world and say, "Well, what is this agency? What is that? Is that legislative or is that judicial or is that executive?" Of course, the answer is, well, it's a little bit of each. It's exercising power delegated by Congress. It's executing it in a particular way. It's issuing regulations that have the force and effect of law, and quite often it's adjudicating particular disputes.

The activities of the administrative agencies are of course the bulk of what judges on the Court of Appeals for the D.C. Circuit do, and the principles of administrative law that have recognized the legitimacy of these agencies, and sought to ensure that their exercise of authority is consistent with constitutional provisions by basically—I mean I know the issue can seem arcane to many people, but the fundamentals of administrative law really go back to the basic principles of justice, is someone being given an opportunity to be heard? Is someone being treated fairly? Is someone who's making a decision doing it for a rational reason or an arbitrary reason?

These are the same basic principles that have animated the common law system since the time of Lord Cook, and they are being applied here as well. The objection is often, "This agency made a decision without adequately hearing our concerns," or "This agency made an adjudicatory decision without hearing the record evidence," or "They did not explain." That's the basic requirement of administrative law, explain your decision. That's the limitation on arbitrariness, and the agency didn't explain why it's doing this.

The notion that even in these arcane areas our legal system insists upon the observance of these basic requirements of—I don't want to say due process as a technical term, but that's the principle that is being applied. That goes a long way to explaining how

these agencies have been accepted into the constitutional system, because they have been required under principles of administrative law to comply with these basic precepts of procedural regularity.

Senator DEWINE. Judge, let me turn to the area of antitrust, a matter that is very important for the businesses and the consumers of this country. For over 100 years our antitrust laws have helped consumers by ensuring their economy is competitive and vibrant. Our antitrust laws are the oldest in the world, and many people, including me, think they are the best in the world. In fact, I am proud to say that John Sherman, Republican Senator from my own home State of Ohio, wrote the first antitrust law back in 1890.

Over the past 20 years we have achieved a great deal of consensus I think about how the antitrust laws should be enforced, Democrat and Republican administrations. As the Chair of this Committee's Subcommittee on Antitrust, Competition, Policy and Consumer Rights, I have worked very closely with Senator Kohl who asked you some questions about antitrust. I think we have worked in a bipartisan way to ensure that consumers and competition are protected.

It is a simple goal, but it is not always easy to achieve or put into practice. For example, recently, the rise and expansion of the Internet and the technological explosion of the so-called new economy have led to a marketplace that is changing faster and more often than we have really ever experienced before.

Judge, what challenges do you think the courts face in trying to square our old antitrust laws as they are currently written with new business strategies and the high-technology markets, and do you think that these laws give courts enough guidance to deal with these new economy issues?

Judge ROBERTS. Well, that was really the basic issue that I faced in the Microsoft case before the D.C. Circuit en banc. There was a lot of argument, academic commentary back and forth, the idea this is a whole new area. You can't apply the old principles. They don't work in this context. You need to do something different, the so-called new paradigm and all that.

At least the argument that I tried to make on behalf of the States was that the basic principles are the same. The Sherman Act was, as many have said, a charter of economic freedom and that those basic principles do have to be applied regardless of changes in the economics of the underlying businesses or the structure of the markets. Obviously, it requires a great deal of sensitivity on the part of the judges and it's a really challenge for the lawyers sometimes to be able to understand the economics, to be able to explain them to the judges, and judges appreciate that.

But my basic instinct, and it's nothing more than that, is that the principles are there and the issue is simply application in a new context.

Senator DEWINE. Good. Thank you. Judge, just one final comment. Yesterday, Senator Grassley asked you whether you think that there is, and I quote, "any room in constitutional interpretation for the judge's own values or beliefs." In response, you said, and I quote, "No, I don't think there is. Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't

look to your own values and beliefs. You look outside yourself to other sources," end of quote.

You continued by saying that, and I quote, "Judges wear black robes because it doesn't matter who they are as individuals. That's not going to shape their decision. It's their understanding of the law that will shape their decision," end of quote.

Now, Judge, I know what you meant by that answer. Judges should not impose their own preferences from the bench. In fact, I said pretty much the same thing in my opening statement on Monday.

But, Judge, putting on a black robe does not mean that a judge should lose his character. You, sir, have a perfect resume and certainly an outstanding professional career. But a Supreme Court Justice is more than just impeccable academic credentials and impressive accomplishments. President Bush nominated John Roberts, the man. America has gotten to know John Roberts, the man. And I am quite sure that the Senate is, in fact, going to confirm John Roberts, the man.

Over the past several months, we have examined your life, met with you in private, and now question you about your beliefs. Throughout this time, your honesty, your integrity, your wisdom, your judgment, and dare I say, yes, your values have shown through.

I would just say, sir, please don't check any of that at the door when you walk into the Supreme Court. By becoming John Roberts, the Chief Justice, don't ever forget to be John Roberts, the man.

I think this country needs you to remember how you got here and who you met along the way. We need you to bring to the Court your compassion and your understanding for the lives of others who haven't been as successful as you have been. We need you to bring to the Court your strong commitment to equal justice for all. And we need you to always remember that your decisions will make a real difference in the lives of real people.

When you put on that black robe and assume your spot on the Supreme Court, you will surely bring with you your heart and your soul, the values you learned from your parents and others that you learned as you grew up in the wide open fields of your youth. Those values are strong, they are true. The President saw them when he nominated you and we have certainly seen them this week, and I must say, sir, that they must never leave you.

Justice Felix Frankfurter gave this same advice to his colleagues in 1949. "There comes a point," Justice Frankfurter wrote, "where this Court should not be ignorant as judges of what we know as men."

Great Justices are more than just legal automatons, legal technicians. They are more than just that. And though they lose their individuality when they put on a black robe, great Justices never forget who they are. I wish you well. Thank you, sir.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator DeWine.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Judge, I subscribe to much of what Senator DeWine said. I want to tell you what I think perhaps a little differently and personally.

Senator Graham last night pointed out that Justice Scalia was confirmed by 98 votes of this body, and I thought then and I think now of how different the days were in 1986. There is so much water under the dam since then. The nation is divided. It is polarized. It is about 50–50. We are at war. Executive authority is very much on people's minds. The law as it relates to war, the Geneva Conventions, Conventions Against Torture, all of these things are very much on everyone's minds. We have seen in the last 10 years 193 five-to-four decisions of the Court, which suggests that on major questions, the Court is also very divided.

So in comes this young Justice. I was one on our side who voted for you for the D.C. Circuit Court. I did so because there were so many testimonials about what a fine lawyer you are, what a fine human being you are. And I voted for you, but there is more in this vote.

Senator DeWine just spoke about the man as opposed to the legal automaton. Yesterday morning, you spoke, I thought eloquently, in answering Senator Specter's questions on *Roe*. You discussed *stare decisis* as fully as I have ever heard it discussed. I am not a lawyer. I learned a lot from listening to you. You discussed the right to privacy. You were very full and forward speaking. And then after lunch, it was as if you shut down and became very cautious.

So my first question, did anybody caution you between the morning and the afternoon sessions?

Judge ROBERTS. No, Senator. No.

Senator FEINSTEIN. Has anyone, when you were being interviewed for this position, ever asked your opinion on *Roe*?

Judge ROBERTS. No.

Senator FEINSTEIN. Okay. That is good to know. From 1973 to 2005, 32 years, over three generations of women have come really to feel that finally they have some autonomy over their body. Women are all different. Many of them are very pro-life. Many are pro-choice. People have different religious views, moral views, so we have this big diverse population of women. The growth of women's ability to succeed has been enormous, I mean, I went into the workforce at the same time Sandra Day O'Connor did with a year's graduate work. The door was closed. It is now open and women are so lucky.

And it seems to me that the living Constitution is that each person in this great country, man or woman, rich or poor, white or black, whatever it might be, can really reach their full potential. And I guess what has begun to concern me a little bit is Judge Roberts, the legal automaton, as opposed to Judge Roberts, the man, because I have heard so many times, "I can't really say because it may come before me," and yet I don't expect you to say what you would do with *Roe* one way or another.

But I do expect to know a little bit more about how you feel and how you think as a man, because you are a very young man to be Chief Justice. You could be Chief Justice for 40 years. That is a very long time.

And because of the division, and because there is also a lot of fear out there where this new Court, now with potentially two new Justices, is going to go, we want to know whether you have got the ability to bring the new Court together, to end the five-to-four decisions, to see that big decisions are made so that they represent a much greater consensus. I am trying to find out and see, are those qualities really there?

I was interested in a colloquy you had with Senator Biden on the end of life. He asked a number of legal questions and then says, okay, just talk to me as a father and tell me what you think. Now, I have been through two end-of-life situations, one with my husband, one with my father, both suffering terrible cancers, a lot of pain, enormous debilitation.

Let me ask this question this way. If you were in that situation with someone you deeply love and you saw the suffering, who would you want to listen to, your doctor or the government telling you what to do? To me, it is that stark because I have been through it.

Judge ROBERTS. Well, Senator, in that situation, obviously you want to talk and take into account the views and the heartfelt concerns of the loved one that you are trying to help in that situation because you know how they are viewing this. You know what they mean when they are saying things like what their wishes are and their concerns are. And, of course, consulting with their physician.

But it seems to me that in that situation, you do want to understand and make sure that you appreciate the views of the loved one, and only you can do it because—

Senator FEINSTEIN. That wasn't my question.

Judge ROBERTS. I'm sorry.

Senator FEINSTEIN. I'm trying to see your feelings as a man. I am not asking you for a legal view—

Judge ROBERTS. Well, I wasn't trying to give a legal view. My point was that, obviously, you look to the views of the person involved, and if it's a loved one, you are the one who is in a position to make sure that you understand their views and can help them communicate those—

Senator FEINSTEIN. How would you feel if you were in that position?

Judge ROBERTS. An end-of-life situation? You know, I do think it's one of those things that it's hard to conceptualize until you're there. I really would be hesitant to say, this is what I would definitely want done or that is what I would definitely want done. You do need to confront that and appreciate all of the different concerns and impulses and considerations—

Senator FEINSTEIN. And every situation is different.

Judge ROBERTS. Yes. It's one of those things, I think it's difficult to put yourself in that position and say, well, with any degree of confidence, if I were suffering and confronting the end of life, this is what I would want to do, or that is what I would want to do. I just—you can theorize it and try to come up with your views or how you would—

Senator FEINSTEIN. That is right. All I am saying is you wouldn't want the government telling you what to do.

Judge ROBERTS. Well, I'm happy to say that as a general matter—

Senator FEINSTEIN. That there should be a basic right of privacy.

Judge ROBERTS. Well, that's getting into a legal question and you don't want—

Senator FEINSTEIN. Okay. I won't go there. Let me go somewhere else.

The Commerce Clause, the 14th Amendment, *Lopez*, which began a chain of about 36 cases striking down major pieces of legislation. It is not easy to get a bill passed here. I mean, there are hearings, there are discussions, there are markups. There is one House, there is another House, there is a President. It goes through most of the time scrubbed pretty good before it gets to the President.

The Gun-Free Schools Zones Act was struck down in 1995, an impermissible use of the Commerce Clause. In 1996, Moses Lake, Washington, a shooting in a school. In 1997, Bethel, Alaska, principal and one student killed. In 1997, Pearl, Mississippi, two students killed and seven wounded by a 16-year-old. In 1997, West Paducah, Kenntucky, three students killed, five wounded. Stamps, Arkansas, two students wounded. Jonesboro, Arkansas, 1998, four students, one teacher killed, ten others wounded outside Westside Middle School. Edinborough, Pennsylvania, one teacher killed, two students, and on and on and on. An impermissible use of the Commerce Clause to prohibit possession of a weapon in and around schools. Now, at what point does crime influence commerce?

Judge ROBERTS. I think it does, and one of the things that's important to understand about the *Lopez* decision as the Court analyzed it, and again, I'm not taking a position on whether it was correctly decided or not—

Senator FEINSTEIN. Right.

Judge ROBERTS.—but as the Court analyzed it, one of the things about the Act is that it did not have what's known as a jurisdictional requirement. It didn't have a requirement that the firearm be transported in interstate commerce, a requirement that I would think it would be easy to meet in most cases because—

Senator FEINSTEIN. But the firearm is transported in interstate commerce, maybe not when that student had it, but to get to the student, the firearm has been transported in interstate commerce.

Judge ROBERTS. My point is that the fix in *Lopez*, all that the Court was saying was missing in there, or what was different about *Lopez* than many of the other cases was that lack of a jurisdictional requirement. And if the Act had been, as I understand the Court's analysis, if the Act had required that, which I think, again, it's fairly easy to show in almost every case—as you say, these guns are transported in interstate commerce—then that would have been within the Congress's power under the Commerce Clause.

I think it was an unusual feature of the legislation that it didn't have that requirement as so many laws do. As you know, it often says, you know, in interstate commerce, and that's, at least as I understand the *Lopez* decision, what made it unusual.

Senator FEINSTEIN. That is very helpful. You might get it back again someday with that fix.

Let me turn to something else that Senator Leahy asked a number of questions on, and that is the Constitution and Executive power. I am looking for the section, but the Constitution very clearly says that any treaty is treated as the supreme law of the land, right, and that no State or official can abrogate it—

Judge ROBERTS. Right.

Senator FEINSTEIN.—which gives it the total weight of law. Can a President, then, decide not to follow a treaty?

Judge ROBERTS. As a general matter, the answer is no. The treaty power—as long as it's ratified according to the requirements in the Constitution, by two-thirds of the Senate, you're perfectly correct. It is, under the Supremacy Clause, the supreme law of the land.

Now, I don't know if there are particular arguments about Executive authority in that area with which I'm not familiar, and I don't mean to state categorically, but my general understanding is that treaties that are ratified—and, of course, we have treaties that aren't ratified and Executive agreements that aren't submitted for ratification and so on, but a treaty that's ratified by the Senate under the Supremacy Clause is part of the supreme law of the land. Now—

Senator FEINSTEIN. So the Conventions Against Torture and the Geneva Conventions would apply?

Judge ROBERTS. Yes. Now, there are questions, of course, that arise under those and have arisen under those about interpreting the Conventions and how they apply in particular cases to non-parties to the Convention and so on, and as you know, those cases have been coming up and are being litigated. But that's an issue of what the Convention means in a particular case, not whether, as a general matter, a treaty is binding.

Senator FEINSTEIN. Let me take you to yesterday morning and *stare decisis*, because you specifically discussed, when you were asked about *Roe* and *Casey*, precedent, workability, reliance, pragmatic considerations, changed facts or circumstances, and whether the underlying legal or constitutional doctrine would still be valid. Are there any other factors that you think should be considered?

Judge ROBERTS. Well, the Court has been somewhat inconsistent on some other factors. They, for example, talk about in some cases the length of a precedent, the idea that the longer it's been on the books, the more people have conformed their conduct to it. In other cases, they've suggested that's not such an important consideration. In *Payne* v. *Tennessee*, the case that it noted how closely divided the Court was in the prior case as a factor, but in other cases the Court has said that's not a major consideration.

So I put those factors on the table simply because in some cases, the Court looks to them. In others, it doesn't. But I think the ones I mentioned yesterday are ones that apply in every case, including the settled expectations, the workability, whether the doctrinal basis of a decision had been eroded.

Senator FEINSTEIN. Yesterday, in answering Senator Specter on this very point, when you referred to *Payne* v. *Tennessee*, you did point out there were other considerations that come into play and they are laid out again in *Dickerson* and in other cases, *Payne* v.

*Tennessee*, *Agostini*, and a variety of decisions where the Court has explained when it will revisit a precedent and when it will not.

Judge ROBERTS. Yes.

Senator FEINSTEIN. When do you think it should and should not?

Judge ROBERTS. Well, I do think you do have to look at those criteria, and the ones that I pull from those various cases are, first of all, the basic principle that it's not enough that you think the decision was wrongly decided. That's not enough to justify revisiting it. Otherwise, there'd be no role for precedent, no role for *stare decisis*.

Second of all, one basis for reconsidering it is the issue of workability. If a precedent has turned out not to provide workable rules, if courts get different results in similar cases because they—

Senator FEINSTEIN. Or if another case like *Casey* finds that *Roe* is workable—

Judge ROBERTS. Well, again, that's a different—that is a precedent of its own—

Senator FEINSTEIN. Right.

Judge ROBERTS.—that obviously would be looked at under principles of *stare decisis*.

The issue of the erosion of precedent, if you have a decision that's based on three different cases and two of them have been overruled, maybe that's a basis that justifies revisiting the prior precedent.

The issue of settled expectations, the Court has explained you look at the extent to which people have conformed their conduct to the rule and have developed settled expectations in connection with it.

Perhaps the discussion earlier we had about the *Dickerson* case is as good example of that, where the Chief Justice just thought *Miranda* was wrongly decided, but explained that it had become part of the established rules of police conduct and he was going to respect those expectations.

Senator FEINSTEIN. Now, yesterday, you said this. "I agree with the *Griswold* Court's conclusion that marital privacy extends to contraception and availability of that. The Court since *Griswold* has grounded the privacy right discussed in that case in the liberty interest protected under the Due Process Clause."

Do you think that right of privacy that you are talking about there extends to single people as well as married people?

Judge ROBERTS. The courts held that in the *Eisenstadt* case, which came shortly after *Griswold*, largely under principles of equal protection, and I don't have any quarrel with that conclusion in *Eisenstadt*.

Senator FEINSTEIN. Okay. Do you think that that same right extends beyond family choices then about a child's education?

Judge ROBERTS. Well, that's where it actually got started 80 years ago, in the earliest cases. *Meyer* and *Pierce* involved questions about how to raise children, whether you could teach them a foreign language, whether you could send them to a private school. And those decisions are really what started that body of law.

Senator FEINSTEIN. I have another question I could ask, but you won't answer it, unless—

Senator LEAHY. Give it a try, Dianne. Go ahead.

[Laughter.]

Senator FEINSTEIN. Does it cover the right of a woman to decide whether to continue her pregnancy?

Judge ROBERTS. Well, Senator, as I've explained, that is an area—

Senator FEINSTEIN. That could come before you—right. That message has been well conveyed.

Could I ask you one question? I think I will have time. In *Acree* v. *Republic of Iraq*, this was the case where 17 U.S. prisoners—Americans—suffered severe beatings, starvation, mock executions, dark and unsanitary living conditions, et cetera, during the First Gulf War. And they sued the Government of Iraq, the Iraqi Intelligence Services, and Saddam Hussein for their brutal and inhumane treatment. The veterans won their case in district court in July of 2003. They were awarded $959 million in damages.

After the judgment, the Justice Department intervened in the suit to contest the district court's jurisdiction. The specific issue involved a statutory interpretation of the Emergency Wartime Supplemental Appropriations Act passed in 2003. Justice argued that the statute gave the President the authority to change Iraq's designation as a state sponsor of terror and thereby relieve it after the fact of its responsibilities for prior acts of terror.

You wrote a concurring opinion in favor of overturning the district court's judgment. Although you agreed with the other two judges on the panel that the judgment should be reversed, you alone adopted the Department of Justice's argument that the statute granted the President total power to absolve Iraq of liability. You reached this conclusion while acknowledging that the question of statutory interpretation is close.

May I ask my question?

Chairman SPECTER. Yes, you may finish your question.

Senator FEINSTEIN. Do you believe that when, as in Acree, there is a close question of interpretation of a statute touching upon a foreign policy that the Executive deserves total deference?

Judge ROBERTS. Oh, no, Senator. Whether the question is close or not, I don't think there's any situation where a court concludes that the Executive deserves total deference, and that was not the basis of my decision.

The judges were unanimous that the veterans were not entitled to relief. The panel was chosen from what happened to be appointees of three different Presidents. The view was unanimous that they were not entitled to relief. The other two judges concluded there was no cause of action available to them. I concluded that there was no jurisdiction and wrote separately.

The recognition that it was a close question is also reflected in the view of the other two judges in addressing my concern. They acknowledged that it was a close question, and I agreed with that. But you did have legislation that said that the President can determine that these laws do not apply if he makes a determination under the criteria set forth in the statute, and he had done that, and my conclusion that that extended to the provision that otherwise would have allowed suit.

The other two judges disagreed. They thought there was jurisdiction, but then concluded there was no right of action. So the end

result of both of our positions was the same. But it was not a question of deference. It was a question of interpreting the legal authority and consequences of an Act that this body had passed and the President's finding under that. When it comes to interpreting questions of law, I go back to *Marbury* v. *Madison*. That is emphatically the province and duty of the judicial branch. We don't defer to the Executive. We don't defer to the legislature in making that final decision about what the law is.

Senator FEINSTEIN. If you get confirmed, maybe you will defer to the legislative a little bit. Thank you.

Thank you, Mr. Chairman.

Judge ROBERTS. Just to clarify, we certainly defer in the standards of review to make sure that we're not—but the final decision about what's constitutional or not rests with the judicial branch. The policy judgments, we certainly defer to the legislature.

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Sessions?

Senator SESSIONS. Thank you, Mr. Chairman. And thank you for your leadership as we move forward expeditiously, I think, today and I think in a helpful way. I think the hearings have been very good and, Judge Roberts, I salute you for your excellent manner and your forthrightness and professionalism as you answer these questions.

You know, I hope we are moving away, Senator Feinstein, from divisiveness. In some ways, we do have a divided country. But in other ways, I think we have the potential to move together, and I frankly believe that one thing that causes divisiveness and frustration and angst is when the Supreme Court were to render an opinion that really is more a political or social policy decision rather than a legal decision. And when they say it amounts to the Constitution, a constitutional provision, then that Supreme Court opinion can only be changed by two-thirds of both Houses and three-fourths of the States.

Do you understand that danger, Judge Roberts, in opinions? And is that perhaps one reason you think a judge should show modesty?

Judge ROBERTS. Well, it's part of what I mean when I say a certain humility should characterize the judicial function. Judges need to appreciate that the legitimacy of their action is confined to interpreting the law and not making it. And if they exceed that function and start making the law, I do think that raises legitimate concerns about legitimacy of their authority to do that.

Senator SESSIONS. Well, I would observe that the American people are beginning to believe that is occurring, and I think it does threaten legitimacy of the Court in a way that all of us who love the law should be concerned. And I do love the law, and I am a big critic of the courts on these kinds of activist cases. But I have practiced full-time before Federal judges, and as I said earlier, I believe day after day justice is done.

You have said that before your court you are impressed with the objectivity and fairness that the judges bring. Is the ideal of blindfold justice, a neutral umpire, is that a romantic, naive ideal, or is that something that you believe we can and should strive to achieve in America?

Judge ROBERTS. Well, I do know that there are sophisticated academic theorists, people who spend a lot more time theorizing in this area than I do, and a lot smarter than I am addressing these issues who—some of whom conclude that in particular cases it's difficult to do, it's difficult to avoid making the law while you're interpreting it, and they kind of throw up their hands and suggest that we shouldn't even try, therefore.

I don't agree with that. I think as a practical matter, as a pragmatic matter, judges every day know the difference between interpreting the law and making the law. Every day judges put aside their personal views and beliefs and apply the law. Whether the result is one they would agree with as a legislator or not agree with, the question is what the law is, not what they think it should be.

I've seen that on the court of appeals. I've seen that as a practicing lawyer before the court. That is the ideal. I'm sure judges, I'm sure Justices don't always achieve it in every case because it's a human endeavor and error is going to infect any human endeavor. But that is the ideal, and I think good judges working hard can not only achieve it but also achieve it together in a collegial way and benefit from the insight and views of each other.

Senator SESSIONS. Well, I thank you for that, and I would share those views. And I absolutely believe the strength of our Nation is our good legal system.

We have talked about the Commerce Clause, and there has been a lot of criticism of some of the cases. I think there have only been two significant Commerce Clause cases maybe in the last 40 years: *Lopez* and *Morrison*. Senator Feinstein and you had a nice exchange about *Lopez*. I would certainly agree with your analysis. Had the Congress placed in there a requirement that the firearm had been traveled in interstate commerce, I believe that statute would have been upheld. We could pass it again with that simple requirement, and virtually every firearm will have traveled in interstate commerce. A few States have manufacturers. When I was a Federal prosecutor, I prosecuted a lot of those cases. As a young prosecutor, I was sort of an expert at it in the 1970s, and I proved sometimes the interstate commerce by simply putting an agent on saying there was no gun manufacturer in Alabama, or it said "Made in Italy" on it. I remember I got that affirmed one time as proof beyond a reasonable doubt that it was not made in Alabama. So *Lopez*, I believe, is a good decision.

Also with regard to crime, I would note that we have always had that nexus with interstate commerce. As a Federal prosecutor, it is not prosecution for theft. It is prosecution for interstate transportation of stolen property. That is the Federal crime. Theft is prosecuted only by the State courts, unless it is theft from an interstate shipment. That is a Federal crime. It is not stealing an automobile. It is interstate transportation of a stolen motor vehicle. ITSMV is the Federal crime.

The Hobbs Act, the Extortion Act to use against politicians, you have to have an interstate nexus.

And I have had cases where bribery was proven but we were not able to prosecute it federally because it did not have an interstate nexus. RICO, even arson cases have to have it there. So I just want to make sure that if—

Let me ask you this. In general, would you not agree that if someone in Pennsylvania picks up a rock and murders their neighbor, that is a crime unreachable by Federal prosecution under traditional interpretations of Commerce Clause and the reach of the Federal Government?

Judge ROBERTS. Well, again, barring special circumstances of the sort you were talking about, that's generally something addressed by State authorities.

Senator SESSIONS. But we need to get this thing straight. We have some people complaining we are federalizing too many crimes and then complain that we are striking down some that go too far. States should prosecute these cases locally and effectively and should do that, schools and guns and that kind of thing. And in the Violence Against Women Act, there was a Commerce Clause case where a woman was raped and then sued the people who assaulted her and raped her. She wanted to sue in Federal court under the Violence Against Women Act. And what the Court held there was, as I read it, that the Court limited Congress's power to provide for civil damages, money damages. She could sue that rapist in State court, but not for money damages in Federal court. Is that the holding of that case?

Judge ROBERTS. That's my understanding of what the Court held in the *Morrison* case, yes.

Senator SESSIONS. And I don't think it is an utterly extreme position. It certainly did not gut the Violence Against Women Act. It has so many more provisions than just that. If the action had been against a private business, could the damages have been rendered in that case?

Judge ROBERTS. I'm not sure I know the answer to that, Senator.

Senator SESSIONS. I will take the follow-up on the *Garrett* case that several people have mentioned. It involved the University of Alabama in a lawsuit against the State institution, claiming violation of the disabilities act. The State defended on the grounds that you could sue the State of Alabama for backpay; you could sue the State of Alabama to get your job back; you could sue the State of Alabama and get an injunction against the State to not discriminate again in the future; but under the Sovereign Immunity doctrine that protects a State from lawsuits, you couldn't sue them for money damages.

Now-Senator Cornyn as attorney general of his State and attorneys general like Attorney General, now-Judge Bill Pryor, who defended Alabama, raised that defense. And I do not think it is a bogus defense. I think it is a legitimate concern.

Judge, do you recall where the doctrine that is so famous in the law—that the power to sue is the power to destroy—do you remember where that came from in legal our legal history?

Judge ROBERTS. I remember tax opinions talking about it, the power to tax being the power to destroy, but—

Senator SESSIONS. I think the doctrine has been applied to the States, so we attorneys general are familiar with it under the sovereign immunity that the States have. If you are empowered to sue the State of Alabama in Federal court, then you have virtually the power to destroy that State financially, if there is no real limit on it. And so we have always provided and the States have provided

a sovereign immunity that the States will only allow themselves to be sued under certain circumstances and you cannot just sue them unnecessarily.

I know Senator Mark Pryor, our Democratic colleague, signed on the brief for the State of Alabama in the *Garrett* case taking this position, and the Supreme Court ruled with it. I also would note that it did not in any way destroy the disabilities act. It applied to only—State employees only make up about 3.7 percent of the employees in the Nation that might be covered by that.

So I think that there have been some healthy trends in reestablishing that there is some limit to reach of the Commerce Clause. Would not you agree?

Judge ROBERTS. Well, the interesting thing, the Court's most recent decision is the medical marijuana decision in the *Raich* case. And the Court there looked at the *Lopez* and *Morrison* decisions and tried to put them in context and said—because the argument there was based on *Lopez* and *Morrison*, saying this is beyond Congress's power, and the Court said those are only two of our cases and they need to be put in the broad sweep of Commerce Clause precedents for over 200 years. Yes, they are two cases and it had been, I think, 65, 70 years since the Court had focused on limitation under the Commerce Clause and concluded that it was beyond Congress's power. But the *Raich* case concluded this was within Congress's power. They said don't—it's not as if *Lopez* and *Morrison* are junking all that came before. They just need to be considered in a broad context.

And of course there's decision after decision, going back to *Gibbons* v. *Ogden*, one of Chief Justice John Marshall's early opinions, about the scope of Congress's power and the recognition under the constitutional scheme that it is a broad grant of power, and the recognition that this body has the authority to determine when issues affecting interstate commerce merit legislative response at the Federal level. I think that's—

Senator SESSIONS. Well, I think you are—just to go on to another subject, but I think you are correct. These are some difficult areas and the courts need to give a lot of attention to. But some recognition that there are limits to Federal reach is, I think, legitimate for a court.

Judge, are you aware of the salary that you will be paid when you become—if you are so fortunate?

Judge ROBERTS. In a vague way, yes.

Senator SESSIONS. And I suppose you were when you were affirmed to the court of appeals?

Judge ROBERTS. Yes.

Senator SESSIONS. So you are not going to be back next week asking for a pay raise, are you?

Judge ROBERTS. Not next week, no.

[Laughter.]

Senator SESSIONS. The Chief was always over here knocking on our door about pay raises. But, you know, we have a deficit in our country—

[Laughter.]

Senator SESSIONS.—and you are paid the same—I guess the Chief may be paid more than Senators, but for the most part

judges are paid what Members of Congress are paid. And I frankly am dubious that we should give ourselves big pay raises when we can't balance the budget.

I also chair the Court Subcommittee, Courts and Administration, and as Chief you have a serious responsibility with regard to managing and providing guidance to the Congress on the needs of the court system. I know that—I am sure that you will do that with great skill and determination. But let me ask you, will you also seek to manage that court system—and I hesitate, but I will use the word "bureaucracy" at times—effectively and efficiently and keep it a lean and effective management team and maintain as tight a budget as you can maintain?

Judge ROBERTS. Well, if I am confirmed, Senator, the answer is yes. I am aware that there is, for example, the Administrative Office, and they provide valuable services to judges around the country. As a consumer of their services for the past 2 years, I have, certainly, particular views about where I think they're effective and helpful to judges and other areas where, like any bureaucracy, where I think they can do better. It is an area where my first priority is going to be to listen, because I'm sure there are many considerations of which I'm not aware that are very important for the Chief Justice to take into account. And after listening, I'll try to make the best decisions I can about administering that system.

Senator SESSIONS. Well, there are a lot of problems. Judges are not happy with the General Services Administration and sometimes GSA is not happy with the judges, and sometimes judges overreach and want to be treated awfully specially. So I think you have a challenge there. I would look forward to working with you. If you will help us make sure that your court system is lean and efficient and productive, we will try to make sure that you have sufficient resources to do those jobs.

One more thing I would just like to inquire about, and that deals with *stare decisis*, the deference you give to a prior decision of the Supreme Court. And you mentioned a number of factors, and I recognize those as valid and worthy of great consideration. But it almost strikes me that it is a bit circular. In other words, the Court is creating a wall around its opinions to try to avoid seeing them overruled. Isn't it true that your first oath is to enforce the Constitution, as God gives you the ability to understand it, and that sometimes decisions have to be reversed if they are contrary to a fair and just reading of the Constitution?

Judge ROBERTS. Yes, Senator. The oath we take is to uphold the Constitution and laws of the United States. That's true. And the way judges go about that is within a system of precedent and, consistent with rules of *stare decisis*, no judge starts the day by opening a blank slate and saying what should the Constitution mean today? We operate within those systems of precedence. That's the best way that judges have determined to interpret the Constitution and laws, consistent with principles of *stare decisis*.

Senator SESSIONS. Judge, I will just conclude with noting that I remember when the court in the Ninth Circuit ruled that striking down the Pledge of Allegiance, then-Majority Leader Tom Daschle came to the floor, as now-Minority Leader Harry Reid did the same afternoon, and they criticized the opinion and criticized the Ninth

Circuit and expressed concern about activism in that circuit, which I have done often myself.

But I responded that my concern was not so much with the circuit but with the confusing number of opinions from the Supreme Court and that I had no doubt that there was Supreme Court authority that would justify the Ninth Circuit rendering, or ruling, that they did. And I say that because we have just received word today that a judge in San Francisco has upheld—has ruled that the Pledge's reference to one Nation under God violates the Constitution and should be stricken down. So that case is going to be winding its way forward.

I am not going to ask you to comment on it because it will obviously come before you. But will you tell us whether or not you are concerned about the inconsistencies of these opinions, and will you work to try to establish a body of law in the Supreme Court that recognizes the Free Exercise rights of American citizens in regard to religion and to avoid a state establishment of a religion?

Judge ROBERTS. Well, we talked about this in the Committee hearings on a couple of occasions, and I think everyone would agree that the religion jurisprudence under the First Amendment, the Establishment Clause and the Free Exercise Clause could be clearer. The Ten Commandments cases are the example right at hand. You have two decisions of the Supreme Court. Only one Justice thinks both are right. That is an area in which I think the Court can redouble its efforts to try to come to some consistency in its approach.

Now, it obviously is an area that cases depend in a very significant way on the particular facts, and any time that's the case the differences may be explained by the facts. You do have the two provisions, as your question recognized, the Establishment Clause and the Free Exercise Clause. And as I've said before, I think that both of those are animated by the principle that the Framers intended, the rights of full citizenship to be available to all citizens without regard to their religious belief or lack of religious belief. That I think is the underlying principle, and hopefully, the Court's precedents over the years will continue to give life to that ideal.

Senator SESSIONS. Thank you, Judge Roberts. You have, by your testimony, validated the high opinions that so many have of you. I am confident you would make a great Chief Justice.

Judge ROBERTS. Senator, thank you.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Judge, let me start off by talking about a couple of new topics. In September 1985 when you were in the White House Counsel's Office, you recommended deleting the following line from the Presidential briefing materials, quote: "As far as our best scientists have been able to determine, the AIDS virus is not transmitted through casual or routine contact." You said at the time that the conclusion was in dispute. We now know of course that the line is completely accurate, but I would say we also knew that then.

The Centers for Disease Control guidelines issued the month before you wanted to delete that line said the following, "Casual person-to-person contact as would occur among schoolchildren appears

to pose no risk." Major news organizations had reported the CDC's conclusion. In fact, the CDC had said as early as 1982 that it was unlikely that HIV could be spread through casual contact.

Judge ROBERTS. I'm sorry. As early as when?

Senator FEINGOLD. As 1982, that it was unlikely that HIV could be spread through casual contact. Why did you recommend that that line be deleted?

Judge ROBERTS. Well, for the reason I gave in the memorandum. This was a statement by the President, and I just wanted to—didn't want the President giving out medical advice if it was the subject of some uncertainty. I obviously was not a medical expert, and you said the CDC had issued a report a month before. Well, earlier in your commentary—I don't know what the 1982 issue was—but I just thought it was—it's purely a matter of caution and prudence to have the President make a pronouncement on a—you have to remember this was at the very beginning of the AIDS coming into public consciousness, and I was just concerned that the President not be giving out medical statements if people weren't absolutely sure that it was correct.

Senator FEINGOLD. Let me follow that a little bit. It certainly was an early time and also a critical time. I am wondering what you did to check or have someone check on these facts. I mean you must have known that the issue was so important the President was saying something like this, that it could have given great reassurance to people all over the country, as well as helping children infected with the AIDS virus to live happier and more normal lives to know that this was the medical conclusion. So I am just wondering why you would not check it out a little bit.

Judge ROBERTS. I mean I—the flip side of that, Senator, of course, is if it turned out to be wrong, it could have been disastrous to have the President announcing—because the President wasn't a medical expert either—and I'm sure my suggestion would have caused the people drafting the President's speech to go back, and if they thought they were convinced and they were sure, then that's what would have gone in there. It was just a question of concern. I wanted to make sure that they were 100 percent confident that what the President was going to be saying about a medical issue was they had complete confidence in it. I don't know actually whether they took it out or left it in, but at least it caused them to focus—

Senator FEINGOLD. I do not want to belabor it, but I think that was a great opportunity for Presidential leadership and reassurance, and I would just respectfully disagree with your judgment there.

Judge ROBERTS. Well, my judgment—just so I could—it wasn't my medical judgment. The impact of my suggestion was, obviously to cause to people who wanted that in there to go back and make sure they were sure that they wanted the President of the United States issuing a medical statement.

Senator FEINGOLD. I think it was pretty certain at that time what the medical view as, as indicated by the medical community of our Government, but I will leave it at that.

Do you believe that the Congress has the power under the Constitution to prohibit discrimination against gays and lesbians in employment?

Judge ROBERTS. I don't know if that's an issue that's going to come before the courts. I don't know if Congress has taken that step yet, and until it does, I think that's an issue that I have to maintain some silence on. I think personally I believe that everybody should be treated with dignity in this area, and respect. The legal question of Congress's authority to address that though is one that could come before the courts, and so I should be—

Senator FEINGOLD. Can you imagine an argument that would be contrary to that view?

Judge ROBERTS. Well, I don't know what arguments people would make. I just know that I shouldn't be expressing an opinion on an issue that could come before the Court.

Senator FEINGOLD. Let us go to something else then. I would like to hear your views about the Second Amendment, the right to bear arms. This is an amendment where there is a real shortage of jurisprudence. You mentioned the Third Amendment, where there is even less jurisprudence, but the Second Amendment is close. So I think you can maybe help us understand your approach to interpreting the Constitution by saying a bit about it.

The Second Amendment raises interesting questions about a constitutional interpretation. I read the Second Amendment as providing an individual right to keep and bear arms as opposed to only a collective right. Individual Americans have a constitutional right to own and use guns, and there are a number of actions that legislatures should not take in my view to restrict gun ownership. The modern Supreme Court has only heard one case interpreting the Second Amendment. That case is *U.S.* v. *Miller*. It was heard in 1939. The Court indicated that it saw the right to bear arms as a collective right. In a second case, in *U.S.* v. *Emerson*, the Court denied cert and let stand a lower court opinion that upheld a statute banning gun possession by individuals subject to a restraining order against a Second Amendment challenge. The appeals court viewed the right to bear arms as an individual right. The supreme court declined to review the appeals court decision.

So what is your view of the Second Amendment? Do you support one of the other of the views of what was intended by that amendment?

Judge ROBERTS. Well, I mean you're quite right that there is a dispute among the circuit courts. It's really a conflict among the circuits. The Fifth Circuit—I think it was in the *Emerson* case if I'm remembering it correctly—agreed that—with what I understand to be your view, that this protects an individual right. But they went on to say that the right was not infringed in that case. They upheld the regulation there.

The Ninth Circuit has taken a different view. I don't remember the name of the case now, but a very recent case from the Ninth Circuit has taken the opposite view that it protects only a collective right, as they said. In other words, it's only the right of a militia to possess and not an individual right.

Particularly since you have this conflict, cert was denied in the *Emerson* case, I'm not sure it's been sought in the other one or will

be, that's the sort of issue that's likely to come before the Supreme Court when you have conflicting views. I know the *Miller* case sidestepped that issue. An argument was made back in 1939 that this provides only a collective right, and the Court didn't address that. They said instead that the firearm at issue there—I think it was a sawed-off shotgun—is not the type of weapon protected under the militia aspect of the Second Amendment.

So people try to read into the tea leaves about *Miller* and what would come out on this issue, but that's still very much an open issue.

Senator FEINGOLD. I understand that a case could come before you. I am wondering if you would anticipate that in such a case that a serious question would be, which interpretation is correct?

Judge ROBERTS. Anytime you have two different courts of appeals taking opposite positions, I think you have to regard that as a serious question. That's not expressing a view one way or the other. It's just saying, I know the Ninth Circuit thinks it's only a collective right; I know the Fifth Circuit thinks it's an individual right; and I know the job of the Supreme Court is to resolve circuit conflicts, so I do think that issue is one that's likely to come before the Court.

Senator FEINGOLD. I would like to revisit the *Hamdi* issue. I asked you which of the four opinions in the case of *Hamdi* v. *Rumsfeld* best approximates your view on the Executive's power to designate enemy combatants, and you refused to answer that question because the issue might return to the Court. I want to press you a bit on that. In *Hamdi* there were four different opinions. And by the way, I checked it because you mentioned *Youngstown*, and all four opinions cited the *Youngstown Sheet and Tube* v. *Sawyer* case. Both Justice Thomas's dissent and Justices Ginsburg's and Souter's concurring opinion, cited Justice Jackson's opinion in the *Youngstown* case. And they came to completely different conclusions.

So your answer that you would apply that principle does not help me very much in understanding your view of this. We know where all 8 other members of the Court stand on these opinions. In their opinions, they either wrote or joined one of them, yet all 8 of them will hear the next case that raises similar issues. No one is suggesting that their independence or impartiality in the next case has been compromised.

Mr. Hamdi, of course, has left the country, so the precise facts of his case will never return to the Court. Of course, if a member of the Court expressed a view outside of the Court on a specific case that was headed to the Court, that might be cause for recusal, as Justice Scalia recognized when he recused himself from the Pledge of Allegiance case a few terms ago after discussing it in a speech. But obviously, Justice Scalia can participate in the next case involving the questions at issue in *Hamdi* even though we know exactly what he thinks about that decision.

So I guess I want to know why are you different? I am not asking for a commitment on a particular case. I recognize that your views might change once you are on the Court and hear the arguments and discuss the issue with your colleagues, but why should not the public have some idea of where you stand today on these crucial questions concerning the power of the Government to jail them

without charge or access to counsel in a time of war? They know a great deal about how each of the other Justices approach these issues. Why is your situation different?

Judge ROBERTS. Well, because each of the other 8 Justices came to their views in those cases through the judicial process. They confronted that issue with an open mind. They read the briefs presented by the arguments—by the parties, and the arguments the parties presented. They researched the precedents as a judge. They heard the argument in the case. They sat in the conference room, just the 9 of them on the Court, and debated the issues and came to their conclusions as part of the judicial process.

You're now asking me for my opinion outside of that process, not after hearing the arguments, not after reading the briefs, not after the participating with the other judges as part of the collegial process, not after sitting in the conference room and discussing with them their views, being open to their considered views of the case, not after going through the process of writing an opinion, which I have found from personal experience and from observation, often leads to a change in views, the process of the opinion writing. You can't—the opinion turns out it doesn't write. You have to change the result. The discipline of writing helps lead you to the right result.

You're asking me for my views, you know, right here without going through any of that process.

Senator FEINGOLD. What would be the harm, Judge, if we got your views at this point, and then that process caused you to come to a different conclusion, as it appropriately should? What would be the harm?

Judge ROBERTS. Well, the harm would be affecting the appearance of impartiality in the administration of justice. The people who would be arguing in that future case should not look at me and say, "Well, there's somebody who under oath testified that I should lose this case because this is his view that he testified to." They're entitled to have someone consider their case through the whole process I've just described, not testifying under oath in response to a question at a confirmation hearing.

I think that is the difference between the views expressed in the prior precedent by other Justices in the judicial process and why—as has been the view of all of those Justices—every one of those Justices who participated in that case took the same view with respect to questions concerning cases that might come before them, as I am taking here.

Senator FEINGOLD. I understand your view. I think it is narrow. I had the experience of having one of my bills go before the Supreme Court, and I know I did not have, as we say in Wisconsin, a snowball's chance with a couple of the Justices because of what they had ruled previously, but I did not think that made the process in any way tainted. I knew that they simply were not going to agree with the statute, but I recognize your limitations.

Let me ask you about something else, the *Hamdan* matter. Yesterday you refused to answer any questions regarding your conduct in the *Hamdan* v. *Rumsfeld* case. But today you answered questions from Senator Coburn regarding this matter. So I want to follow up in order to make sure the record is complete.

You interviewed with the Attorney General of the United States concerning a possible opening on the Supreme Court on April 1, 2005. Is that correct?

Judge ROBERTS. Yes. The specifics of the details I've discussed in the response to the Committee's questionnaire.

Senator FEINGOLD. That was 6 days before the oral argument in the *Hamdan* case, is that not right?

Judge ROBERTS. I don't remember the exact date of it. I know it was shortly before that, yeah.

Senator FEINGOLD. You had further interviews on May 3rd concerning a possible appointment to the Court with numerous White House officials including Karl Rove, the Vice President and the White House Counsel before the decision in the *Hamdan* case was released; is that correct?

Judge ROBERTS. The decision was June 15th.

Senator FEINGOLD. The question here is just did you have further interviews on May 3rd concerning a possible appointment to the Court?

Judge ROBERTS. May 3rd, yes. But whatever was—I don't remember the exact dates, but whatever was—

Senator FEINGOLD. But you had interviews with those individuals—

Judge ROBERTS.—in the Senate questionnaire.

Senator FEINGOLD. The questionnaire seems to indicate it was on May 3rd. You met again with Ms. Miers, the White House Counsel on May 23rd; is that right?

Judge ROBERTS. I'm relying on the—if that's what I said in the questionnaire, yes. I don't have an independent recollection.

Senator FEINGOLD. You have no reason to doubt that those facts are correct. You never informed counsel in this case of these meetings, did you?

Judge ROBERTS. I did not, no.

Senator FEINGOLD. Mr. Gonzales's advice to the President concerning the Geneva Conventions was an issue in the case, isn't that right?

Judge ROBERTS. I don't want to discuss anything about what's at issue in the case. The case is still pending, and pending before the Supreme Court.

Senator FEINGOLD. How about this one. President Bush was named a defendant in the case, right?

Judge ROBERTS. Yes. In his official capacity.

Senator FEINGOLD. The *Hamdan* decision was released on July 15th. Is it your testimony that no work on that decision took place after July 1?

Judge ROBERTS. No. I didn't—that was not my testimony. The opinions in the D.C. Circuit—

Senator FEINGOLD. Is it your testimony now that no work on that decision took place after July 1?

Judge ROBERTS. Opinions in the D.C. Circuit are complete and circulated to the panel a week before they're released. That was my—the conclusion of when work was complete, and again, I wasn't the author of the opinion—it would have been a week before it was released.

Senator FEINGOLD. Did you read over the opinion of the concurrence after July 1? Was there any editing that took place after that date?

Judge ROBERTS. I don't recall, Senator, and—

Senator FEINGOLD. Well, when was the issue of whether you should recuse yourself from this case, when did that first come to your attention?

Judge ROBERTS. I saw, was made aware of an article—I think it was an article—I don't remember when that took place, whenever the article was published. And then I understand there was legal opinions on the other side were requested by I believe the Chairman, and I know that those were published—

Senator FEINGOLD. You do not recall when this matter first came up? I would think it would be something you would remember, when somebody suggested you should have recused yourself.

Judge ROBERTS. I don't remember the date of the—

Senator FEINGOLD. How about the approximate time?

Judge ROBERTS. I think it was sometime in July or—

Senator FEINGOLD. Mr. Chairman, so the record would be complete, I would like to submit the article from Slate Magazine by Professors Gillers, Luban and Lubet and a letter sent to you responding to Professor Rotunda's criticism of their position, and I also want to submit an article by these three law professors that was published in the Los Angeles Times on this topic.

I do not want to take any more time on this, but I think these—

Chairman SPECTER. Without objection that will be made a part of the record.

Senator FEINGOLD. Thank you, Mr. Chairman. I think these professors very convincingly answer Professor Rotunda's views and point out that his analysis of the case law is not particularly persuasive. And I would urge any of my colleagues who really want to understand the issue with Judge Roberts's participation in the case, rather than just dismissing it because it is inconvenient, that they take a look at it and actually see what the issues were here. But I do appreciate your answer to those questions.

I will only be able to get to some of my questions on the next subject, and hopefully in the next round can continue. But, Judge Roberts, as Senator Leahy mentioned earlier, when you came before the Committee a couple of years ago, we discussed the fact that more than 100 people on death row have been exonerated and released, and, in fact, I believe the number is now 121 people who we know were sentenced to die for crimes they did not commit.

I want to follow up on work that Senators Durbin and Leahy have done in discussing with you the *Herrera* case. I do differ with your characterization of the case. The Solicitor General brief that you signed presented the issue as whether the Constitution "requires that a prisoner have the right to seek judicial review of a claim of newly discovered evidence." That is, the question was not how strong the evidence of innocence must be, as you seemed to be suggesting earlier, but whether the Constitution requires that there be some avenue for presenting evidence of innocence in Federal court. Your brief argued that it does not.

Now, that brief also, as you know, contained a footnote that I am going to ask you to comment on. It said, "There is no reason to fear

that there is a significant risk that an innocent person will be executed under procedures that the States have in place. . . . The direct review and collateral procedures that the Federal Government and the States have in place are more than ample to separate the guilty from the innocent." Yesterday you talked about the possible effect of DNA evidence on the legal framework in this type of case.

In light of the many cases of innocent people ending up on death row that have come to light in the past decade, and aside from what was the ultimate issue at stake in that case, do you still agree with your statement from the Government's *Herrera* brief?

Judge ROBERTS. Well, that was the administration position at the time. It was one that the Supreme Court agreed with; 6–3 I think was the ruling. I know Justice O'Connor was in the majority.

The issue—and, again, there was obviously argument a the time about what the issue really was in *Herrera*. And I thought it was quite inaccurate to view it as a case involving the question of whether actual innocence could be presented, because there was—it was a claim of newly discovered evidence, and it was a claim that somebody who had just died was actually the murderer. At the end of exhaustive appeals through the State system, exhaustive collateral review through the State system, exhaustive collateral review through the Federal system, is there an obligation to decide at that point that a new claim that somebody else committed the crime—

Senator FEINGOLD. I am running out of time, and I just wonder if you still stand by the statement, if you can just say yes or no.

Judge ROBERTS. Well, that was the administration position.

Senator FEINGOLD. All right. Well, let me cut to the quick. I would like to know whether you think there is a risk that innocent people may be sentenced to death in today's criminal justice system. And I must say, Judge, Supreme Court Justices do have the power of life and death in these matters.

Judge ROBERTS. Senator, I think there is always a risk in any enterprise that is a human enterprise like the legal system. Obviously, the objective of the provision of the rights to a criminal defendant and trial, the provision of collateral review at the State level, the provision of collateral review at the Federal level, the availability of, as you suggested, clemency—all of that is designed to ensure that the risk is as low as possible.

There are issues that are going to be presented about the availability of DNA evidence which may or may not help reduce the risk even further. There is always a risk. And, obviously, when you're dealing with something like capital punishment, the risk is something that has to be taken extremely seriously at every stage of the process.

As we talked about more than 2 years ago at the prior hearing, I think the most effective way of minimizing that risk is to ensure that people facing that sanction have the best counsel available at every stage. As you know from looking at this problem, the issue that comes up are questions that weren't raised that should have been raised if the person had a more capable lawyer, avenues that weren't pursued that should have been pursued if that lawyer had the resources. And that's where I think the risk of wrongful convic-

tion is going to be most effectively addressed, ensuring the availability of competent counsel at every stage of the proceeding.

Senator FEINGOLD. Thank you, Judge.

Judge ROBERTS. Thank you, Senator Feingold.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Judge Roberts, your intellectual stamina impresses me because—you can't see this on television—it must be 150 degrees in here.

[Laughter.]

Senator GRAHAM. And I just don't know how you are doing it, but I am tremendously impressed.

Mr. Chairman, I would like permission to introduce into the record some law professor's opinion that being interviewed for the Supreme Court vacancy when Judge Roberts was interviewed did not require him to recuse himself, and I will do that at—

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator GRAHAM. But let's think about that in kind of political terms, and I know that is not really your job. If we took this to its logical conclusion, say I was President—and I don't think that is going to happen, so you don't need to be overly worried about it. But you could pick someone to be Chief Justice from the people sitting on the Court; is that correct?

Judge ROBERTS. Yes.

Senator GRAHAM. So if you had a judge you did not particularly like, the best thing you could do is go talk to him about the job and they could not decide anything. Would that be the logical conclusion of this?

Judge ROBERTS. I think that would be the logical conclusion of some—

Senator GRAHAM. Well, I will remember that if I am President. On the record now, I don't think I should have the right to do that. That is part of the process.

Some big themes here. Were you proud to work for Ronald Reagan?

Judge ROBERTS. Very much, Senator, yes.

Senator GRAHAM. During your time of working with Ronald Reagan, were you ever asked to take a legal position that you thought was unethical or not solid?

Judge ROBERTS. No, Senator, I was not.

Senator GRAHAM. We talked about the Voting Rights Act. The proportionality test in the Reagan administration's view was changing the Voting Rights Act to create its own harm. Is that correct?

Judge ROBERTS. The concern that the Attorney General had, and the President, was that changing section 2 to the so-called effects test would cause courts to adopt a proportionality requirement, that if elected representatives were not elected in proportion to the racial composition in a particular jurisdiction, that there would be a violation shown that would have to be redressed.

Senator GRAHAM. Do you think it would be fair to try to suggest that because you supported that position that you are somehow racially insensitive?

Judge ROBERTS. No, Senator, and I would resist the suggestion that I am racially insensitive. I know why the phrase "Equal Justice Under Law" is carved in marble above the Supreme Court entrance. It is because of the fundamental commitment of the rule of law to ensure equal justice for all people without regard to race or ethnic background or gender. The courts are a place where people need to be able to go to secure a determination of their rights under the law in a totally unbiased way. That's a commitment all judges make when they take a judicial oath.

Senator GRAHAM. Knowing this will not end this line of inquiry, but at least trying to put my stamp on what I think we have found from this long discussion, basically the Supreme Court decided in section 2 that the intent test was constitutionally sound. Is that correct?

Judge ROBERTS. That was its determination in *Mobile* v. *Bolden*.

Senator GRAHAM. And Senator Kennedy disagreed because he wanted a different test. And I respect him. He is one of the great—first, he is not part of the Reagan Revolution. I think we all can agree with that, so I don't expect him to buy into it. But I respect him greatly for his passion about his causes. He took it upon himself to try to change a Supreme Court ruling, to go away from the intent test to the effects test. And he was able to reach a political compromise with the administration. And I just want that to be part of the record. To say that Ronald Reagan or Judge Roberts by embracing a concept approved by the Court equates to that administration or this person being insensitive to people of color in this country I think is very unfair and off base.

You said something yesterday that was very compelling to me. I asked you could you express or articulate what you thought might be one of the big threats to the rule of law. And I believe you said, "Judges overstepping their boundaries, getting into the land of making the law, putting their social stamp on a cause rather than interpreting the law because that could over time in the eyes of the public, undermine the confidence in the court."

Is that a correct summary?

Judge ROBERTS. Yes, Senator.

Senator GRAHAM. Well, we have before us today, Judge Roberts, a legal opinion, just issued, hot off the presses, that says the Establishment Clause of the Constitution apparently is violated if an American expresses—recites the Pledge of Allegiance. You will be on the Court, I hope, and you will use your best judgment of how to reconcile the Ninth Circuit opinion. And I am not asking you to tell us how you might rule. I am making a personal observation that this is an example, in my opinion, of where judges do not protect us from having the Government impose religion upon us but declare war on all things religious. And that is my personal view and opinion. That is why most Americans sometimes are dumbfounded about what is going on in the name of religion. No American wants the Government to tell them how to worship, where to worship, or if to worship. But when we exercise our right to worship, it bothers me greatly that judges who are unelected confuse the concept between establishment and free exercise. And I will move on. I think it is one of the cases that is undermining the confidence in the judiciary, and I am glad you are sensitive to that.

The war on terror. In my past legal life, I have spent most of my legal career associated with the military, and I am proud to be a military lawyer. I am the only reservist in the Senate. I sat as an Air Force Court of Criminal Appeals judge. I handled the easy cases because I don't have a whole lot of time and I help when I can. But I understand, I think, very well what it means to abide by the judicial canons of ethics, not to tip your hand, not to compromise yourself to get promoted or to get put on the court, promoted in the military or to get put on the court, trying to please your boss, trying to please a Senator. And my respect for you has gone up because you are unwilling to compromise your ethics, and I hope the Senate will understand that in the past other people were not required to do so.

Are you familiar with the Geneva Convention?

Judge ROBERTS. Yes, Senator.

Senator GRAHAM. Do you believe that the Geneva Convention as a body of law, that it has been good for America to be part of that Convention?

Judge ROBERTS. I do, yes.

Senator GRAHAM. Why?

Judge ROBERTS. Well, my understanding in general is it's an effort to bring civilized standards to conduct of war, a generally uncivilized enterprise throughout history; an effort to bring some protection and regularity to prisoners of war in particular. And I think that's a very important international effort.

Senator GRAHAM. As Senator Kyl said, this will be the only time we will actually get to talk, and I do not want to compromise your role as a judge, but I do want you to help me express some concepts here that America needs to be more understanding of. And I want to work with my Democratic friends to see if we can find some way to deal with this.

We are dealing with an enemy that is not covered by the Geneva Convention. Al Qaeda, by their very structure and nature, are not signatories to the Geneva Convention and are not covered under its dictates. An enemy combatant—are you familiar with that term in the law?

Judge ROBERTS. Yes, Senator, I am.

Senator GRAHAM. What would an enemy combatant be under American jurisprudence? Who would they be?

Judge ROBERTS. Well, I really have to—

Senator GRAHAM. Fair enough, fair enough.

Judge ROBERTS. Those cases are both pending, the ones that I have decided are pending before the Supreme Court, and those issues are likely to come before it.

Senator GRAHAM. Fair enough. The Geneva Convention does not cover al Qaeda but our President has said that anyone in our charge, terrorist or not, will be treated humanely. I applaud the President because in fighting the war on terror, we need not become our enemy. Our strength as a Nation is believing in the rule of law, even for the worst of those that we may encounter.

I admire Mr. Adams for representing the Redcoats. I cannot imagine how tough that must have been. But his willingness to take on the unpopular cause in the name of the rule of law has made us stronger.

When the President said that we will treat everyone humanely, even the worst of the worst, I think he has brought out the best in who we are. But we are in a war, Judge Roberts, where the Geneva Convention does not apply, and we have before the courts a line of cases dealing with the dilemma this country faces. When you capture an enemy combatant, non-citizen foreign terrorist, there are three things I think we must do: we must aggressively interrogate them without changing who we are; we must have the ability to keep them off the battlefield for a long period of time to protect our Nation; and we must have a system to hold them accountable for some of the most horrible crimes imaginable.

Justice Jackson was one of your favorite Justices; is that correct?

Judge ROBERTS. I think that's a fair description, yes.

Senator GRAHAM. He has indicated in the *Youngstown Steel* case that the Presidency or the executive branch is at its strongest when it has concurrence with the legislative branch. Is that a fair summary of what he said?

Judge ROBERTS. Yes, he divided up the area basically into three parts, and considering the executive's authority, and said when it has the support of Congress, it's at its greatest. And obviously when it's in opposition to Congress, it's at its lowest ebb, as he put it. And he described a middle area in which it was sometimes difficult to tell whether Congress was supporting the action or not.

Senator GRAHAM. This is me speaking, not you.

Congress is AWOL, ladies and gentlemen, in the war on terror when it comes to detention, interrogation, and prosecution of enemy non-citizen combatants. Justice Scalia has written eloquently that Congress has the power to get involved in these issues, and Congress is solid.

What is the case—is it the *Razul* case where the Supreme Court in a 5–4 decision has given habeas corpus rights to non-citizen foreign terrorists?

Judge ROBERTS. I think that's correct, Senator, yes.

Senator GRAHAM. That is an amazing departure from what we have been as a Nation for 200 years. I have been to Guantanamo Bay twice. The people running the prison tell me that 185 of the detainees have lawyers in Federal court. Justice Scalia says we have set up a situation where 94 different jurisdictions can hear habeas cases involving non-citizen foreign terrorists. The people running the jail say this process is undermining our ability to get good information. A habeas corpus petition hearing, would it allow a defense attorney to call a military commander in to answer for how this person was captured?

Judge ROBERTS. I don't know, Senator, and I hesitate to opine on that without knowing.

Senator GRAHAM. Well, the truth is that we have set up a situation where our military leaders and our military commanders and soldiers in the field can be called from all over the world, all over the country, to answer for why such person is detained.

We had a conversation in our office—in my office. You said something to the effect, as Justice Scalia said in his dissenting opinion, that this would be an area where the courts would welcome some congressional involvement. And right now we have the executive branch carrying the load totally by themselves. We have got sev-

eral cases before the Court dealing with detention policy, interrogation policy, and prosecution policy.

Do you believe that this is an area, if the Congress acted, as Justice Jackson said, that it would strengthen the hand of the Executive in the legal situation?

Judge ROBERTS. My observation during our meeting, Senator, was not an expression of legal determination, and it doesn't necessarily mean a view that Congress's action or involvement would be determinative or would even be within the scope of legal authority, depending on what the issue and the arguments were.

I do know that when you are in the middle area where it's difficult to determine whether Congress is supporting the President's action or is opposed to the President's action, that the Court often has to try to read the tea leaves of related legislation. If you look at the *Dames* and *Moore* decision coming out of the Iranian hostage crisis, what the Court did in that case, applying the middle tier, was look at a vast array of legislation. And it was a very difficult enterprise to try to figure out what Congress's view was. My point was simply that if we'd know what Congress's view was, it might make it easier to apply it in a particular case, and you wouldn't have to go through that process of trying to determine what position Congress was in, if that turned out to be pertinent under the particular legal challenge.

Senator GRAHAM. Thank you. Justice Scalia said in a very direct way, the courts are ill-equipped to deal with these issues. In the *Youngstown Steel* case, Justice Jackson says, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at the maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who may attack."

Do you agree with that?

Judge ROBERTS. That was read from the Jackson—I do. I agree with the basic proposition that the President's authority is at its greatest when he has the support of Congress.

Senator GRAHAM. To my colleagues, I think it is imperative for this body to get involved in the war on terror when it comes to detaining, interrogating, and prosecuting enemy combatants who are not citizens. It is important that all three branches of Government, in my opinion, feel comfortable with the policies of this Nation, that we will be stronger if the judicial branch, the legislative branch, and the executive branch are working together to come up with policies that will allow for aggressive interrogation, appropriate detention, and serious prosecution in a way that is within the values of our Nation. So that is why I will be introducing legislation on all those topics, and I will not ask you any further what you may or may not do about the legislation if it ever gets to the floor of the Senate and passed.

The *Kelo* case. Of all the things that have been decided—and I haven't been to my office since the recent case about the Pledge, so it may have trumped it—I have gotten more phone calls about the *Kelo* than anything the Supreme Court has done lately. And for

those who may be tuning in, the *Kelo* basically said that the Government can take your property, give it to someone else, another private person, because it could be used at a higher and best use and it might generate more taxes.

I am not going to ask you to tell me how you will decide the *Kelo*, but I just want you to know—as Senator Kyl indicated, this is the only time you can hear from us—that my phone is ringing off the hook and that every legislature that I know of is going into session as quickly as they can to correct that. So I want to leave with you—and when you meet your new colleagues, please let them know that some of the things they do, that we watch, and that the courts are able to do their job because the public defers to the Court and respects the Court. But there is a limit.

The Office of Chief Justice of the United States is different, as you are the first among equals. What do you believe as Chief Justice you can bring to the table that you could not as just a normal member of the Court?

Judge ROBERTS. Well, if I am confirmed, I think one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court. I know that has been—it was a priority of the last Chief Justice. I actually believe that is something that should be a matter of concern for all of the Justices. But as the Chief, with responsibility for assigning opinions, I think he has greater scope for authority to exercise in that area, and perhaps over time can develop greater persuasive authority to make the point. Again, coming from the Chief, it may be a point that other Justices would receive—be more receptive to than they might coming from one of their colleagues, that we are not benefited by having six different opinions in a case, that we do need to take a step and think whether or not we really do feel strongly about a point on which a Justice is writing a separate concurrence which only he or she is joining, or whether the majority opinion could be revised in a way that wouldn't affect anyone's commitment to the judicial oath to decide the cases as they see fit, but would allow more Justices to join the majority so the Court speaks as a Court. That is something that the priority should be, to speak as a Court.

Senator GRAHAM. So your goal as Chief Justice is, where you can and as often as you can, to find consensus and unite the Court. Is that true?

Judge ROBERTS. I think the Court should be as united behind an opinion of the Court as it possibly can. Now, obviously, in many cases it is not going to be possible.

Senator GRAHAM. I applaud you because we are a divided Nation, and the more united we can become at any level of Government, the stronger we will be. So I applaud you for that attitude.

Chairman SPECTER. Thank you very much, Senator Graham.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman, and, Judge Roberts, it is nice to talk to you so early in the day.

Yesterday you stated that you "agree with the *Griswold* Court's conclusion that marital privacy extends to contraception and availability of that." And you noted that the Court's later decisions have

based the constitutional right to privacy on the liberty component of the Due Process Clause of the 14th Amendment.

Now, Justice Thomas at his confirmation hearing answered in a way very similar to the way you did. During his confirmation hearing, here is what he said: "I believe the approach that Justice Harlan took in . . . *Griswold* in determining the—or assessing the right to privacy was an appropriate way to go."

Now, we all know that Justice Harlan's approach located the right to privacy in the liberty interest of the Due Process Clause of the 14th Amendment. And Justice Thomas also said at his confirmation hearings, along the same lines, that he agreed with the Court decision in *Eisenstadt* v. *Baird* where the Court held that single people have the same right to privacy as married people on the issue of procreation.

However, since he has been confirmed onto the Court, Justice Thomas has not applied the right to privacy to key protections. For instance, in *Lawrence* in 2003, he declared that there is no general right to privacy in the Constitution.

Now, yesterday you said that, "Liberty is not limited to freedom from physical restraint. It does cover areas," as you said, "such as privacy. It's not only protected in procedural terms, but protected substantively as well." You said that you agreed that, "There is a right to privacy to be found in the Liberty Clause of the 14th Amendment." So that seems directly to contradict Justice Thomas's view once he got on the Court, as I outlined, in *Lawrence*.

I assume that you disagree with Justice Thomas's view that there is no general right to privacy, as he stated in *Lawrence*.

Judge ROBERTS. Well, I think that question depends obviously on the modifier and what you mean by "general." I noted in going over the nomination hearings of Justice Breyer, he also said that the privacy interest is within the—is protected as part of the liberty—protected by the Due Process Clause. I think that is the general approach. Now the—

Senator SCHUMER. Let's talk about Justice Thomas. He said there is no general right of privacy. You seemed to say yesterday—you didn't seem to say. You said that there was a right to privacy. Let's forget that Justice Thomas said it. You would disagree that there is no general right to privacy in the Constitution.

Judge ROBERTS. Well, I wouldn't use the phrase "general" because I don't know what that means. I don't know if by saying "general" they are trying to describe the particular scope to the right to privacy or not. I think there is a right to privacy protected as part of the liberty guarantee in the Due Process Clause.

Senator SCHUMER. A substantive right to privacy.

Judge ROBERTS. Protected substantively, yes.

Senator SCHUMER. Is it your reading of Justice Thomas's case in *Lawrence* that he does not believe in that?

Judge ROBERTS. No. I think his statement obviously focuses on general, and his conclusion in that case was that the right to privacy protected under the Due Process Clause that you noted he acknowledged at his hearings did not extend to include the activity at issue in *Lawrence*.

Senator SCHUMER. Well, this is obviously very important because Justice Thomas seemed to be more full in his view of privacy at his

confirmation hearing than later when he was on the Court, at least if you read his decisions. And you are not willing to say that your view is different than the view Justice Thomas stated in *Lawrence*.

Judge ROBERTS. I'm not willing to state a particular view on the *Lawrence* decision, and that's consistent with the approach that I've taken.

Senator SCHUMER. Let me ask you a broader question. Do you disagree with Justice Thomas's interpretation of the right to privacy in any decided case?

Judge ROBERTS. Well, Senator, I'm not going to comment on whether I think particular cases were correctly decided or not in areas—

Senator SCHUMER. I didn't ask that.

Judge ROBERTS. Well, I don't know which cases you're talking about.

Senator SCHUMER. Any. Any one you want.

Judge ROBERTS. Well, that would be commenting on whether that decision was correctly decided or not. If I'm agreeing or disagreeing with one of the Justices' views in that case, that would be commenting on whether that view was correct or not. If it was in a dissent, it would be disagreeing; if it was in the majority, it would be agreeing. And because those are in areas that could come before the Court, like every other nominee to come before this Committee who is on the Court today, I think it's inappropriate to comment on the correctness or incorrectness of those decisions in areas that could come before the Court.

Senator SCHUMER. So you are not—you do not have to answer this. It is obvious you will not state where you disagree with Justice Thomas, and it could well be that what he said at his hearing and you said at your hearing might lead to—might lead you to rule in the same way on privacy?

Judge ROBERTS. Well, again, my view on privacy is as I've expressed, that there is a right to privacy, protected as part of the liberty under the Due Process Clause.

Senator SCHUMER. Would you say there is a general right to privacy?

Judge ROBERTS. I don't know what "general" means.

Senator SCHUMER. Substantive right to privacy.

Judge ROBERTS. Well, substantive, yes, I have said that, that the protection extends to substantive protection. But when you say general, I don't know what that means. I don't know if that means—

Senator SCHUMER. Didn't Justice—excuse me. Didn't Justice Thomas disagree with the substantive right to privacy in *Lawrence*?

Judge ROBERTS. His conclusion was that the liberty protected by the Due Process Clause did not extend to that right, yes.

Senator SCHUMER. Thank you. So it would seem to me you disagree with him. I think you just said it without saying it.

Judge ROBERTS. No, Senator, you're asking me whether the right to privacy protected under the Liberty Clause extends to a particular right, the right at issue in *Lawrence*.

Senator SCHUMER. I think what I am asking you, is there a substantive right to privacy? I didn't apply it to a particular case.

Judge ROBERTS. I have said there is a substantive right to privacy.

Senator SCHUMER. And in *Lawrence*, Justice Thomas seemed to say there is no substantive right to privacy.

Judge ROBERTS. No. As I understand it—and, again, his testimony as a nominee was that there was. What he said is—the quote you read in *Lawrence* said there's no general right to privacy. Now, I don't know—

Senator SCHUMER. But his holding was that there was no substantive right to privacy under the Liberty Clause, wasn't it? Wasn't that the whole thrust of his argument?

Judge ROBERTS. No, I think, Senator, that his conclusion in *Lawrence* was that whatever right there was, it did not extend to the activity that was at issue in *Lawrence*.

Senator SCHUMER. The bottom line is you are unwilling to differentiate yourself from Justice Thomas's view in *Lawrence*.

Judge ROBERTS. Well, it's consistent with the approach I've taken, that I don't think it's appropriate to protect—as necessary to protect the independence and integrity of the Court to comment on whether that decision was correctly decided or not. And that is consistent with the approach that every member of the Court has taken—

Senator SCHUMER. I just didn't ask you that. I asked you if you would—I asked you if you disagreed with his particular holding, and—but let me ask you a few other questions here, because I think you are cutting back a little on what you said yesterday, at least if you look at the whole picture here and your unwillingness to disagree with Justice Thomas.

But let me ask you this about judges in general. You sit on a court, correct?

[Judge Roberts nods head.]

Senator SCHUMER. Okay. And sometimes you dissent.

[Judge Roberts nods head.]

Senator SCHUMER. And that's routine, not just for your but for every judge.

Judge ROBERTS. It's rare on our court, I'm happy to—

Senator SCHUMER. Yes, it is. It is. That is true. I have noticed that. But it happens in courts all the time.

[Judge Roberts nods head.]

Senator SCHUMER. Okay. And in doing so, the dissenting judge is criticizing the majority opinion, right?

[Judge Roberts nods head.]

Senator SCHUMER. Disagreeing with it?

[Judge Roberts nods head.]

Senator SCHUMER. And I take it this happens on the Supreme Court quite often.

[Judge Roberts nods head.]

Senator SCHUMER. And, in fact, there aren't that many unanimous Supreme Court cases on major cases these days.

Judge ROBERTS. Well, actually, at one point the statistics always showed that more cases were unanimous than anything else.

Senator SCHUMER. But there are a lot of dissenting judgments.

Judge ROBERTS. There are a lot.

Senator SCHUMER. And every Justice on the Supreme Court has dissented in many cases.

[Judge Roberts nods head.]

Senator SCHUMER. Meaning they disagreed with the opinion of the Court, right?

[Judge Roberts nods head.]

Senator SCHUMER. And nothing is wrong with that. There is nothing improper, nothing unethical.

[Judge Roberts nods head.]

Senator SCHUMER. Okay. Let's go to commentators. Non-judges are free to criticize and disagree with Supreme Court cases, correct?

Judge ROBERTS. Yes.

Senator SCHUMER. In speeches, law review articles. This is a healthy process, wouldn't you say?

Judge ROBERTS. I agree with that, yes.

Senator SCHUMER. And you did this occasionally when you were in private practice?

Judge ROBERTS. Yes.

Senator SCHUMER. Okay. Nothing unseemly about that.

Judge ROBERTS. No.

Senator SCHUMER. Okay. And how about lawyers representing clients? Lawyers representing clients criticize cases in legal briefs all the time. That is what they do for a living.

Judge ROBERTS. Yes.

Senator SCHUMER. And that is part of being a good lawyer. And you have signed your name to briefs explicitly criticizing and disagreeing with Supreme Court decisions.

Judge ROBERTS. On occasion, yes.

Senator SCHUMER. In *Rust* v. *Sullivan*, for example, your brief said that, "*Roe* was wrongly decided and should be overturned." Right?

Judge ROBERTS. Yes.

Senator SCHUMER. Okay. But in this hearing room, you don't want to criticize or disagree with any decided cases. That seems strange to me. It seems strange, I think, to the American people, that you can't talk about decided cases, past cases, not future cases, when you have been nominated to the most important job in the Federal judiciary. You could do it when you worked in the White House. You could do it when you worked in the Justice Department. You could do it when you worked in private practice. You could do it when you gave speeches and lectures. As a sitting judge, you have done it until very recently. You could probably do it before you just walked into this hearing room. And if you are confirmed, you may be doing it for 30 years on the Supreme Court. But the only place and time that you cannot criticize any cases of the Supreme Court is in this hearing room when it is more important than at any other time that the American people and we, the Senators, understand your views.

Why this room should be some kind of cone of silence is beyond me. The door outside this room does not say, "Check your views at the door." So your failure to answer questions is confounding me. You have done it in instance after instance after instance after instance. What is the difference between giving your views here in

this hearing room and what judges do every day, what professors do every day, what lawyers do every day? In each case, they have to state their opinion. They have to do it as part of their job, if you will, writing a brief, rendering an opinion, writing an article. In each case they are stating their views, which might bias them. You have done it.

Yet only here you cannot state your views. If the argument—and by the way, there is a very good countervailing reason that you should state your views, because, as the Founding Fathers so constructed, this is the one time you go before an elected body before a lifetime appointment. And it seems to me this is something of an argument of convenience. Senator Specter said it well. He said you will answer as many questions as you have to to get confirmed. That may be the actual fact, but it is not the right thing to do, in my judgment.

And so please tell us why is the bias, why is the fact that you have already stated an opinion any different when you sit in this room, in terms of jeopardizing your future as a judge, than it is when you are doing all these other things that you have done? And let me just remind you—I am going to give you a chance to answer this, but I think it is bothering a lot of people in this room and out of this room. Justice Ginsburg, people who have sat in your very chair, just about every single Justice, with one or two exceptions, has given their opinions of existing cases.

Justice Ginsburg said on *Roe* v. *Wade*, "My view is that if *Roe* had been less sweeping, people would have accepted it more readily." Do you think she was unable to keep an open mind in cases implicating *Roe*? Do you? Do you think she was unable to keep an open mind? Just answer me about her, not about what you think—

Judge ROBERTS. Senator, I'll explain why she expressed her views on that particular issue. It was an explanation that she gave at the time, that she had written extensively on that subject and she thought that her writings were fair game for discussion. She took a different view—

Senator SCHUMER. But she—excuse me, I just—because I want to—She would be expressing an opinion which might yield bias whether she wrote before or not. She did it over and over again. She praised Learned Hand's First Amendment decision in *Masses Publishing*. I don't think she was unable to keep her mind open on courts in that line. As Joe Biden said, in *Moore* v. *East Cleveland*, she candidly—and I don't think she had writings on that one. She expressed that the opinion has difficulties. And other Justices have done it. Justice Bryer talked about the topic at issue later in *U.S.* v. *Booker*, Justice Powell about *Miranda*, Justice Souter about *Miranda*. It didn't bias him in the *Dickerson* case. Not all of these people had previously written.

You can make a distinction to every single example I give. You can say, well, she wrote on that one. But when you add it all up, you are being less forthcoming. I know you are doing what you feel is right, but you are being less forthcoming with this Committee than just about any other person who has come before us. You are so bright and you know so much, but there is another aspect to this, which is letting us know what you think. And you have set up your own little construct. It is not really the Ginsburg precedent

or it isn't Canon 5, which you cited repeatedly at your court of appeals hearing.

And so let me ask you this one question and then you can answer it in general. Has there been any judge that you are aware of who has had to recuse himself or herself because of what they said at a confirmation hearing? Can you name for me a judge who you think was biased or not able to render justice because they gave their opinion at a confirmation hearing, sitting at this table as you do?

Judge ROBERTS. I think, because the Justices have followed the approach that I am following, and as I said, I've gone back and read every one of the transcripts for the Justices, they have avoided commenting on whether they think decisions were correctly decided or not. If you look at what Justice Ginsburg said when she was asked whether she thought the *Mayer* and *Harris* cases were correctly decided, you will see she said, I'm not going to comment on that. She said, I know what the precedents are, I have no agenda to overrule them, and that's all I'm going to say.

Senator SCHUMER. She commented on many other cases, as you went through with Senator Biden yesterday and as we have gone through a little bit here. She commented on many different cases, didn't she?

Judge ROBERTS. My understanding—

Senator SCHUMER. There were reasons, but she did comment on other cases, didn't she?

Judge ROBERTS. My understanding of the cases she felt it appropriate to comment on, as I've said, were the ones where she had already written on it. And she said, I think my writings are appropriate.

Senator SCHUMER. There are no cases she commented on where she hadn't written?

Judge ROBERTS. I thought she adhered to her view. Her view was no hints, no forecasts, no previews. That's exactly what she said. That's an exact quote from her hearing transcript.

Senator SCHUMER. I have to say, sir, I disagree with you. I have looked at her testimony. She didn't comment on some cases and commented on others. If you look at how many she commented on and how many she didn't, it is a far different balance than you, who have commented on *Marbury*, *Brown*, *Griswold*, and not much else. And each time, even when we talked yesterday about *Wickard* v. *Filburn*—and it is a 1942 case, it is at the root of a large, it is a trunk of a large tree of constitutional law—you were unwilling to comment. And of course you say it might come before the Court. But that is a prediction. Some may, some may not. Maybe a *Brown* case would come before the Court. Maybe a *Griswold* case would come before the Court. And if you had wanted to, you could have easily said those may come before the Court and not answer those. It is sort of your own little way of doing it.

I just have one more question here. The President, as I said—and this motivates some of us—he said he wants to nominate judges in the mold of Thomas and Scalia. I want to ask you, are you in the mold of Thomas and Scalia? The President said he wanted to nominate people that way.

Judge ROBERTS. Well, Senator, I'll give the same answer I gave yesterday to Senator Graham when he asked if I would be in the mold of the Chief Justice. And the answer is I will be my own man on the Supreme Court. Period.

Senator SCHUMER. I appreciate that.

Do you think they are activist judges?

Judge ROBERTS. I'm not going to criticize them with respect to any general description of that sort. I'm sure there are cases where I would agree with them, there are cases where I would disagree with them, as with all of the Justices.

Senator SCHUMER. Right. Okay. Now—by the way, I will note, I don't think I have time here, but you did criticize in a memo back when you were working in Attorney General Fred Fielding's office, Brennan and Marshall as activist judges. Now, I don't think that was the official position of the Reagan administration, so it seemed to be your opinion. Can you tell me in 30 seconds, so I can just ask one more question, how is it different not to want to characterize Justices Thomas and Scalia but it was okay to characterize Justices Marshall and Brennan as activist?

Judge ROBERTS. Well, that was a—it was a reflection of the views of the Attorney General at the time, and that was part of the administration's position.

Senator SCHUMER. But was it official Reagan policy?

Judge ROBERTS. I don't think it was official policy. It was an expression that the Attorney General had made on various occasions.

Senator SCHUMER. Let me just say, sir, in all due respect—and I respect your intelligence and your career and your family—this process is getting a little more absurd every time—the further we move. You agree we should be finding out your philosophy and method of legal reasoning, modesty, stability, but when we try to find out what modesty and stability mean, what your philosophy means, we don't get any answers.

It is as if I asked you what kind of movies you like. Tell me two or three good movies. And you say, I like movies with good acting. I like movies with good directing. I like movies with good cinematography. And I ask you, no, give me an example of a good movie. You don't name one. I say give me an example of a bad movie. You won't name one. Then I ask you if you like "Casablanca," and you respond by saying, Lots of people like "Casablanca."

[Laughter.]

Senator SCHUMER. You tell me it is widely settled that "Casablanca" is one of the great movies.

Chairman SPECTER. Senator Schumer, now that your time is over, are you asking him a question?

Senator SCHUMER. Yes. I am saying, sir, I am making a plea here. I hope we are going to continue this for a while, that within the confines of what you think is appropriate and proper, you try to be a little more forthcoming with us in terms of trying to figure out what kind of Justice you will become.

Chairman SPECTER. We will now take a 15-minute break and reconvene at 4:25.

Judge ROBERTS. Mr. Chairman, could I address some of the—

Chairman SPECTER. Oh, absolutely. Absolutely. I didn't hear any question, Judge Roberts, but you—

Judge ROBERTS. Well, there were several along the way. I will be very succinct.

Chairman SPECTER. You are privileged to comment. This is coming out of his next round, if there is one.

Judge ROBERTS. Oh, well, then.

[Laughter.]

Senator SCHUMER. I guess there will be.

Judge ROBERTS. First, "Dr. Zhivago" and "North by Northwest."

[Laughter.]

Senator SCHUMER. Now how about on the more important subject of what cases—

Judge ROBERTS. On the more important subject, I—

Chairman SPECTER. Let him finish his answer. You are out of time.

[Laughter.]

Judge ROBERTS. The only—

Senator SCHUMER. Not out of movies.

Judge ROBERTS. The only point I would like to make, because you raised the question how is this different than Justices who dissent and criticize and how is this different than professors. And I think there are significant differences. The Justice who files a dissent is issuing an opinion based upon his participation in the judicial process. He confronted the case with an open mind, he heard the arguments, he fully and fairly considered the briefs, he consulted with his colleagues, he went through the process of issuing an opinion. And in my experience, every one of those stages can cause you to change your view. The view you ask, then, of me, well, what do you think, is it correct or not, or how would you come out, that's not a result of that process. And that is why I shouldn't respond to those types of questions.

Now, the professor, how is that different? That professor is not sitting here as a nominee before the Committee. And the great danger of courts that I believe every one of the Justices has been vigilant to safeguard against is turning this into a bargaining process. It is not a process under which Senators get to say I want you to rule this way, this way, and this way. And if you tell me you'll rule this way, this way, and this way, I'll vote for you. That is not a bargaining process. Judges are not politicians. They cannot promise to do certain things in exchange for votes.

And if you go back and look at the transcripts, Senator, I would just respectfully disagree. I think I have been more forthcoming than any of the other nominees. Other nominees have not been willing to tell you whether they thought *Marbury* v. *Madison* was correctly decided. They took a very strict approach. I have taken what I think is a more pragmatic approach and said if I don't think that's likely to come before the Court, I will comment on it. And, you know, again, perhaps that's subject to criticism, because it is difficult to draw the line sometimes. But I wanted to be able to share as much as I can with the Committee in response to the concerns you and others have expressed, and so I have adopted that approach.

Senator SCHUMER. Thank you.

Chairman SPECTER. 4:25. We are anxious to try to conclude your testimony, Judge Roberts, as early as we can. I know you will agree with that.

Judge ROBERTS. Thank you, Mr. Chairman. Sorry—thank you for the accommodation.

[Recess 4:13 to 5:10 p.m.]

Chairman SPECTER. We found out as soon as we had completed the recess that a vote had been called, and the Senators have been over voting, which accounts for the slight hiatus here, but we are now going to proceed.

It is the turn of Senator Cornyn for a 20-minute round.

Senator LEAHY. I am sure, Mr. Chairman, the Judge just missed us terribly, could not wait for us all to get back here.

Judge ROBERTS. Glad we're back.

Chairman SPECTER. He may have missed us just under the theory that the sooner we start, the sooner we end.

Judge ROBERTS. Thank you.

[Laughter.]

Chairman SPECTER. But that principle may not apply here. *Stare decisis* would suggest that it does not.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Judge Roberts, my observation is that you have been completely bipartisan when it comes to refusing to answer questions either from this side of the aisle or that side of the aisle, that you feel would compromise your independence as a judge or violate your code of conduct as a judge. I have to tell you though that there are people who may be keeping score of how many questions you are answering propounded by this side and that side. And I guess one way to sort of run the score up would be to keep asking questions that you know you cannot answer, and thus to claim some grievance or advantage when it comes to making that comparison, but I hope we do not do that.

I want to talk to you a little bit—well, first of all, before we go there, I know one of the questions involved the Code of Judicial Conduct and whether you were proscribed by that and the differences between what you have felt at liberty to testify to, and Justice Ginsburg did. But I notice that in the commentary to Canon 5, the Model Code of Judicial Conduct, the last sentence says, "This section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure, and legislative bodies confirming appointment." Is that your recollection of the Code's scope?

Judge ROBERTS. Yes, Senator.

Senator CORNYN. I would ask unanimous consent that that be made a part of the record.

Chairman SPECTER. Without objection, it will be made a part of the record

Senator CORNYN. Thank you, Mr. Chairman.

I will not dwell on this any more about the numbers of questions asked, but I know we are now up to about 66 questions that you have responded to on the role of a judge and your judicial philos-

ophy, 48 on civil rights and discrimination, 44 on abortion and privacy.

Let me ask you this, if we keep asking the same question over and over and over again, but try to approach it from a slightly different way to get you to answer a question that you do not feel you can ethically answer, are you going to give us a different answer, or are you going to give us the same answer?

Judge ROBERTS. I hope my answer would be the same, Senator.

Senator CORNYN. I am sure that is the case. We talked about the Code of Judicial Conduct and your ethical obligation. We have talked about the practical aspects of being a judge and the importance. And I guess this is not just practical. It is really a constitutional duty that judges have to maintain judicial independence, even from the legislative branch, by making commitments of performance in office as a condition to your confirmation.

But I want to also ask you what I would call, I guess for lack of a better phrase, practical reasons why it is hard if not impossible, even if a judge wanted to, to be able to accurately predict how you might decide a particular matter. I was interested to hear Senator Biden earlier ask you about right-to-die issues, and you said, "I can't answer the question in the abstract," and he said, "That's not abstract, that's real." And you said, "Well, Senator, as a legal matter it is abstract because the question would be in any particular case, is there a law that applies that governs that decision?"

That prompted me to think of in addition to, as I think Senator DeWine asked you about, the case or controversy limitation in Article III of the Constitution, that limits the manner in which you might reach a particular issue, so it requires a case or controversy. He talked about standing and the importance of litigants actually having a stake in the outcome so they are willing to fight hard in the adversarial process.

Could you explain, for example, why the adversarial process is so important? And it is important for judges to make sure that people have an actual stake in the outcome, rather than, let us say—well, I know Senator Brownback, Senator Coburn, all of us get letters from constituents that say, "What is your position on the Base Realignment and Closing Commission?" And why we just cannot write judges letters and ask what your opinion is just sort of for an advisory capacity.

Judge ROBERTS. Well, that actually goes back very far in our history, as you know, to the early States when John Jay, I believe, as the first Chief Justice, was asked for his opinion on a matter, and he made the determination that it would be inappropriate to give that kind of advice. It was really one of the leading historical episodes that contributed to implementing the separation of powers. I think he appreciated that if he started just giving advice on legal questions that were of concern to the President, that he would be acting more like an Attorney General and it wouldn't be separated from the Executive. And then he would be in a position of giving the President advice, while at the same time ruling on the legality of his conduct. I think the reason John Jay decided that was not appropriate for these new judges on the new Supreme Court to give advisory opinions is because he appreciated that they were in the

Judicial Department, as the Constitution put it, not in the Executive Department, or if the advice, request for advice had come from the Legislature. It's an important part of the separation of powers that our courts don't give advisory opinions.

Now, some State courts do have a different system of separation of powers, and in some State courts the Supreme Court will give an advisory opinion, but the Federal rule has always been that you have to have a constitutional case or controversy.

Senator CORNYN. Is that a constitutional limitation?

Judge ROBERTS. It's in Article III, yes.

Senator CORNYN. I mean it is not something you can take or leave?

Judge ROBERTS. No. The requirement of an actual case or controversy is derived from the Constitution. There are some aspects of standing doctrine that are, they say, prudential, in other words, that it's up to the Court whether to apply them or not, but the core requirement, that the litigants have a stake in the issue, a case or controversy, is a constitutional requirement.

Senator CORNYN. In getting back to Senator Biden's question about right to die, and what you believe or what your position would be if that were to come before the Court. It just occurred to me you would have to determine whether there was in fact a case or controversy, whether there was actually a person that had standing, that is, with a concrete stake in the outcome that brought the lawsuit, so as to preserve that adversarial process. It would, I imagine, if you are sitting as an appellate judge, either in the circuit court or Supreme Court, you would want to look and see what the evidence is, and maybe, for example, whether it would make any difference in a right-to-die case whether someone had a living will or not, and what the evidence was in the court below before you could really sort of make a pronouncement from on high, that, yes, right to die trumps everything.

Judge ROBERTS. Well, it's hard to know whether it trumps something until you know what the other something is, and that includes what the legislation might be. I've had many questions before this Committee about the importance of deferring to the legislature in areas in which Congress is given authority under the Constitution.

Well, as a judge, before I would propound the idea of right, that it does not matter what the issue is on the other side, I would like to know if a legislature had addressed that issue. Now, sometimes, as you know, legislatures can exceed their constitutional bounds and there are rights under the Constitution that individuals have that trump efforts by the legislature to address those or infringe upon them, but you need to know what the issue is in terms of the conflict between an asserted right and an asserted power of the legislature. I do not think members of a legislative body would accept the principle that you would decide a case like that without even knowing what the legislature had enacted or what the issue was or why they had decided that this was an appropriate area of legislation. That is not deciding the controversy. It is just saying we need to have the issue narrowed in a way that courts are familiar with addressing.

Senator CORNYN. Well, then, of course, juries in many instances are the fact finder, and their determination is usually binding on not only the court below, but also appellate courts reviewing that, and I guess citizens would feel that they were engaged in a futile exercise of serving on juries and listening to evidence and trying to decide disputed facts if the judge on appeal was just going to say, you know, "Let us throw that out the window. We do not really care because this is a result we want to reach in a particular case."

Judge ROBERTS. Well, judges, when they sit down to decide a case, when the cases come into the chambers, judges don't sit and decide, well, what do I think about issues under the Fourth Amendment or the Fifth Amendment or the Seventh Amendment. They want to know what the case is about, and that begins with knowing what the factual dispute is about and what the record is. Then they want to know what law applies in resolving that question. And they want to know what the arguments are. That's why we have briefs on one side, then briefs on the other. And I'm sure you've had the same experience that I've had, which is that you find the opening brief can be very persuasive; then you move on to the second one, and you see it in an entirely different light. And maybe your view of the case will change again as you consult with your colleagues on the bench or as you hear the oral argument.

I know I spent a lot of time doing those briefs and arguments, and I certainly hope they had some impact on a case from time to time. And then when you sit down with the judges, all of these things, your view of the case is going to change in some way at every stage. And to say that it's the same thing when you sit down and ask an abstract question as when you have been through the judicial process and reached a decision, including having to reduce it to writing, the requirement that judges write opinions is an important discipline on the decisional process, because—and those opinions are going to be submitted to the public, and everyone is going to be able to see your reasoning. And so it has to be coherent and reasonable and something that can stand the glare of publicity and the scrutiny of scholars and other judges.

That's a very important discipline. It means—it's quite a bit different than saying, well, what do you think about this and whatever opinion you might give.

Senator CORNYN. I am also, of course, intrigued by how poorly Senators, Presidents, and others who try to predict how a life-tenured judge or Justice on the Supreme Court is likely to look at issues next year, 10 years, 20 years down the road. And it just occurs to me that there is a long list of examples where life tenure and the lack of electoral or political accountability has caused judges to change the way they perhaps have looked at things over time, and I guess how badly Presidents have guessed sometimes about how a judge will decide cases in the future. And I think, you know, one of my favorites is Teddy Roosevelt and Oliver Wendell Holmes, when he said, "I could carve more backbone in a banana than demonstrated by this Justice." He was pretty hot.

So, in addition to the ethical, the constitutional, the practical limitations, it just seems to me that we are engaged in a little bit of a futility here because when you are confirmed—and I expect that you will be confirmed—the designers of our Constitution ex-

pected and created a system where you would be immunized or at least insulated, I should say, from political or other pressures.

I know there were questions about—I want to move quickly to your participation in a lawsuit. Let me see. It was the *Hamdi* case?

Judge ROBERTS. *Hamdan* was the one that—

Senator CORNYN. *Hamdan*.

Judge ROBERTS. *Hamdi* was the one in the—

Senator CORNYN. Supreme Court, right. Sometimes I confuse those.

Judge ROBERTS. It is a common source of confusion.

Senator CORNYN. And we have had a little back and forth. I think Senator Feingold asked about the ethics of your participation. Senator Graham I thought made a very good point in talking about if a President wanted to disqualify a judge in a case, well, just call the judge up and tell him, "You are being considered for a Federal appointment," which certainly cannot be right.

But do you know for a fact that Justice Breyer, when he was being considered about a possible nomination to the Supreme Court, sat and decided seven cases while sitting on the First Circuit Court of Appeals? Are you familiar with that statistic?

Judge ROBERTS. No, I'm not, Senator.

Senator CORNYN. Okay. Well, our research reveals that that is, in fact, what happened, and so if Justice Breyer could participate fully in the court's decisionmaking process while being considered by President Clinton for appointment to, nomination to the Supreme Court, it strikes me that we should not have a different standard. And I am not asking you to comment on that because you said you are not familiar with Justice Breyer's record. But if that is true—and I believe it is, that he sat on seven different cases involving the U.S. Government and the executive branch while he was being considered for the Supreme Court, we shouldn't hold John Roberts to a different standard. And that is my view.

We have about 5 minutes. Let me just ask you just as a practical matter, I worry when I see that the Supreme Court's opinions are so fractured and divided as you alluded to, I believe, on the question of the Ten Commandments. The only one that agreed with both decisions that the Ten Commandments could be displayed in Texas but not in Kentucky was Justice Breyer. And there were ten opinions in those two cases, which led the former Chief Justice Rehnquist to quip, "Well, that's more opinions than we have Justices." Ten opinions for nine Justices in that case which decided the constitutionality of the Ten Commandments.

Well, it strikes me that one of the goals of the Court ought to be—of any court ought to be to write decisions that can be read and understood by a person of reasonable intelligence and, frankly, Judge, I have to tell you that lawyers struggle, no doubt circuit court judges, trial court judges such as in the court you serve on now struggle to try to figure out just what in the world the law actually is. And it breeds additional litigation, a lot of money, a lot of time spent just litigating issues that the Court could, if it had the will, clearly decide.

And in some ways, I think it leads some observers to wonder whether the Supreme Court is firmly grounded in the reality of how their decisions will actually be read and understood and imple-

mented, either by lower courts or by litigants who are trying to figure out what is the law, so how can I conform my behavior and how can I make plans in a way that I can rely upon is legal.

I would be interested in your observations.

Judge ROBERTS. Well, Senator, I hope we haven't gotten to the point where the Supreme Court's opinions are so abstruse that the educated lay person can't pick them up and read them and understand them. You shouldn't have to be a lawyer to understand what the Supreme Court opinions mean. One of the reasons I've given previously for admiring Justice Jackson is he was one of the best writers the Court has ever had, and I think you didn't have to be a lawyer to pick up one of his opinions and understand exactly what his reasoning is and why he is saying that, and if he is citing and relying on precedents, he cites them and explains them. They are not written in jargon or legalese, but an educated person whose life, after all, is being affected by these decisions can pick them up and read them, and you don't have to hire a lawyer to tell you what it means. I hope we haven't gotten to a point where that is an unattainable ideal.

Now, I'm not suggesting that I've always lived up to that, and I'd hate to have somebody go back and look at my opinions and critique them under that exacting standard. But I do think that's something that it's worth shooting for, at least in most cases, that opinions should be accessible to educated people without regard to whether they're lawyers or not.

Senator CORNYN. Well, I think your experience as both a lawyer practicing before the Supreme Court and advising clients, as well as being a circuit court judge and trying to apply those as an intermediate appellate court, will help you understand that and the importance of that.

In the last few seconds we have here, you know, I was reflecting on the Ten Commandments cases, and I was thinking that, as crazy as it struck me that they would uphold it in Texas but strike it down in Kentucky, you know, I wondered—I am glad they did not take out their blue pencil and try to edit the Ten Commandments, because several of them—Thou shalt not murder; Thou shalt not steal; Thou shalt not give false testimony against your neighbor—it is hard for me to see how those violate the Establishment Clause. But maybe that is another topic for another day.

Thank you very much, Judge.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Leahy and I have been discussing the schedule. There had been a request for 30 additional minutes, all to be done tomorrow. A schedule has been structured which will conclude shortly before 8 o'clock this evening, and we will take a little time in the morning and then move ahead to the public witnesses. So that what we will be having is Senator Durbin will have his 20 minutes from 5:35 until 5:55. Senator Brownback will then have his 20 minutes and Senator Coburn will have his 20 minutes from time yielded back. And the Republicans met and decided we would not take a third round, in order to expedite the process.

Tomorrow morning, Senator Kennedy is willing to negotiated 30 down to 20 if it is tomorrow morning, so he will be on at 9 o'clock.

And Senator Feinstein will be on this evening from 6:30 to 6:45 and again tomorrow morning from 9:20 to 9:35. I will post these so everybody will know exactly where everybody stands. Senator Feinstein will have the advantage, to some extent, of an overnight transcript, which she had been concerned about.

Then I believe we will proceed next week to—we have an exec set for the 20th, but with agreement among the Democrats that we can hold it on the—

Senator LEAHY. Is the 20th?

Chairman SPECTER. It is a Tuesday.

Senator LEAHY. My proposal, and I would commit to you on this, that—just so people watching can understand—the Judge knows this—that under our rules, when we have a markup in exec, when the nomination would come up, any Senator has the right, for any reason whatsoever or no reason, to put it over for one week, which, where this is now set for Tuesday, would put it over to the following Tuesday.

My proposal, and the Chairman has been accommodating of what we have been trying to do, is that I would commit to him that we would move the exec to Thursday of next week, which would give everybody plenty of time to read all the transcripts and everything else. On Thursday we would waive—and I am sure nobody on your side is going to ask—to put it over by 1 day, so we will debate it, whatever appropriate time that is, on Thursday. We will vote on Thursday within the Committee. Then, of course, it is out of our hands. It is up to the leadership to schedule what time they want it on the floor. I understand they want to do it sometime—

Chairman SPECTER. I think Senator Frist, the leader, will want to bring it to the floor on Monday, the 26th. But he will make the final judgment on that. And Senator Leahy and I have talked between ourselves, on the exec we are going to set the pattern for 10-minute statements and ask that that pattern be followed. All Senators have rights as they choose.

I personally am opposed to a third round. But in the face of requests by many of my colleagues on the other side of the aisle for a third round, and in light of its being a lifetime appoint for Chief Justice and all the other factors, I want to accommodate people as best I can. And I don't want to run too far into tomorrow because I want to finish the public witnesses tomorrow. We may have to run very late, but it is easier to run later with the public witnesses because we have 31 and six panels and they will all be fresh. And Judge Roberts, whom I conferred with before discussing the matter with Senator Leahy, is a very, very good sport. The one question he answered positively and affirmatively was whether he could take it until 8 o'clock this evening, and he said he could. I don't think it advisable to take him beyond that time. So we will spill over a little bit into tomorrow morning.

Senator LEAHY. Mr. Chairman, as I have noted, you have been fair in listening to us. We all think so, obviously. And I think Judge Roberts would be the first to say this. This is a very serious thing. We are talking about the Chief Justice of the United States. We should take time to do it right. I commend Mrs. Roberts, who has sat through this. And of course you, Judge, cannot see her, but the look of love and devotion from Mrs. Roberts, is probably what

is sustaining you through these long hours, and I commend her for doing it.

But I also want to applaud the Chairman. He has been fair. We have discussed—I said yesterday or the day before; they blur—that the Chairman and I, I think, have each other's home numbers on speed dial, we have talked so much. He has fulfilled every one of his commitments. We have worked hard to fulfill ours. We all take this seriously. A number of people have announced how they are going to vote, and that is fine. Everybody has a right to do it. Every member of the Senate is going to think of this seriously and will vote as they are going to vote. I just want to make sure that when anybody votes that they know what they have.

With that, Mr. Chairman, I commend you again for running a very fair, very open, very honest hearing.

Senator SCHUMER. Mr. Chairman?

Chairman SPECTER. Thank you for your cooperation, Senator Leahy.

Just a moment and I will recognize you, Senator Schumer.

I don't want anybody to feel they have been short-changed by the spilling over a little. I feel my duty is to have this matter resolved by October 3rd. And I think, if confirmed, Judge Roberts can take the seat as Chief Justice on October 3rd. That is what I am looking toward.

And to the extent possible, I want people on this Committee to feel good about what we are doing and have sufficient time.

Senator Schumer?

Senator SCHUMER. Mr. Chairman, I just wanted to go over the schedule. So we will start the third round this evening of 15-minute rounds and then continue tomorrow?

Chairman SPECTER. That is correct, except for Senator Leahy was taking 10 and 10 as ranking, and Senator Kennedy is going to take 20, but all tomorrow morning, giving up 10 minutes for the morning.

Senator FEINSTEIN. I get 15 tomorrow morning.

Chairman SPECTER. You have 15 tomorrow morning and 15 this evening.

Senator SCHUMER. Same here.

Chairman SPECTER. And the same for Senator Schumer.

Senator SCHUMER. Mr. Chairman, I just want to thank you. I think you are being—I want to commend you and Senator Leahy. You are being fair and we are getting a full opportunity to ask questions.

Chairman SPECTER. Do I understand you are waiving the fourth round, Senator Schumer?

Senator LEAHY. As well as the fifth.

Chairman SPECTER. Senator Durbin, you are recognized for 20 minutes. On to business, Judge Roberts.

Senator DURBIN. Thank you very much, Mr. Chairman. And thank you for your fairness. Judge Roberts, good to see you again, and Mrs. Roberts, friends and family.

Yesterday and again today, you have continued to prove your legal talents. I remember law students with your talents when I was in law school. I had to get to know them in the first year be-

cause they were then off to the Law Review, and I was off to buy another Gilbert's Outline. I didn't see them again.

But today I have noticed that the questions have changed some. The questions have gone beyond your resume and beyond your legal skills. And I think it relates to the fact that so frequently, when asked, you have said, appropriately, that you will be driven and inspired by the rule of law, which is an appropriate term but a hard and cold term by itself. We know you have the great legal mind and have proven it here. But the questions that have been asked more and more today really want to know what is in your heart, and I think those are appropriate.

When you look down from the bench or read a trial transcript, do you just see plaintiffs and parties and precedents, or more? Do you see the people behind the precedents, the families behind the footnotes? I think that is what many of us are driving at with these questions.

You have lived a comfortable life. Court cases often involve people who have not. Many times, contests between the powerful and the powerless, as someone said in the opening statement, are contests where the powerless just have the rule of law and the Constitution on their side, praying for relief for their day in court.

Aside from a few pro bono cases, as important as they are—and I salute you for being involved in them—what would the powerless, the disenfranchised, minorities, and others see in your life experience that would lead them to believe that they would have a fighting chance in your Court?

Judge ROBERTS. Well, Senator, I think there are many things that people could look to. You said I had a comfortable life. I think that's a fair characterization. I had a middle-class upbringing in Indiana. As part of that, I worked in the steel mills outside of Gary during the summers, as soon as I was old enough to do that, and throughout my life have been exposed to and mixed with at school, learned and played with people of a wide variety of backgrounds. Comfortable, yes, but isolated, in no sense.

I was, I would say, a typical middle-class kid growing up in Indiana and had, I think, a great upbringing. I was privileged in the sense of having my parents and sisters contributing to my upbringing and education. And I think people looking at my life would see someone in that experience, and obviously with limitations. I wasn't raised in other places in the country. I might have a different perspective if I were. I wasn't raised in different circumstances and would have different experiences if I were. If you look at the Supreme Court, the people there come from widely different backgrounds and experiences, and I think that's a healthy thing.

But as far as someone going into Court and looking to see why they would expect to get a fair hearing from me, I think—and I can answer this with respect to the court I am on now. It's hard for me to imagine what their case is about that I haven't been on their side at some point in my career. If it's somebody who's representing welfare recipients who have had their benefits cut off, I've done that. If it's somebody who's representing a criminal defendant who's facing a long sentence in prison, I've done that. If it's a prosecutor who's doing his job to defend society's interest against crimi-

nals, I have been on the side of the prosecution. If it's somebody who's representing environmental interests, environmentalists in the Supreme Court, I've done that. If it's somebody who's representing the plaintiffs in an antitrust case, I've been in that person's shoes; I've done that. If it's somebody representing a defendant in an antitrust case, I've done that as well.

It's one of the, I think, great benefits of the opportunity I've had to practice law as I have, is that it has not been a specialized practice. I have not just represented one side or the other. I've represented all of those interests. And I think those people will know that have had their perspective. I've been on the other side of the podium with a case just like theirs, and that should, I hope—and I hope it does now—encourage them that I will be fair and that I will decide the case according to the law, but I will have seen it from their perspective.

Senator DURBIN. So let me follow through on that because I think that is what people need to hear, but we need to apply it to your real life and legal experiences. Let me talk to you about a case where you were involved in as a private attorney.

Today, there are about 45 million uninsured people in America. Too often Americans with insurance can't receive coverage for medically necessary procedures and have to fight the insurance companies. In my home State of Illinois, we have a law called the Illinois Health Maintenance Organization Act. I think you are familiar with it. It provides that if a patient's primary care physician deems a proposed procedure to be medically necessary but their HMO disagrees and denies coverage for the procedure, the patient may have the HMO's decision reviewed by an outside physician, the determination of that outside physician binding on the HMO.

You challenged this law on behalf of an HMO that refused to pay $95,000 for the shoulder surgery of Debra Moran of my State of Illinois. The case went to the Supreme Court in 2002. You argued for Rush Prudential, and you argued they weren't subject to the Illinois law governing HMOs because, you said, they weren't really an insurance company.

You claimed that since the HMO was not providing health care but merely a promise to pay for health care, it was exempt. Thankfully, from my point of view, you lost the case. If you had won it, it would have put millions of American consumers and families at risk of losing coverage for necessary health care.

Judge Roberts, did you have any reservations about taking this case?

Judge ROBERTS. No, Senator, I did not. The result in the case, I did lose. I lost 5–4, if I'm remembering correctly. In other words, four of the Justices on the Supreme Court thought the argument we were—I was making on behalf of my client was correct. It has always been my position that I do not sit in judgment other than once I've satisfied myself that the legal arguments are reasonable ones, within the mainstream, if you will, that I don't decide whether that's the way I would rule as a judge or whether I would rule the other way.

My practice has been to take the cases that come to me, and if the other side in that case had come to me first, I would have taken their side.

Senator DURBIN. So you didn't step back at any point in your practice and say, "No, I am not going to do this. I can't be associated with a case or a cause, even though it may be legal and ethical, that might cause so much harm to so many innocent people"?

Judge ROBERTS. That's a judgment for the legal system to make. They're asserting legal rights. Lawyers aren't judges when they're representing clients. They don't sit there and say—or maybe some do. I don't. I think it's a basic fundamental principle of the legal system and the bar that you take clients who have reasonable arguments—now, I'm not talking about frivolous arguments. I don't take cases in which those are raised. But the lawyers aren't the judges. The judges are.

Now, the case you mentioned, you've explained the arguments on one side. There were legal arguments on the other side, and four Justices agreed with those. This isn't an extreme case when it's decided 5–4. And that's one of the very points I was making earlier, that I take cases on all sides of the issue. You can go through and find cases. For example, when I was asked to assist an inmate on Florida's death row, I didn't step back and say, Well, is this really a good thing for me to assist this individual guilty of—convicted of particular murders? I took the case. When the various pro bono activities in which my firm was involved, I didn't sit in judgment and say, Is that something I agree with? Is it not something I agree with?

I was a lawyer involved in that area of the law, and I thought it my obligation to take the cases that come in.

Senator DURBIN. Many of the organizations that oppose your nomination represent minorities in America. You have the distinction of being opposed by LULAC. This, of course, is the first time this Hispanic organization has ever opposed a Supreme Court nominee. You are also opposed by MALDEF. I personally think that their feelings go beyond the "illegal amigos" comment that you talked about yesterday. And I want to point you to one particular area that they find troubling, when I speak to them, and I find troubling. And it goes back to the case of *Plyler* v. *Doe*, a 1982 Supreme Court case, that held it unconstitutional to deny elementary education to children on the basis of their immigration status. It was a Texas case where the Court struck down the Texas law and allowed elementary schools, 23 years ago, to refuse entrance to undocumented children.

On the day the case was decided—and I think the timing is important here, because it appears to be kind of a gratuitous comment. It isn't as if you were asked for an opinion. On the day it was decided, you coauthored a memo that criticized the Solicitor General's office for failing to file a brief supporting the Texas law which would have refused education to these children. Your memo disagreed with the administration's position on the case, so it isn't as if you were arguing the Reagan administration's position. They had taken a different position on the case.

Can you describe your involvement in the case? And I guess more importantly, can you describe now how you feel about this today, 23 years later, when the largest—

Judge ROBERTS. Well—

Senator DURBIN. I will just finish, and I will leave you the time you need to answer. When the largest, fastest-growing segment of America's population is Hispanic, when the major Hispanic organizations feel that this showed real insensitivity to who they were and what their children needed? Can you explain that memo that really wasn't part of the Reagan agenda? Why did you say this?

Judge ROBERTS. Well, I think, Senator, if I'm remembering the memo—and it was 23 years ago, and the case that was decided was, I believe, again, a divided decision by the Supreme Court. If I'm remembering the memo correctly, it was making the point that the position was inconsistent with the Attorney General's litigation policy approach, if that's the right memorandum.

Senator DURBIN. It is.

Judge ROBERTS. Well, in that case, again, as a staff lawyer, I thought it was my obligation to call to the Attorney General's attention activities in the Department that I thought were inconsistent with what he had articulated as his approach. And that is what I would have been doing in that case. And, again, it would have been apparently supporting the State of Texas in its legislative determination in that area.

Senator DURBIN. Well, did you agree with the decision then? Or do you agree with it now?

Judge ROBERTS. I don't—I haven't looked at the decision in *Plyler* v. *Doe* in 23 years, Senator, and there is nothing gratuitous about the memorandum. It obviously came out because the decision came out. That would have been why I was advising the Attorney General with respect to it.

Obviously, the importance of the availability of education for all is vital. That's a different question than the legal issues involved and whether a State law should be struck down.

Senator DURBIN. Twenty-three years later, millions of children have benefited from this decision. They have been educated in America. Many have gone on to become citizens. Some are business people. Some are professionals. Some are serving in our military today because *Plyler* was decided in a way that you apparently disagreed with 23 years ago. So my question to you: For the Hispanic groups that oppose your nomination, what is your feeling? Is this settled law as far as you are concerned about our commitment in education in this country?

Judge ROBERTS. Senator, as I said, I have not looked at the decision in *Plyler* v. *Doe* in 23 years. It's not an area that I've focused on. And the issue is not my policy view about what is a good idea for educational policy or national policy or whether what the Texas legislators determined was a good idea for Texas policy.

The question was a particular legal issue, and, again, the Supreme Court was divided on that, so it is not as if we are talking about a position outside the mainstream. And what I was explaining, this was viewed, as the memo states, if it were looked at in full, it was something that I thought was inconsistent with what I understood the Attorney General's approach to be, and it was my job to call that to his attention, which is what I did.

Senator DURBIN. Okay. I think you have taken refuge in the fact that you were working for someone. The fact that this memo came out the day after the decision I think is an important circumstance.

But let me go back to the beginning, the first question, the first day with Senator Specter. Wouldn't it be a jolt to the system in America if we decided that we would no longer offer education to these children?

Judge ROBERTS. Of course. Well, of course, Senator.

Senator DURBIN. And so—

Judge ROBERTS. And then the decision in *Plyler* is a precedent of the Court. I don't think it—I'm not aware that it's been called into question in the intervening 23 years that have passed since the time I wrote those two paragraphs in the memo. And that is a precedent that is entitled to respect under principles of *stare decisis*. And it's something that is where I would begin if an issue arose in this area. I'm not aware that any is arising in this area, but if an issue were to arise, that's where I would begin, with the precedent that—

Senator DURBIN. I just think that millions of Americans would like to have heard you say I think it is a good idea, I am glad we did it for America. But if you can't say it, you can't.

Judge ROBERTS. Well, Senator, if I could just make the point that the issue is not whether or not I thought it was a good idea. That's not the job of a lawyer presenting legal advice and legal—the legal implications of an issue to his boss, the Attorney General. He wasn't interested in whether I thought it was a good idea or not. He was interested in the legal question of whether or not this was consistent with his policy and his approach.

That's not taking refuge. That's explaining the circumstances of a memorandum. And it's not avoiding an expression about whether it's a good idea or not. It's explaining that what we're dealing with—

Senator DURBIN. But you have been unequivocal in your statements supporting *Brown* v. *Board of Education*. No one has suggested, in any respectable way, that we should return to the bad old days of separate but equal. I mean, you have accepted that is part of America. And the point I am trying to make to you is, whether we are talking about millions of uninsured people or millions of Hispanic children, I would think that it would be a basic value. You would say this is good for America, for people to have insurance, and bad for them to be denied. It is good for America to see children with education rather than to see them in the streets ignorant. It seems so fundamental.

Judge ROBERTS. Senator, do you—I don't think you want judges who will decide cases before them under the law on what they think is good, simply good policy for America. There are legal questions there. And I'm sure there are clients that I have represented in court that you would agree with. You would say that's the right side of the cause to be on, whether it's the environmental interests I represented in the *Tahoe* case, whether it's the welfare recipients I represented pro bono in the *Bivens* case, whether it's the cause of the inmate on death row that I assisted in in Florida, whether it's the environmental interests in Glacier Bay that I represented or in the Grand Canyon on a pro bono basis. I'm sure I could go down my list of clients and find clients that you would say that's the right side, that's the cause of justice, and there are others with whom you disagree.

My point is simply this, that in representing clients, in serving as a lawyer, it's not my job to decide whether that's a good idea or a bad idea. The job of the lawyer is to articulate the legal arguments on behalf of the client.

Senator DURBIN. I am just trying to get to the bottom line about your values. If it is strictly a question about whether this is a legal and ethical—an ethical legal question that can be contested, then there are many positions you can take in the law. Some I wouldn't be comfortable with, some you may not be comfortable with.

Let me ask you one other question. Senators Coburn and Brownback have, I think, sincerely and accurately expressed their views on the issue of abortion. I think they have been very articulate in saying so. Many would argue that it is one of the most divisive legal and political issues we faced in our generation. I would like to ask you this question. Why do you think this issue is so important to so many women in America, the whole question of *Roe* v. *Wade*, the question of reproductive freedom, and the question of freedom of choice? Why do you think it is so important?

Judge ROBERTS. Well, I think it's important, and again, to women on both sides of the issue and also, I think, to men as well, but obviously it's an issue that directly affects women. It's a fundamental question, as the Court has addressed in *Roe* and in *Casey*, that obviously affects the lives directly of millions of Americans, and the availability of rights under that decision affects women. But I know there are people of strongly held views on both sides of the issue. And I know that the responsibility of a judge confronting this issue is to decide the case according to the rule of law consistent with the precedents, not to take sides in a dispute as a matter of policy, but to decide it according to the law.

And to the extent that your questions earlier about, you know, causes we agree with, causes we don't agree with, I do want to emphasize that there is a unifying theme in my approach, both as a lawyer and as a judge. And that is the cause that I believe in passionately, the one to which I have devoted my professional career, is the vindication of the rule of law. And I tried to explain in my opening statement on Monday why that's important. Because without it, any other rights that you may agree with as a matter of policy are meaningless. You need to have courts that will enforce the rule of law if you're going to have rights that mean anything.

Senator DURBIN. I am running out of time, but I do want to give you an opportunity. Last night I passed a memo along to you relative to the *Bob Jones University* case. I don't know if you have had a chance to look at it and can tell me whether that is your handwriting on that memo, whether you were in fact in a meeting involving the *Bob Jones University* decision with the Reagan administration. Did you provide any input in the meeting or have any conversations with Justice Department personnel about the case?

Judge ROBERTS. It is my handwriting. It's a list. It's apparently a meeting to discuss a number of civil rights issues, six of them, I see. I did not participate in any way in the *Bob Jones* case. It was apparently discussed, according to this memo, at the meeting. The recusal rule that was at issue says that I shouldn't participate by way of consultation or advice, and I did not.

Senator DURBIN. Thank you for clarifying that.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Durbin.

Senator Brownback?

Senator BROWNBACK. Thank you very much, Mr. Chairman, Judge Roberts, again.

Mr. Chairman, I want to enter into the record something that has been cited to already but sent yesterday from the ABA, the statement by the unanimous opinion of the ABA that Judge John Roberts is well qualified for the position of Chief Justice of the United States.

Chairman SPECTER. Without objection, they will be made a part of the record.

Senator BROWNBACK. Judge Roberts, I would note now you have been here for 18 hours and 30 minutes of testimony. Just as a reference, because people like statistics and records, Justice Breyer was here for 18 hours and he was through. You may have the end in sight, but you are not there yet, and you are going to pass Justice Breyer and perhaps others.

I want to take you back to the First Amendment. This is an area that I have just not understood where the Court has been going. I hope you are willing to explain some of this jurisprudence, or at least give me your thoughts on how the Court got to where they did on these issues.

The First Amendment, everybody knows, requires that Congress shall make no law abridging the freedom of speech. It is well-known, well-regarded, and broadly interpreted by the courts. In the four years, the Court had sternly disapproved of restrictions upon certain forms of speech such as virtual child pornography. The Court said you can't do that, limit that speech. Tobacco advertising. The Court said you can't limit that speech. Dissemination of illegally intercepted communications. You can't limit that speech. Sexually explicit cable programming. You can't limit that speech.

So the Court has been, it seems to me, very pronounced in this area of free speech, basically telling the Congress you can't limit it. The Court even extended this to the issue of virtual child pornography. The case of *Ashcroft* v. *Free Speech Coalition*. I want to describe this in a little bit of detail because I want to then ask another question associated with it. In *Ashcroft* v. *Free Speech Coalition*, the Court struck down a congressional statute regulating pornography, in this case the Child Pornography Prevention Act of 1996, and expanded the Federal prohibition on pornography to include virtual child pornography, realistic images which were made without the use of actual children.

Congress based its opinion on the chance that pedophiles would use this material to recruit individuals over the Internet to draw in children into sexual activity. We found out about that, investigated it, held a number of hearings, and said we have to stop this stuff. But now, the Court says you can't do it; it is a limitation on free speech.

Then, not long ago—as a matter of fact, the opinion was issued in 2003—we had a big debate on campaign finance reform in front of the Congress. One of the members of our Committee, Senator Feingold, was one of the lead sponsors of the McCain-Feingold legislation. It came in front of the courts, *McConnell* v. *Federal Elec-*

*tion Commission*, and the Court largely upheld the McCain-Feingold law, one section of which did the following: prohibited corporations, labor unions, and other organizations from political advertisement that mentioned a specific candidate or office-holder within 60 days of a general election. You are probably very familiar with this legislation.

This was a big national debate. Under the Court's decision, this congressional action prohibiting speech—and not just any speech, and not just pornography—political speech close to the time when people are making decisions on elections—was constitutional.

The Court decided that this congressional action prohibiting political speech could be upheld under a First Amendment ostensibly designed to protect this form of political participation and speech. I looked at that. I voted for the McCain-Feingold law. I did not think there was any way the Court would hold that this provision is constitutional because it limits political free speech right when people are making their decision.

One of leading abilities we have in this country is to be able to criticize the Government, particularly at a point when it matters the most right before elections. How do you square such a broad interpretation of the First Amendment in these cases and such a limitation on political free speech? Can you explain that to me?

Judge ROBERTS. Senator, I'm not sure that I can put the two together side by side and talk about it other than to say that I think the Court tends to address each case on its own terms, and in the case of the Bipartisan Campaign Reform Act, I do know that we're dealing there with an extraordinarily extensive record in that case. The judicial opinions addressing the issue before three-judge District Court I know went on for several hundred pages, just dealing with records and the issues involved, the record that had been developed, including before Congress.

My reading of the Court's opinion in the Bipartisan Campaign Reform Act case is that that was a case where the Court's decision was driven in large part by the record that had been compiled by Congress. I think the determination there was based—just reading the opinion, there's no great insight—that the extensive record carried a lot of weight with the Justices.

Now, with respect to the other areas, again, I think the Court would tend to look at those, sort of put the one case aside and then move on to the next case, and they're dealing there with developments in that area, and again I—

Senator BROWNBACK. Does this not strike you as odd, these two decisions side by side under the same First Amendment?

Judge ROBERTS. Only in the sense, Senator, that obviously they come out different ways, and your point that the political speech is generally regarded as at the core of what the First Amendment was designed to protect, and some of the other speeches is not. I certainly appreciate that concern, but whether—again, whether the particular cases were correctly decided or not is not something I feel is appropriate for me to discuss.

Senator BROWNBACK. I looked at those and they just did not make much sense. If you are going to read the First Amendment expansively, which I agree with, that reading should be consistently applied.

I want to go to an issue that is likely to come before you, and I recognize you are not going to give a pre-opinion on it, but I just want to make a point in talking about it. That is the issue of marriage and its definition by the courts, and taking the issue of marriage from legislative bodies to the Court. This is one of the most driving issues in the political environment in the United States today.

If the Court comes in and trumps the Congress and State legislatures on this issue and says legislative bodies cannot decide this issue because it is as a matter of constitutional law, it will create an enormous jolt in the system and potentially change a series of marriage laws that have been passed by legislative bodies. Forty-five of our 50 States have passed either constitutional amendments or statutes that preserve the traditional definition of marriage as the union of a man and a woman. It has been addressed in all regions of the country.

I bring it up to you because a Federal court has now ruled on this issue. In Nebraska, one Federal judge has said that the Nebraska constitutional amendment violates the U.S. Constitution. Now all the States are rushing to pass constitutional amendments, but everybody is scared of what the U.S. Supreme Court is going to do. Nebraska passed its State constitutional amendment by a 70 percent vote of the Nebraskan people. These are good-hearted, good people. They want to try to do what is right.

One Federal judge comes in and throws all these Federal constitutional issues on it saying it: violated the First Amendment right to free association; violated equal protection guaranties; and then—I do not know where he got this one—represented an unconstitutional bill of attainder, which is legislation drafted at a particular individual.

I just hope if you are confirmed on the Court that you would look at what happens if the Court comes in and stomps on this issue that has stirred up so much discussion.

These are issues properly left to legislative bodies and people to shape, to look at, to debate and to consider, and left to movement back and forth within the legislative arenas. If you come in and you say there is a constitutional right to a broader definition of marriage, and the Court says that is the way it is going to be, it takes something out of the system that should be there—discussion—it should be allowed to mature there.

And we will be here years later like we are in the series of *Roe* cases, where after 30 years now there is not more acceptance of the rule opinion, but there is less acceptance in America. This will not be like *Brown* v. *Board of Education*, where after it was resolved society says, "Okay, that was the right way to go," and we would all say that today. *Roe* has gone the other way, and this would create another issue like that in *Roe* if it is picked up and stomped on by the courts.

I want to talk with you on another issue and just get your opinion of another area of the Constitution.

You would agree under the Constitution that Congress has the power to appropriate money?

Judge ROBERTS. Yes. The Framers regarded that as the basis legislative power, the power of the purse.

Senator BROWNBACK. And that that power is not given to the judiciary, it is given to the legislative branch of Government?

Judge ROBERTS. Yes. Alexander Hamilton, in making his point—I think it was Hamilton—that this was the least dangerous branch, emphasized that the courts have neither the power of the sword nor the power of the purse.

Senator BROWNBACK. I want to point out to you—that this is happening in State judiciaries; this is happening and being considered now in the U.S. Federal courts. You will have in front of you a case regarding the Solomon amendment that was considered here. A recent Third Circuit Court of Appeals case struck down the Solomon amendment on constitutional grounds. Jerry Solomon, a long-term Member of Congress, a wonderful gentleman, who has since passed away, had conditioned a university's receipt of Federal funds on the university's granting equal access to the military for purposes of recruiting students. This amendment was passed by Congress.

It basically said, you need to allow military personnel access if you want to receive Federal funds. It was considered by Congress, and it was passed. The Third Circuit struck down the Solomon amendment on constitutional grounds. The decision has been appealed to you.

I obviously do not want you to declare your position on this. I would ask you, if you can state the obvious one first, that we have the role of the power of the purse here in the Congress, not in the judiciary. May the Congress attach conditions to the receipt of Federal funds?

Judge ROBERTS. Well, Congress historically has done that. The Spending Clause power, for example, *South Dakota* v. *Dole* said that if you accept Federal Highway funds, you have to raise the drinking age to 21, and that was upheld by the Supreme Court. So certainly as a general proposition the Congress has that authority. I consider it a case involving a waiver of sovereign immunity. The condition on the receipt of Federal funds was that Washington's Metro system waive its sovereign immunity with respect to disability claims, and by a 2–1 vote we upheld that exercise of authority under the Spending Clause.

Senator BROWNBACK. The Solomon amendment will be in front of you if you are confirmed, and obviously you cannot comment on it. It is just that if the courts start appropriating money through this route, the rub between the systems and the branches of Government I think will be absolutely extraordinary, and Congress will find more and more innovative ways to limit the judiciary. It is not healthy for the system and it is certainly not healthy for the judiciary if it goes further into the business of appropriating funds. It bleeds down through the system. It is not just in the U.S. Supreme Court. It goes through the State court systems as well, and I would hope that that right of the Congress would be respected with adequate judicial restraint, as you noted this morning, that being the major check on the judiciary, though I think we can limit what the judiciary can review under the Constitution.

I want to make—in the limited time I have left—just two quick points. One is on the end-of-life issues. You have had a discussion with several members on end-of-life issues. This was discussed

*Washington* v. *Glucksberg* the leading recent case from 1997, which upheld a State statute banning assisted suicide.

Would you agree that that case held that there is not a constitutional right to die—a right to die does not exist in the Constitution?

Judge ROBERTS. I think that's an accurate conclusion of the holding in that case. Again, without expressing views on correctness or not, since that's where the line has been drawn in terms of what nominees can say, my understanding is that that court rejected the conclusion. It went through the analysis of what liberty interest protected by the Due Process Clause included, and it concluded that there wasn't a right under the Liberty Clause that trumped the regulation that was at issue in that case.

Senator BROWNBACK. I believe the standard that the Court held in this case was the rationally—related standard, the lowest level of review—that if the State can find a rational basis, they can limit these assisted suicide laws, efforts across the country.

Judge ROBERTS. Once the Court concluded that there wasn't a fundamental right that was in conflict with the State regulation, then the Court applied the rational relation test to uphold the State law.

Senator BROWNBACK. That would be subject to, in your opinion, the continued status of *stare decisis* as an opinion of the Court, and the deference and the dependency that the society has had on that ruling, would have the same status as any opinion of the us Supreme Court on the basis of *stare decisis* in your opinion?

Judge ROBERTS. It would be subject to the same analysis as any other precedent of the Court, yes.

Senator BROWNBACK. Regardless whether it is a recent opinion or a later opinion, this has the same standing because it is an opinion of the Court's?

Judge ROBERTS. Some of the Court's cases talk about how long an opinion has been standing. Some of the Court's cases say that is less of a factor, but it is a decision of the Court, a precedent on that issue. Any question of revisiting it would have to be consistent with the principles of *stare decisis*, and we have talked about those principles and how they apply.

Senator BROWNBACK. Yes. I wanted to make clear that it doesn't matter the length of time the opinion has set or the number of times it has been revisited, *stare decisis* is a basic principle that applies to any opinion previously held by the Court.

Judge ROBERTS. Yes.

Senator BROWNBACK. I would note this is an opinion put forward, as you get from a lot of us, that these are issues that are very difficult, and they are ones that are actually quite well suited for the legislative process to discuss because you have different views of life. Is life sacred, per se, or is it subject to some sort of objective review? It is a very difficult issue here in this body and across the country, and it is one that has a lot of emotion, and it is a very important issue for the society itself to talk through.

I want to talk about a separate hat you would carry as the Chief Justice of the United States, and that is as the head of the Judicial Conference of the United States. I'd like to ask you about court reorganization. There have been proposals put forward to split the Ninth Circuit Court of Appeals, the far western circuit, a very large

circuit. There are discussions in the Congress about splitting that circuit in two because of its size, its caseload, and a number of other factors that have been proffered or put forward.

You would agree that under Article I, section 8, that Congress has the power to constitute tribunals inferior to the Supreme Court?

Judge ROBERTS. Yes, Senator.

Senator BROWNBACK. And that these inferior courts would include such things as the circuit court and the lower district courts of the Federal Government?

Judge ROBERTS. Yes.

Senator BROWNBACK. So that Congress would have the power under the Constitution to split the Ninth Circuit Court of Appeals?

Judge ROBERTS. I know that Congress did just that with respect to the old Fifth Circuit, which used to run from Florida out through Texas, and they split it into the new Fifth Circuit and the 11th Circuit. I don't think any questions have been raised about Congress's authority to do that.

Senator BROWNBACK. And you do not raise those here as the head of the Judicial Conference of the United States?

Judge ROBERTS. Well, I wouldn't want to—

Senator BROWNBACK. Some potential role there.

Judge ROBERTS.—just yet, but I'm not aware of any objections to Congress's authority. I don't think that's the issue. I know the judges have various views on whether it's a good idea of not, and since it affects them, I know some of the judges have expressed those views. But the question of congressional authority to do that is not something I've seen raised.

Senator BROWNBACK. I thank you. Judge Roberts, this will be my last chance to interact with you this way. I do commend you. I also just note to you that a lot of hopes and prayers are riding on you from a lot of people across this country and around the world. It is just such an incredible important time with so many big issues that I think I can speak for millions of people in saying that. So godspeed to you and your family.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator Brownback.

Judge Roberts, would you care to take a break at this time?

Judge ROBERTS. No, I am fine.

Chairman SPECTER. Sure?

Judge ROBERTS. Yes.

Chairman SPECTER. Senator Leahy says you are the only one, but that is good.

[Laughter.]

Chairman SPECTER. Senator Coburn.

Senator COBURN. Thank you Mr. Chairman.

Judge Roberts, I will try not to take my 20 minutes. I have heard a little trend that I think needs to be dispelled. I have heard it put forth that you might not be fair to women. I have heard it put forth that you might not be fair to minorities or Latinos. I have heard that you might not be fair to those people with AIDS. And, Mr. Chairman, I would like to just put into the record about six different documents here that clarify the record on Judge Roberts's action on affirmative, on disability rights, on civil rights, on wom-

en's rights, actually, his involvement in the *University of Richmond* v. *Bell*, Title IX, and also his Title VII employment discrimination record that I think refutes the underlying tone that I have heard here that is very disturbing to me.

Chairman SPECTER. Without objection, Senator Coburn, they will all be made part of the record.

Senator COBURN. And the reason it is disturbing to me is I want lawyers who will take the wrong cases for the right people to preserve our country. And the very fact that you may have taken a case that some other lawyer might not view as right is the very thing that makes the justice system work. And one of the things that you have reaffirmed is one of the reasons we have people not having equal justice under the law is sometimes they do not have qualified attorneys that will do that.

So, first of all, kudos to you. Number two, the fact that you write positions as a staff lawyer, young—I remember what I was like when I was 25, and it was not very pretty. Some people say it is not very pretty now. I also would remind you that you got another 5 years from Senator Feinstein. She said you would be on there 40 years, so all power to you.

But the fact is I have noticed something that I really do not appreciate, and that is this kind of trend to say that you are not a kind, not a considerate person, the fact that you have a wife that is an attorney and a young daughter that is going to be into this world, that you wouldn't believe that they ought to have equal rights, that you don't believe in hiring practices that are fair, you don't believe in treating people fairly. On the basis of a flimsy record—and I want the American people to know that that record doesn't hold up to the smell test that has been presented here today. And it is a little bit disturbing to me because it is this subtle way of trying to say you are not who you really are. And you have not been able to defend yourself in that because you cannot comment without creating a problem for you in terms of being a fair Justice. So you are kind of in a double bind, and I want you to know that I want to defend that, because I don't think it is appropriate.

The other thing is I want to enter into the record both the chronology of cases that Justice Breyer and Justice Ginsburg decided after they met with the White House, the Clinton White House, before they were nominated. There was a total of, on Justice Breyer, seven cases, on Justice Ginsburg, five cases. The implication that you are not ethical is the other subtle implication that comes across there. And I find it tremendously uncomfortable that that is the trend where this is going.

The other thing I want to address for you and the American public, Senator Schumer yesterday quoted some statements that were made, which a lot of people do not agree with, and you did not identify with, Tony Perkins at the Family Research Council and others. The fact that they made those statements, whether we agree with them or not, is not the important thing. The important thing is that the Court is losing the confidence of the American people or they never would have said that. These are not bad people. These are people with a perception that says, you know, what is going on here?

Let me just list for a minute why they might think that. We had today a judge in California say you can't use "under God" in the Pledge. The abortion issue we have talked about. Homosexual marriage we have talked about. The fact that the judges have said online pornography is fine, regardless of what the Congress has said. Parents who know that their 12-year-old daughter can be given oral contraceptives without their permission and an IUD in many places without their permission, but they cannot be given an aspirin.

You know, these very crucial issues—not to say they are right or wrong, but how we got to the decision is causing some Americans to lose confidence. And as you and I spoke in my office, one of my greatest concerns—and I asked you, How do we build that back up? How do we build the confidence of the American people back in the Court? And part of that is the work of getting more consistent, more unanimous opinions, but also it is making sure the Court does what it should do and the legislature does what it should do. And I don't want you to feel committed to me at all. And I don't want to influence. I am very pleased that every time you are going to look at the law, look at the precedents, look at the facts, look at the litigants, and then work with the other Justices to try to do what is under the law, the Constitution, our Constitution, and our statutes.

So the only question I would have for you is this one final one, and I will finish, I hope, before 10 minutes are consumed. Where did our law—would you teach the American public where our law came from? I mean, there was law before the American Revolution. What did our law come from? What did—where did it come from?

Judge ROBERTS. Well, before the Revolution, of course, we were under the British legal system.

Senator COBURN. And before that?

Judge ROBERTS. Go back under the legal system in Britain to the Magna Carta and the dispute between the King and the lords there as they tried to establish their rights against the King or the central government, was a key part of the development of English law since that time.

Senator COBURN. And prior to that? Some of the input to that was what some people—these very people who are worried—these very people who have lost confidence—call natural law. The ideas came from somewhere, didn't they? Like don't kill somebody, don't steal from them, be truthful. Where did those come from? Those came from the natural tendencies of what we were taught in beliefs through the years that would best support a society. There is a theological component to that to many people. But the fact is there is a basis for the laws that we have, and it has proven consistent through the years, even as it comes to America, that if we enforce those tenets, we all are better off.

And I just want to tell you that I believe you have been very strong today, just, first of all, to tolerate this and the amount of time.

A final point, and I have 12 minutes and 25 seconds, and I will be through. You also were accused of—not accused. You were also questioned about your advice on a speech that the President was going to make on HIV. And I would like to put into the record, at

that time, first of all, the best-known and best-loved Surgeon General of this country did not make a decision on that issue until 12 months after your memo, but also at the same time, the Washington Post 2 or 3 days prior to that had published—or after that, had published an article talking about the very questions you were raising that may not be true. And so with unanimous consent, Mr. Chairman, I would like to have that introduced, the Washington Post article, September 4, 1985.

Chairman SPECTER. Without objection, it will be made part of the record.

Senator COBURN. And with that, 11 minutes and 34 seconds, I am done and thank you, Judge Roberts.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator Coburn, especially for yielding back time.

Senator Feinstein, you are recognized now for 15 minutes.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Just to correct the record, to begin with, the Gun-Free Schools Zone Act was amended as part of the Omnibus Fiscal Year 1997 Appropriations bill and the jurisdictional requirement was added to the Act.

So it is the law. And from my point of view, that is very good.

I would like to finish up some questions I have. Let me, in trying to sort of get at you the man, as opposed to you the jurist, ask you something that the late Senator Simon, Paul Simon, asked Justice Ginsburg. He asked this: "Theodore Roosevelt, in a 1913 speech—this is after he had been President—said this: 'Our judges have been on the whole both able and upright public servants, but their whole training and the aloofness of their position on the bench prevent their having, as a rule, any real knowledge of or understanding sympathy with the lives and needs of the ordinary hard-working toiler.'

"I think that is a danger for jurists, and probably no place is at a greater danger than on the U.S. Supreme Court, where you really are isolated, and where, when you meet people, they will tend to be people of power and wealth, and not people who are unemployed, not people who have many of the problems that Americans face. Have you reflected on this at all, either in your present tenure or future tenure? How can this nominee make sure that she stays in touch with the problems real people have out there?"

Judge ROBERTS. That is something that I thought about, Senator, at greater length before I came onto the court of appeals as little more than 2 years ago. I think it's a common concern, that judges are isolated. There's some natural tendency to that. You find that lawyers that you used to socialize with don't feel they can talk to you anymore, and other people, again, a certain distance develops. And it is something that my wife and I talked about at the time. And I concluded, and she made the point, that it was a great blessing to me to have our children. They will obviously keep us in touch with things outside of the isolation of the law. There are a lot of soccer games and swim meets and things of that sort in my future for the next 15 years and I'll be seeing people not just involved with the law, not just involved with the Court, but other parents and other children in those activities. And I think that will

be a very healthy part of an effort to keep in touch with things outside the isolated marble palaces.

Senator FEINSTEIN. But I would hypothesize that if it is just through your children, it is still going to be a very limited segment of society.

Judge ROBERTS. Well, sure, Senator, but there have always been areas in which I've continued to be active that keep me involved with other people. I mentioned, I think yesterday, the Street Law Program that I've been a part of for more than 15 years, which—

Senator FEINSTEIN. And you will continue that?

Judge ROBERTS. I certainly will. I continued that when I became a judge and plan on continuing it as well. It's jointly sponsored by the Supreme Court Historical Society, and that brings high school teachers. And I've always found that extremely rewarding because they have a very different perspective. They're obviously dealing with children a little further along at that stage, but they're not lawyers. And they're here to try to understand the law. And I have always enjoyed very much their questions and sharing with them why the Supreme Court is so important to the rule of law, and allowing them the opportunity. They go in and they see the Court in action, as it were, and then they go back. And it helps them talk to their students about something that I think is critically important for those students to know.

Senator FEINSTEIN. Do you see yourself mixing with people in some of the harder places in our country?

Judge ROBERTS. Well, it's hard to look ahead and see how that would work. I have as—I know, for example, when I was a lawyer and handling a case about native village rights in Alaska, I went to the native villages. I've always thought that was an important part about understanding the real-world consequences of any case—to get on the ground. When I handled a case involving people on the assembly line, I went to the assembly line and saw what it was like. I went to these villages that you could only reach by boat or by plane, where they make do with so little because of the remoteness. And I've always viewed that as an important part of understanding any case that I've been involved in.

Senator FEINSTEIN. The reason I ask that is because I had a question about the *Plyler* case which question I was going to ask you. And I have your memo, because I was really surprised by it as well. Let me ask you this question. It is signed by Carolyn Kuhl, and your name is second.

Judge ROBERTS. Oh.

Senator FEINSTEIN. Does that mean you wrote the memo or did not write it?

Judge ROBERTS. Senator, I'd have to just say I don't know who wrote it. It obviously was submitted by both of us. I don't remember.

Senator FEINSTEIN. You submitted it, right. But her name is on top. I was just curious because clearly the purpose of this memo is to try to get one Justice, namely Justice Powell, over on your side. But the concluding part—I just don't understand why you would say this, and perhaps you would believe today it was wrong. Let me quote: "As you will recall, the Solicitor General's Office had decided not to take a position before the Supreme Court on the

Equal Protection issue in this case. The briefs for the State of Texas were quite poor. It is our belief that a brief filed by the Solicitor General's Office supporting the State of Texas and the values of judicial restraint could well have moved Justice Powell into the Chief Justice's camp and altered the outcome in the case. In sum, this is a case in which our supposed litigation program to encourage judicial restraint did not get off the ground, and should have."

Now, this concerns, regardless of what the briefs were, whether children should be educated in our country. I come from a huge immigrant State. We are 36 million people. We probably have at least 12 million immigrants. Maybe three to five million people here illegally, in our State. To say that this vast number of children shouldn't be allowed to be educated, I would be surprised you would write that kind of—

Judge ROBERTS. Well, Senator, I don't know if it was from both of us. I don't know who wrote it. If my name is on it, it's on it. But I agree, of course, that children should be educated. The example I just gave of my activities with the Street Law Program focuses on the importance of education for children. The legal issues presented in that case and the question of whether or not it was consistent with the Attorney General's litigation approach and program, those are different questions from the basic issue of whether children should be educated.

Senator FEINSTEIN. Well, could I do this? Could I give this to you? Because I have 15 minutes tomorrow. Could I ask you to read it?

Judge ROBERTS. Certainly.

Senator FEINSTEIN. I would really like to know whether you think this way today. And I will ask that question tomorrow. And attached to it is the Congressional Research Service analysis of it. If you wouldn't mind—

Judge ROBERTS. Not at all. Happy to.

Senator FEINSTEIN.—I will do this.

Let me ask you a question about strict scrutiny and affirmative action. You mention in several of your memos from the Reagan administration addressing affirmative action that the Government should be color blind. And I would agree. And I wish we were there, but we are not there. And because America is well-served by educating all her people well, do you personally subscribe not to quotas but to measured efforts that can withstand strict scrutiny?

Judge ROBERTS. A measured effort that can withstand strict scrutiny is, I think, a—affirmative action of that sort, I think, is a very position approach. And I think people will disagree about exactly what the details should be, but the general notion—

Senator FEINSTEIN. Such as *Michigan*, the University of Michigan—

Judge ROBERTS. In *Michigan*. In the *Michigan* case, obviously, you have—I always get the—whether it's the law school—I think the law school program was upheld and the university program was struck down because of the differences in the program. But efforts to ensure the full participation in all aspects of our society by people without regard to their race, ethnicity, gender, religious beliefs—all of those are efforts that I think are appropriate. At the time of the Reagan administration, President Reagan was at pains

to make clear, and I know the Attorney General was as well, that in opposing quotas—and at the time, it was a much stricter quota approach that was being proposed, set-asides—they were not in any way opposed to what they regarded as beneficial affirmative action to bring minorities, women into all aspects of society. That's important, and as the Court has explained, we all benefit from that.

Senator FEINSTEIN. I want to go back to the "hapless toad." It still bothers me. I asked you some questions about it yesterday. Let me ask you instead, because I am trying to get at it one way or another, the factors you would consider in making determinations on the scope of congressional power under the Commerce Clause. In *Viejo*, you addressed whether the survival of the endangered toad substantially affects interstate commerce.

In *National Association of Home Builders* v. *Babbitt*, a case you call into question in *Rancho Viejo*, the D.C. Circuit followed the *Wickard* cumulative test and looked at whether the protection of all endangered species substantially impacts interstate commerce. The D.C. Circuit noted that although it is difficult to know the commercial impact of an individual species, in the aggregate we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.

In order to determine whether the Endangered Species Act regulates activity that substantially affects interstate commerce, should the courts look at the impact on interstate commerce of each individual species, or the cumulative impact of all species that are protected?

Judge ROBERTS. Senator, first of all—

Senator FEINSTEIN. Do you think you can answer that?

Judge ROBERTS. I can, Senator. But I do need to clarify. At the beginning you said something that, what I did in the *Rancho Viejo* case, and that was not what I did. The only thing that I did in my opinion—and again, there was another opinion that analyzed it and made a determination of whether it was constitutional. I did not join that opinion determining that it was unconstitutional. I simply said that we need to look at these other grounds on which to sustain the Endangered Species Act. We should consider it en banc.

There was another court suggesting that our approach was inconsistent with the Supreme Court opinions. When I was confirmed for the court of appeals, everybody wanted to know will you follow the Supreme Court opinions? And I told you I would. And here we have a court of appeals suggesting you're not following them, and I said, well, let's take the case en banc. I did not state an opinion on whether the Commerce Clause requirement was satisfied or not. I said let's take it en banc and consider these other grounds.

The other grounds went to precisely the issue and the question that you asked.

If we had looked at it under the other grounds, which was the commercial activity surrounding the endangered species, in other words, the issue that one other court of appeals had said, for example, there is commercial activity surrounding endangered species that takes place nationwide, not limited to where the particular species is, and that would satisfy the commercial activity require-

ment and allow the Court to apply *Wickard* under the Supreme Court's precedents—

Senator FEINSTEIN. Which is tough duty when you get down to, let's say, a really endangered species where you have very few of the species remaining. Perhaps they had been in a number of different States.

Judge ROBERTS. That was the problem that was presented—as my opinion tried to set forth, that's the problem that was presented with the approach that the panel took, and I thought we ought to re-hear it and look at these other grounds where you don't have to ask whether there is impact on interstate commerce from the particular species, the very point you—

Senator FEINSTEIN. Let me tell you what is bothering me, is that it sets a prelude for the Clean Water Act and the Clean Air Act.

Judge ROBERTS. Well, in those areas, again, the commercial impact of pollution, those are things that I think are not going to present as difficult an issue remotely as if you look at each individual species. The whole point of my argument in the dissent was there was another way to look at this that would allow you to not have to look at the interstate impact of the one particular species. They were grounds that the Court in a panel opinion said they did not have to reach because they had taken this other approach that the Fifth Circuit was suggesting was inconsistent with our approach. And all I said—and, again, it is important to recognize, I did not say that even in this case the decision was wrong, that it was unconstitutional. Another judge dissenting did say that. I did not join that opinion. I simply said let's look at these other grounds for decision because that doesn't present this problem.

Senator FEINSTEIN. Thank you for clearing that up. I appreciate it.

Judge ROBERTS. Thank you, Senator.

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Schumer?

Senator Schumer, you are recognized for 15 minutes.

Senator SCHUMER. Thank you, Mr. Chairman. Again, thank you for allowing us to go on with the questioning.

I just want to make a comment and then I will get into the questions, because in our last round you had mentioned something that I did not think you had said before. You know, you have always said you cannot talk about decided cases because people might think there is some bias, but you introduced an argument I have heard you make to me privately, but I don't know if you made it here publicly, which is you don't want to try and, quote, get my vote by changing your position, and there shouldn't be a bartering process at these hearings. I would like to say to you that I don't think there should be either, and I don't think anyone does. I am not asking you, I don't think any member of this Committee, from Mr. Coburn all the way to the other end, is asking you to try and tailor your answers to what you think we want to hear. That would be unfair to you and unfair to us.

All we are asking is to learn of your views within the ways you feel that you can tell us your views. So I think this argument that this is a bargaining or bartering process demeans it. I want to

know what you think, not what you think I want you to think, so I can make a fair judgment as to how to vote for you. And I think that is probably true of every single member here.

And, by the way, since you are before all of us, if you try to earn one person's vote, you might lose another person's vote. So you may as well just say what you think and not try to do any bartering. And I am sure that is how you think, too, but I don't think that is a fair argument in terms of why people won't answer questions about decided cases or about anything else. That would apply to every question you are asked that you might—we may as well not have hearings if the only reason was for you to try and twist yourself in a pretzel to please everybody here.

As I have said, I would like to vote for you. To me, as I said in my opening statement, the test is: Are you a mainstream person, conservative mainstream but mainstream, or an ideologue? Now, this is my view, and I am not going to ask you yours. I think there are a couple of ideologues, too, on the Court who want to use the law to change America dramatically in their vision. And so I am going to try a few other ways to try and figure out who you are so I feel comfortable with it.

Justice Rehnquist in his hearings to become Chief Justice 19 years ago was asked where he sat on the ideological spectrum of the Court. Justice Rehnquist replied, "On the conservative side. In fact, on the basis of the Court's opinions," he said, not their personal preferences—he had been on the Court I guess, 16 years? You would know better than me. But a good number of years—13, I think.

Judge ROBERTS. Thirteen.

Senator SCHUMER. Yes. He said, "I think the Chief"—Warren Burger—"and I are probably the most conservative, and it may be that I am more so than he." That doesn't involve any previous case or bias. So let me ask you the parallel question about the D.C. Circuit upon which you sit now. Where, Judge, do you place yourself on the ideological spectrum of the D.C. Circuit?

Judge ROBERTS. Well, Senator, I think that's a very hard question to answer for a number of reasons. One, as you know, almost all of our opinions are unanimous. We don't parse ourselves out according to an ideological spectrum.

Senator SCHUMER. Most are technical—yes, many are tech or commercial, you know, governmental, technical. But on the tough ones they are not.

Judge ROBERTS. I don't know where I fall. I do know that I saw recently a study that was done that indicated I agree more with some judges appointed by Democratic Presidents than I do with judges appointed by other Republicans Presidents, and it's not simply lined up according to the President who appointed you. There are judges there that I've joined in opinions where I've found myself—where we have had dissents. There are some—I know one case we were talking about earlier, the *Bombardier* case, Judge Rogers and I were in one position, Judge Rogers appointed by President Clinton, and Judge Garland was in a different position.

I know in another case that was decided that we have talked about, *Barber*, Judge Garland and I were on one side and Judge Sentelle dissented.

So to the extent there have been divisions, I think you could go and see and they would be completely non—

Senator SCHUMER. So you are saying you are somewhere in the middle—

Judge ROBERTS.—political. I am saying that judges don't think of themselves along an ideological spectrum.

Senator SCHUMER. Justice Rehnquist did.

Judge ROBERTS. Well, I don't.

Senator SCHUMER. Okay.

Judge ROBERTS. And the judges, I think, on the D.C. Circuit generally don't either.

Senator SCHUMER. So I guess you wouldn't want to place yourself on the current Supreme Court either.

Judge ROBERTS. No, I think that would be—

Senator SCHUMER. Okay. Let's try another route. I didn't think that one would get too far, although as I said, Justice Rehnquist did answer it. He is your mentor, and he answered it openly, fully, directly. He and Burger were the two most conservative, and he is more conservative than Burger.

How about modesty and stability? Let's try to talk about that. And when we met, I was very impressed with the concepts of modesty and stability. They suggest to me you respect precedent and well-settled law. You have said that yourself here, particularly in reference to Senator Specter's opening round of questions. And that is a good opportunity for common ground. I had a history professor, Franklin Ford. He had Ford's rule of history: "We are no smarter than our fathers." A pretty good rule. And that is sort of a modest concept in history, not in jurisprudence.

So I would like to find out a little bit more about modesty. So I would ask you—and these can be well settled, they could be 50 or 100 years ago, and please don't go on at length—can you give me a few Supreme Court cases that are modest, or represent modesty, is a better way to put it, at least in your view, and a few Supreme Court cases that would represent immodesty?

Judge ROBERTS. Sure. I guess I would think the clearest juxtaposition would be the cases from the *Lochner* era. If you take *Lochner* on the one hand and, say, *West Coast Hotel*, which kind of overruled and buried the *Lochner* approach on the other, and the immodesty that I see in the *Lochner* opinion is in its re-weighing of the legislative determination. You read that opinion, it's about limits on how long bakers can work. And they're saying we don't think there's any problem with bakers working more than 13 hours.

Senator SCHUMER. Right.

Judge ROBERTS. Well, the legislature thought there was, and they passed a law about it, and the issue should not have been, Judges, do you think this was a good law or do you think bakers should work longer or not? It should be: Is there anything in the Constitution that prohibits the legislature from doing that?

Senator SCHUMER. How about another one?

Judge ROBERTS. Well—

Senator SCHUMER. Or modest ones. You know, it could be either way.

Judge ROBERTS. You know, people talk about *Brown* v. *Board of Education*, and let me explain why I think that is an example. It's obviously a dramatic departure in American history, and in many respects very bold. Yet I think it's more appropriately understood as a restrained decision compared to the decision that came before in *Plessy* v. *Ferguson*. And you can see this if you look at the arguments of the lawyers, because what John W. Davis was arguing on the side of the Board was to the Court, "You need to be worried about the social consequences of upsetting this decision. People have lived their lives this way. If you overturn this, it is going to be disruptive, the consequences are going to be bad."

Thurgood Marshall, on the other side, was making a legal argument addressed to the obligation of the Court to apply the rule of law, and he said, focused on the discrimination involved in the separation. He made an argument, and it was a very clever approach to the case because he based his decision on precedent as well, saying "You have had this recent case in *Sweatt* v. *Painter*. Don't talk to me about *Plessy* v. *Ferguson*. You are beginning the process of departing from that. Your recent decision here, if you are going to be consistent, you have to come out this way."

So again it seems odd I know to talk about things like modesty in such a bold decision, but it is in my view a more appropriate judicial restrained decision.

Senator SCHUMER. Let me ask you. This is a general question that I was going to ask you that leads to this. In other words, if a decision of the Court issued many years ago is immodest, in your view, modesty could compel overruling?

Judge ROBERTS. Well, I think if you take—

Senator SCHUMER. That is what you argued just a minute ago with *Brown* I think.

Judge ROBERTS. Well, sometimes the appropriate restrained approach—now, with *Brown* my point was the notion of precedent was one that Thurgood Marshall appreciated in arguing to the Court that it shouldn't be simply a debate. He didn't want to debate it on John W. Davis's terms about *Plessy*, should it be overruled or not? He said, "Here's another precedent of the Court." So he was arguing from precedent as well.

Senator SCHUMER. Right. But when you have the conflict, a past error decision that was fundamentally immodest, let us say, and then years and years of it being on the books, stability argues keep it on the books, and even modesty, with its respect for precedent argues keep it on the books. How do you draw that? Can you just elaborate a little bit on how you weigh those two different concepts of "modesty?"

Judge ROBERTS. Well, I think a modest approach requires beginning with the body of precedent. That is what judges do, and that's a recognition just as Professor Ford said, that we're not necessarily, we're not smarter than our fathers who laid down this precedent.

Senator SCHUMER. Professor Ford.

Judge ROBERTS. Professor Ford, yes. My point with respect to *Brown* was that Thurgood Marshall appreciated that and then he was making an argument from precedent, just as the way Davis was, and they kind of I think gave the Court some comfort in de-

parting from *Plessy*, that they had already taken the initial step in *Sweatt* v. *Painter*.

Senator SCHUMER. Let me go to—I think Senator Durbin alluded to it, because this is one that was a little troubling and maybe you can talk about it. In the memo you wrote about *Wallace* v. *Jaffre* which had just been decided, involved church and state—I am not interested right now in the specific holding—you wrote, "Rehnquist tried to revolutionize Establishment Clause jurisprudence and ended up losing the majority, which is not to say the effort was misguided." Then you wrote, because you were speaking approvingly of Rehnquist's attempt to revolutionize a well-settled area of law. You also in the same memo criticize the opinion of Lewis Powell, same case, criticizing as, "a lame concurring opinion focusing on *stare decisis*."

To at least the reader of this it seems very immodest, praising the revolutionary decision and sort of criticizing, saying it was lame opinion for focusing on *stare decisis*.

I know you wrote this 20 years ago, and I know you wrote it for your boss, Ronald Reagan, who you admire—I admire him too but probably for different reasons—but those words, Ronald Reagan did not command you to say, "I approve of Rehnquist's view to revolutionize [Powell]." I know your establishment clause jurisprudence had to come out on that side. Just please explain to me, if you still stand by, not the holdings in the case, not whether *Wallace* v. *Jaffre* was correctly decided, but the language that you used, the thinking that you used, how does that square with modesty, or had you not developed the theory of modesty when you were there as a young clerk or a young member of the, I guess at that point, Solicitor General's Office.

Judge ROBERTS. No, no.

Senator SCHUMER. Wherever you were.

Judge ROBERTS. If it's 20 years ago it would have been—

Senator SCHUMER. It is 1985, yes.

Judge ROBERTS. It would have been in the White House Counsel's Office.

Senator SCHUMER. White House Counsel's Office. Excuse me.

Judge ROBERTS. And the memo that you are referring to is, obviously, it's speculation about what happened in the case.

Senator SCHUMER. I know. How does it square with modesty? Did modesty arise in your way of thinking after that?

Judge ROBERTS. It's not a question about me being a judge. It's a question about my describing what I was obviously speculating was going on in that particular case.

Senator SCHUMER. But you approved of it. You said the revolutionary aspects were not—"which is not to say the effort was misguided." And then you said "lame"—there is no real way to interpret that except pejoratively—"concurring opinion that focused on *stare decisis*."

Judge ROBERTS. Saying that the effort was not misguided referred to what I had been speculating was the Chief Justice's effort to reformulate the approach in that case, and it's the *Lemon* test, and we've talked about the *Lemon* test before, and the pluses and minuses. I've described it I think it was today, maybe yesterday. It is a survivor. I noted when we argued the *Lee* v. *Weisman* case,

that every—six of the Justices I think had taken the position critical of the *Lemon* test, six of the sitting Justices. They never took it at the same time. It is still the test that applies, and it would be, the precedent that I would begin with—

Senator SCHUMER. Just going to cut you off. I apologize, because I have 16 seconds, and the Chairman said I have to ask the questions before.

Just assure me and maybe some more of us, that modesty is not a concept that you use when you want to slow things down because the courts are moving too fast, but you do not use when you think things should be sped up, that it is a general approach that sort of says to judiciary, "Go slow in every aspect." Try to convince me of that if you can.

Judge ROBERTS. Well, I'll try, Senator. It is a neutral principle. Your suggestion that I apply it in cases where I want to but don't—is of course a grievous insult to any judge, the notion that they're result-oriented, that they would apply a particular approach one way in one sort of cases and a different way in another case. That's not how I approach judging and not how I would approach judging whether I'm back on the court of appeals or somewhere else.

It is a neutral principle. It reflects the—and it's obviously not an original concept with me.

Senator SCHUMER. No, it's not.

Judge ROBERTS. There are judges, you go back throughout our history, that have articulated and recognized the principle of judicial restraint, that there are limits on what the judge can do. And those judges have always explained that this applies whether or not I'm in favor of a particular result or not. It's a reflection of their institutional authority in their role, that their job is to interpret the law, not to make the law. And that applies without regard to what law you would like to have made or not.

Senator SCHUMER. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Thank you, Judge Roberts.

Thank you all.

Judge ROBERTS. Thank you, Mr. Chairman.

Chairman SPECTER. We will reconvene tomorrow morning at 9:00 a.m. That concludes our hearing.

[Whereupon, at 7:00 p.m., the hearing was recessed, to resume at 9:00 a.m. on Thursday, September 15, 2005.]

# NOMINATION OF JOHN G. ROBERTS, JR., OF MARYLAND, TO BE CHIEF JUSTICE OF THE UNITED STATES

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**THURSDAY, SEPTEMBER 15, 2005**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:01 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. Good morning, ladies and gentlemen. Good morning, Judge Roberts.

Judge ROBERTS. Good morning, Mr. Chairman.

Chairman SPECTER. We will now proceed to the third round of questioning, which will be abbreviated. There are six Senators on the other side of the aisle who have requested additional time. There will not be a third round for any of the Senators on the other side of the aisle.

We will go into a closed session a little before 11:00, and we will turn to the outside witnesses hopefully at 11:30. And we project a conclusion late this afternoon, but that will depend upon the sequence of events.

I now yield to my distinguished colleague, Senator Leahy, for 20 minutes.

Senator LEAHY. Thank you, Mr. Chairman.

Judge, you are really going to miss us, aren't you? You are going to miss doing this every day. It is—you are not even going to answer that one, are you?

[Laughter.]

Judge ROBERTS. Well, it's a once-in-a-lifetime experience, Senator.

Senator LEAHY. When we left off the other day, you and I were discussing the Supreme Court's decision in the Christine Franklin Title IX case. This, for those who may have forgotten, is the case of very, very serious sexual abuse of a young girl by her teacher. It makes your skin crawl just to hear the facts of it.

Now, Justice White's opinion for the Supreme Court rejected your arguments, your technical legal arguments. You had argued she should not be allowed to sue for damages. He wrote, "From the earliest years of the Republic, the Court has recognized the power

of the judiciary to award appropriate remedies to redress injuries actionable in Federal court." He went on to note that, "To disallow a damages remedy in this case would be to abdicate our historic judicial authority to award appropriate relief in cases brought in our court system."

And then, most tellingly, Justice White wrote that your argument that Christine Franklin's remedy should be limited to back pay and injunction, a position you had reiterated a couple days ago, he said that conflicts with sound logic. He went on to say it is clearly inadequate. And he wrote that back pay does nothing for her and that prospective relief accords her no remedies at all.

Now, the reason I raise this case is not that it is one of those rare ones where you were on the losing side, but I raise it because I felt it was a case about what our courts should do, including doing justice and remedying rights and protecting Americans.

So my question to you is this: Do you now recognize that the Supreme Court's view in the case as set forth in Justice White's opinion was the right one and the positions of the United States in your brief were the wrong ones?

Judge ROBERTS. Well, as a judge looking at it, obviously when you lose a case, as you point out, 9–0, it's a pretty clear signal that the legal position you were advocating was the wrong one. The position the administration took in that case was the same position that the court of appeals had taken. In other words, what the Supreme Court did was reverse the lower court, so—

Senator LEAHY. Well, I—

Judge ROBERTS. I'm just explaining why the position we took prior to the decision may have looked different than it did after the decision.

Senator LEAHY. And I understand that. I thought I sort of laid that out earlier. But my question is: Do you now accept that Justice White's position was right and that the Government's position was wrong?

Judge ROBERTS. Well, I certainly accept the decision of the Court, the 9–0 decision, as you say, as a binding precedent of the Court and, again, have no cause or agenda to revisit it or any quarrel with it. The issue, of course, was the one of what remedies are available for an implied cause of action. The reason I think that the lower courts came out the other way and the Supreme Court came out one way is that you're dealing with an implied cause of action. In other words, it hasn't been spelled out and—

Senator LEAHY. But I think the Supreme Court was looking and acting, as they felt, within the law for an area that would actually bring justice. That was basically my point. It may have been implied, but they looked within the case, they looked within the law, and they found an area to bring justice. And I realize hard cases sometimes make not the best law, but I think this case is a hard case but it made good law. Would you agree?

Judge ROBERTS. I have no quarrel with the Court's decision, Senator.

Senator LEAHY. You have been involved a great deal in the development of the Supreme Court authority limiting the ability of individual Americans to ensure they actually receive the rights and protections that Congress has mandated under Spending Clauses.

In the Reagan administration, you advocated legislative responses to *Maine* v. *Thiboutot.* That is how the Supreme Court tells me it is pronounced. It is not how those of us who live with those of French-Canadian descent might say it. But you strongly criticize—that was a case that recognized broad access to courts to vindicate your rights under Federal law. You criticized the damage supposedly caused by that case in a 1982 memo. And then you wrote briefs and argued before the Supreme Court in the 1980's and the 1990's. We talked about some of these—*South Dakota* v. *Dole, Wilder* v. *Virginia Hospital, Suter* v. *Artist M., Gonzaga University* v. *Doe*. And you called for the narrowing of Congress's spending powers and limiting the right of individuals to sue to compel the protections Congress required under Federal law.

I worry about this if an individual loses their right to sue if the State or the administration, whoever the administration might be, doesn't protect their rights. For example, if the only remedy for a State's refusal to live up to its obligations under a spending power enactment, like Medicaid or another such program, is action by the Federal Government, and the Federal Government doesn't act, where does that leave the rule of law? Where does that leave America's sense of justice if an individual can't then step in and seek action?

Judge ROBERTS. Well, two points, Senator. The issue in the Spending Clause cases that you refer to—*Wilder*, the later one, the *Suter* case, and the *Gonzaga* case that I argued when I was in private practice—the issue is one of congressional intent. The question is: Did Congress intend there to be a private right of action? That's what the courts are trying to figure out. And if Congress did intend there to be a private right of action, if Congress intended this to be actionable whether through 1983 or under—Section 1983 or under the law itself, then there would be a private right of action. In some cases, Congress doesn't intend that, and in those cases, there wouldn't be. I would say—

Senator LEAHY. But—no, go ahead.

Judge ROBERTS. I was just going to make the point that in those cases, of course, I was advocating a position for a client. I did have occasion as a judge to address a Spending Clause case. It was a case called *Barber* v. *Washington Metropolitan Area*—

Senator LEAHY. But that one, the statute was pretty darn clear, the Metro case.

Judge ROBERTS. Well, it was a 2–1 decision, divided decision on a court that doesn't often issue 2–1 decisions. There was a lengthy dissent saying that Congress did not have the authority to require the Metro—

Senator LEAHY. Judge Sentelle dissented?

Judge ROBERTS. Judge Sentelle dissented.

Senator LEAHY. I read that. I don't want to go into that. He is not here before us. But what I worry about, though, is the trend of these to say that Congress intended these programs, more like Medicaid, commitments there to be kind of an exclusive bargain between the Federal Government and the State government. And that raises a question in my mind. Do the courts really think we have made empty promises? I thought of this the other night because I remember what you said about the empty promises of the

Soviet Constitution. But wouldn't it be an indication we were making the same kind of empty promises if individuals can't sue if they are left as innocent bystanders who are harmed, but they have no remedy if the State is negligent in acting or if the Federal Government doesn't protect it? I mean, why shouldn't they be able to sue to get the promises that are made in these bills so that it is not like the Soviet constitution, great promises but empty?

Judge ROBERTS. Well, the issue is not whether they should be able to sue or not. The issue is whether Congress intended them to be able to sue or not. The issue doesn't even come up if Congress would simply spell out in the legislation we intended these individuals to have the right to sue in Federal court. That would prevent the issue from even coming up.

All of those cases we have been talking about arose because Congress did not address the question, and, therefore, the courts—

Senator LEAHY. Yes, but Congress assumes the States and the Federal Government are going to do what the law spells out. We don't do it as an empty promise. We assume they are going to do it. When they don't do it, if you are developmentally disabled, Medicaid kids, foster kids, rape victims and so on, shouldn't they be able to have a voice?

Judge ROBERTS. Well, if Congress wants them to sue, all Congress has to do is write one sentence saying, "Individuals harmed by a violation of this statute may bring a right of action in Federal court." There are laws where Congress says that, and that question never comes up.

The issue in the various cases that we have been talking about, including in the *Barber* case, where I ruled that the individual did have the right to sue when I was judge, the issue is, What did Congress intend? And all too often that issue is not even addressed. I don't know whether it's because of inadvertence or it's because of an inability of Congress to agree, and they both sort of—both sides sort of say, well, let's let the courts figure it out.

Senator LEAHY. Well, maybe it is an assumption of those of us who take an oath of office here to uphold the laws that the State government, those officials who take similar oaths of office, or the administrators in the national government who take similar oaths of office are actually going to do what they have sworn to do.

Judge ROBERTS. Well—

Senator LEAHY. Let me—can I move on? Because it also goes to—and I understand your point on this, and we could probably debate this all morning long. But I hope you understand my concern, which is a concern of lot of American people in this area.

Let's go to another precedent that moved me a great deal, *Gideon* v. *Wainwright*. As a young law student, I had an opportunity—my wife and I had an opportunity to have lunch with Hugo Black shortly after that, one of the most memorable times I had. He was a former Senator. He recognized the Sixth Amendment's guarantee to counsel in a criminal case was a fundamental right to a fair trial. He called it an obvious truth that in an adversary system of criminal justice, any person hauled into court who was too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. There is a wonderful book, "Gideon's Trumpet," that Anthony Lewis wrote.

Doesn't *Gideon* stand for the principle that to be meaningful such a fundamental right as the right to counsel requires assurances that can be exercised?

Judge ROBERTS. Yes, I think so. I have often said that a lot of these difficulties, particularly in the area of legal errors being raised and collateral review, a lot of those difficult questions could be avoided if people had competent counsel from the very beginning.

Senator LEAHY. Well, doesn't the same principle embodied in *Gideon*, that the Constitution guarantees a person's ability to exercise fundamental constitutional rights, doesn't that apply to other constitutional rights? I mean, to be meaningful, if we have these rights, they have also got to be real in people's lives.

Judge ROBERTS. Well, I think the basic instinct and genius behind the *Gideon* decision was that without counsel to protect people's rights, they were going to forfeit them. They were going to waive them due to ignorance or inability to appreciate the proceedings, and that is why you need counsel at that stage. It is not simply because you have a right to counsel in the abstract. It was the recognition that having counsel is a way to ensure the protection of your other rights that you may not even be aware of.

Senator LEAHY. That could be with a lot of our rights. I mean we have got to be meaningful. You cannot just say you have them. I am really struck by your discussion of the Soviet Constitution. I totally agree with you on that, but we have 280 million Americans of all different economic and educational backgrounds and everything else; we have wonderful rights. Our Bill of Rights is, I think, one of the most amazing things ever written by a democratic people. But the rights are only there if they are meaningful in people's lives, if they can be enforced. And ultimately it may come right down to the courts.

Judge ROBERTS. Well, I think—

Senator LEAHY. I mean Hugo Black's opinion is a pretty strong opinion.

You suggested I may have over-read your memo following the Lebanon operation. You said it was really talking about veterans' rights, but actually your memo, what struck me, it does not say veterans' rights, it says "War Powers" on it. The Constitution vests the power of declaring war in Congress, not the President. I still have a hard time squaring that with your inherent authority argument you advanced in that memo. Maybe I could ask it this way. Do you continue to believe that the President has inherent authority to invade a sovereign nation absent attack by a foreign power?

Judge ROBERTS. Senator, that is a very abstract hypothetical. There are situations that arise when an Executive may determine that that type of action is necessary. That may be challenged. I don't think abstract questions like that should be answered. There have been situations in our past where that authority has been claimed, both abstractly and concretely. Certainly Congress has the power to declare war, but as you know, of course, there have been several incidents in our history, the Korean War, the Vietnam War, others where there has been authorization of the use of force, but not a declaration of war.

You know the history, when Madison's original proposal gave Congress the authority to make war, and he thought that should be changed so that the Executive would have the authority to respond to an invasion, and I appreciate that part of your question.

Senator LEAHY. You also have George Washington, if you are going to quote people back at that time. George Washington "no offensive expedition of importance can be undertaken until after Congress shall have deliberated upon the subject and authorized such a measure." So I will go to the flip side, can Congress stop a war?

Judge ROBERTS. Well, that's of course a difficult question. Now, Congress has always exercised the power of the purse with respect to activities of that sort, and regulated the funding for that type of activity, and that has of course always been the core of Congress's authority. But the question to actually terminate hostilities that the Executive has determined to initiate, either with the authorization of Congress on in the situation of congressional silence or acquiescence, to go back to the *Youngstown* decision. The issue of what Congress's authorities are to terminate short of exercising its power with respect to the purse, those are unsettled and I think have to be addressed in the context of a particular case.

The memo to which you refer, again, I was a lawyer for the Executive, and any cautious lawyer for the Executive, without regard to the administration, would be alert for any type of suggestion that there are limits on that power, just as—

Senator LEAHY. Showing how cautious you were, you wrote, in another memo regarding the invasion of Grenada, "There's no clear line separating what the President may do on his own and what requires a formal declaration of war," but you conclude the exercise of Presidential power in connection with the Grenada incident fell comfortably on the legitimate side of the line. What is a situation that falls on the illegitimate side of the line where a declaration of war would be needed?

Judge ROBERTS. Well, you know, you take the history anyway, if you have a situation like the Korean War taking place without a declaration of war, the war in Vietnam taking place without a declaration of war, I think it's difficult to articulate in the abstract where the line would be other than the fact that throughout our history there have been those significant types of engagements that I suspect all of the people involved in them thought were a war that did not have a congressional declaration of war. So again, where the line is drawn or how it would be drawn in a particular case, or even what the role of the courts would be. As you know in these areas there's often an initial dispute, is this a judiciable question that the Court should entertain in the case of litigation and a conflict between the executive and the legislative concerning something like whether a declaration of war was required. That would be a question the Court would have to address before reaching the merits.

Senator LEAHY. Let me switch gears again. Senator Grassley, who is not here right now, and Senator Specter and I have worked for several years to shed some light on the FISA Court, the Foreign Intelligence Court. A lot of Americans are affected by the decisions. Most Americans do not know how it works, do not know whether civil liberties are being curtailed or violated. We added some sun-

shine provisions. The Attorney General now submits a biannual report to four congressional committees, details how many people are targeted for electronic surveillance and so on. It still is inadequate in that it doesn't get public reporting. If you are confirmed as Chief Justice, you are the overseer of the FISA Court. Most do not even look at that role of the Chief Justice. I think it is probably one of the most important ones if you are going to talk about our liberties and how they are protected. Would you be willing to work with Members of Congress to add more transparency, or do you believe there is enough transparency in the work of the FISA Court now?

Judge ROBERTS. Senator, you said you think this is something most Americans aren't aware of. I'd suggest probably most judges aren't aware of it. It is a specialized court. I will tell you when I became aware of it, it's a surprising institution. It's an unusual setup.

Senator LEAHY. Certainly different than what we think in our system of courts.

Judge ROBERTS. That was exactly my reaction. On the other hand, Congress, in setting up the court, obviously concluded there were reasons to do it that way. I was asked a question about appointing the judges to it, and my response was that given the unusual nature of it, very unusual nature, given the usual traditions of judicial processes, that the people appointed to it have to be people of the highest quality, undoubted commitment to all the basic principles, both of the need for the court and the need to protect civil liberties. That, I think, is very important.

Beyond that I would just tell you I don't know enough about the operations of the court at this point and how it functions to be able to make any representations about what I would do other than that I certainly appreciate that it's an unusual establishment and in many respects doesn't have the sorts of protections that the normal judicial process has, and that I would be sensitive to those concerns.

Senator LEAHY. I realize my time is up and I apologize, but I hope that if you are confirmed that you might be willing—and I think Senators Grassley, Specter and myself could put together some suggestions—to at least keep an open mind on.

Judge ROBERTS. Certainly, Senator.

Senator LEAHY. Because in an electronic age, in a digital age, when more and more information is being pulled in on Americans that we sometimes do not even know about, it is frightening. We want security, but we want to keep in mind—as Benjamin Franklin said, that people who give up their liberties for security deserve neither.

Thank you.

Thank you, Mr. Chairman.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Kennedy for 20 minutes.

Senator KENNEDY. Thank you. Thank you very much, Mr. Chairman.

Good morning, Judge Roberts.

Judge ROBERTS. Good morning, Senator.

Senator KENNEDY. In response to a question that was asked by Senator Biden the other day, you appropriately pointed out that there were different responsibilities at the local level, State level and national level in dealing with the challenges our country faces in domestic policy. I want to talk about what you understand are the powers that we have at the national level.

And I want to start off with the issue of racial discrimination, discrimination on the basis of race in our society. We have talked about this in different ways over the past few days, and our Founding Fathers did not get it right in the Constitution. We have had the Civil War and the struggles of Dr. King. Do you believe that we have the authority and the power to pass legislation to free ourselves from the stains of racial discrimination?

Judge ROBERTS. Yes.

Senator KENNEDY. Now let me ask you about gender discrimination. We find out over the history of this country, as you are very familiar, how women have been discriminated against in all forms and all shapes, and now I want to ask you whether you believe that we have the power and the authority to pass legislation to free our Nation from discrimination against women in our society?

Judge ROBERTS. Yes, Senator, I do. I'm familiar with the various legislative enactments in the area that protect the right to work and so forth, free from discrimination.

Senator KENNEDY. Let me ask you about those that are faced with disabilities. Do you think the 50 million Americans that are faced with disabilities in one form or another, challenges I like to say, do you think that we have the authority and the power to free this country, free our Nation from the forms of discrimination against those who have disability?

Judge ROBERTS. I do, Senator. Now, there are issues that come up, as you know, in several of the cases before the Supreme Court on the particular applications of that, cases concerning the question of do you have the authority under Section 5 of the 14th Amendment to abrogate State sovereign immunity if the claim of disability discrimination concerns a State as a defendant. And as you know, in the *Garrett* case there was the conclusion that the authority was not there. Later in the *Lane* case under Title II of the Americans with Disabilities Act, the conclusion was that the sufficient record had been established that there was the authority.

So while as a general matter, there is the authority in a particular case that may come up against other provisions in the Constitution, or—in that case the recognition of State sovereign immunity, and that presents an issue that the courts have to address.

Senator KENNEDY. You mentioned the *Lane* case. That was decided 5–4, 5–4. We are going to hear later today from Beverly Jones, who was a plaintiff in that case. I have listened to her and met with her before. She is an extraordinary woman, mother of two, trying to provide for her family, and a court reporter. The issue or question whether she was going to crawl up the flight of stairs to have access to the courtroom and have someone bring up her wheelchair, or whether she was effectively going to be denied that opportunity to have access to a courtroom in Tennessee.

Four Justices indicated in their dissent that this kind of an issue or question ought to be resolved by the States, effectively, 50 States

ought to be making that judgment. I strongly believe that this country, in its march towards progress in dealing with disabilities, with Americans with Disabilities Act, the Rehabilitation Act, the work that was done with IDEA over a long period of time, that we have come to the point where we as a country want to invite all of those with forms of disability to be a part of the main stream. But that was a 5–4 decision.

And I appreciate the fact you at least mention *Lane* v. *Tennessee*, that you are at least sympathetic to the judgment that Justice O'Connor made in indicating that accommodation for those with disability in that case was appropriate.

Judge ROBERTS. Well, it's certainly the precedent of the Court in that area and I have no quarrel with it. The issue of course is whether or not Congress has the authority under Section 5 of the 14th Amendment to abrogate the State's sovereign immunity. It's not a policy judgment by the Court about leaving things to the States or the Federal Government, but a legal determination of whether the State's sovereign immunity has been abrogated. And the Court determined in that case that Congress did have that authority and that it could authorize the suit against the State institution.

Senator KENNEDY. We are going to come back to the kind of legalist determinations that make an extraordinary difference in terms of people's lives. We welcome guidance and invitation about which particular provisions of the Constitution that we ought to utilize in order to strike down these forms of discrimination.

Let me ask you a broader question. Do you think having a diverse society where everyone has an equal chance to participate is an American value and is fundamental to the strength of our society?

Judge ROBERTS. I do, I agree with that statement Senator, yes.

Senator KENNEDY. I do too, and I want to just review very quickly what I consider to be sort of a pattern in different judgments that you have made over a period of 20 years. We have not got a lot of time and I am not going to bother going through the memoranda unless you would like to. But for someone who is a minority, a woman, disabled, and looks at a pattern over 20 years where you were actively involved in the Reagan administration against affirmative action—I am leaving out the whole issue of quotas, all of us oppose quotas, we are talking about affirmative action—and you expressed strong reservations about the affirmation action. Then in 1991 in the FCC case, you as the advocate for the U.S., the Acting Solicitor General, refused to take the position of the FCC, your own client. And the FCC filed briefs in favor of its own affirmative action program and your office opposed the FCC. This is, as I understand, extremely unusual.

Part of the difficulty that we have, Judge Roberts, is we do not have your records on affirmative action. They were in the Reagan Library and at some time they became misplaced and we do not have those records to be able to give a complete review of these documents, although what I am stating here is factual. We do not have the information that we requested from the Solicitor General's Office, who, as you appropriately mentioned yesterday, is America's lawyer.

In this particular case, the FCC—with its affirmative action program that recognized that with all of the broadcasting and the television stations there were very few minority-owned stations and they had a very modest program—petitioned you to intervene on behalf of the FCC. But you made a judgment that you would enter a brief in opposition to it. The Supreme Court came out in favor of the FCC. I know that the standard altered and changed subsequently on that case.

And then in 2001 you took a private case to basically ensure that the Department of Transportation's affirmative action program that applied in this case to the highways, which has been overwhelmingly supported by the Congress year in and year out, would be effectively undermined.

The point I am asking here is, given these series of actions over a period of time, what do you think in your record would give some sense of hope to women, to minorities, to those that are disabled that are not looking for a hand-out, but just looking for a chance in this diverse society to be able to have an equal opportunity?

Judge ROBERTS. Well, Senator, I think there's a great deal in my background that you could look to in that respect. For example, you could look to the cases in which I argued in favor of affirmative action. I've argued on both sides of that issue. In the *Rice* v. *Cayetano* case, for example, before the Supreme Court, I argued in favor of affirmative action for Native Hawaiians. I lost that case but I was arguing on the side of affirmative action.

There are other episodes in my background that people could look to. For example, I regularly participate in, when I was at my law firm, a program sponsored by the firm, a legal reasoning program for minority and disadvantaged students going on to law school, to help them prepare for the rigors of law school, so not simply that they would be chosen, selected and admitted into law school, but be in a better position to be able to succeed once they got there.

With respect to the FCC case that you mentioned in the Metro Broadcasting case, I think a fuller understanding of the situation there is necessary. The United States had already taken a position before the FCC opposed to the FCC program. That put the Solicitor General's Office in the position where they had—the position of the United States, which was opposed to it, and the FCC position which had prevailed before the District of Columbia Court of Appeals. I authorized the FCC to defend its position in court. That was a discretionary decision. I didn't have to do that, but I thought the Supreme Court, in a situation where the FCC, part of the United States and the formal position of the United States, before I had ever gotten involved in the case, were at loggerheads, that the Court should have both views and decide the case. They did decide it in favor of the FCC 5–4, and as you noted in the other case that I participated in later, the Supreme Court overturned that decision.

The long and short of it is, that if you look at my record on the question of affirmative action, yes, I was in an administration that was opposed to quotas. Opposition to quotas is not the same thing as opposition to affirmative action. That was something that President Reagan emphasized repeatedly. I argued against quotas in the

FCC case. I argued in favor of affirmative action in the Hawaiian case. In terms of my own personal involvement, I've been active in programs that promote the interests of minorities and disadvantaged to participate fully in our society.

Senator KENNEDY. As you know, the Hawaiian case was not an affirmative action case. You gave that response to Senator Durbin in the written answers when you were promoted to the circuit court. The case itself indicates that it was not an affirmative action case. All right. Well, let me go—we will agree to differ.

Judge ROBERTS. Sure.

Senator KENNEDY. I have just a short time left.

On the EEOC, there is the quote that you have. This is the Equal Employment Opportunity Commission that was set up in 1964 as part of the 1964 Act. And it was basically set up at the strong suggestion and recommendation of Everett Dirksen, who played a key role in trying to deal with the discrimination of women, of race, of ethnicity, and national origin. And so they set up a Commission in order to be able to take the various complaints. They did not think they would have many complaints. The first year they had 9,000 complaints, and it has been doing extraordinary work ever since.

You mentioned in your memorandum that we should—you are familiar I think with these words; they have been written up in the journals and you can probably recognize them. "We should ignore the assertion that the EEOC is un-American, the truth of the matter notwithstanding."

Is there some reason that you would make a comment like that, "the truth of the matter"?

Judge ROBERTS. Well, Senator, you have to read the memo I think in its entirety to put it in context. That was not my language. That was the language—the "un-American" reference was the language that was employed by an individual who had a case before the EEOC. He actually won his case before the EEOC, but he didn't like the difficulty and the time involved. He wrote to the President, and he said two things, one, that his treatment at the hands of the EEOC was un-American, and two, that the President has promised in the campaign to abolish the EEOC, and he wanted to hold the President to that promise. It was my responsibility to figure out how to respond to this complaint that had been received.

And how we responded was by protecting that EEOC from interference by the President in any political way, by protecting the EEOC from this sort of complaint. We did not go to the President and say, "You've got to do something about the EEOC." We didn't pass on the objection at all. And the point of the letter, when you read the whole memorandum, you see two points. The first is that I was unable to determine, in the short time I had to respond, whether or not the President had made such a pledge to abolish to EEOC. I simply didn't know, and I said that in the paragraph if you read it. And that's what "the truth of the matter notwithstanding" is referring to, the question of whether or not the President had promised to abolish the EEOC. I say right in the memo that we cannot determine that, and whether his treatment was un-American or not is beside the point. We don't interfere with the ac-

tivities of the EEOC. That was the conclusion and that's what we did in that case.

Senator KENNEDY. Well, Mr. Chairman, I would ask that the memo by included in the record.

Chairman SPECTER. Without objection, it will be included.

Senator KENNEDY. You say that the assertion that the EEOC is un-American—the "truth of the matter notwithstanding" was your comment though.

Judge ROBERTS. You do need to read the prior clause, prior sentence.

Senator KENNEDY. I have read it a number of times and I will include it in the record and we will let the record stand.

Chairman SPECTER. When Senator Kennedy's line of questioning is finished and he has used his time, he will have the memo and you can respond.

Judge ROBERTS. Thank you.

Senator KENNEDY. At the outset of my questions I talked about Earl Warren, and you were enormously complimentary about Earl Warren, about him understanding not only the law, but also understanding the importance of the Chief Justice bringing other Justices together in a very important way in terms of dealing with a societal issue and a question. And I think we are a fairer country and a fairer land because of this.

This was really the bringing together of the mind and the heart. Oliver Wendell Holmes said: It's dangerous to think that legal issues can be worked out like mathematics. And another nominee who was here not too long ago, had this to say about the head and the heart. "What you worry about is someone trying to decide an individual case without thinking out the effect of that decision on a lot of cases. That is why I always think law requires both a heart and a head. If you do not have a heart, it becomes a sterile set of rules, removed from human problems and it will not help. If you do not have a head, there is the risk that in trying to decide a particular person's problem in a case, that may look fine for that person, but you cause trouble for a lot of other people, making their lives yet worse."

In the remaining moment, recalling Justice Warren, just thinking through what other nominees have said about the importance of a heart and a legal mind, and you as a Chief Justice together, in telling the American people how you were inspired by Chief Justice Warren at a very important and critical time in our Nation's history, what could you tell them now that could give them the assurance that you might be a similar kind of Chief Justice should you be approved by the Senate?

Judge ROBERTS. Well, Senator, my point with respect to Chief Justice Warren was that he appreciated the impact that the decision in *Brown* would have, and he appreciated that the impact would be far more beneficial and favorable and far more effectively implemented with the unanimous Court, the Court speaking with one voice, than a splintered Court. The issue was significant enough that he spent the extra time in the reargument of the case to devote his energies to convincing the other Justices—and obviously, there's no arm-twisting or any of that. It's the type of collegial discussion that judges and justices have to engage in of the im-

portance of what the Court was doing, and an appreciation of its impact on real people and real lives.

I recognize as a judge, and I recognized as a lawyer, that these cases have impact on real people and real lives. I always insisted when I was a lawyer about getting out into the field and seeing it. If I was arguing a case involving Native villages in Alaska, I went to the villages. If I was arguing a case about an assembly line, I went to the assembly line. You had to see where the case was going to have its impact and what its impression was going to be on people.

Now, none of those cases were as important as *Brown* v. *Board of Education*, but the basic principle is the same. I think judges do have to appreciate that they're dealing with real people with real cases. We obviously deal with documents and texts, the Constitution, the statutes, the legislative history, and that is where the legal decisions are made, but judges never lose sight, or should never lose sight of the fact that their decisions affect real people with real lives, and I appreciate that.

Senator KENNEDY. My time is up, Mr. Chairman. Thank you.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Kennedy.

As I said when Senator Kennedy was questioning you about the EEOC, I did not want to take his time to have him present the memo to you, the limited time that he had, and it has been made a part of the record.

Senator Kennedy, if you would make the memo available now to—Senator Kennedy, if I could have your attention?

Senator KENNEDY. Yes, excuse me.

Chairman SPECTER. If you would make the memo available to Judge Roberts now so that he can comment on it now without having taken your time to do that.

Senator KENNEDY. Mr. Chairman.

Chairman SPECTER. Senator Kennedy?

Senator KENNEDY. As you know, this has been redacted, and so I think in fairness to him and in fairness to the Committee, if we can get out the other redactions, it would be a more accurate and complete record.

Chairman SPECTER. Well, if it is possible for Judge Roberts to deal with the redactions, that would be fine.

Judge ROBERTS. I think the redactions simply identify the individual—the individual who was making the complaint, who had his case. The only thing I would emphasize is that the language that was quoted was part of a sentence, and the question of what "the truth of the matter" is referring to goes to the first part of the sentence that was not read, which is the assertion, the assertion that the President promised to abolish the EEOC. That was the matter that I could not determine in the time available whether that was correct or not, so I said, "The truth of that matter notwithstanding." And I also emphasized that any reference to the phrase "un-American" is always in quotes to make it clear that that's what the writer of the letter said, and certainly not what I said, and was certainly not my view then or now.

Chairman SPECTER. Senator Kennedy, do you want to follow up on that?

Senator KENNEDY. Well, I think we have been over this. After all is said and done, about finding out what President Reagan wanted to abolish or not abolish, that really wasn't the issue or the question. And the question is about whether—the use of "un-American" is obviously unacceptable and they are dismissing that. But Judge Roberts said the assertion the EEOC is "un-American"—and he is quite right saying that they were dismissing that word. But then he adds, "The truth of the matter notwithstanding." I think it is not unreasonable to assume that he somehow was disparaging the EEOC. That is all. I am glad to let the record stand, Mr. Chairman.

Chairman SPECTER. Any counter-reply?

Judge ROBERTS. Well, I am glad to let the record stand, just so long as the whole memorandum and the entire sentence that is being discussed is in the record.

Chairman SPECTER. We have finally come to one point of agreement.

Senator Feinstein for 15 minutes.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I want to just say one thing, Judge Roberts. I don't really know what I am going to do with respect to voting for you or voting against you. I had one impression of you when we had our hour in private, and to a great extent, I think I came out of that meeting with a different sense of you. And, of course, the impression that I have today is of this very cautious, very precise man, young, obviously with staying power. I mean, you have gone through this in a remarkable way. I am convinced you will be there, God willing, for 40 years. And that concerns me even more because it means that my vote means that much more. And I come from a different side than my Republican colleagues do, with different concerns, I think, and different life experiences.

Last night, I gave you the *Plyler* memo. Senator Durbin asked a number of questions. I asked a few. And you read that memo, I hope, last night.

Judge ROBERTS. I did, Senator, yes.

Senator FEINSTEIN. Do you believe you were wrong?

Judge ROBERTS. Well, Senator, on the underlying question—

Senator FEINSTEIN. Could you say you were wrong if you believed you were wrong?

Judge ROBERTS. Well, I can say that the—the reason I'm hesitating—and this is what was brought out in the Congressional Research Service memo that you attached to it. These issues come up all the time in related questions. I have no quarrel with the Court's decision. As you know, it was a 5–4 decision on the legal question, not the question—I certainly believe every child should be educated.

Senator FEINSTEIN. Regardless of immigration status?

Judge ROBERTS. My own view is that if you have a child, he or she should be educated, and you worry about status later.

Senator FEINSTEIN. Just say yes, regardless of immigration status.

Judge ROBERTS. As a personal view, yes. It's a separate issue as a legal question, as you know. And the Court in *Plyler* split 5–4. Among the dissenters, the people who agreed with the position that

the administration—or the position discussed in the memorandum were Justice White and Justice O'Connor. And I would not take their subscribing to the position of the dissent in *Plyler* v. *Doe* as suggesting that they in any way have less than fully developed and sensitive concerns about children and education. Justices White and O'Connor don't, and they're not subject to criticism on that score simply because their understanding of the law came out in the dissent in *Plyler* v. *Doe*.

So I would just try to make sure that people appreciate that saying that this is what you think the legal determination was—because the issue there was the Texas Legislature, the representative of the people of Texas, had reached a certain determination about funding and how they wanted to fund particular activities. And that was what the litigation was about. It's not a question about whether you believe in educating children or not. I don't think Justice O'Connor didn't believe that children should be educated, yet she was in the dissent in that case.

Senator FEINSTEIN. I understand. Let me just give you two human dynamics. One of the people in public life that I most respect is a mayor in my State of a small immigrant community called Orange Cove. His name is Victor Lopez. I have known him for about 10 years. I am a former mayor, and I have watched him try to build a town from nothing. I was there. There weren't sidewalks. There weren't schools. He has managed to do it. He has given his people—they are all agricultural workers—a sense of pride and dignity.

To me, that is the American dream. It is the Federal Government's job to keep illegal immigrants out, but once they are here, it is our job to see that they have certain basic rights, I think, among them education.

Another interesting twist to this is in 1986, an amnesty was passed. *Plyler* was in 1982. If the decision had gone the other way, you could have seen the enormous problem that would have happened in 1986 when all these children, then legal absolutely, still would have been denied school. So I think that is an interesting twist.

Now, Duke Law School Professor Katherine Fisk examined nine cases heard by you while you have been on the court of appeals. Her review concluded that you ruled in favor of a business each time. Consequently, she made this prediction: you're going to be a fairly reliable vote against workers' rights across the board.

Would you respond to that, please?

Judge ROBERTS. I think the conclusion is wrong. I would suggest that any examination of nine cases is too small of a statistical sample to draw any conclusions of that sort. I know that I've ruled against corporations on a regular basis on the D.C. Circuit. I think I just saw a study, a more comprehensive one, that suggested I tended to rule against corporations more than the average judge. I don't want to—I just skimmed the article, but it is quite often the case, for example, a lot of the business on the D.C. Circuit involves regulatory issues, agencies regulating corporations. Are you ruling in favor of the corporation or the agency? And I know I regularly rule in favor of the agency. Sometimes I rule against the agency. I like to think it depends upon the particular law and the par-

ticular facts. But I haven't seen that study, but, again, nine cases, I am sure you could fine nine cases going the other way as well.

Senator FEINSTEIN. Thank you. I want to move on.

A number of people on our side are very concerned about Executive power and what we perceive, either rightly or wrongly, to be greatly expanded Executive authority in recent years, causing enormous concern in a number of different ways.

Let me go back into your past. In trying to get Senate documents, one of the documents withheld was a draft memo titled, "Establishment of NHAO," the Nicaraguan Humanitarian Assistance Office. This office was used by President Reagan to give aid to the Nicaraguan contras following the passage of the Boland amendment, and that was a prohibition on providing funding to the contras.

What involvement did you have with the Nicaraguan Humanitarian Assistance Office?

Judge ROBERTS. Senator, I'm not familiar with the memorandum. If it was withheld, it was probably withheld from me as well, and I don't recall any involvement. So, you know, I don't recall any—

Senator FEINSTEIN. Okay. Fair enough.

Judge ROBERTS. I do know that there was an issue—an issue was raised. I have seen memoranda that I know have been released about private fundraising activities, and I do know that I gave advice in order to make sure that they didn't engage in lobbying activities in order to be consistent with the Boland amendment. I've seen those, but beyond that, I'm not recalling anything.

Senator FEINSTEIN. Do you believe that the administration's provision of funds to the contras exceeded the Executive's power in light of the Boland amendment's prohibition on funding the contras?

Judge ROBERTS. You know, it's not something I've—I just sort of know what I've read in the papers about it. And, you know, it seemed to me that it did. But, again, that's just based on—it's not based on a study or a legal analysis, just sort of—I think a lot of it—

Senator FEINSTEIN. Well, it's a pretty simple question. I mean, when the Congress passes a law that says don't fund something and the Executive finds a covert way to fund it, and as you know, one of the great redeeming qualities of President Reagan was that he gave an admission of wrongdoing, and I think the American people accepted that. He was able to admit a mistake, which I tend to think, you know, is hard to do in this arena. But in a way, it is a sign of a big person to be able to come forward and say, "I was wrong." So on its face, what you are saying, if I understand you, is you do believe that the provision of funds exceeded the Executive power in this instance.

Judge ROBERTS. Well, again, I haven't done a legal study, but based on what I know, which is just what every citizen knows from reading—I think it all took place after I was no longer in the Government, or at least came to light after that. It seemed to be inconsistent with the law.

Senator FEINSTEIN. Let me ask you a general question then. If an Executive exercises power in direct violation of an Act of Congress, is such an act unconstitutional?

Judge ROBERTS. Well, the answer depends, Senator, and this is where you get back to the *Youngstown* analysis, where Justice Jackson said there are three categories: you can act with Congress' support, being unclear what Congress's position is—and he recognized a third category where you can act—the Executive may act in the face of a congressional prohibition. And there are certain areas where the Executive does have authority to the exclusion of Congress. You know, without stating a legal view, for example, one that law professors regularly talk about is the pardon power. In other words, that's given expressly to the President in the Constitution. And restrictions, if Congress were to pass a restriction on the pardon power, does the President nonetheless have the authority to act under the Constitution? That's a difficult question. But it may be that the President's authority would trump Congress' authority.

So I can't answer a question in the abstract without knowing exactly what the record is and what the situation is. What Justice Jackson said in *Youngstown*, though, is obviously true, that if the President is acting in the face of congressional opposition, his power is at its lowest ebb. As Jackson put it, it includes his powers less whatever powers Congress has. So if it's in an area in which Congress has legitimate authority to act, that would restrict the Executive's authority.

Senator FEINSTEIN. Which this case was. All right.

Senator Kennedy engaged you in, I think, a substantive discussion on the civil rights issue, and you did let a little bit of the man come through, and I commend you for that. Thank you very much.

Let me talk about *Gonzaga* for a minute, because if I understand it, you argued that the Spending Clauses are not the supreme law of the land but should be viewed as contracts between the Federal Government and the States, right?

Judge ROBERTS. No.

Senator FEINSTEIN. Okay.

Judge ROBERTS. It was not a dispute about it being the supreme law of the land. There is no dispute about that, that when Congress passes legislation, under the Supremacy Clause it's the supreme law of the land.

The question is what remedies are available. It's a very simple problem. You folks give money to the States, and you say you can spend this money on educational programs. But if you accept our money, you have to do this, this, and this.

Senator FEINSTEIN. Right.

Judge ROBERTS. And the question is, well, what happens if somebody comes into court and says they accepted the money, Congress said if you take our money you have to do this, they didn't do it, they violated my rights under this provision, what happens then?

Now, in many cases, Congress will say if these rights are violated, you can sue in court and you can make that State institution—in this case, not a State institution, a private university. The same thing, they've accepted the funds. You can make them pay damages. But in other cases, the argument is, well, the condition was imposed by the Federal Government, and the Federal Government should enforce any violations. And you don't necessarily have the right to sue for damages. That's the question.

It's an issue that would never come up if Congress would say in each law if you violate this provision, you can sue in Federal court, or you can't sue in Federal court. Or as in this case, we are going to set up an office in the Department of Education that is going to police compliance, and if you violate this provision, that office is going to come down on the university and make them comply, make them do whatever they need to do to get back into compliance.

There's no dispute that the university in this case is bound by the condition. The question is: Does an individual who's harmed by their violation get to sue about it? And sometimes it comes out that they can, as in the *Wilder* case. Sometimes it comes out that they can't. The determination is that Congress did not intend there to be a private lawsuit to enforce that. And that was the conclusion in the *Gonzaga* case.

Senator FEINSTEIN. Well, let me ask you: Do you believe that State obligations created by Congress through the Spending Clause are enforceable by citizens in the courts?

Judge ROBERTS. Well, the answer there is it depends on that law. In *Gonzaga* what the Court determined was that provision at issue there was not enforceable by private citizens in the courts. It was enforceable by the Federal Government. The Federal Government can cut off the funds. More likely, the Federal Government can enforce the provision through proceedings against the university.

In the *Wilder* case, a different statute, the Court determined the condition in that case, the Medicare—or Medicaid funding case was enforceable, a private citizen could go into court because the review of Congress' intent in that case came out differently than it did in the *Gonzaga* case.

Senator FEINSTEIN. Thank you. Well, let me just finish this quickly. I am not a lawyer and I don't really know how to ask this question, but let me try. When is it a contract and when is it the law? Because if it is a contract, that affects a whole host of laws that we pass that are very important—Medicaid, Title IX, No Child Left Behind, even the Internet Protection Act, all of these things. So when does a contract attach?

Judge ROBERTS. It's always a contract, and sometimes if the intent of Congress is that private parties be allowed to sue, it's more than a contract. But it's always at least a contract.

Senator FEINSTEIN. So the intent has to be a specific intent.

Judge ROBERTS. It doesn't—no, the courts don't require that. They don't require that you specifically say you have the right to sue. But the Court has to look at it and try to figure out did you intend—when you put this provision in, did you intend private parties to be able to sue for damages? Or did you expect the Department of Education to enforce that and have the authority to cut off the funds or to impose other conditions because a university is violating it? And as I've said, some cases come out one way, and some cases come out the other way. But in each of those cases, what the Court is trying to do is figure out what you, the Congress, meant in that statute.

Senator FEINSTEIN. I think my time is up. Thank you very much. Thank you.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Feingold, you are recognized for 20 minutes.

Senator FEINGOLD. Thank you again, Mr. Chairman, for your willingness to allow us this additional round, and thank you, Judge Roberts, for all your patience throughout this whole process.

Judge ROBERTS. Thank you, Senator.

Senator FEINGOLD. A topic we touched on in our meeting in my office in July was the issue of judges going to judicial education conferences at sometimes fancy resorts, which are put on by ideologically oriented groups and paid for by private corporations that sometimes even have cases pending before the judges in attendance. And when we spoke, of course, you had been nominated for the Associate Justice position, and our conversation concerned your personal interest in attending such events. As I remember, your answer was that you said you would rather spend your free time with your family, which I thought was a pretty good answer.

But now you have been nominated for Chief Justice, and one of your duties is to head the Judicial Conference, which among other things, sets the ethics policies for the Federal judiciary. And this is one area where I think Chief Justice Rehnquist might have taken a different course. He took a number of steps to essentially leave this ethical question up to the personal decision of individual judges and appointed a judge to head the Committee on Codes of Conduct who had been prominently featured in a "20/20" expose of these junkets. Not surprisingly, the Committee weakened the judicial ethics rules on this question of privately financed trips.

Chief Justice Rehnquist strongly opposed congressional efforts to put a halt to these judicial junkets that I believe sometimes reflect poorly on the independence and impartiality of the judiciary.

So I would like to know, Judge Roberts, if confirmed, whether you will use your power as Chief Justice to set a high ethical tone for the Federal judiciary by putting in place new codes of conduct that would prohibit judges from participating in privately funded "judicial education" that lets special interests essentially lobby Federal judges?

Judge ROBERTS. Well, I don't think special interests should be allowed to lobby Federal judges. Stated that way, I think the answer is clear.

I don't know enough about how these things operate. As I said, I have not been on one of them. I don't know how the funding is set up. I don't know what the situation is. If confirmed, I'm certainly happy to examine it. I know that there is a conflict of interest or ethical standard review group, I think, within the Judicial Conference. I believe they addressed that question and issued an opinion on it recently. But, again, I am just sort of recollecting something I read.

I would say more generally, though—and maybe it is off topic, in which case feel free to cut me off. But I do think it is important for judges and Justices to get out, particularly get out of Washington a little bit. I've always enjoyed going to the law schools, participating in the moot courts or, you know, functions where you get to visit with the law students. I've done that a few times—not a lot, a few times. I wouldn't call that by any stretch of the imagination "a junket." But I do think it's important for the Justices to get

out around the country and particularly visit the law schools. That is probably not the same sort of thing you are talking about.

Senator FEINGOLD. Fair enough, and I think you would agree that there is nothing wrong with judges or Senators golfing. That is not the question.

Judge ROBERTS. It may not be good for the game of golf, but...

[Laughter.]

Senator FEINGOLD. In 2000, Chief Justice Rehnquist wrote a letter supporting repeal of a provision of the Ethics Reform Act of 1989 that bans honoraria for judges. Do you believe that the law should be changed to permit judges to take honoraria for speeches or appearances?

Judge ROBERTS. There again, Senator, that's not an issue I've looked at. I know the law prohibits that. I know that there was a case about that, and the Supreme Court decided that, to some extent, that prohibition was unconstitutional as applied to lower-level officials but constitutional as applied to others. It's not a question that I've addressed.

Senator FEINGOLD. Just to return for the record for a moment, the item that the judge referred to in terms of a Judicial Conference opinion is actually the policy that I was concerned about that I thought was a step backward, and I just wanted that reflected in the record.

I also, Mr. Chairman, want to put an item in the record. I am not going to ask more questions about Judge Roberts's memo recommending against the President stating that HIV could not be transmitted through casual contact. But I do want to make sure the record is complete. I would like to submit for the record Judge Roberts's memo on that issue from September 1985, Centers for Disease Control documents from 1982 and 1985, and a number of news stories from August and September 1985, reporting the CDC's conclusion that HIV could not be spread through casual contact. I would note that there are several articles in this collection from the Washington Post on September 4, 1985, the date of the article that Senator Coburn submitted yesterday, that I think makes this clear as well.

Mr. Chairman, if those items could be entered in the record? Mr. Chairman?

Chairman SPECTER. Without objection, so ordered.

Senator FEINGOLD. Turning again to the death penalty, when you worked in the Reagan administration, you expressed strong opposition to Federal courts reviewing criminal convictions and State courts reviewing writs of habeas corpus. As you know, prisoners who believe they were wrongly or unfairly convicted in State court can seek to have the Federal courts hear their claims via a writ of habeas corpus.

Habeas corpus is a fundamental part of our legal system that has long protected individual freedom. In a 1981 memo, you argued that the availability of Federal habeas relief to State prisoners "goes far to making a mockery of the entire criminal justice system." In that same memo, you said, "The question would seem to be not what tinkering is necessary in the system but, rather, why have Federal habeas corpus at all?"

Then in 1983, as Senator Leahy brought up yesterday, you suggested that if the Supreme Court wanted to reduce its caseload, it should "abdicat[e], the role of fourth or fifth guesser in death penalty cases." Not in First Amendment cases or antitrust cases, but death penalty cases.

I know that you've said that your memos in the Reagan administration reflected the views of the administration and not your own. But in this area, at least, your memos clearly indicate, I think, that these were your views. With the 1981 memo, for example, there is a cover note in your handwriting directing that the memo be sent to Jon Rose, an Assistant Attorney General at the time, with a cover note that reads, "The attached memorandum contains some thoughts on habeas corpus reform, for whatever you think they're worth. Judge Friendly and Justice Rehnquist would never have forgiven me if I remained mute." That sounds a lot like a memo advocating your views, not those of the Department.

With regard to the memo from 1983 that I mentioned, you were analyzing the Chief Justice's proposal to create another intermediate appellate court to take the pressure off the Supreme Court's docket, and you said, and I quote, "My own view"—"My own view is that it is a terrible idea." And you went on to say that the fault lies with the Justices themselves who take too many cases, including death penalty cases.

And you sent a personal letter to Judge Friendly in 1981 that said, "This is an exciting time to be at the Justice Department when so much that has been taken for granted for so long is being seriously reconsidered. To cite just one example, serious thought is being given to reform of habeas corpus. . . . I do not know what will eventuate as you noted, what has come to pass as the Great Writ is regarded by many lawmakers with no idea of the problems as unalterable perfection."

Now, that discussion in a personal letter sounds like your own opinion as well. A decade later, when you were at the Solicitor General's office during the first Bush administration, you signed several briefs that sought to strictly limit Federal habeas review. And in 1993, while in private practice, you testified before the House Republican Task Force on Crime in favor of further habeas restrictions.

The comments in your memos from the 1980's, I am sorry to say, don't even show the slightest concern about innocent lives possibly being lost if Federal habeas were eliminated. Does the possible hostility toward the habeas process that was expressed in those memos, particularly in death penalty cases, reflect your current view on Federal habeas? Or have your views changed or evolved?

Judge ROBERTS. Well, as you know, the law has changed and evolved dramatically since the early 1980's, and at least with respect to my personal letter to Judge Friendly—I guess I thought it was a personal letter—

[Laughter.]

Judge ROBERTS. But the situation has changed dramatically, as you know. What I was referring to in the early 1980's was a situation where there were no limits on repetitive habeas corpus petitions, four, five, six, dozens of different petitions could be filed repetitively. Congress saw that as a problem. Congress acted to ad-

dress the very concerns that I was raising there in past legislation. The Supreme Court saw it as a problem. The Supreme Court acted in a number of cases, the *Teague* case and others, in limiting the availability of successive and repetitive habeas petitions.

Actually, what happened is the Supreme Court, I think, started down that path, and Congress made the decision that this is something they should look at in a more comprehensive way. So Congress passed laws that restrict when people can file repetitive and successive petitions. Those are the very concerns that I was talking about. They were concerns that had motivated the first person I worked for as a lawyer, Judge Henry Friendly, to write on the subject. He wrote a famous article on habeas reform entitled "Is Innocence Irrelevant?" because he thought these successive petitions had made sort of a game out of the whole process in which the question of innocence was totally lost in these successive petitions.

And the references to the Great Writ, yes, of course, the writ of habeas corpus has an established heritage as a basis for complaining about illegal confinement. But all the stuff we are talking about there—the fourth and fifth successive petitions, raising new issues that should have been raised in the first petition—and as you know, that's what Congress' legislation focused on.

Senator FEINGOLD. But, Judge, did you not at the time, as I read in your statement, advocate the abolition of Federal habeas review?

Judge ROBERTS. No. The purpose of what I was saying was to certainly reform and abolish the system as it existed then, where people could file repetitive and successive petitions, and I'll tell you why. The main problem—and I think it's a particular concern in death cases—is that nobody along the way feels that they're making the responsible decision. If people get in a situation where they know, okay, if you're on a jury and you sentence someone to death, if you think, well, he's going to file habeas petitions in State court, and they're going to look at it then, after that—and the person who considers the State habeas petition says, "I know there are going to be successive Federal habeas petitions, they'll look at the issue then," everybody is pointing fingers in opposite directions.

When Congress reformed this system, I think it helped to make clear that the decisions that are going to be made on the first habeas petition are going to be critical, and so hopefully it's looked at a lot more carefully than in the prior system when you knew, well, that wasn't the end of the process, it wasn't even the beginning of the end; the conviction was just the end of the beginning.

Senator FEINGOLD. Well, would you agree that had the view that you advocated in your memos prevailed in the early 1980's—the abolition of the writ and the entire removal of Federal habeas review of State court convictions had that happened, innocent people would have been executed and serious constitutional errors would have gone unaddressed?

Judge ROBERTS. Well, that wasn't my position.

Senator FEINGOLD. No, but I am asking—

Judge ROBERTS. No, my—

Senator FEINGOLD. Had that view prevailed, not necessarily your personal view, but the abolition of the writ, isn't it the case that innocent people would have been—

Judge ROBERTS. Oh, I'm not in favor now and was not in favor then of not allowing any Federal habeas review.

Senator FEINGOLD. I am asking you whether you wouldn't agree that as a matter of fact—

Judge ROBERTS. Yes.

Senator FEINGOLD.—had the writ been eliminated, that some innocent people would have been executed?

Judge ROBERTS. Well, they certainly wouldn't have been able to assert their claim of innocence in Federal habeas—

Senator FEINGOLD. Would not have—

Judge ROBERTS.—and people do succeed at that stage. I certainly think it serves a valuable purpose. But that, again, was not—you know, the situation with respect to habeas 23 years ago was quite different than it is today, and the reason it's changed, I think, is because Congress responded to those sorts of concerns.

Senator FEINGOLD. I take those comments as very important, and I know you can't comment on this, but there are further efforts now to further limit this right that could come before you. And I know you can't comment on it, but I think it is of great significance that you have acknowledged that some of those changes that were made in the 1990's have significantly affected your view about the propriety of the habeas process.

On a different subject, after the passing of Chief Justice Rehnquist, a number of news articles discussed his legacy and noted that early in his tenure as Justice, he had been a dissenting voice, but the Court seemed to shift in his direction over time. Recently, Professor Cass Sunstein recalled that over lunch with a group of Supreme Court clerks when he was an Associate Justice, Chief Justice Rehnquist described his own role on the Court. He said the Court was like a boat that had tilted way over to one side, and his task was to put it upright again.

Do you believe that the Chief Justice has the duty to influence the overall philosophical direction of the Court through his personal leadership or through opinion-writing assignments or any other means? And do you think that it is appropriate for the Chief to do that?

Judge ROBERTS. I don't think using opinion-writing assignments as a way to try to promote a particular view or agenda is a good idea. And I don't think Chief Justice Rehnquist did that. I do think if you go back and look at every year that he was the Chief Justice and just pick out what you think are the 10 or 12 biggest cases of that year, I think you will find that those cases are distributed very evenly among the nine Justices. And one reason I think relations among the Justices were so collegial under Chief Justice Rehnquist's leadership—at a time when, of course, the Court had very marked philosophical differences and sharp dissents in some areas, but everybody got along well—is because the Chief made a priority of being fair in his opinion assignments. I think that is the more important priority.

Senator FEINGOLD. Can you imagine ever changing your vote in order to be able to assign the majority opinion to yourself or to another Justice? And do you think that such a practice is appropriate?

Judge ROBERTS. No, I don't, in answer to both questions.

Senator FEINGOLD. So you would not do that.

Judge ROBERTS. I wouldn't do that. I think that, again, sort of trying to use that assignment power in a tactical way, it causes tension on the Court and I think undermines the ability of the Chief Justice, to the extent he has that ability—and it's obviously limited—to act as a force to help bring about some cohesiveness and collegiality.

Senator FEINGOLD. Thank you. Thank you for that answer.

On a different subject, some people blame plaintiffs' lawyers for various problems with the economy and the legal profession. Do you believe that lawyers who represent indigent persons in product liability and medical malpractice cases are harming America?

Judge ROBERTS. No.

Senator FEINGOLD. Having worked on the defense side for most of your non-Government career, can you be fair in your rulings to plaintiffs seeking redress for injury?

Judge ROBERTS. I'm going to disagree with your premise. I've represented plaintiffs' interests. I think if you look, for example, at the antitrust cases I've argued, more of them have been on the plaintiff side than on the defendant side. One of my co-clerks, when I clerked for Justice Rehnquist, is a very prominent personal injury lawyer, and I think he does a wonderful job.

I know there are abuses in this area. There are abuses in the area of defense representation as well. I certainly don't have any biases one way or the other.

Senator FEINGOLD. Thank you, Judge.

Judge, you argued an important case before the Supreme Court concerning who is protected under the Americans with Disabilities Act. It was called *Toyota* v. *Williams*. Ms. Williams suffered from hand, wrist, and arm pain while working in an engine assembly line. She was diagnosed with carpal tunnel syndrome, and her physician placed her on permanent work restrictions. Her pain continued and she did not think that her employer was addressing her physician-ordered work restrictions appropriately, so she sued under the ADA. You represented Toyota in the case before the Supreme Court, and this was a case of statutory interpretation, so I assume you are quite familiar with the legislative history of that Act.

Do you agree with the statement of one of the Justices during oral argument that the Act was primarily intended to protect people who are "wheelchair-bound"?

Judge ROBERTS. The Act contains a definition of disability, and that's what the issue was about, and that definition does not contain that type of restriction. So, you know, I don't want to comment on issues that might come before me, but the case was about the definition. The definition was not restricted in that way.

The only point I would make—and I'm sure you appreciate this—is that a lot of times the statements during oral argument are certainly not expressions of either the Justices' view—they're often playing a devil's advocate, and I don't even remember that question. I don't know if it was directed at me or the other counsel, but it may well have been intended to elicit a response to flesh out more fully what the definition was.

Senator FEINGOLD. More generally, do you believe that the ADA or any other civil rights statute should be interpreted narrowly or broadly when it comes to the issue of who it protects?

Judge ROBERTS. Well, I have to say I think it should be interpreted consistent with Congress's intent, and you look at a lot of different factors in trying to flesh that out.

If you folks here in Congress had a particular—in any statute, a narrow focus, then to give that focus a broader impact I think would be wrong. If you had a broad focus, as, of course, you often do when you're dealing with statutes designed to address discrimination, giving that interpretation a narrow focus would be wrong.

The effort in every case is to try to give it the right focus, and that's the focus that you intended when you passed the law.

Senator FEINGOLD. Thank you, Judge, and I appreciate all your answers.

Mr. Chairman, I yield back the remainder of my time.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you very much, Senator Feingold.

Senator Sessions has asked for recognition briefly to clarify one point which he thinks requires that clarification.

Senator SESSIONS. Thank you.

Judge Roberts, I commend you on your good humor, and even when they read a memo to suggest you said that the EEOC was un-American, when actually all you were doing was quoting a complaint, and that you defended the EEOC and its rights and independence aggressively in that memo.

But I wanted to ask you about this Texas case. As I understand it, Texas decided that they would not fund education for illegal aliens that are here in the country. And that was challenged as being unconstitutional and went to the Supreme Court. I know you have said that you as a parent and as a person who believes in education, you absolutely believe in education for all children in some way, form, or fashion. But you don't mean to suggest or prejudge, do you, the constitutionality of the right of the State of Texas to make that decision? That would be a matter of, I think, some importance, and perhaps again in the years to come.

Judge ROBERTS. Well, no, Senator, and I did try to be very careful in separating the personal views with respect to the importance of education from the legal question there. And the legal question, of course, was a close one. It divided the Court 5–4, and as I noted, among the dissenters were Justices White and O'Connor. And I don't think their legal position reflected any less than wholehearted view concerning the importance of education.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Schumer is recognized for 15 minutes.

Senator SCHUMER. Thank you, Mr. Chairman.

First, just a little housekeeping. I think tomorrow is the day that it is due for us to submit written questions, and you will have no problem getting those back to us before we have to vote, which I think by the agreement of the Chairman and the Ranking Member will be next Thursday, will you?

Judge ROBERTS. Well, it depends how many there are.

[Laughter.]

Judge ROBERTS. My answers will be fuller the fewer questions there are, but I will certainly—

[Laughter.]

Judge ROBERTS. I will certainly obviously make every effort to get them in as soon as possible.

Senator SCHUMER. Thank you. Next question: We have had a great debate here in the Senate and with the administration about the documents—there were 16 cases, I think, led by Senator Leahy, that the eight of us requested when you were Principal Deputy Solicitor General. Now, we know the administration has said they will not relinquish those documents. I just wanted to know—and I am not asking your view on the law. Do you have a personal objection if they were to give us those documents? Because you wrote them.

Judge ROBERTS. Senator, I don't think it's appropriate for me to take a position. If the client is asserting a privilege, I don't think the attorney should be stating a position on it, because in these situations the privilege is that of the client. And for the attorney to take a position would, could, might put pressure on the client and—

Senator SCHUMER. I may not get—

Judge ROBERTS.—I think that's inappropriate.

Senator SCHUMER. I may not get this. Aren't they the attorney and you the client this time?

Judge ROBERTS. Well, when the memos were prepared, I was the attorney.

Senator SCHUMER. I see.

Judge ROBERTS. And they were the client.

Senator SCHUMER. So you won't take a position on that.

Judge ROBERTS. I don't think it's appropriate for a lawyer to do so.

Senator SCHUMER. Yesterday, as I told you, I was sort of confounded by the refusal to answer certain questions. I do not think any of us expected you to answer every question or answer the—give us the answer the way we want it. But we did hope that you would answer enough questions with enough specificity so that we and the American people would get a clear picture of the kind of Chief Justice you will be, not just rely on your assurances.

So I want to try this another way because I really want to find out. You are one of the best litigators in America. You know how to convince people. That is what you have been paid to do for a long time. So let me ask you, if you were sitting here, what question would you ask John Roberts so that you or us could be sure that we were not nominating what I call an ideologue, someone who you might define as somebody who wants to make law, not interpret law? And then how would you answer the question you asked yourself?

[Laughter.]

Judge ROBERTS. I'd begin by saying, "Well, that's a good question, Senator."

[Laughter.]

Judge ROBERTS. I think, with respect, I would ask a lot of the questions that have been asked, a lot of the questions that were asked in the questionnaire that I completed earlier, and it begins

with the most important question, What is your view of the proper role of a judge in our system? And people have different answers to that question. I've given an answer to that question.

How do you approach particular cases in areas of particular interest? And I've been asked that question and I've given an answer. I've explained, for example, in the area of Executive power, as issues arise what the framework that I would use would be, and I've talked about the *Youngstown* opinion and Justice Jackson's framework there.

I've talked about how I would approach cases involving the right to privacy under the Liberty Clause. I've talked about how I would approach cases involving Government enforcement in the antitrust—

Senator SCHUMER. How about something that you have not—a question that has not been asked since some of us are still unsure?

Judge ROBERTS. But in other areas people talk about—and it is personal views on issues, and there again, I think it is important. There may be some nominees who want to share personal views on issues. My reaction has been to emphasize—and I think this tells you about what kind of a judge I hope I am on the Court of Appeals and what kind of a Justice I would be if confirmed, and my reaction has been that I set those personal views aside, and so don't consider them pertinent. Other nominees might take a different approach in response to those types of questions.

People have asked about particular decisions, and I've talked about decisions in which I've been involved. We've talked about—with Senator Grassley about the *Totten* case in which I was involved, others about the *Barber* case involving Congress's power under the Spending Clause.

People have asked very probing questions about my legal positions. What did you—what was the position you were advocating in this case and why? I think it's fair to talk about the record.

Senator SCHUMER. Any question that you would ask that has been left out?

Judge ROBERTS. There have been a lot of questions asked and a lot answered. I can't think of any that—you know, I expected people to ask me about this and it hasn't been asked.

Senator SCHUMER. So I guess we did a better job than we think we did, right?

Judge ROBERTS. I think the Committee has been very effective over the last several days in learning a lot about me. I think in the process of meeting with the Senators before—and I was quite serious when I said I appreciated how accommodating everyone had been in sitting down with me. I think people learned a lot about me. I think you can learn a lot about me from looking at the 50 opinions I've written. You can learn about—

Senator SCHUMER. Let me, if I might. I want to go back to the Commerce Clause, which bothers me, as you know. Again, apart from anybody's view, do you agree that the Congress has the power under the Commerce Clause to regulate activities that are purely local, so long as Congress finds that the activities exert a substantial economic effect on interstate commerce?

Judge ROBERTS. If the question—and this is where the issue comes up—is whether or not as the Court has addressed it, the ac-

tivities are commercial. If the activities are commercial in nature, you get to aggregate them under *Wickard* v. *Filburn* that we have talked about. You do not have to look at just that particular activity. You look at the activity in general. Where the dispute and issues come in is whether the activities are commercial. That is where the disagreement—the point I was trying to make in the infamous or famous toad case. If you should look at this as commercial activity, then you can—

Senator SCHUMER. Do you believe Congress deserves a great—this is in reference to some of the things Senator Specter talked about—that Congress deserves a great deal of deference when it decides something is commercial and has findings to that effect?

Judge ROBERTS. I do, Senator, and I think that is the basic theme that runs through the Court's Commerce Clause jurisprudence. There is again of course the *Lopez* and *Morrison* decisions, but there is also the *Raiche* decision, and again I think it is very important to—and what the *Raiche* decision said is you've got to consider *Lopez* and *Morrison* in the context of this broad sweep, not just as sort of the only decisions.

Senator SCHUMER. Okay. Let me ask you then this hypothetical, and that is: that it came to our attention, Congress's, through a relatively and inexpensive simple process individuals were now able to clone certain species of animals, maybe an arroyo toad; did not pass over State lines, you could somehow do it without doing any of that. Under the Commerce Clause can Congress pass a law banning even non-commercial cloning?

Judge ROBERTS. I appreciate it's a hypothetical and you will as well, so I don't mean to be giving binding opinions. But it would seem to me that Congress can make a determination that this is an activity, if allowed to be pursued, that is going to have effects on interstate commerce. Obviously, if you were successful in cloning an animal, that's not going to be simply a local phenomenon, that's going to be something people are going to—

Senator SCHUMER. You can leave it at that. That is a good answer as far as I am concerned.

What I would like to do is say a few concluding words here with a final request. First I want to thank you for holding up so well during the 3 days of grueling questions. Many of us on this Committee, probably every one of us, some more than others, have been wrestling with how to vote on your nomination since well before the hearing started, and of course now that process is accelerated. I, for one, have woken up in the middle of the night thinking about it, being unsure how to vote. I think my colleague from Delaware was on to something when he called this a roll of the dice.

But this is a vote on the Chief Justice of the Supreme Court. You will in all likelihood affect every one of our lives in many ways for a whole generation, so this is not just rolling the dice. It is betting the whole house.

I thought I would share with you some of the thoughts of some of us with important questions; there are pros and cons. On the pro side first of all is your brilliance. You have an amazing knowledge of the law. You spent 3 days here talking on so many aspects of it without any paper in front of you, without a single aide coming over and whispering in your ear or passing you a note. Your knowl-

edge of law and your way of presenting it is a tour de force. You may very well possess the most powerful intellect of any person to come before the Senate for this position.

Second on the pro side is that you seem to be a lawyer above all. You have devoted your entire life to the law, and it is clear that you love it. Most people in that position tend not to be ideologues. They will follow the law wherever it takes them, regardless of the consequences, and you have repeatedly professed that to be true for you. But given that you have spent most of your legal life representing others, and that your limited tenure on the Court of Appeals did not allow you to rule on very many non-technical cases, there is not a long enough track record to prove that point.

The third and perhaps the most important, at least to me, is your judicial philosophy of modesty and stability. Such a theory respects precedent, the Congress and other judges' opinions. Modest jurists tend not to be ideologues, and many of us on this side of the aisle would like the Court to maintain, and in cases related to the Commerce Clause like *Morrison*, increase its modesty.

But in complicated decisions like this one, there is always a counterpoint even on the modesty question. Yesterday you said that the decision of *Brown* v. *Board* could be described as modest. *Brown* v. *Board* was breathtaking. It was wonderful. It reversed 80 years of accepted but bad law, yes, but modest? So I ask myself could overturning *Wickard* or *Roe* also be modest by your definition?

Nonetheless, I think the philosophy of modesty is an appealing, important, and unifying philosophy to many of us.

Let me go to the con side here. First is the question of compassion and humanity. I said on the first days of these hearings it is important to determine not just the quality of your mind, but the fullness of your heart, by which I think a good number of us, at least, on both sides of the aisle really, mean the ability to truly empathize with those who are less fortunate and who often need the protections of the Government and the assistance of the law to have any chance at all. It did not seem much, for instance, to concede that the wording "illegal amigos" was unfortunate, yet you refused to say so. America has moved in the 21st century beyond what Senator Kennedy called "the cramped view of civil rights professed in the early Reagan administration." But you would not admit now in 2005 that any of those views you argued for in the early '80's were misguided, with the hindsight of history. That is troubling.

Second is the refusal of the administration to let us see any documents you wrote when you served as Deputy Solicitor General, when you were not simply following policy, which you have reminded us in your earlier days there and in the Counsel's office, but making it. This would have given us tremendous insight into who you are, into actually knowing who you are and what kind of justice you would make. But for what seemed to be self-serving reasons they were refused. Now this was not your decision, but you carry its burden, and I think we all have to consider it when weighing how to vote.

Third, and most important on the con side, is your refusal to answer so many of our questions. I know you feel you were more

forthcoming than most any other nominee to the High Court. I must disagree. You certainly were more forthcoming than a few. Now, for instance, I do not know Justice Scalia's opinion on "Dr. Zhivago," but most answered more relevant questions than you did. Your refused to comment on any issue that you thought may come before the Court. We learned a lot about your views on older, completely discredited cases like *Lochner* and *Plessy* and *Korematsu*, but they are not of much help to us. What we need to know are the kinds of things that are coming before the Court now, and not knowing makes it hard to figure out what kind of Justice you will be, particularly in light of the fact we have little else to go on.

You did speak at length on many issues and sounded like you were conveying your views to us, but when one went back and read the transcript each evening, there was less than met the ear that afternoon. Perhaps that is the job of a good litigator, but in too many instances it did not serve the purpose of the hearing.

Having said that about documents and questions, obtaining documents and answering questions are a means to an end, not an end in itself. In some cases like Miguel Estrada's nomination, we had no knowledge of his views so we could not vote. But here there is clearly some evidence. So now we must take the evidence we have and try to answer the fundamental question: what kind of Justice will John Roberts be? Will you be a truly modest, temperate, careful judge in the tradition of Harlan, Jackson, Frankfurter and Friendly? Will you be a very conservative judge who will impede congressional prerogatives but who does not use the bench to remake society like Justice Rehnquist? Or will you use your enormous talents to use the Court to turn back a near century of progress and create the majority that Justices Scalia and Thomas could not achieve? That is the question that we on the Committee will have to grapple with this week.

And over the next week, if you have any more information that could help us answer this question, I think every one of us would welcome it. Thank you, Judge.

Senator FEINSTEIN. Mr. Chairman?

Chairman SPECTER. Thank you, Senator Schumer.

Senator FEINSTEIN. Mr. Chairman?

Chairman SPECTER. Wait just a minute. I will recognize you in a moment.

Judge Roberts, Senator Schumer has postulated quite a number of questions in his last soliloquy, but—

[Laughter.]

Chairman SPECTER.—they are summarized in what kind of a Justice you would be, and I think you are entitled to respond to that if you care to do so.

Senator FEINSTEIN. That was going to be my request. I think it would be very important.

Chairman SPECTER. In that case, go ahead and make your request.

[Laughter.]

Senator FEINSTEIN. Yes. I think—

Chairman SPECTER. Better the request comes from you than from me, Senator Feinstein.

Senator FEINSTEIN. I think that Senator Schumer really summed up the dilemmas, and not only for himself but for our side. I would very much like you to respond, particularly to the con side. The pro side speaks for itself. Many of us are struggling with exactly that, what kind of a Justice would you be, Judge Roberts?

Chairman SPECTER. No time limit, Judge.

Judge ROBERTS. Well, I appreciate the comments very much, Senator Schumer, and I very much appreciate the pro side of the ledger.

On the con side, the issue of documents, it is hard for me to comprehend that there could be more documents. The numbers been ranging from 80,000 to 100,000, and there is a lot of paper out there.

I have tried to be as fully responsive as I thought consistent with my obligations as a sitting judge and a nominee. And I appreciate that this is not a new issue. You have gone back and read the transcripts and of course participated. I have gone back and read the transcripts. It comes up at every nomination. In some instances Members of the Committee want more information than the nominee feels that he or she can give in good conscience. That is nothing new. I have tried to be as fully expansive as I can be, and drawn the line where as a practical matter I think it is necessary and appropriate.

The basic question, Senator Feinstein and Senator Schumer, what kind of a Justice would I be? That is the judgment you have to make. I would begin, I think, if I were in your shoes, with what kind of a judge I have been. I appreciate that it has only been a little more than 2 years, but you do have 50 opinions. You can look at those.

And, Senator Schumer, I don't think you can read those opinions and say that these are the opinions of an ideologue. You may think they're not enough. You may think you need more of a sample. That is your judgment. But I think if you've looked at what I've done since I took the judicial oath, that should convince you that I'm not an ideologue, and you and I agree that that's not the sort of person we want on the Supreme Court.

Beyond that I have the few days that I've been here, all the documents, the questionnaire. You have not just my opinions but my briefs. I think those also help show what kind of a judge I would be. You of course appreciate that that's presenting a position and I'm just an advocate, but advocates deal with the law in different ways. You can look at other people's briefs, I think, and conclude that that person may not be a good judge because of the way they argue the law. I would hope you would look at my briefs and my arguments before the Supreme Court and conclude that that's a person who respects the law, respects the Court before whom he is arguing, and will approach the law in a similar way as a judge.

Chairman SPECTER. Thank you, Judge Roberts.

Senator CORNYN. Mr. Chairman?

Chairman SPECTER. Senator Cornyn.

Senator CORNYN. If I might have three minutes. I would just want to ask the witness to explain the rationale as he understands it for the privilege—

Chairman SPECTER. Senator Cornyn, you are recognized for three minutes.

Senator CORNYN. Thank you. Mr. Chairman, it strikes me as odd, having been on the Committee last year when we had an alleged theft of internal documents that were written by staffers of individual Senators, and which were then published to the outside world, and there was bipartisan outrage over that. And we, as I recall, referred that matter for investigation and possible prosecution.

But surely if the legislative branch is entitled to confidential communications between our lawyers and us so we can do our jobs and get candid advice, the Executive or the President is entitled to the same sort of confidential and candid communications.

And, Judge, this is the question. I do not want anybody to be under the misapprehension that, number one, it is within your power to produce additional documents. It is hard to imagine there are in addition to the 100,000 that have already been produced. But I want to give you a chance to articulate the reasons why the law recognizes this importance of a confidential, candid communication between a client and the lawyer that cannot be readily overrun or trumped. Would you give that a shot, please?

Judge ROBERTS. Well, I mean certainly the basic attorney/client privilege goes back centuries, and there have been eloquent expressions of its value in the Supreme Court. I think of the *Upjohn* opinion from 1981 in the Supreme Court and other classic expressions. And the idea is that if we want people to benefit from the advice that lawyers can give, we have to ensure that they feel perfectly free to communicate and exchange their views with their lawyer without fear that that would be reviewed and used to their prejudice.

Carried forward to the point that we are talking about now, you have to have a candid exchange among lawyers in presenting cases to the Court in order to effectively represent your client whether your client is the Government of the United States or a private company. And that type of debate, which often involves pointing out inconsistencies in the decision, even flaws in your own legal position, say, "This is the argument, but this part of the argument is really quite weak and we have to be worried about that." Those sorts of things you do need to thrash out and discuss and elaborate on. And yet if that was then revealed to your adversary or to the Court, it would obviously prejudice the presentation.

And if those things were going to be regularly revealed, people wouldn't make those types of analyses and judgments. They wouldn't say, "This is a weak argument. What are we going to do about that? Should we really make that argument?" They would not commit those to writing and the adequacy of the legal counsel and advice would suffer, and the role of the advocate before the court in vindicating the rule of law on which the courts rely, would also suffer.

Senator CORNYN. Mr. Chairman, it may already be part of the record, but if it is not, I would ask unanimous consent at this point in the record that we would make the letter of former Solicitor Generals, appointed both by Democrat Presidents and Republican Presidents who agree that these Solicitor General memos should remain protected by the privilege, part of the record.

Chairman SPECTER. Without objection, so ordered.

Senator Durbin, you are recognized for 20 minutes.

Senator DURBIN. Thank you very much, Mr. Chairman.

Judge Roberts, again, thank you, and you may be nearing the end of the process, which I am sure is a great relief to you and your wife and friends.

Let me first address Senator Cornyn's point. The memos that were stolen from offices of the Senators on this Committee, stolen by a Republican staffer who was discharged, that case was turned over to the Justice Department. I sent a letter to the Attorney General yesterday applauding the fact that the Justice Department had in fact successfully prosecuted in Massachusetts a person who had hacked in and stolen the telephone records of Paris Hilton. And I asked the Attorney General to please ask our Special Counsel in this case to take a look at the precedent of the Paris Hilton case and see if he can perhaps protect our records as much as he wants to protect that poor young lady's telephone records.

[Laughter.]

Senator DURBIN. The second aspect I would like to raise is this. Many of these documents we are talking about have been given before. Justice Rehnquist offered similar documents to the Committee for consideration, so it is not unprecedented for us to ask, nor for the Government to produce them on a voluntary basis, no theft involved.

If I could clear up a couple other things that have been raised, I read and reread the sentence which you and Senator Kennedy debated about the EEOC, and I want to read it again, conceding the fact that the word "un-American" is in quotes and clearly refers to something else. But the sentence in your memo reads in its entirety as follows: "We should ignore that assertion in any event, as well as the assertion that the EEOC is 'un-American', the truth of the matter notwithstanding."

Now, those are your words but for the quotes "un-American." What did you mean when you say "the truth of the matter notwithstanding?" It suggests that you agree with that conclusion.

Judge ROBERTS. The first part of the sentence refers to that assertion, and that assertion was the assertion that President Reagan had promised to abolish the EEOC. That as the issue that I said in the memorandum I had been unable to determine whether that was accurate or not. It was the truth of that matter, of that assertion that I couldn't verify. The reference to "un-American" was not my language. It was the language of the person who complained and said, "You need to do something about the EEOC," and our response was what we're going to do is make sure that the EEOC is not interfered with because of your complaints.

Now, he may have felt that he was being treated in an "un-American" way and wanted something done about it. But it was not my view, and again, the language was in quotes to make clear that it wasn't my view.

Senator DURBIN. I do not question the fact the language was in quotes, but I think there is at least some ambiguity in what was said. It might have been said more precisely if the conclusion that we are suggesting does not reflect your views.

If I could I would like to return to a discussion that we had yesterday about a very fundamental question. I asked you yesterday about a case that you handled as an attorney involving a large HMO, in which you advanced a very narrow reading of an Illinois State law. Had your position prevailed, millions of American families stood the risk of losing coverage for their health insurance. You did not prevail, and as you mentioned, it was a closely divided Court, which again underlines the importance of each new Justice as we consider them, but your position did not prevail.

Let me read what you said to me in response. You told me you had no reservations about taking the case, and here is what you said, quote: "My practice has been to take the cases that come to me, and if the other side in that case had come to me first, I would have taken their side," end of quote. I want to follow up on this.

You have taken some pride in the pro bono cases that you have taken, and I am glad you have. I think that is part of being a professional, accepting pro bono cases. You were asked the other day about your participation in the 1996 case of *Romber* v. *Evans*, a landmark case that struck down a Colorado law that would have taken away the rights of gay and lesbian Americans. You gave some legal advice to the lawyer in this case who was trying to uphold the rights of those with different sexual orientation. So I will ask you, if the other side had come to you first and said, "Mr. Roberts, we would like you to defend the State amendment that took away the rights of gays and lesbians." Would you have taken the case?

Judge ROBERTS. It's a hypothetical question. Of course, I think I probably would have, Senator. I actually have done pro bono assistance for States on a regular basis through the National Association of Attorneys General, and if I'm remembering right, the State would have been the other party in that case. I think that's right. And through the State and Legal Center, I participate in moot courts for the States on a regular basis. And a big part of my practice was representing States, so if a State, in that case, Colorado, had come to me and said, "We have a case in the Supreme Court, would you defend it?" I might—again, I can't answer without knowing the full details and all that, and I have to look at the legal issues. And I would not, and never have, presented legal arguments that I thought were not reasonable arguments, doesn't necessarily mean they're going to prevail, and I have certainly lost my share of cases.

But it has not been my general view that I sit in judgment on clients when they come to me. I viewed that as the job of the Court when I was a lawyer. And just as someone once said, you know, it's the guilty people who really need a good lawyer, I also view that I don't evaluate whether I as a judge would agree with a particular position when somebody comes to me for what I did, which was provide legal advice and assistance, particularly before the Supreme Court.

Senator DURBIN. I have a long series of hypotheticals that I will not get into, such as, would you have represented that D.C. Government against the welfare families? You spoke to me of your pride in representing the poor people in the District of Columbia on their welfare rights. I could ask you whether you would have

taken the side of the Board of Education in the *Brown* case. Would you have taken the side of the State of Virginia in *Loving*? I could have gone through all of those hypotheticals. The purpose is, and the purpose of my original question was this: all of us are trying to get down to what are your core values, where would you draw lines, saying "I do have principles and values. There are certain things I would not use my legal skills to do because they conflict with those values."

If this is just a process, a legal contest, and you will play for any team that asks you to play, it raises a question about where would you draw the line if you would ever draw the line? And I think that is why I have asked this question, and I want to give you an opportunity now to tell us.

Senator Feinstein asked a little earlier today about the *Plyler* case. You came a little bit further than you did last night in saying—and I think this is a very safe assertion—"Children deserve an education." That is not a headline. But I think that what I would like to get to is the original question here. As a lawyer, do you have standards and values as to the causes and beliefs that are so important to you where you would draw a line?

Judge ROBERTS. Well, let me try to answer it this way, Senator. People become lawyers for different reasons, all perfectly good and noble, and legitimate. People who are interested, for example, in protecting the environment often will go into the law and practice environmental law because they think that is an effective way to advance a cause in which they passionately believe.

People who are committed to the cause of civil rights may become lawyers and become civil rights lawyers and present and press those causes because they are causes in which they passionately believe.

I became a lawyer or at least developed as a lawyer because I believe in the rule of law. The point I was trying to emphasize in my opening statement, that all of these other areas—you believe in civil rights, you believe in environmental protection, whatever the area might be, believe in rights for the disabled, you're not going to be able or effectively to vindicate those rights if you don't have a place that you can go where you know you're going to get a decision based on the rule of law. It was the point I was making with respect to the Soviet Constitution, filled with wonderful-sounding rights, absolutely meaningless, because people who suffered under that system had no place they could go in court and say, "My rights have been violated." So that's why I became a lawyer, to promote and vindicate the rule of law.

Now, that means that that's at issue and play regardless of what the cause is, and that's why, as we were talking yesterday, you can go in my record and you'll see, yes, I've advanced cases promoting the cause of the environment. As I was discussing earlier, I've been on both sides of the affirmative action issue. Take even technical areas like antitrust. I've defended corporations; I've sued corporations. In each case, I appreciated that what I was doing as a lawyer, particularly as a lawyer before the Supreme Court, was promoting the rule of law in our adversary system. And I viewed that as—I appreciate that to some they may say, well, that sounds like you're a hired gun, to be disparaging, you are going to take the side

of whoever comes in the door first. I think that's a disparaging way to capture what is, in fact, an ennobling truth about our legal system that lawyers serve the rule of law, above and beyond representing particular clients. That's why when the Chief Justice welcomes new members to the Supreme Court bar, he welcomes them as members of the bar and as officers of the court, because that is the important role that they play. That has significance for what types of arguments they can present and how they can present them.

Senator DURBIN. Well, if I might say, Judge, if you have made one point many times over the course of the last 3 days, it is that as a judge you will be loyal and faithful to the process of law, to the rule of law. I think that is without question from what you have said. I accept that on its face.

But the questions which we continue to ask you really try to go beyond that, because I said at the outset that I thought one of the real measures as to whether or not you should be on the Supreme Court goes back to a point Senator Simon had made: Would you restrict freedom in America or would you expand it?

When you are defending gays and lesbians who are being restricted in their rights by the Colorado amendment, you are trying, from my point of view, to expand freedom in America. That to me is a positive thing. That is my personal philosophy and point of view.

But then when you say, "If the State would have walked in the door first to restrict freedoms, I would have taken them as a client, too," I wonder, Where are you? Beyond loyalty to the process of law, how do you view this law when it comes to expanding our personal freedom? Is it important enough for you to say in some instances, "I will not use my skills as a lawyer because I don't believe that that is a cause that is consistent with my values and belief"? That is what I have been asking.

Judge ROBERTS. Well, and the—I had someone ask me in this process—I don't remember who it was, but somebody asked me, you know, "Are you going to be on the side of the little guy?" And you obviously want to give an immediate answer, but as you reflect on it, if the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, well, then, the big guy is going to win, because my obligation is to the Constitution. That's the oath. The oath that a judge takes is not that I will look out for particular interests, I'll be on the side of particular interests. The oath is to uphold the Constitution and laws of the United States, and that's what I would do.

Senator DURBIN. Would you at least concede that you would take into consideration that in our system of justice the race goes to the swift, and the swift are those with the resources, the money, the lawyers, the power in the system, and that many times the powerless, the person who has struggled and clawed their way to your courtroom, went through a wall of adversity which the powerful never had to face? Is that part of your calculation?

Judge ROBERTS. Absolutely, and it is, again, what's carved above the doors to the Supreme Court: "Equal Justice Under Law." And the judicial oath talks about doing justice without regard to per-

sons, to rich and to poor. And that, of course, is critically important. You do have to appreciate that there are going to be interests who, for one reason or another, don't have the same resources as people on the other side. The idea is not to give the case to the side with the best resources, the side with the best lawyers, the side with the most opportunity to prepare and present. It is to decide the case according to the law and according to the Constitution. And as case after case in the Supreme Court shows, that's often the prisoner who's sitting in his cell and writes his petition out longhand. Sometimes the Constitution is on that person's side and not on the side of the corporation with the fancy printed brief. But the judge's obligation is to appreciate that the rule of law requires that both of those be treated equally under the law.

Senator DURBIN. Judge Roberts, thank you very much.

Mr. Chairman, thank you.

Judge ROBERTS. Thank you, Senator.

Chairman SPECTER. Thank you, Senator Durbin.

Judge Roberts, questions will be submitted to you within 24 hours, and you have already stated your commitment to answer the questions. And you can't be totally open-ended because you don't know how many questions there will be.

Senator GRAHAM. Mr. Chairman?

Chairman SPECTER. I have a strong inclination that however many questions there are, you will be able to answer them in appropriate course.

We are now going to move into a closed session. Senator Graham?

Senator GRAHAM. Yes, Mr. Chairman.

Chairman SPECTER. You are recognized.

Senator GRAHAM. Just for a couple minutes. I am trying to compile questions from the past where the answers were very similar to the answers of Judge Roberts about "I can't comment," "I can't answer your question because it may compromise my integrity," the judge in the future. And I would ask for permission of the Committee to get a chance to organize this because there are so many volumes. And what I would like to be able to demonstrate to the Committee is that the pattern that he has displayed in terms of saying "I can't give you an answer because it may disqualify me" is not unique to the Senate and very similar to past nominations, and I have got some examples of that.

But if I may—and I know we have been here—and Lord knows this guy has been through the wringer—I just want to comment a little bit about an unhealthy area I think we find ourselves in, in the last hour. Most of us are lawyers, and I would hate to be judged by the people I have represented in the past, totally. I have represented some people that are not very nice. But I gave them my all. I have represented people on Air Force bases that were so unpopular, Judge Roberts, that no one would eat with me, because it was my job as the area defense counsel to represent that person.

Your heart. Nobody can question your intellect because it would be a question of their intellect to question yours.

[Laughter.]

Senator GRAHAM. So we are down to the heart. And is it all coming down to that? Well, there are all kinds of hearts. There are

bleeding hearts, and there are hard hearts. And if I wanted to judge Justice Ginsburg on her heart, I might take a hard-hearted view of her and say she is a bleeding heart. She represents the ACLU. She wants the age of consent to be 12. She believes there is a constitutional right to prostitution. What kind of heart is that? Well, she has a different value system than I do, but that doesn't mean she doesn't have a good heart. And I want this Committee to understand that if we go down this road of putting people's hearts in play, and the only way you can have a good heart is adopt my value system, we are doing a great disservice to the judiciary.

Thank you.

Chairman SPECTER. Thank you very much, Senator Graham.

We are now going to go into executive session under Senate Rule XXVI to review the FBI report, which is standard for all judicial nominees, Supreme Court or court or appeals or district court, and to consider any other investigative issue that members of the Committee may have.

During Senator Biden's tenure as Chairman, the practice was initiated of conducting routine closed sessions with each nominee for the Supreme Court to ask the nominee on the record under oath about all investigative charges against the person if there were any. These hearings are routinely conducted for every Supreme Court nominee, even where there are no investigative issues to be resolved. In so doing, those outside the Committee cannot infer that the Committee has received adverse confidential information about a nominee.

The Committee and Judge Roberts will now proceed to Dirksen 226, which is right down the hall—

Senator LEAHY. Mr. Chairman, I understand, also following our practice, the Republican counsel and the Democratic counsel, who normally work together on such issues, will brief the Committee.

Chairman SPECTER. Senator Leahy, that is correct.

Senator LEAHY. Thank you.

Chairman SPECTER. We expect to return to hear our first outside witness, the American Bar Association, just as soon as we conclude this. We want to move ahead as promptly as we can, so those witnesses should be available, and we will now adjourn to 226 in this building.

[Whereupon, at 11:07 a.m., the Committee proceeded to executive session.]

[Whereupon, at 11:38 a.m., the Committee reconvened in open session.]

Chairman SPECTER. The Committee went into executive session and reviewed the background investigations on Judge Roberts, which were routine. Senator Leahy and I have been delegated to report that there are no disqualifying factors. We had Judge Roberts in for a very short discussion and we returned to the hearing room to move ahead with our hearing.

Senator Leahy?

Senator LEAHY. I concur with that. The practice of this was begun with the prior Chairman. I think it is good to have it as a routine. We do this through the Supreme Court nominees we meet, go over the background. I agree with the Chairman, there was

nothing in the background of a disqualifying nature and it was pretty routine. I mention this because I don't want anybody to read more into what is just, if anything, a housekeeping chore in this case.

Chairman SPECTER. Thank you very much, Senator Leahy.

We have six panels of witnesses, a total of 31 witnesses. It is our hope and expectation that we can conclude our work today. And while Senators have rights to question, we customarily have a 5-minute rule. To the extent that we can move ahead promptly, it would be appreciated.

We start first with the American Bar Association. The Chairman of the ABA Standing Committee on the Federal Judiciary is Mr. Steve Tober, undergraduate and law degrees from Syracuse University, law review, deeply involved in the New Hampshire and New England legal communities, former Chairman of the Committee to Redraft New Hampshire's Rules of Professional Conduct.

Thank you for joining us, Mr. Tober, and thank you for your service. And now we look forward to your testimony.

All witnesses will be limited to 5 minutes, which is standard under our rules.

**STATEMENT OF STEPHEN L. TOBER, CHAIRMAN, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, PORTSMOUTH, NEW HAMPSHIRE; ACCOMPANIED BY THOMAS Z. HAYWARD, PAST-CHAIRMAN, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, CHICAGO, ILLINOIS; AND PAMELA A. BRESNAHAN, D.C. CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION, WASHINGTON, D.C.**

Mr. TOBER. Thank you, sir.

Mr. Chairman and members of the Committee, my name is Stephen L. Tober, of Portsmouth, New Hampshire, and it is indeed my privilege to chair the ABA Standing Committee on the Federal Judiciary. I am joined by Thomas E. Hayward, Jr., of Chicago, sitting to my right, my immediate predecessor, and by Pamela Bresnahan, who was the 2004–2005 District of Columbia Circuit member, also of the 2004–2005 committee.

For more than 50 years, the ABA Standing Committee has provided a unique and comprehensive examination of the professional qualifications of candidates for the Federal bench. It is comprised of 15 distinguished lawyers who represent every judicial circuit in the United States and who individually volunteer hundreds of hours in public service to our profession. This Committee conducts a thorough, non-partisan, non-ideological peer review, and it does so by using long-established standards that measure the nominees' integrity, professional competence, and judicial temperament. In the sense that a major portion of the investigation consists of scores and scores of interviews with judges and lawyers, it is very much the voice of the bench and bar of this Nation.

Over the course of its history, the ABA Committee has never proposed a candidate of its own, nor do we do so now. Its function, rather, is to receive the name of each nominee, investigate and evaluate the professional qualifications of each nominee, and then vote. While factors used in considering lower Federal court nomina-

tions obtain here as well, the committee's investigation of a nominee for the United States Supreme Court is further based on the premise that such an individual must possess exceptional professional qualifications. The significance, range, and complexity of issues that such a nominee will face on that Court demands no less.

As a result, our approach to a Supreme Court nomination has two procedural differences. First, all circuit members of the Committee conduct confidential interviews within their circuits; and second, the Committee works with at least two reading groups composed of a team of academicians and a team of practitioners who analyze the nominee's writings in detail and report their findings to the full committee.

After the comprehensive investigation is completed and assembled, each member of the Standing Committee reviews the report thoroughly and individually evaluates the nominee, using three rating categories: well-qualified, qualified, and not qualified. Needless to say, to merit an evaluation of well-qualified, the nominee must possess legal ability, experience, and reputation of the highest standing.

With respect to Judge Roberts's nominations to the Supreme Court, the Standing Committee has rated him twice. When he was first nominated by the President to be Associate Justice, on July 29th, the 2004–2005 committee, chaired by Tom Hayward, undertook a complete evaluation and measured the nominee's integrity, professional competence, and judicial temperament. That evaluation included interviews with more than 300 judges, lawyers, and community members throughout the Nation; a review of his decisions and selected substantive memoranda from the National Archives by both our reading groups and individual circuit members; and an in-person detailed interview with Judge Roberts. Based upon that evaluation, the 2004–2005 Committee found that Judge Roberts was unanimously well-qualified to be Associate Justice of the Supreme Court.

When the President thereafter nominated Judge Roberts to be Chief Justice, on September 6th, the 2005–2006 committee, which took office in mid-August with seven new members, performed a supplemental evaluation. That supplemental effort was focused solely upon the nominee's qualifications to perform the administrative and leadership skills incumbent upon the Office of Chief Justice of the United States. This new Committee had, essentially, a handful of days to perform that supplemental evaluation. Nonetheless, that supplemental effort included interviews with well over 80 judges, lawyers, and community members; a review of the materials gathered in the original report; and an in-person interview with Judge Roberts. Based upon that supplemental evaluation, and even with the change in membership, Judge Roberts was found by the 2005–2006 Standing Committee to be unanimously well-qualified to perform the administrative and leadership responsibilities required of the Chief Justice of the United States.

These two ratings, when considered together and in conjunction with the accompanying letter to your Committee, which we ask to be made part of this record, provide the Senate Judiciary Committee with a comprehensive, independent peer review.

Allow me to summarize: The ABA Standing Committee is fully satisfied that Judge Roberts meets the highest standards required for service as Chief Justice of the United States. He has the admiration and respect of his colleagues on and off the bench. And he is, as we have found, the very definition of collegial.

Mr. Chairman, the goal of the ABA Standing Committee has always been and remains in concert with the goal of your Committee, to assure a qualified and independent judiciary for the American people.

Thank you for the opportunity to appear here. We are more than happy to entertain any questions.

[The prepared statement of Mr. Tober appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Tober, for your testimony. Thank you, Ms. Bresnahan, for your contribution; Mr. Hayward, for your contribution. We thank the ABA for your hard work and a very comprehensive report. Obviously a great deal of effort has gone into it, with the very extensive interviews which you have conducted.

Senator Leahy?

Senator LEAHY. They are probably going to feel left out and disappointed if we don't grill the three of them the way we grilled Judge Roberts the last few days.

Ms. BRESNAHAN. I don't think so.

Senator LEAHY. But on their behalf, I am willing to waive that.

Mr. TOBER. We will take that risk, Senator.

Chairman SPECTER. A vote has just begun. I think we can move ahead into the next panel unless any of the members have any questions which are important to be asked.

Senator Biden?

Senator BIDEN. I just want to reiterate, we know how much work this entailed. I mean, it was an incredible amount of work. And truly, we thank you. There have been debates in this Committee in the past about the relevance and importance of the ABA recommendation. I think it is important, what you do; I think we all do now. And I want to thank you. It is a whole lot of work.

And thank you, Steve, for your efforts.

Mr. TOBER. Thank you, sir.

Chairman SPECTER. Senator Hatch?

Senator HATCH. Let me just second that. I have certainly appreciated over the years the good work you are doing. I have to say that over the last number of years it has just been exemplary in every way. I just want you all to know that, and we appreciate it. We know all the effort and especially, Ms. Bresnahan, the effort that you have put in on a number of the judges that have come up in this area. You have worked your heart out, and I have to say I want to compliment.

Ms. BRESNAHAN. Thank you, Senator Hatch.

Chairman SPECTER. Senator Sessions?

Senator SESSIONS. Mr. Chairman, I would also like to thank these members for their work and would just point out that, in the course of making these evaluations, you talked to the judges, lawyers on both sides, against whom they litigated. You know from your own personal experience normally who will give a fair and

honest evaluation and place good judgment on a person's professional skills. So I do think it provides a lot of advantages for our Committee, and I salute that.

Secondly, let me ask if one of you would comment just as a professional lawyer who has been involved in the practice for many years—how do you feel about the tendency that sometimes occurs to judge a lawyer by their client rather than how they perform honorably and effectively in court? Would you share your thoughts about that subject?

Mr. TOBER. I guess what I would say, Senator, is that a lawyer is an advocate in the first instance and an officer of the court as well. And the roles are distinct, well-defined. And if we only defended those that didn't need our help, we wouldn't be doing very much for the American people.

The role of a judge is very different. By definition, that person should know nothing about the case coming before them, should have no judgment about the parties either way, and must be fundamentally fair at the end of the day so that litigants and lawyers feel they've been treated properly in our system. The only thing, Senator, that keeps our buildings of justice standing is the respect of the American people, and that is the product that comes out of that building from judges.

Senator SESSIONS. And you would have some concern that if a judge judged lawyers by their clients and didn't give them the full fair hearing in court, I guess you would say.

Mr. HAYWARD. That is true, Senator, and I adopt the comments of Steve Tober. And I would even add to that. You should not judge it by who the lawyer represents because the lawyer, as you have heard over the last several days, is there as an advocate.

Chairman SPECTER. Thank you, Senator Sessions.

Senator LEAHY. I didn't want by my saying there would be no questions to suggest that we don't have appreciation. I have been Chairman of this Committee as have several others here, and we do know the work, we do know a number of instances where you have gone back and followed up on things. It is not easy. I should note for the people who are watching this, you don't get paid for doing this.

Mr. TOBER. That is correct, sir.

Senator LEAHY. In fact, we couldn't begin to afford it, with the fees of some of you, if you did. You do this pro bono. It is a tremendous service to the Senate, but it also a tremendous service to the bar overall, and I thank you for it.

Mr. HAYWARD. Thank you, Senator.

Mr. TOBER. Thank you, Senator.

Ms. BRESNAHAN. Thank you, Senator.

Chairman SPECTER. It is a high compliment to have no questions, or few questions.

Senator SESSIONS. Could I ask one more?

Senator LEAHY. We are diminishing the compliment now.

Senator SESSIONS. With regard to the lawyers and judges and others you interview, isn't it true that sometimes they are more willing to confide in you if they have a problem that they might share with someone else?

Mr. TOBER. I believe that is true, Senator. Tom served 6 years before being Chair. I served three as a member. Pam has been on for three. We all have had experience in talking to judges, to lawyers, to other community members who feel very comfortable understanding that what they tell us remains in the strictest of confidence, and we are able to do a true peer review because of that. I thank the Senator for the opportunity to explain that. We do get information of the most important kind from the process that we engage in.

Chairman SPECTER. Thank you very much, Mr. Tober, Ms. Bresnahan, and Mr. Hayward. Thank you.

Mr. TOBER. Thank you, Mr. Chairman.

Mr. HAYWARD. Thank you, Senator.

Ms. BRESNAHAN. Thank you.

Senator SESSIONS. I think that makes that report particularly valuable, Mr. Chairman.

Chairman SPECTER. I agree with you, Senator Sessions.

We will now call on our second panel, Governor Thornburgh, Congressman Lewis, Commissioner Braceras, Mr. Wade Henderson, Commissioner Kirsanow, and Judge Jones.

While the panel is being seated, just a word of explanation. There is a vote in process, but there is a second vote behind that so that when we break to vote, it is most efficient to vote a second time before returning. But we never know exactly when the first vote is going to end, so our time is best economized if we arrive there about 20 minutes after the vote has started so that we can return as promptly as possible.

Our first witness is the distinguished former Governor of Pennsylvania, Governor Dick Thornburgh, elected in 1978 and reelected in 1982, Attorney General for both President Reagan and President George H.W. Bush, Under Secretary General for Administration and Management of the United Nations, currently counsel for the international law firm of Kirkpatrick and Lockhart and a longstanding friend of mine. It began in 1966 when I campaigned with him in Squirrel Hill when he ran for the Congress of the United States.

Governor Thornburgh, thank you for joining us.

**STATEMENT OF HON. DICK THORNBURGH, FORMER ATTORNEY GENERAL OF THE UNITED STATES, FORMER GOVERNOR OF PENNSYLVANIA, AND COUNSEL, KIRKPATRICK AND LOCKHART NICHOLSON GRAHAM, WASHINGTON, D.C.**

Mr. THORNBURGH. I appreciate that, Mr. Chairman. Thank you, Chairman Specter, other distinguished members of the Judiciary Committee. It is my distinct honor and privilege to be here today in full support of Judge John G. Roberts's nomination to be the 17th Chief Justice of the United States.

I have known Judge Roberts as a friend and colleague for over 15 years and can attest to his outstanding personal characteristics and undoubted integrity. Perhaps more important for present purposes, Judge Roberts's extraordinary legal skills and keen intellect are undisputed.

Before his Senate confirmation by unanimous consent over 2 years ago to be a judge on the D.C. Circuit Court of Appeals, he

was heralded by leading Democrats and Republicans alike as one of the very best and most highly respected appellate lawyers in the nation with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague, both because of his enormous skills and because of his unquestioned integrity and fair mindedness, that from his peers at the D.C. Bar.

I can echo this fanfare because of the deep and lasting respect I have for Judge Roberts's legal abilities that I saw firsthand when he served as the Principal Deputy Solicitor General while I was Attorney General under Presidents Reagan and George H.W. Bush. In that capacity, Judge Roberts represented the U.S. Government in all manner of cases before the Supreme Court, where he was charged to defend, among other things, legal attacks on the constitutionality of Acts of Congress. John represented the Government in 39 cases before the Supreme Court while in the Solicitor General's Office.

He is a truly remarkable lawyer—bright, witty, capable, respectful, and creative. I had the good sense to enlist him as my coach for my final appearance before the Supreme Court myself in 1991 and we won the case.

On the Court of Appeals for the last 2 years, Judge Roberts has demonstrated in practice the principles he has articulated as a young attorney working at the Department of Justice.

Reflecting on the role of judicial restraint as a guiding standard for how courts should approach the judicial decisionmaking process, Judge Roberts explained in the materials he drafted for then-Attorney General William French Smith, and I quote, "The phrase 'judicial restraint' may mean many things to many people, but at its core, it is a notion that Federal courts must scrupulously avoid engaging in policy making, which is committed under our system of government to the popularly elected and accountable branches of the States."

"Judicial activism," Judge Roberts stated, "is neither conservative nor liberal." He recognized that throughout history and to this day, both liberal and conservative interests have sought to enlist an activist judiciary in the achievement of goals which were not attainable through normal political processes. Today, different groups urge judges to substitute their own policy choices for those of Federal and State legislatures, but the evils of judicial activism remain the same regardless of the political ends the activism seeks to serve. So said Judge Roberts.

Indeed, he sagely recognized that the greatest threat to judicial independence occurs when the courts flout the basis of their independence by exceeding their constitutionally limited role and engage in policy making.

Let me highlight just one of Judge Roberts's D.C. Circuit opinions, which clearly reflects the correctness of his approach that cases should be decided upon the text of the statute, the Constitution, and the particular facts before the court. I know that most members of this Committee are familiar with this case, which has been nicknamed the "french fry case."

The facts are straightforward. The D.C. City Code made it illegal to eat or drink in a Metro station and the local transit authority imposed a zero-tolerance policy for violation, since it had received

complaints about bad behavior in certain Metro stations. A 12-year-old girl who stopped at a fast-food restaurant on the way home from school made the mistake of eating a french fry while waiting for her friend to purchase a farecard. She was arrested and hauled off to jail for booking, and ultimately, some three hours later, delivered to the custody of her parents.

Was this bad policy? Yes. In fact, after the publicity surrounding the case, the City Council adopted a new rule whereby they would merely issue citations to juvenile offenders rather than arresting them. Was the policy unconstitutional? Both the District Court judge and the unanimous panel of the D.C. Circuit agreed that it was not because age, or more specifically youth, is not a suspect classification under the Constitution or any Act of Congress and because probable cause existed to support the arrest, since she did, in fact, eat the french fry in violation of the city's zero-tolerance policy.

Why discuss such a seemingly silly case? I think that in the opening paragraph of the decision, which I will quote, Judge Roberts forcefully establishes his understanding of the court's limited role while at the same time expressing hope that the policy is changed at the appropriate level.

He said, "No one is very happy about the events that led to this litigation. A 12-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed and she was transported in a windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later, all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout her ordeal. The District Court described the policies that led to her arrest as foolish, and indeed, the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the District Court, we conclude that they did not."

Judge Roberts has also stated repeatedly his belief that cases should be decided on the merits, not on the basis of a judge's personal opinion. As he expressed as recently as this past July in *United States* v. *Jackson*, sentiments do not decide cases. Facts and the law do. Understanding that most basic principle highlights the significant difference that exists between a lawyer acting as an advocate on behalf of a client and the role of a judge charged with deciding cases fairly and objectively.

But all too often in the soundbites that attach to reviews of Judge Roberts's record, one group or another will state that Judge Roberts doesn't support, for example, the rights of criminal defendants, environmental enactments, or the civil rights laws, or most egregiously, that Judge Roberts condoned the bombing of women's clinics. The supposed bases for these claims is gleaned, interpreted, and misconstrued by these critics from their interpretation of arguments that Judge Roberts made as a lawyer, both in private practice and for the Government.

The distinguished members of this Committee can easily see through this argument, for we all know and appreciate that lawyers are duty-bound to be zealous advocates for their clients. Cases argued by Judge Roberts as a Government lawyer or a lawyer in private practice, in my opinion, say little about how Judge Roberts as a Supreme Court Justice will approach cases, other than as he has all his professional life. He approaches matters with great skill, dedication, and earnestness.

It is Judge Roberts's record as a jurist that is most impressive and most persuasive. It is a record that speaks of a judge who understands the role of the judiciary, who approaches each case independently and objectively, who respects history and precedent, who interprets the law based on the facts before him, who does not engage in judicial policymaking, and who will make this country proud as the next Chief Justice of the United States.

I sincerely appreciate the Committee's invitation to speak today and the Committee's careful and deliberate consideration of Judge Roberts's nomination. He is, in my view, an exemplar of what we should seek in our next Chief Justice. Thank you.

[The prepared statement of Mr. Thornburgh appears as a submission for the record.]

Chairman SPECTER. Thank you. Thank you very much, Governor Thornburgh.

Congressman Lewis is voting at the moment.

Do we know how much time is left on the vote? Well, the time has expired, so we are going to go vote and we will return just as soon as we can. The Committee stands in brief recess.

[Recess 12:03 p.m. to 12:31 p.m.]

Chairman SPECTER. The hearing will resume.

Our next witness is Congressman John Lewis of Georgia, an architect of the historic march on Washington in August of 1963; has been the Representative for Georgia's Fifth Congressional District since November of 1986 when he was elected, took office in January; a B.A. in religion and philosophy from Fisk University, graduate of American Baptist Theological Seminary.

Thank you for crossing the Rotunda today, Congressman Lewis, and we look forward to your testimony.

## STATEMENT OF HON. JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Representative LEWIS. Thank you very much, Mr. Chairman.

Mr. Chairman and distinguished members of the Committee, I am honored to be here today. As many of you know, this is not the first time I have come before this Committee. I was here 14 years ago when the nomination of another Justice to the Supreme Court moved me to speak out. I am here today with the hope that this Committee will hear my words and take heed.

When I was growing up in rural Alabama I saw those signs that said "White Men, Colored Men," "White Women, Colored Women." I used to ask my parents and my grandparents, "Why racism? Why racial discrimination?" And they would tell me, "Don't get in trouble. Don't get in the way."

As a participant in the civil rights movement of the 1960's I decided to get in the way. I was beaten, arrested and jailed more

than 40 times for peaceful, nonviolent protests against legalized segregation in the South.

During that time I saw American citizens with their head cracked open by nightsticks lying in the streets, weeping from tear gas, trampled by horses and attacked by police dogs, calling helplessly for medical aid.

Back then, legalized discrimination was enforced by State and local officials. The Federal Government was our only hope, and we depended on the Supreme Court to act as referee in the struggle for justice and civil rights.

I remember on one occasion when the Court issued a decision on public transportation, and a elderly black woman was overheard to say, "God Almighty has spoken from Washington."

In 1965, Jurist Roberts was only 10-years-old. He may be a brilliant lawyer, but I wonder whether he can really understand the depth of what it took to get the Voting Rights Act passed. The right to vote is precious, almost sacred. It is the most powerful nonviolent tool we have in a democratic society.

As many of you know, I gave a little blood on the Edmund Pettus Bridge, but some of my friends and colleagues gave all they had, their very lives for the right to vote. People stood day after day in unmovable lines to pass their so-called literacy tests. They had to interpret certain sections of the Constitution, count jelly beans in a jar or the number of bubbles in a bar of soap to register to vote.

I feel that if Judge Roberts is confirmed to be the Chief Justice of the United States, the Supreme Court would no longer hear the people's cries for justice. I feel that the leadership of the Court will promote politics over the protection of individual rights and liberties. If the Federal Courts had abandoned us in the civil rights movement in the name of judicial restraint, we might still be struggling with the burden of legal segregation in America today.

Jurist Roberts's memos reveal him to be hostile towards civil rights, affirmative action and the Voting Rights Act. He has even said that Voting Rights Act violations, and I quote, "should not be made too easy to prove." Under the Court's decision in *Mobile* v. *Bolden*, the Court weakened the Voting Rights Act. Under this ruling many political subdivisions would have been permitted to maintain at large election systems, diluting minority voting strength. This may be less obvious than the violence and intimidation of 1965, but it is no less harmful to our Nation's principles of inclusive democracy.

Section 2 has been successful in reducing barriers, and has increased the number of minority elected officials. There is no doubt, Mr. Chairman, in my mind, that had Judge Roberts's narrow reading of the Voting Rights Act prevailed, fewer people of color would be serving in Congress and at both the State and local level today.

As our Nation is still reeling from Hurricane Katrina, the timing of these hearings could not be more significant. What happened in New Orleans and along the Gulf Coast of Alabama, Mississippi and Louisiana exposed the issue of race, class and fairness yet again. We are still a Nation deeply divided by race and class.

All Americans, every race or every religion or nationality, whether they are women or men, gay or straight, or people with disabil-

ities, all of us need equal access to a fair and independent judiciary to assure equal justice under the law.

The stakes are higher than ever. We cannot afford to elevate an individual to such a powerful lifetime position whose record demonstrates such a strong desire to reverse the hard-won civil rights gains that so many of us sacrificed so much to achieve. We have come a great distance. We cannot afford to stand still. We cannot afford to go back. We must go forward to the creation of one America.

My friends, Members of the Senate, I implore you to get in the way.

Thank you, Mr. Chairman.

[The prepared statement of Representative Lewis appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Congressman Lewis for those very passionate remarks.

Our next witness is Commissioner Jennifer Braceras, U.S. Commission for Civil Rights; taught at the Suffolk Law School as a Visiting Fellow at the Independent Women's Forum; in the year 2000, Massachusetts Lawyers Weekly rated her as one of the State's top ten lawyers of the year. Practiced law with the Boston firm of Ropes & Gray.

Thank you for joining us, Commissioner Braceras, and we look forward to your testimony.

**STATEMENT OF JENNIFER CABRANES BRACERAS, ESQ., COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS AND VISITING FELLOW AT THE INDEPENDENT WOMEN'S FORUM, BOSTON, MASSACHUSETTS**

Ms. BRACERAS. Thank you.

Chairman Specter, Senator Leahy, members of the Committee, my name is Jennifer Braceras. I am a resident of Massachusetts and a member of the Massachusetts Bar and the Hispanic National Bar Association. I am, as you said, a Visiting Fellow with the Independent Women's Forum, and I am privileged to serve by appointment of the President as a Commissioner on the United States Commission on Civil Rights.

I am honored to be here today to support the nomination of Judge John Roberts to be Chief Justice of the United States. Although I do not know Judge Roberts personally, I am generally familiar with his background and record. His distinguished career and his testimony before this Committee make clear to even the most casual observer that Judge Roberts is eminently well qualified for the post.

Despite these obvious qualifications, however, opponents of Judge Roberts criticize his record on a variety of matters that loosely fall under the umbrella of civil rights. These critics allege that Judge Roberts's confirmation to be Chief Justice will somehow be harmful to women and minorities. These charges are at best misplaced, and at worst deliberately misleading attacks that would have been leveled against anyone nominated by this President.

There are at least five reasons why such criticisms are without merit. First, many of the specific criticisms of Judge Roberts's record involve positions he advocated as a lawyer in the adminis-

trations of Presidents Ronald Reagan and George H.W. Bush. Some of the subjects that have elicited criticism by interest groups include school busing, racial quotas, the revision of the Voting Rights legislation to seek equal electoral results as opposed to equal access, and the theory of comparable worth.

Published reports indicate that the positions taken by Judge Roberts in this capacity as a lawyer for the Reagan and Bush administrations are broadly consistent with the views of the American people and fully within the political mainstream. But even if they were not, the arguments expressed by Judge Roberts as a young man decades ago are arguments on behalf of the administrations for which he worked, not the views of a neutral umpire asked to rule on particular legislation.

Judge Roberts's view of the judicial function does not contemplate the imposition of his own policy preferences from the bench. His commitment to judicial restraint should give Americans of all political viewpoints great comfort.

Second, it is clear from the public record that Judge Roberts supports the vigorous enforcement of our Nation's anti-discrimination laws. In his executive branch memos Judge Roberts repeatedly defended the "bedrock principle of treating people on the basis of merit without regard to race or sex." And he argued numerous times for the executive branch to prosecute claims of unequal treatment to the fullest extent of the law.

Third, as an advocate, Judge Roberts has been on both sides of controversial civil rights questions. This broad experience should give the American people faith in Judge Roberts's ability to understand the complexity of controversial issues.

Fourth, it is clear that Judge Roberts has a strong commitment to equal opportunity and to the anti-discrimination principle embodied in the 14th Amendment and codified in the Civil Rights Act of 1964. He has written—and I quote—"Before the law, we do not stand as black or white, Gentile or Jew, Hispanic or Anglo, but only as Americans entitled to equal justice."

Certainly there is nothing extreme or unusual about this field. To the contrary, it embodies the American ideal. It reflects the aspirations of the 14th Amendment which were given life by the Court in *Brown* v. *Board of Education* and by the framers of the 1964 Act.

Finally, and perhaps most importantly, irresponsible rhetoric that a Court led by Judge Roberts would be hostile to civil rights misinterprets the role of the Court in our democracy. This rhetoric is based on several deeply flawed premises. First, such rhetoric presumes that it is the job of the Court to create new rights in response to evolving circumstances. It is not. Our Constitution guarantees certain basic rights which the courts must, of course, enforce. Legislatures, both State and Federal, may expand upon those rights or create new ones, provided that they act within the scope of their constitutional authority. If citizens are in any way dissatisfied with the scope or reach of current law, it is to their democratically elected representatives, not the courts, that they must turn.

Second, Judge Roberts's critics erroneously presume the Court should interpret all statutory language expansively. That is also not their role. Their role is to apply statutes as written.

Chairman SPECTER. Commissioner Braceras, could you summarize the balance of your statement, please?

Ms. BRACERAS. Sure.

Chairman SPECTER. Your full statement will be made a part of the record, as will all statements.

Ms. BRACERAS. The Supreme Court is neither the first nor the last word on civil rights, or any other issue, for that matter. Each of the three branches of Government has a role to play, and Judge Roberts respects and understands these distinct roles.

In conclusion, I submit that Judge Roberts's critics have it wrong. Judge Roberts's commitments to the vigorous enforcement of our Nation's civil rights laws and to the bedrock principles of judicial restraint, judicial review, and equal opportunity will make him a Justice of whom all Americans can be proud. And I urge you to confirm him as the next Chief Justice of the United States.

[The prepared statement of Ms. Braceras appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Commissioner Braceras.

Senator Leahy has asked for recognition before we complete the panel. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

A classmate of mine from law school, John Dean, was supposed to testify, but when we changed the schedule this week he was unable to join us. I just want to make sure his testimony is put in the record at the appropriate place.

Chairman SPECTER. Without objection, it will be made part of the record.

Our next witness is Mr. Wade Henderson, who is the Director of the Leadership Conference, a longstanding leader on civil rights. Before his current position, he was Washington Bureau Director of the NAACP, serves as the Rauh Professor of Public Interest Law at the Clarke School of Law, a graduate of Howard University and the Rutgers University School of Law. I know you talked to David Brog about a postponement of the hearing, and then events overtook us, and postponement did take place. Thank you for joining us today, Mr. Henderson, and the floor is yours.

**STATEMENT OF WADE HENDERSON, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, D.C.**

Mr. HENDERSON. Well, good afternoon, Mr. Chairman, and members of the Committee, and thank you, Mr. Chairman, for your courtesies in giving us an additional week because of the aftermath of Hurricane Katrina.

Again, my name is Wade Henderson, and I am the Executive Director of the Leadership Conference on Civil Rights. The Leadership Conference is the Nation's premier civil and human rights coalition and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957. The Leadership Conference's 190 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians, and civil liberties and human rights groups. It is a privilege to rep-

resent the civil rights community in addressing the Committee today.

Based on reasons I will highlight here today, discussed at greater length in my written testimony, and after a careful review of John Roberts's available record, including his testimony before this Committee, the Leadership Conference is compelled to oppose his confirmation to the position of Chief Justice of the United States.

In the last several days of testimony, Judge Roberts has failed to distance himself from the anti-civil rights positions he has advocated. We have heard nothing demonstrating his commitment to ensuring that the Federal Government will continue to play a strong role in protecting civil and human rights of all Americans. To the contrary, all evidence indicates that Judge Roberts would use his undeniably impressive legal skills to bring us back to a country that most of us wouldn't recognize, where States' rights trump civil rights, where the Federal courts or Congress can see discrimination but are powerless to remedy it. This is not the America in which most Americans want to live.

As we have seen over the past 2 weeks in the wake of Hurricane Katrina, when the Federal Government's role is diminished, the least among us suffer most. Our Nation fought a Civil War over the meaning of equality in our Constitution and the role of the Federal Government in ensuring that equality, and then engaged in a great debate about the power of the Federal Government to enforce the 13th, 14th, and 15th Amendments. Reconstruction failed, and African-Americans were returned to a position of near servitude because those who advocated for weak Federal power won.

It wasn't until decades later when the Court outlawed State-sponsored segregation in *Brown* v. *Board of Education*, followed by the enactment of a series of civil rights statutes by Congress in the 1960's that are now the bedrock of our national commitment to equality of opportunity, that the Federal Government stepped in as a champion of equal justice under law.

However, in recent years, we have seen the rise of a political movement that is an eerie parallel to the post-Reconstruction period. Today, there are those who in the name of judicial restraint advocate for a Federal retreat in the area of civil rights. While our Constitution speaks of fundamental rights, some oppose the Federal courts or Congress using the Constitution to protect individuals against violations of those rights. John Roberts has written that Federal courts should not be empowered to invalidate "widely accepted State practices," even if such practices prevent African-Americans and others from having equal opportunity in voting. If his view had prevailed, our country's voting rights revolution would never have happened.

Would Judge Roberts have approved of poll taxes or literacy tests because those were "widely accepted practices"? Despite the strong recommendation from a very conservative member of the Reagan administration's civil rights team, John Roberts advised against intervention in a sex discrimination case against the Kentucky prison system, contending that discriminatory treatment of men and women in the prison's vocational program was "reasonable in light of tight prison budgets."

Would Judge Roberts then apply the same argument to equal educational opportunities for women generally? Could States in the name of saving money refuse to provide equal health services to men and women? In John Roberts's view, Congress could exclude all school desegregation cases from the jurisdiction of the Federal courts. This is, in effect, a pre-*Brown* vision that fits squarely into the objective of preventing the Federal courts from fulfilling the promise of the 14th Amendment.

As many commentators have made clear, John Roberts is a gifted and intelligent lawyer and advocate, but that is not the test for determining whether he is fit to lead the highest Court in the land. Rather, the test is whether John Roberts has demonstrated he has committed to the fundamental principles on which our country was founded and whether his vision of America matches the expectations of mainstream Americans. John Roberts has failed this test. Therefore, the Leadership Conference on Civil Rights has no choice but to oppose his confirmation. America can and should do better.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Henderson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Henderson.

Our next witness is Commissioner Peter Kirsanow of the U.S. Commission on Civil Rights, had been labor counsel for the City of Cleveland; he is the Chair of the Board of Directors of the Center for New Black Leadership, on the Advisory Board of the National Center for Public Policy Research, a graduate of Cornell, a law degree from Cleveland State with honors.

Thank you for coming in today, Commissioner, and we look forward to your testimony.

**STATEMENT OF PETER KIRSANOW, PARTNER, BENESCH, FRIEDLANDER, COPLAY & ARONOFF, AND COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS, CLEVELAND, OHIO**

Mr. KIRSANOW. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I am Peter Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the Cleveland, Ohio, law firm of Benesch, Friedlander, Coplay & Aronoff, in the labor and employment practice. I am here in my personal capacity.

The U.S. Commission on Civil Rights was established in 1957 to, among other things, act as a national clearing house for information related to denials of equal protection and discrimination, and in furtherance of that function, my assistant and I reviewed the opinions of Judge Roberts while on the D.C. Circuit related to civil rights and also his Supreme Court advocacy related to civil rights, particularly with respect to prevailing civil rights norms, jurisprudential norms, with particular attention to the 1964 Civil Rights Act and the 14th Amendment.

Our examination reveals that Judge Roberts's approach to civil rights is consistent with mainstream textual interpretation of the relevant constitutional and statutory authority and governing precedent. His opinions evince appreciable degrees of judicial restraint, modesty, and discipline and, in short, Judge Roberts's approach to civil rights is exemplary. It is legally sound, intellectually

honest, and with a deep appreciation for the historical bases for civil rights laws.

Our examination also reveals that several aspects of Judge Roberts's civil rights record have been mischaracterized and sometimes the criticisms have been sorely misplaced, for example, conflating his counsel and advocacy on the part of clients with his own personal policy preferences. Just three brief examples.

First, some have contended that during the 1982 reauthorization of the Voting Rights Act, Judge Roberts had adopted an anti-civil rights approach to the interpretation of the Act. But the record definitively shows that Judge Roberts had consistently counseled in favor of reauthorization of the entire Act as is, and he expressed the administration's concern that a substantive redefinition of Section 2 could risk introducing confusion and uncertainty into what had already been considered one of the Nation's most successful pieces of civil rights legislation. Judge Roberts continued to advocate on behalf of his client for vigorous enforcement of Section 2 even after adoption of the effects test.

Second, some have claimed that Judge Roberts's position on affirmative action is regressive. Most of these criticisms relate to his questioning of a 1981 U.S. Commission on Civil Rights report pertaining to affirmative action. A detailed examination of that report shows that not only was Judge Roberts's criticism correct but imperative. The Commission's report was inconsistent with the status of the law in 1981, when issued, and fails to comport with the post-*Adarand Construction* v. *Pena*, *Grutter* v. *Bollinger* affirmative action norms of today. Judge Roberts had properly advised against unlawful racial quotas and set-asides untethered to a proof of discrimination. He supported the—and we heard it earlier—"bedrock principle of treating people on the basis of merit without regard to race or sex."

A third contention unsupported by examination is that Judge Roberts's arguments before the Supreme Court in civil rights matters were somehow extreme or out of the mainstream. Probabilities would dictate that if Judge Roberts had somehow slipped past the Supreme Court's gatekeepers and got to make extremist arguments before the Court, the Court would have dismissed virtually 100 percent of those arguments or, at a bare minimum, far more than 50 percent, which is the fate of most arguments before the Court. Again, a review of the record shows that Judge Roberts's arguments with respect to civil rights were agreed to by the Supreme Court 71 percent of the time—hardly indicative of positions outside of prevailing civil rights norms. And these Justices who agreed with him included those who might colloquially be described as conservative, such as Justice Rehnquist, who agreed with him 75 percent of the time, or Justices Scalia and Thomas, each of whom agreed with him 71 percent of the time. But they also include Justices colloquially described as liberal, such as Justice Ginsburg, who agreed with him 60 percent of the time; Justice Souter, 59 percent of the time; Justice Stevens, 59 percent of the time; and even Justice Thurgood Marshall, the premier civil rights litigator, probably forever, agreed with his advocacy position 67 percent of the time, almost as much as Justices Scalia and Thomas, and more than Justice O'Connor.

Mr. Chairman, it is respectfully submitted that Judge Roberts's 25-year record with respect to matters pertaining to civil rights demonstrates an unwavering commitment to equal protection and a comprehensive understanding of our civil rights laws that would make him an outstanding addition to the Supreme Court, particularly in the capacity of Chief Justice.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kirsanow appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Commissioner.

Our next witness and final witness on this panel is Judge Nathaniel Jones, who served as Executive Director of the Fair Employment Practice Commission, was an Assistant U.S. Attorney for the Northern District of Ohio, directed NAACP litigation as general counsel for 10 years, a graduate of Youngstown State University, both Bachelor's and law degrees and served on the Court of Appeals for the Sixth Circuit and is now retired.

Judge Jones, thank you for coming in today and we look forward to your testimony.

**STATEMENT OF NATHANIEL JONES, RETIRED JUDGE, U.S. CIRCUIT COURT OF APPEALS TO THE SIXTH CIRCUIT, OF COUNSEL, BLANK ROME LLP, CINCINNATI, OHIO**

Judge JONES. Thank you, Mr. Chairman and Senator Leahy and esteemed members of the Committee. I am honored to have this opportunity to appear as a witness today to, I hope, assist you to more effectively evaluate the fitness of John G. Roberts to be confirmed as Chief Justice of the United States by providing a historical perspective.

Mr. Chairman, I ask that my full statement be entered into the record.

Chairman SPECTER. Without objection, Judge Jones, it will be a part of the record.

Judge JONES. Thank you. My acceptance of your invitation to offer testimony was prompted by my conscience and is driven by a profound obligation to introduce into the record a historical perspective, and in doing so, I join with my colleague, John Lewis, whose life is a personification of courage and I wish to add to his description of the struggle for civil remedies and civil rights remedies.

You are confronted here, I suggest, with a serious constitutional and moral responsibility. You are considering under the Constitution's Advice and Consent Clause the fitness of a Supreme Court nominee who has in the past argued against the use of Federal power to eradicate the vestiges of slavery and the badges of servitude. This record triggers serious questions and a vigorous inquiry into the whys.

So much of the nominee's advocacy as a Government lawyer and counselor was in the direction of against the implementation of civil rights remedies. There has been a lack of balance.

While I appear in my own right, more importantly, I am invoking the voices of distinguished legal giants whose voices have been stilled by time: Dean Charles Hamilton Houston, Justice Thurgood Marshall, Judge William H. Hastie, Clarence Mitchell, James A.

Nabrit, Judge Spottswood Robinson, Judge A. Leon Higginbotham, and many others who have my, and I trust your, deep and enduring respect.

These individuals believed in the Constitution and they hoped that government would step up and protect the rights of the minorities and the persons who were victims of majoritarian excesses. They fashioned a strategy for using the law and the courts to attack racial segregation. They set the stage for the development of remedies to remove the stain of racial segregation that law and the courts imposed upon this land.

You may ask why I invoke their names and speak in the voice of these towering legal giants and hold up the contributions they made to advancing civil rights jurisprudence. My reason is twofold. First, my professional and personal experiences qualify me to do so. Second, since he was nominated by the President, serious questions have been raised concerning Judge Roberts's views about the relevance and legality of remedies aimed at ending racial discrimination.

Unfortunately, few Americans know or have focused on or are familiar with the history of the myriad ways the posit of law and legislatures and courts reinforced and perpetuated racial discrimination in America. It is up to this Committee, therefore, to assure that, at the very least, the next Chief Justice of the United States understands that history and, most importantly, why remedial action was and continues to be necessary. Those courageous souls who laid the foundation for overturning decades of legally enforced racial segregation are calling out to you, and I echo their voices, to respect their labors and heed their lessons.

One's fitness to be the Chief Justice transcends stellar academic achievements and acknowledged professional competence. The nominee's views and his documented activist attempts to thwart the Federal court's efforts to dismantle segregation schemes that the courts themselves permitted to be erected and sustained bring into play something much more fundamental than technical skills. The critical question before you is one of values, not competence.

To understand why this is true, one need to only consider the most wretched decision the Supreme Court ever handed down in a case of human rights, *Dred Scott* v. *Sanford*. The author of that decision, Chief Justice Roger Taney, was undoubtedly highly qualified from a technical and professional standpoint, yet faced with the fundamental question of whether a former slave had standing to sue to retain his newly acquired free status, Justice Taney wrote that black people were not persons within the meaning of the Framers of the Constitution.

Similarly, Henry Billings Brown, the author of the 1896 *Plessy* v. *Ferguson* decision, had impressive professional credentials and academic, as well. He was a graduate of both Harvard and Yale, and his prior judicial experience was on the Sixth Circuit Court of Appeals, but he lacked the values that sensitized him to understand why the 13th, 14th, and 15th Amendments had to become a part of the Constitution.

On the other hand, it was Justice John Marshall Harlan, the lone dissenter, a graduate of a much smaller law school, the son

of slave owners, who gave us the final word, and it is his word that has rung through the years.

Gentlemen and lady, I would conclude with this observation. Abraham Lincoln stated in his famous speech in 1862 to the Congress that, fellow citizens, we cannot escape history. And it was George Santayana who said, those who cannot remember the past are condemned to repeat it.

But given the nature of the exchanges that I have observed taking place this week in connection with the hearings, I would leave with you the words of Dr. Martin Luther King. He asked and answered these questions. Cowardice asks the question, is it safe? Expediency asks the question, is it politic? Vanity asks the question, is it popular? But conscience must ask the question, is it right? I leave you with those challenges.

Chairman SPECTER. Thank you very much, Judge Jones.

[The prepared statement of Judge Jones appears as a submission for the record.]

Chairman SPECTER. Our practice in the Committee is to have five-minute rounds. In setting the witness list, we had many, many, many, many requests and we have honored as many as we could with some 30 witnesses, equally divided between Democrats and Republicans. Usually, there is a tilt to the majority, but my decision was to divide them equally. We have a very long road ahead of us. This is the second panel on six. It is my hope that the questions will be abbreviated. We wanted to see you and hear you and have your statements and have your views and look you in the eye.

I personally will have just a few questions which I will want to ask, and let me start, Congressman Lewis, with you, with great appreciation for what you have done.

The Voting Rights Act, which we labored through in 1982, and I was there in Senator Dole's office and Senator Kennedy was deeply involved and so was Senator Leahy, so many of us were to get the effects test instead of the intent test so that we have some realistic enforcement of civil rights. Senator Kennedy and I have already conferred. He came to me and said, let us renew the bill this year, the Act this year, if we can. It is the 40th anniversary. We have a jammed agenda, but we are going to try to do that. It will be renewed. It doesn't expire until 2007. I am very much with you on the objectives and what we have to do.

The memoranda which you referred to, and there are quite a number of them, go back to Judge Roberts's days as a young lawyer and he has testified that he was representing a client and we had real battles with the Reagan administration. There is no doubt about that. I was involved in them, notwithstanding the fact that it was my party.

But Congressman Lewis, I would like your views as to how you regarded what Judge Roberts said in explaining his views at the time, or what the memoranda said, which he said were not necessarily his views, and you have to evaluate that, contrast it with the very close questioning by Senator Kennedy and others where he did not raise objections. He said he did not have an agenda to turn back the clock.

Representative LEWIS. It is my view, Chairman, that the Judge was on the wrong side of history. He was on the wrong side of the Voting Rights Act, not just the letter, but also the spirit of the Act.

It is very hard and very difficult, almost impossible, to prove intent. You don't have—I think Vernon Jordan, the former head of the Urban League, said on one occasion that you won't have people in the American South, in the 11 Southern States or the Old Confederacy, from Virginia to Texas, couldn't have signs saying we are going to discriminate. We are going to keep black people from getting elected. They are not going to do that.

I was young, too, a few years ago, 24, 25, but I tried to do the right thing. I got in the way. And I think Judge Roberts as a young attorney in the administration of President Reagan and others failed to go with his gut. Maybe did he go with his gut, did he go with his heart, or was this his view? You don't come back years later and say, "Oh no, oh no, this was not my view." Sometimes you have to fight. Sometimes you have to get in the way. If you can't get in the way when you are 25 or 30, you are not going to get in the way when you are 50.

Chairman SPECTER. Thank you, Congressman Lewis.

I just have a minute-forty left and I want to give Governor Thornburgh an opportunity to comment. Based on your knowledge of Judge Roberts, and you worked with him at a time when he was young, do you think that those memoranda reflected his own views as to civil rights or what do your insights and your knowledge of Judge Roberts tell you as to what we might expect of him as Chief Justice, if confirmed, on these issues?

Mr. THORNBURGH. Let me say just three things in response to that, Senator. I have never seen any evidence of any hostility to civil rights on the part of Judge Roberts during my professional and personal association with him, which goes back some 15 years.

Secondly, I think it is important, and Justice Ginsburg was quite definite in this in her appearance at the time of her nomination, to separate out the views that are expressed as an advocate for a client and the views that might obtain if the individual was speaking for him or herself.

And thirdly, I don't think any of us could stand—perhaps my friend, John Lewis, could because of his distinguished career, but I don't think any of us could stand a complete and thorough rummaging through the views we expressed when we were 20 or 25 years old. I shudder to think that some of the things that I had in my craw at the time would stand the test today.

But most importantly, I think it is my conclusion on the basis of my personal knowledge of Judge Roberts that there is no hostility there to civil rights. There is a veneration of the rule of law, and to the extent that the rule of law permits, it seems to me that he would be a strong supporter of equal rights and equal treatment and equal justice for all under the law.

Chairman SPECTER. Thank you, Governor Thornburgh.

This is a very, very distinguished panel and we could hear a great deal more, but my time is up and I have to set the lead on observing the time.

Senator Leahy, do you care to question?

Senator LEAHY. Just more a comment. Of course, Governor Thornburgh is a friend of all of ours. We have worked with him during his time as the Attorney General.

You mentioned Justice Ginsburg. Just so the record is clear, her appearance here was a lot different. She answered questions from numerous Senators on race discrimination and affirmative action. From several other Senators, she answered questions on gender discrimination. From several other Senators, she answered questions on reproductive rights. From several other Senators, she answered questions on the death penalty, and then First Amendment and freedom of speech, the Religion Clause of the First Amendment, separation of powers, unenumerated rights, the 14th Amendment, the role of the court, deference to Congress, and then had three or four that she didn't answer. But she answered specifically from both Republicans and Democrats very intensive questions.

I only mention that because there seems to be some view that when Judge Roberts took, I think, too much to heart the recommendation made by some of the Senators here not to answer questions, he took it too much to heart and did not answer those questions.

When my friend, John Lewis, talks about time to get in the way, he knows of which he speaks. He nearly died doing that. He was doing it for the right cause, the cause of civil rights, and I think every African-American and every white American and every brown American and everybody else, all Americans have to thank you for what you did.

I yield back my time.

Chairman SPECTER. Thank you, Senator.

Does anybody else on the other side of the aisle want to say anything?

Senator BROWNBACK. Can I offer one thought, Mr. Chairman, just real quickly if I could. I want to welcome the panel and in particular my friend, John Lewis. We worked a lot on the African-American Museum of History and Culture that is going to be here in Washington, D.C., sometime soon. We got that passed through.

Judge Jones, if I could just ask you a real brief question on this, because I hear your concerns and I hear the thoughts and I respect the thoughts that you are putting forward here. Judge Roberts, when people asked him, I think Senator Durbin asked him, how do we know what kind of a judge you are going to be on some of these issues? Obviously, you have got a great head, but I want to look at your heart. It is hard to see a man's heart, and Judge Roberts responded and said, well, look at how I ruled in cases thus far, which there are not a lot of, I think 52 cases thus far, but he does have one Washington Metropolitan Transit Authority case where he ruled against the D.C. Government's claim of sovereign immunity and in favor of a worker's disability discrimination lawsuit. It is kind of thin, but we only have 52 cases and that one is there.

And then he also talked about his dedication to rule of law and that that is really what drew him into the law. If he is sufficiently dedicated to that rule of law, given the laws that we have on the books how work and protect civil rights and a number of other issues, shouldn't that give some solace, that if his heart is right on defending the rule of law, given that we have gotten some of the

laws better and right now, that he could be quite a good judge for civil rights cases?

Judge JONES. Thank you for your question, and I would respond this way. I will respond both as a former litigator, a civil rights litigator, and as a judge.

As a judge, you look at the record. The record that has been made here, the part of it that I have observed, shows an early disposition to take positions contrary to civil rights enforcement. The burden that is now imposed upon him and imposed upon this Committee is to be satisfied that the presumption, or at least the inference that one can draw from that prior record has been overcome and that he doesn't share those views at this time. That is a burden and judgment this Committee has to make.

I would also point out that, if I may just be a little personal, at the time I left my job as General Counsel of the NAACP, a position that I had occupied which Thurgood Marshall also occupied, I have been involved in litigating major civil rights cases all across the country. I joined the court upon appointment by President Carter in 1979. At that time, we thought generally that certain civil rights principles were settled.

We thought that the issue of school desegregation was settled in light of Chief Justice Burger's decision in *Swann* in which he said that busing and transportation was an appropriate remedy when you had a finding of constitutional violations that rigged a school district. We thought the issue of affirmative action was settled with the *Bakke* case and Justice Powell's plurality opinion in which he says you may take race into account.

But we find that following that case, or those cases which I thought were settled, I was then sitting as a judge on the Sixth Circuit Court of Appeals and I was engaged in dealing with the first wave of attacks against school desegregation and against affirmative action. The challenges claiming preferential treatment, claiming forced busing, all of these buzzwords were coming at the court and we were then faced with the decision, are these principles settled?

I have now learned that in the boiler room of the Reagan administration, stoking out and crafting out a lot of the theories that were being used in the courts to attack these settled principles, was the nominee. Now, that raises a question for me and for you, or this Committee, to decide whether if one is a believer in the rule of law, why one would not accept *Swann* as settled law, would not accept *Bakke* as settled law, would not accept *Weber* as settled law.

The whole body of jurisprudence that had been built up to reaffirm the value of remedial actions when it was clear that we had this vast history of racial discrimination in this country—

Senator BROWNBACK. If I could, before my time runs out, just quickly say I appreciate the thought. I do think we have to—

Chairman SPECTER. Quickly, Senator Brownback. We have to move on.

Senator BROWNBACK. Okay. We do know what Judge Roberts has ruled, what he has done as a judge, and I would hope people could look at that in the fair light of what it is in indicating his judicial temperament and nature.

Thanks, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback. We are going to break for lunch at the conclusion of this panel.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

I don't think any of us in the course of the time of questioning Judge Roberts ever suggested that in any way he had any hostility on the issues of race. I really think the question was does he get it. Does he get it? Just what the good judge as pointed out, the march towards progress that we have seen over the recent years.

So I would ask Mr. Henderson and then John Lewis, how about this argument: Well, he was just an attorney. He was just attorney who was speaking for an administration. He was just taking the administration's position. So we shouldn't be too harsh on this. Sure, the administration just wanted the reauthorization of the intent test; he was just following orders, so to speak, on this.

So why should we not assume that he gets it with regard to the issues of this Nation's great, great challenge, the poison of discrimination that is there since the first days of it? And we have all seen, including in my own State of Massachusetts, the challenges that we face.

Why can't—what is your response to that?

Mr. HENDERSON. Well, Senator, I certainly recognize a legitimate argument that an individual representing a client often projects the views that best suit the client. But I remind you, sir, that Judge Roberts never once distanced himself from positions articulated in many of the memoranda at issue in a way that would give comfort to the notion that he in fact had not internalized these views to reflect his own policies.

Judge Roberts has a vision of judicial restraint, and he has articulated it himself—which is really a retreat from the role of the Federal courts in protecting civil rights. And I guess, you know, from my view, this is really not an academic debate. It is very personal. I mean, I grew up right here in the Nation's capital. I was 16 before formal segregation ended by law. I know what it is like to be on the politically disfavored side of the color line. And I know that the Federal courts have played an important role in helping to ensure equal opportunity for all of American citizens. We are not prepared to take that risk.

I would simply say that even in today's society, Senator Brownback mentioned earlier, well, laws have changed, things have happened, they have improved. Certainly that is true. But in the words of William Faulkner, you know, the past is never dead; in fact, it's not even past. And just to confirm that point, I have a pending complaint right now before the Department of Justice for a case of public accommodation discrimination from a hotel in New Orleans over the 4th of July weekend in an area where I thought change had been made in a lasting way that would not have permitted that to happen.

I know first-hand what that stigma is about, and I reject that analysis.

Senator KENNEDY. Well, it is true that we did ask him, I asked him, about whether any of these positions that he had taken at that time, whether he would reverse any of these. And we didn't hear a response from him that he might.

Let me ask John Lewis to comment on that and then also—I have a minute and a half, John, so you know this business. So I hope you will respond to the earlier question to Wade, but I hope also—when Judge Roberts was asked about the intent test and the effects test, and he was asked also by members of the Committee, well, if we had actually had the intent test, do you think we would have made the progress we made with the effects test? He said, I'm not so sure we might not have made that kind of progress on that.

We know the earth-shattering progress that has been made with the election of officials locally, State, and at the Federal level, and the progress that has been made with the effects test. I am interested in someone who knows and believes that the Voting Rights Act is the key civil rights issue. What is your own view on this question? How could anyone view that if we had had the intent test we would be where we are today? Wouldn't we be a different land?

Representative LEWIS. Well, I tell you, Senator, as someone who worked in the American South for several years directing an organization called the Voter Education Project, for 7 years trying to get people registered, trying to get people to lose their sense of fear, I tell you, we wouldn't be where we are today. The American South would be different, the country would be different if we had to rely on the intent test. I wouldn't be here as a Member of Congress. And a lot of my colleagues in the House of Representatives, a lot of the elected officials all across the South, before the Voting Rights Act in 1965, there were less than 50 black elected officials in the 11 Southern States, from Virginia to Texas. Today, there are more than 9,000. We wouldn't have made it. There still would be people trying to get elected and they wouldn't be elected.

I don't buy this argument that he was just doing his job, he was just following the rules. By this time you had the 1964 Civil Rights Act, the 1965 Voting Rights Act, the Fair Housing Act of 1968. By this time if there was someone in the administration, they should have a mindset. I think this says something about Judge Roberts's mindset. He didn't stand up and argue against this attitude. He didn't speak out. He didn't send a memo saying something different.

Senator KENNEDY. My time is up. But thank you.

Chairman SPECTER. Thank you very much, Senator Kennedy.

Senator Durbin?

Senator DURBIN. Thank you, Mr. Chairman. Thank you to the panel.

Let me first thank my colleague, Senator Kennedy. I think that during the course of this inquiry of Judge Roberts he has been laser-focused on civil rights and the Voting Rights Act, and I think it has done a great service to the operation of the Committee. I hope that we all appreciate how much work went into it.

But I do recall, Senator Kennedy, on the first day when you went into this, I made notes how Judge Roberts said repeatedly, That was 23 years ago; I was a staff lawyer of the Justice Department; that was the position for the administration I worked for; it was my job to articulate administration policy. We heard that consistently whenever we brought up these memos.

And so I thought to myself, well, in fairness, if we are going to allow him to use that explanation, what does he feel today? What

can he tell us today? I personally believe in redemption, in faith and politics. And I think, John Lewis, you have seen so many in the past who were on the wrong side of history on civil rights who realized it and conceded that and moved to a different position.

During the course of this hearing, we asked Judge Roberts many questions. In fairness to him, one of the few direct questions he answered was when I asked him about the Bob Jones University case. And he said, I disagree with the position of the Reagan administration. I am glad he said that. I wish he could have told us more.

Then I tried, in my last round of questioning, to get down to a point of where would you draw the line as an advocate? Are there some things you would not bring your legal skills to? You have spoken with pride of *Romber* v. *Evans* and the fact that you counseled gays and lesbians who were about to lose their rights in Colorado. And just a few hours ago I asked him, sitting at the same table, Could you have taken the other position, to restrict the rights? And he said yes.

And so it comes down to a fundamental question. I don't think I understand if there is a clear, bright line in his mind when it comes to this issue of freedom and when it comes to this issue of liberty. And that troubles me. Because I think, knowing that, I would feel more confident that he could lead this Court.

But I would like to ask you, John Lewis, on the issue of redemption, do you feel that even if he was totally wrong 23 years ago or 24 years ago in his memos, that people can change?

Representative LEWIS. Well, I think it's possible and conceivable, Senator, that people can change. But when you believe and feel and know from your experience, or maybe from the law and from history that you have been wrong, you show some sign. And you are not afraid to talk about it. You are not afraid to go on the record. Judge Roberts has been afraid to show or demonstrate any signs that he has changed. I wonder whether it is part of his mindset.

Senator DURBIN. I think that is the point, and maybe Wade Henderson made the same point, that when Senator Kennedy went directly to the Voting Rights Act, much like Bob Jones University, he could have made it clear that that position was just wrong and that history had proven it wrong. And yet for two successive days it came up short.

Wade Henderson, you have made that point in what you had to say here. The critical question is values and just not competence here in what we are dealing with. Judge Jones said the same.

So I don't want to dwell on this any longer other than to tell you, for me this is the threshold issue. The issue of race is the threshold issue. I have to be convinced in my mind that Judge Roberts comes to this critical job as the head of the third branch of our Government with a clear understanding of what we must do in this country, still, to deal with the issues of race and justice for so many minorities in this country.

Thank you all on this panel. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Durbin.

Thank you very much—

Mr. KIRSANOW. Mr. Chairman, with your permission, if I could just make one quick clarification.

Chairman SPECTER. Go ahead.

Mr. KIRSANOW. Thank you very much. We have been talking about redemption, and I don't think that John Roberts needs to be redeemed in any sense whatsoever. But to the extent one claims that his position on the Voting Rights Act was somehow wrong prior to the effects test, let's take a look at the facts. After the effects test was implemented, what did Judge Roberts do? He argued *Chisholm* v. *Romer*, he argued the *Houston Lawyers Association*—he argued for an extension of the effects test to State judicial elections. If he redeemed himself at all, he clearly did it right there.

So we have facts here. This is not speculative. In terms of looking at his heart, if it is conflated with what he has done on the court—and I don't know that you can necessarily discern that—we have absolute evidence of what he felt about enforcement of the effects test.

Chairman SPECTER. Thank you, Commissioner.

Senator Sessions wants a minute recognition before we break for a very abbreviated lunch.

Senator SESSIONS. Thank you, Mr. Chairman. I would just like to add, I have been listening to some of this as I could. I would just like to add that we procured explanations from Judge Roberts on each one of the memorandums he wrote, each one of the situations that he was called to express an opinion on, such as the effects test. His ruling was absolutely consistent with the Supreme Court ruling of the United States at that time.

So all I would say is I think it is unfair to suggest that he has a record that indicates that he was somehow wrong on civil rights at that time. Yes, he opposed quotas; yes, he supported the extension of the Voting Rights Act completely, but he did not favor its alteration to overrule a Supreme Court opinion. So I would just, for the record, like to say I believe his record does show affirmatively that he is committed to equal justice under law, which is what he is called upon to do.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Kennedy, you have a unanimous consent request?

Senator KENNEDY. Thank you. I ask unanimous consent—the NAACP Legal Defense and Education Fund prepared some important testimony—that it be made a part of the record.

Chairman SPECTER. Without objection, it will be made a part of the record.

Thank you all very much. We have so many witnesses, we are going to have an abbreviated—not a lunch hour, but a lunch half-hour. We will resume at 2 o'clock.

[Whereupon, at 1:30 p.m., the Committee was recessed, to reconvene at 2:00 p.m., this same day.]

AFTERNOON SESSION [2:16 p.m.]

Chairman SPECTER. Good afternoon, ladies and gentlemen. We will resume the confirmation hearing on Judge Roberts. We have a distinguished panel, and our first witness is Ms. Maureen Mahoney, a partner in the Washington firm of Latham and Watkins. She had worked with Judge Roberts in the Deputy Solicitor General's office. She had been nominated for a district court judgeship, but with some others, her nomination was not taken up, a

problem we intend to correct. She successfully represented the University of Michigan in the *Grutter* case, and she served as law clerk to Associate Justice Rehnquist and Seventh Circuit Judge Robert Sprecher.

Thank you for joining us, Ms. Mahoney, and we look forward to your testimony.

**STATEMENT OF MAUREEN E. MAHONEY, PARTNER, LATHAM AND WATKINS, WASHINGTON, D.C.**

Ms. MAHONEY. Thank you, Mr. Chairman and members of the Committee. It is a real honor to be here today.

Over the past few days, I think all of you and really all of America has gotten to see why so many of us think that Judge Roberts is probably the finest lawyer of our generation. His study of the law, his understanding of the law is absolutely masterful, and he certainly has the legal skills required to be a superb Chief Justice.

Some have, nevertheless, raised some concerns that he may come to the Court committed to implement a partisan agenda and that he may not be fair-minded. I would really like to speak to those concerns based on my personal experiences with him. As you indicated, I met him in 1980 after he succeeded me as a clerk to the Chief Justice, then-Associate Justice Rehnquist. Since that time, I had the opportunity to be his colleague in the Solicitor General's office. I also was a fellow appellate advocate in the private bar and really also a friend. This has given me a very, very wonderful opportunity to take the measure of this man, and I cannot think of anyone who would be a finer Chief Justice.

I would like to make three basic observations to respond to some of these issues, and the first is that in the Solicitor General's office, when I worked with him there, he was not viewed as a partisan operative. Instead, he was viewed as a brilliant advocate in the finest tradition of the office. And, in fact, in 2001, this office included lawyers from all across the political spectrum. They weren't just Republicans or Democrats, and they all admired him. And in 2001, they sent a letter to this Committee to confirm that, despite their diverse political parties and persuasions, "Mr. Roberts was attentive to and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent." This from his colleagues. He was not a highly partisan person in that role.

The second thing I would like to say to the Committee is please do not presume that the views that are expressed in briefs on behalf of the United States that he filed in the Solicitor General's office necessarily reflect the views that he will adopt as a Justice on the Supreme Court. I was a deputy there, too. It was not our job to establish administration policy with respect to immigration, abortion, affirmative action—you name it. Our job was to defend the policies of the administration within the bounds of the law, within the realm of good logic, good reasoning. That was our job. And, in fact, a historical example might be useful on this.

Thurgood Marshall served as a Solicitor General of the United States, and while Solicitor General, he filed a brief on behalf of the United States advocating against the rule adopted in Miranda because he said it wasn't good for law enforcement. When he became

a Supreme Court Justice, he dissented in cases that refused to extend Miranda more broadly. He abandoned the views that he had previously expressed in a brief because they weren't his views. They were the views of the United States. And I fully expect that Judge Roberts also knows the differences in these roles in our legal system.

Third, I have been particularly troubled about suggestions in the media that he may harbor bias against women, and I say this because I know firsthand that he was very interested in promoting equal opportunity for women. He actually recruited me to the Office of Solicitor General in 1991. There was a vacancy for the deputy slot. There are only four deputies in the office at any given time. This is a highly coveted position. And he called me, he encouraged me to come and apply for that job. He supported me. I got the job and, as a result, was one of the very few women in history to serve in that position.

A year later, a vacancy came open on the Eastern District of Virginia, the Federal court, and he again encouraged me to apply. He helped shepherd me through that nomination process, and as you indicated, for some reason the Committee forgot to get me confirmed. But, really, these were things that Judge Roberts did not just for me but for other women who all admire and respect him and have absolutely no doubt that he harbors no bias.

In sum, I think that he is particularly well suited to succeed the Chief Justice. They both share some incredible traits, really exquisite intelligence, an abiding sense of modesty, charming wit, and I think that the Chief above all understood that the role of a judge is to serve, not to rule. And I think that there is no question that Judge Roberts learned that lesson well, and he ought to be confirmed as the next Chief Justice.

Thank you very much.

[The prepared statement of Ms. Mahoney appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Mahoney. Demonstrating your skills as an appellate advocate, ending precisely on time.

[Laughter.]

Ms. MAHONEY. I was worrying about that.

Senator SESSIONS. One second over. I was watching.

Chairman SPECTER. Precisely on time.

Our next witness is Hon. Carol Browner, former distinguished Administrator of the Environmental Protection Agency, used to be a member of the Senate family when she served as legislative director to Senator Albert Gore when he was here, a graduate of the University of Florida, both undergrad and law school, and currently is a member of the Albright Group. Thank you for joining us, Ms. Browner, and the floor is yours.

**STATEMENT OF CAROL M. BROWNER, FORMER ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, AND PRINCIPAL, THE ALBRIGHT GROUP, WASHINGTON D.C.**

Ms. BROWNER. Thank you, Mr. Chairman and members of the Committee. Thank you for the opportunity to appear here today, and I ask that my full statement be placed in the record.

Chairman SPECTER. Without objection, your statement will be made a part of the record, as will all statements.

Ms. BROWNER. Thank you. Mr. Chairman, as you just noted, I have spent most of my professional life involved in our country's efforts to protect the air we breathe, the water we drink, the health of our communities, the health of our children. Our environmental laws and regulations have allowed us to make steady progress in this country toward cleaner air, cleaner water, a healthy environment.

While it is not always a perfect system, a dismantling of this system could leave our country without any sensible way to address ongoing environmental problems such as mercury, the disappearance of our wetlands, and the reality of global warming.

Briefly, I want to speak to three issues: the Commerce Clause, the power of Congress to delegate to the executive branch, and citizen standing.

More than 40 years ago, Congress realized that individual States often lack the power or the will to do the job of lessening and reducing pollution. Congress recognized that pollution doesn't stop at political boundaries. Dirty air blows across the country without regard for where it originates, and polluted water inevitably flows downstream. Relying on its Commerce Claus authority, Congress passed a whole body of environmental legislation.

The Supreme Court's decisions in *Lopez* and *Morrison* have triggered an effort to undermine Congress's use of its Commerce Clause authority in a number of environmental statutes, including the Clean Water Act. In the *SWANCC* decision, a case involving wetlands, the petitions argued that Congress lacked the authority under the Commerce Clause to protect isolated wetlands. Well, as we have all been recently reminded with Katrina, wetlands are a very important part of nature's efforts to protect us from flooding, to cleanse our waters, to provide important habitat.

While the Court avoided ruling on the Commerce Clause challenge in *SWANCC*, it is troubling that the majority did note "significant constitutional questions regarding the authority of Congress to protect certain types of wetlands, even those used by migratory birds."

I want to quote from Justice Kennedy. Although he joined with the majority, he noted in *Lopez*, "The Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." While Judge Roberts's dissenting opinion from denial of rehearing in *Viejo*, the case that is now referred to as the "hapless toad" case, is not definitive as to his position on the Commerce Clause, it is certainly worth noting that a three-judge panel had rejected a Commerce Clause argument with respect to the Endangered Species Act.

Lower-court judges have also attempted to restrict the authority of Congress to delegate certain powers to the executive branch. In a case I was personally involved with about my decision to set air pollution standards for ozone and smog, the lower court struck down a key section of the Clean Air Act as unconstitutional, citing the non-delegation doctrine, which had been rejected by courts for more than 50 years. For decades, Congress has asked EPA, told

EPA to do this job, to do it based on the best available science, to do it to protect the public health. These are sort of fundamental principles embedded in many of our environmental statutes that have allowed us to make the kind of progress that we have made to date.

Finally, Congress has frequently recognized the right of individual citizens to seek enforcement of our country's environmental laws. When I was the head of the EPA, I was frequently asked, Well, wouldn't you like Congress to prevent those lawsuits from being filed against you, those lawsuits from being filed against your agency? And my answer was always no. Citizen suits are an essential part of how we have gone about this work of clean air and clean water. If Congress tells an agency of the executive branch to do something and they fail to do it, the citizens of this country should have the right to go to our courts and see that Congress's laws are upheld.

A key role and responsibility of Government is to protect those things we all hold in common—our air, our water, the public health of our communities. The Nation's environmental laws are based on a set of shared values, and they rest on principles embraced by Congress over many, many years. The High Court should respect the broad authority of Congress under the Constitution and well-established precedents that allow for a robust Federal role in protecting our environment. The Court should continue to recognize the right of Congress to delegate to the executive branch the day-to-day work, to set pollution standards, to enforce those standards, and the Court must ensure the opportunity for individual citizens to step in when the executive branch fails to do what Congress has directed.

Thank you.

[The prepared statement of Ms. Browner appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Browner.

Our next witness is Professor Kathryn Webb Bradley, senior lecturing fellow at the Duke University School of Law, graduate of Wake Forest and the University of Maryland, first in her class, clerked for Justice White, later became a litigator at Hogan and Hartson.

We thank you very much for coming in today, Professor Bradley, and we look forward to your testimony.

**STATEMENT OF KATHRYN WEBB BRADLEY, SENIOR LECTURING FELLOW, DUKE LAW SCHOOL, DURHAM, NORTH CAROLINA**

Ms. BRADLEY. Thank you very much. Mr. Chairman, members of the Committee, thank you for allowing me to be here today.

I have been a Democrat since I was old enough to vote. But while the President has not enjoyed my personal support, his nominee has my full and enthusiastic support today. I have known John Roberts since 1990 when I was privileged to serve as law clerk to Justice Byron White. As a law clerk, I watched then-Deputy Solicitor General Roberts argue several cases before the Court. While I was fortunate to see many talented advocates that year, John Roberts stood out in my mind as simply the best.

What made him so effective was his gift for being able to take extraordinarily complex concepts and then explain them in a way that seemed straightforward, even simple, yet never simplistic. His command of the facts and the law of each case was impressive, not just because of the level of preparation it revealed, but because it enabled him to anticipate and respond to the concerns of the Court about whatever position he was advocating. Inevitably, his colloquy with the Court left the impression that he had blazed for the Court a clear trail that they could comfortably follow to reach the result he sought.

That is not to say that he was successful in every case, but I do believe that in each case his advocacy aided the Court in its decisionmaking process, which is precisely what good advocacy should do.

My admiration for his advocacy skills deepened into a deep respect for his intellect and his integrity during the time we were colleagues at Hogan and Hartson, where I worked with him on a number of appellate and administrative matters. What I remember most clearly, though, are not the details of the cases in which I assisted him, but about the times when his guidance proved invaluable to me. I have time for one of those stories today.

I was a senior associate involved in the defense of a State institution in a suit brought under the Fair Labor Standards Act. The plaintiff had initially filed suit in Federal court, but dismissed the complaint and refiled in State court after the Supreme Court issued its decision in *Seminole Tribe* v. *Flordia*. As I began to look at the issues, I wondered whether we might move to dismiss the State suit on constitutional sovereign immunity grounds similar to those that had mandated dismissal of the Federal suit.

But the only helpful legal authority were a few State trial court cases and one or two articles. So I called John Roberts and I ran the argument by him.

His response was that while I had a colorable legal argument, the theory I was suggesting certainly did not fit within his understanding of the Court's interpretation of the 11th Amendment. We proceeded to file the motion, and when we lost the motion, we filed an appeal, and at each stage, even though he was not directly involved in the case, John was supportive and responsive to my questions. And when our appeal was stayed, pending the Supreme Court's consideration of *Alden* v. *Maine*, which raised exactly the issue that we were litigating, at my request, John Roberts conducted a moot court for the Council for Maine since a decision favorable to Maine would be favorable to our client.

The Supreme Court's decision in *Alden* focused new attention on federalism and received kudos from many conservatives, yet at no point during the time that I worked with John Roberts on this issue did I ever hear him voice anything other than his understanding of the governing precedent and his thoughtful and considered views about what arguments appropriately could be made within the existing legal framework. I certainly never saw any signs at all that he viewed the case as an opportunity to promote a conservative ideology or advance a particular political agenda.

I believe the qualities that I have admired in John Roberts for the last 15 years are precisely those that qualify him to become the

next Chief Justice. The mastery of the law that he exhibited in oral arguments leaves little doubt that he will be able to find a principled way through the murkiest of constitutional waters. His focus on the facts of the case and the circumstances of his clients, suggest that as Chief Justice he will approach each case on its individual merits. His respect for precedent, with his cautious approach to moving beyond its established bounds, offers reassurance that he will respect the role of *stare decisis*. And his collegiality and his congeniality will enable him to lead the Court as Chief Justice with grace and style.

I would like to make two final points. First, in part because of my experience as a Supreme Court clerk, I have development tremendous respect and an appreciation of the role of the Court and the role of the rule of law in safeguarding our democracy.

As a professor of law I make it my business now to try and instill that respect in the students I teach. I could not in good conscience come before you today were I not convinced that John Roberts shares that respect, and will demonstrate it every day that he serves the Court and this Nation as Chief Justice.

Finally, as both a Democrat and a woman, it is fundamentally important to me that the individual liberties of every citizen, including those relating to the right to privacy and the right to be free from discrimination be fully protected. I could not be here today if I did not feel confident in trusting my own rights and those of my children and their generation to John Roberts for safekeeping.

Thank you.

[The prepared statement of Ms. Bradley appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Bradley.

Our next witness is Ms. Anne Marie Tallman, General Counsel of the Mexican Legal Defense and Education Fund, actually President and General Counsel.

Prior to taking that position she had been an executive with Fannie Mae. She began her career with the law firm of Kutak Rock in Denver; bachelor's degree in psychology and political science from University of Iowa, and her law degree from Boalt Hall.

Thank you for joining us, Ms. Tallman, and the floor is yours.

**STATEMENT OF ANN MARIE TALLMAN, PRESIDENT AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, LOS ANGELES, CALIFORNIA**

Ms. TALLMAN. Thank you very much, Mr. Chairman, members of the Committee. Thank you for the invitation to testify before you today on the confirmation of John Roberts for the post of Chief Justice of the United States.

I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund. We are a nonpartisan civil rights organization established to promote and protect the civil rights of over 40 million Latinos in the area of education, voting rights, immigrants rights, access to the courts and employment.

It is in these areas that the writings and decisions of Judge Roberts placed him in positions opposed not only to equal justice for

Latinos, but opposed to the positions taken by bipartisan majorities of this Congress, and even by the Reagan administration that he served.

There has been much discussion about respect for the law. This hearing is not an abstract discussion. It serves as an acknowledgement of how the law's application impacts all of us, living, working and contributing to the richness of our country, regardless of our station in life.

A Chief Justice must approach his responsibilities with not only an open mind, but cognizant of how his decisions will affect real people. If some of John Roberts's written legal views had been adopted and become settled Federal law, thousands of undocumented immigrant children would have effectively been barred from public schools, left largely illiterate and without hope as members of a permanent underclass. A national system of identification cards might be in place, representing an unprecedented intrusion in the privacy rights of Americans, and placing minorities at much greater risk of racial profiling and discrimination. An electoral empowerment of Latinos, African-Americans, Asian-Americans and Native Americans and the record number of elected officials of these ancestries in Congress and State and local government nationwide would likely have not been achieved.

On immigrants rights, as Special Assistant to the Attorney General, he criticized the Supreme Court decision in *Plyler* v. *Doe*, a case brought by MALDEF. In *Plyler* the Court, following two lower courts, struck down a Texas law effectively barring undocumented children from public schools. Roberts criticized the Solicitor General's Office for not standing up for what he described as judicial restraint and supporting the State of Texas arguments against the application of the Equal Protection Clause, an action, he wrote, that could well have altered the outcome of the case.

As Associate White House Counsel he derided, as clinging to symbolism, the civil liberties and privacy concerns surrounding national identification cards. In expressing his disagreement with the Reagan administration's opposition to national identifiers, he failed to even mention the potential for discrimination and singling out of Latinos and African-Americans.

In voting rights, Judge Roberts mischaracterized the bipartisan efforts by members of this Committee to restore the effects test to Section 2 of the Voting Rights Act as a radical experiment, rather than a restoration of Congress's original purpose.

Finally, a Chief Justice must possess an even temperament in fulfilling his duties to dispassionately adjudicate with an open mind. We need men and women on the Court who will understand our changing Nation. Strikingly, on official White House Counsel and Department of Justice memoranda, Judge Roberts displayed a pattern of insensitivity and dismissive comments that show a lack of respect for Latino immigrants, Members of Congress who supported equal pay for women, and the history of the Kickapoo Indian Tribe.

For these reasons, we respectfully urge that you oppose Judge John Roberts's confirmation to serve as Chief Justice of the United States.

Thank you very much.

[The prepared statement of Ms. Tallman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Tallman.

Our next witness is Judge Denise Posse-Blanco Lindberg, a State Court Judge in Utah. An immigrant from Cuba, Judge Lindberg and her family fled Castro, coming here when she was 10-years-old. After receiving her bachelor's degree from BYU she then added three advanced degrees, including a law degree.

Among her many accomplishments are clerkship for Justice O'Connor. She worked in the D.C. Office of the Law Firm of Hogan & Hartson, and has been a State Court Judge in Utah since 1998.

Thank you for joining us, Judge Lindberg, and your testimony begins simultaneously with the re-arrival of Senator Hatch.

[Laughter.]

Senator HATCH. I would not miss this for the world, I will tell you.

**STATEMENT OF DENISE POSSE-BLANCO LINDBERG, JUDGE, THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH, SALT LAKE CITY, UTAH**

Judge LINDBERG. Thank you, Mr. Chairman, members of the Committee. My name is Denise Posse-Blanco Lindberg, and I am a State Trial Court Judge from the State of Utah. I am honored to appear before you today in enthusiastic support for the nomination of Judge John Roberts as Chief Justice of the United States.

He brings to this appointment a keen intellect, sound judgment, honesty, fairness and decency, and exceptional knowledge of and respect for the law, the courts, and our constitutional system. He has all the attributes necessary to be a Chief Justice in the highest traditions of that office.

Over the past 15 years, I have observed his career from at least three different vantage points; first as a law clerk to Justice Sandra Day O'Connor; second as his colleague at the Washington, D.C. law firm of Hogan and Hartson; and as a member of the Appellate Practice Group, which he headed; and now as a fellow judge who has reviewed his judicial record.

My first exposure to Judge Roberts came on opening day of October term 1990 at the Supreme Court when then-Deputy Solicitor General Roberts presented one of the First Monday arguments. I expected a professional presentation from members of the Solicitor General's office, but the skill and effectiveness with which he argued his case far exceeded my expectations. Notwithstanding his youth, his composure, his clear command of the relevant facts in law, and his exceptional ability to engage with the Court in a discussion of the issues made a lasting impression on me.

After clerking for Justice O'Connor, I joined Hogan's appellate practice group and I worked with John on a number of cases following his return to the firm. I remember many cases that we worked on, but I specifically remember his support and guidance during my first solo effort at drafting a brief for a case before the D.C. Circuit. It was a pro bono matter and he willingly spent considerable time reviewing drafts, providing feedback, and that was invariably insightful, helpful, and courteous. He analyzed issues creatively without distorting precedent or stretching a point of law

beyond what was permitted by the bounds of law. And on top of that, he was an incredibly nice, genuine human being who was incredibly bright but never arrogant.

John's work has always been principled and carefully circumscribed. I learned much of what I know about appellate practice from watching John work and being taught by him. He reveres the law and he treats it and everyone associated with it with the utmost respect. He has taught by word and deed the importance of civility in the practice of law.

My final comments come from perspective as a judge. I reviewed a substantial number of his body of published opinions and some of the commentary. I have noted at least three problems with some of that commentary. Some commentators have failed to acknowledge that judges do not get to choose the cases that come before them but must instead respond to the particular facts in light of applicable law.

Others overlook the fact that whenever an appellate judge writes for the court, that opinion must also reflect the views of at least one, if not two, other members of the appellate panel.

Others appear to misunderstand the essential judicial role. John has correctly noted that judges, quote, "do not have a commission to solve society's problems as they see them, but simply to decide cases before them according to the rule of law."

In each opinion that I reviewed, John focused on the case before him, did not overreach, or did not use it as a vehicle to further any personal preferences. He was respectful of precedent. In fact, he demonstrated the very kind of judicial restraint that this body has indicated is an important consideration for any nominee to the Court.

To this high office, John brings a remarkable combination of skills, personality, and respect for constitutional principles that will make him a highly effective Chief Justice. His towering intellectual skills and engaging personality will enable John to work effectively with his colleagues and bring consensus to a divided Court. Those same traits will make him an outstanding leader of the Federal judiciary and will allow him to work very cooperatively with the coordinate branches of government.

I respectfully urge this Committee to recommend to the full Senate swift confirmation of John Roberts as Chief Justice of the United States. Thank you.

Chairman SPECTER. Thank you very much, Judge Lindberg.

[The prepared statement of Judge Lindberg appears as a submission for the record.]

Chairman SPECTER. Our final witness on the panel is Mr. Reginald Turner, President of the National Bar Association, the nation's oldest and largest association of African-American lawyers. A member of the Detroit-based law firm of Clark, Hill, he has been a White House fellow and worked as an aide to former HUD Secretaries Cisneros and Cuomo. He has a law degree from the University of Michigan and an undergraduate degree from Wayne State University.

We appreciate your being here, Mr. Turner, and the floor is yours.

**STATEMENT OF REGINALD M. TURNER, JR., PRESIDENT, NATIONAL BAR ASSOCIATION, DETROIT, MICHIGAN**

Mr. TURNER. Thank you very much, Mr. Chairman. To Chairman Specter and to all the members of the Committee, the National Bar Association appreciates this opportunity to address you on behalf of the network of over 20,000 lawyers of color who are members of the National Bar Association and on behalf of our 80 affiliates across the Nation and around the world.

Here with me today is the Chair of the National Bar Association's Judicial Selection Committee, Assistant Dean Alfreda Robinson from the George Washington University School of Law, who has worked tirelessly to prepare us for this moment. We are also joined by Theodore Shaw, the Director-Counsel of the NAACP Legal Defense and Educational Fund, whose efforts have contributed to the advancement of civil rights and civil liberties for well over a decade.

The significance of the confirmation of the Chief Justice of the United States cannot be overstated. We ask this Committee to ensure that any nominee is extraordinarily qualified before giving this esteemed position.

The National Bar Association has established a fair process and fair criteria for evaluating judicial nominees. We take a position on a nomination only after a complete and exhaustive review of the nominee's record. We have reviewed Judge Roberts's entire record, including his professional and educational background, and the available records of his years as a government lawyer. The record is, unfortunately, complex and troubling. It is also incomplete. Judge Roberts has impressive educational credentials and a distinguished employment history, but these credentials alone are not sufficient to qualify a lawyer or judge to be Chief Justice of the United States.

Sadly, this Nation was founded on principles and laws that denied many rights and privileges, including the right to vote and of citizenship to African-Americans and women. Throughout our history, however, the Supreme Court has helped to advance our Nation toward the ideal of equal justice under law, and the effect of that work on African-Americans is perhaps unduplicated with respect to any other people in the United States.

Many of the cases in which the Supreme Court has advanced equal justice under law have been decided by razor-thin margins, most typically five-to-four. Accordingly, the stakes in this appointment could not be higher.

As Senator Edward Kennedy stated earlier during this hearing, the devastation of Hurricane Katrina has exposed America's continued racial inequities and economic disparities. In this country, race and treatment of racial issues by the judiciary profoundly affect every aspect of American life and play critical roles in the formulation of American social, economic, and political agendas.

Accordingly, the National Bar Association must determine whether a Federal judicial nominee will interpret the Constitution and laws to effectuate racial equality and eliminate oppression.

Despite the claims of neutrality and equality, our legal system is not yet as colorblind as it should be. In *Grutter* v. *Bollinger*, which upheld the use of affirmative action, Supreme Court Justice Sandra

Day O'Connor acknowledged that. She said, and I quote, "in a society like our own, race unfortunately still matters."

Therefore, a judicial nominee's record should demonstrate support for constitutional principles, statutes, and legal documents that serve to extend the blessings of liberty to all Americans, including people of color.

Unfortunately, the available record on Judge Roberts precludes us from supporting his nomination. We take the position on the following grounds.

The record is incomplete, as many important documents have been withheld from this Committee and from the public. There are numerous available documents demonstrating that the nominee does not support civil rights, civil liberties, and equal justice under law. He has argued for the use of inordinately restrictive standing analysis to limit access for groups seeking to promote civil rights and civil liberties. He has argued for reducing the authority of Federal courts even to hear cases relating to civil rights and civil liberties, and he has argued for restriction of the Federal court's ability to remedy those violations.

In conclusion, on the basis of our thorough review of the available record on Judge Roberts and for the reasons cited above, the National Bar Association cannot support this confirmation.

Earlier, there was a reference to memoranda. It is really important to note that those memoranda reflecting Judge Roberts's views, which have not been repudiated during the course of these hearings, must be considered by this Committee as reflecting his current views. We thank you.

Chairman SPECTER. Thank you very much.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Chairman SPECTER. A vote has been called and we are in the latter stages of it. There are a great many questions which we could benefit from on dialogue. As I have said earlier, we have invited 30 witnesses. We had many, many, many requests and we accommodated as many as we could, but it realistically precludes very much by way of questioning.

We have a Utah judge here. Senator Hatch, do you have a comment or two?

Senator HATCH. I do, as a matter of fact I just want to thank you all for appearing, but I just want to chat a little bit about my good friend and Utah judge here.

Judge Lindberg, given your unique and impressive personal, academic, and legal background, I think you are in a strong position to offer an opinion on Judge Roberts. Not only did you serve there at that law firm, but you have one of the strongest backgrounds of any woman lawyer in this country, as a woman with a Puerto Rican mother and a Cuban father who fled Cuba as a young child and then went on to a distinguished academic career, earning two Master's degrees and then a Ph.D. and then who went on to the Brigham Young University School of Law and got a law degree there with honors, and then knowing something of the Supreme Court from the inside from your time that you spent as a law clerk to Sandra Day O'Connor, and then working at the highest levels of the legal profession, including your work, as mentioned, as a col-

league of Judge Roberts at the law firm of Hogan and Hartson, and now having spent the last 7 years on the bench yourself in one of Utah's trial courts, I am very, very pleased to have you here.

I was particularly pleased to listen to your experiences as a woman, as a minority, as an able jurist in that you believe Judge Roberts's qualifications to be as good as anybody could possibly have. That means a lot to me, and I personally want to pay tribute to you as somebody who has not only excelled in the legal profession, but deserves the accolades that I have just given. Thank you for coming. I appreciate you being here.

I appreciate all of you and your testimony. Whether or not we agree or disagree, we appreciate that you have taken time to come and discuss these matters with us.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy?

Senator KENNEDY. Just briefly, and thank you.

Ms. Tallman, what kind of America would we be if the Judge's position on the *Plyler* case had been the findings and we had that kind of an education policy to many Hispanic families?

Ms. TALLMAN. The *Plyler* decision was a very important piece of litigation decided before the United States Supreme Court that has profound impacts on the ability of undocumented immigrant children, who are in this country by no fault of their own, the ability of them to be protected under Constitution, upholding over 100 years of jurisprudence that prove that aliens were persons under the Constitution and that education was something that these children should be able to access. If that decision had been decided differently, because judicial restraint pursuant to Judge Roberts's view would have been followed, the Equal Protection Clause may not have been applied in that case and, as a result, we would have a permanent underclass of children in this country who would be unable to access public education.

Senator KENNEDY. And your response to his position, well, that was the position of the administration and he was just carrying forward the administration's policy? Did you find out—I asked him about the great decision that Justice Warren, the great *Brown* decision, he said, was settled law with regard to black children—did you find it somewhat troublesome that he had a different interpretation when it came to children of Hispanics?

Ms. TALLMAN. I think the concern that we have on *Plyler* is that on the memo that he wrote on the day of the decision, in June of 1982, his instant reaction was to ignore the Supreme Court's rationale regarding the important societal impact of the decision and focus on how it would have resulted in potentially a different outcome had judicial restraint been followed. That is his personal view, that he thought judicial restraint should have been or could have been followed had the Solicitor General's Office followed a different approach. And I think that, with his ongoing perspectives of the limited involvement of the Federal Government in the protection of people's civil rights, I believe that Judge Roberts's views are that limited involvement—no remarks during this hearing to state that he feels strongly about the decision in *Plyler*, and his memo on the day of the decision all raise very serious concerns for us.

Senator KENNEDY. Carol Browner, let me just ask you about the Judge's 1983 position about the nondelegation doctrine, the constitutional anomaly of independent agencies. This is the recognition—it is the unified presidency, meaning that these independent agencies really don't have the authority to carry—If we carried that concept through to its logical end, where would we be, for example, on environmental issues, just generally, on clean air, clean water?

Ms. BROWNER. Well, I think we would be in complete disarray and the amount of protections we have been able to provide to date probably wouldn't be there. I mean, Congress has very wisely delegated to the Environmental Protection Agency the difficult work of making sure that all the science is there before a pollution standard is set, making sure that both industry and the public at large get to comment on this. There is a whole process that unfolds. If Congress were not able to delegate that authority to the executive branch, to the independent agencies, I suspect that either nothing would happen or it would happen much more slowly, because Congress would be left to do that.

We made a decision when I was in the administration to set tough public health air pollution standards for ozone and fine particles, sometimes referred to as soot and smog. These are standards that will prevent tens of thousands of premature deaths. They are very important. A lower court found that that was an unconstitutional provision of the Clean Air Act. In the Supreme Court we did win 9–0, but it is important to protect that going forward.

Senator KENNEDY. My time is just about up. Mr. Chairman, thank you.

Chairman SPECTER. Thank you very much, Senator Kennedy.

Thank you all. The time has expired, so we are going to go to vote. There may be two votes, but we will be back as promptly as we can to proceed with Panel IV.

Thank you all very much.

[Recess from 2:57 p.m. to 3:16 p.m.]

Chairman SPECTER. The hearing will resume.

Before turning to our fourth panel, I want to correct the record on a statement which I made yesterday when I was questioning Judge Roberts on *U.S.* v. *Morrison* and the alleged rape of a woman. I said by three VMI students, Virginia Military Institute, and that was incorrect. It was VPI, Virginia Polytech Institute. I regret the confusion and apologize to VMI and correct the record.

And now, on to the panel. Our first witness is Ms. Catherine Stetson, a partner in Hogan and Hartson concentrating on appellate and Supreme Court litigation. She had been clerk to Judge Harris on the D.C. District Court and Judge Catell on the D.C. Circuit.

Thank you for joining us, Ms. Stetson, and the floor is yours.

## STATEMENT OF CATHERINE E. STETSON, PARTNER, HOGAN AND HARTSON, WASHINGTON, D.C.

Ms. STETSON. Thank you, Mr. Chairman, members of the Committee. Thank you for the opportunity to testify today. My name is Kate Stetson. I am a partner in the law firm of Hogan and Hartson and I am here today to speak in strong support of the nomination

of my friend and my former colleague, Judge John Roberts, to be Chief Justice of the United States.

You have heard many times over of the Judge's unsurpassed skill as an advocate. I can speak to that issue, as well, but I don't believe you need to hear that from me today. What I would like to do instead is talk to you about my personal experience working for the Judge and his role in guiding me from early in my legal career through partnership in my firm.

I came to Hogan and Hartson as an associate in 1997, after those two judicial clerkships. Those clerkships both gave me a deep appreciation for good advocacy, but I grew up as a lawyer on Judge Roberts's watch. It was my 6 years working for him at Hogan and Hartson, first as an associate and then as his law partner, that taught me to be an advocate.

No one could have had a better teacher, but having a mentor and not just a teacher is equally important to any young lawyer's career and Judge Roberts was a mentor to me, as well. He counseled me on matters I handled for clients. He acted as a mock judge for moot courts that I held before my oral arguments. He demanded a lot from me, he praised me, and he supported me unstintingly.

I will give you just one example. Several years ago, I gave my first D.C. Circuit argument. Judge Roberts came and he sat in the audience and watched, and after the argument was over, he and I walked back together from the courthouse to our offices, as we often had done after the Judge's own oral arguments, and together we discussed and dissected the panel's questions and my answers. I will remember that day and that long walk for a long time.

Judge Roberts mentored me in less tangible ways, as well. I watched him for years interact with colleagues and staff at the firm, no matter what their position, always in the same decent, gentlemanly way. Whether he was dealing with clients or with adversaries, he was unfailingly courteous, never strident, never engaging in the luster that so often characterizes discourse among lawyers. I learned a lot from him in those more subtle respects, as well.

Five years ago, Judge Roberts and his wife, Jane, adopted their two children, Josephine and Jack. In that same year, my husband and I had our first child, as well, so all four of us learned at the same time what a delightful, chaotic, sometimes frustrating, and always joyful thing it is to be a parent.

When I came back to Hogan and Hartson after maternity leave, I faced the difficult challenge of being a new mother and a law firm associate. The transition back to work is hard for any working mother, and I was no different in that regard. But the transition back to working with Judge Roberts was seamless. We just picked up where I had left off a few months before. Judge Roberts never questioned the balance I chose to strike between my obligations to my family and to my colleagues and clients at the firm. He supported me in both of those roles and he did it quietly and without fanfare.

At the end of the year 2001, I was being considered for partnership at my firm. I had taken a few months of maternity leave that year. I was also an associate working on a part-time schedule. Now, either of those considerations might have impeded my pro-

motion to partnership at another firm. Neither of those considerations mattered to Judge Roberts or to my firm. What mattered to Judge Roberts was that I was a good lawyer. And so with his strong support, I became a partner at Hogan and Hartson at the end of that year.

Now, by the time the Judge left for the D.C. Circuit bench, we had worked on many matters together, issues as diverse and arcane as patent appeals, ERISA briefs, energy cases, preemption issues. The issues that we dealt with varied widely from week to week and from case to case, but a few things were constant—the Judge's keen intellect, prodigious beyond description, his depth of preparation for every case, his kind and quiet sense of humor, and his devotion to the law.

No one is more dedicated and more devoted to the law than Judge Roberts. It was my honor to work for him for several years and it is my honor to appear before you today to speak on his behalf. Thank you.

Chairman SPECTER. Thank you very much, Ms. Stetson.

[The prepared statement of Ms. Stetson appears as a submission for the record.]

Chairman SPECTER. Our next witness is Ms. Marcia Greenberger, founder and Co-President of the National Women's Law Center, a graduate of the University of Pennsylvania, both Bachelor's and law degree. She practiced with the Washington firm Kaplan and Drysdale, had been Director of the Women's Rights Project of the Center for Law and Social Policy, which became the National Women's Law Center. She is also on the Executive Committee of the Leadership Conference on Civil Rights.

Thank you for being with us today, Ms. Greenberger, and we look forward to your testimony.

**STATEMENT OF MARCIA GREENBERGER, CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, D.C.**

Ms. GREENBERGER. Thank you, Mr. Chairman. Thank you. I am Marcia Greenberger, Co-President of the National Women's Law Center, which since 1972 has been involved in virtually every major effort to secure and defend women's legal rights in this country. We were directly involved, as a result, in many of the battles to save women's rights that Judge Roberts worked to undermine.

I thank you for your invitation to testify and ask that my written statement and attached report be made a part of the record.

Some have claimed that because Judge Roberts has been so supportive of women family members and friends and wonderful colleagues that he must also support women's legal rights. But Judge Roberts's record consists of document after document detailing his past work to undermine women's legal rights on the job, in schools, and in government programs.

This week, Judge Roberts told Senator Feinstein he could not identify anything he would change in his writings and memoranda except the tone he used in support for limiting life tenure for judges. Judge Roberts provided a clear explanation for this seeming contradiction. He testified that he forms his legal views without regard to his life experiences, and this is his quote, "a father, husband, or anything else," end quote. Unfortunately, John Roberts's

view of the law is entirely divorced from its real-world consequences on women's lives.

In contrast to Justice Oliver Wendell Holmes, who said that, quote, "The life of the law is not logic but experience," for Judge Roberts, the law is pure logic, untempered by life experience.

The Christine Franklin case discussed again this morning demonstrates why his judicial philosophy is so harmful. As a high school student, her teacher and coach sexually harassed and ultimately raped her. Judge Roberts said he did not condone the behavior, and I am sure he did not, but that is not the point. As the political Deputy Solicitor General, he argued that Title IX should be interpreted to preclude her, and indeed any student, from recovering even one cent of damages, no matter how severe her injuries or how egregious the discrimination.

He said students could still recover back pay or get the court to order the sexual abuse to stop in the future, but high school students aren't paid by their schools, and by the time their cases get through the courts, they have often graduated, as had Christine Franklin, so they can't benefit from a court order that a school protect its students in the future.

His argument on the law would have let schools off scot free and left students without effective protection or any remedy for the serious injuries they suffer. The Supreme Court rejected this extreme limitation on Title IX nine-to-nothing, and pressed repeatedly by Senator Leahy today to say the legal positions he argued were wrong now in retrospect, Judge Roberts repeatedly refused to do so. At most, he said he had, quote, "no cause or agenda to revisit it or any quarrel with it," end quote.

Of course, a nine-to-nothing decision is not one likely to be revisited. As for having no quarrel with it, that is a careful formulation we have heard time and again in past confirmation hearings. Justice Thomas used it, for example, in discussing the Establishment Clause under the *Lemon* test, which he attacked once on the Court. He explained, in answer to a question at his hearing, that having no quarrel with a ruling does not mean that he agrees with it.

On women's constitutional rights and equal protection of the law, Judge Roberts testified that he now believes courts must give heightened scrutiny to government practices that discriminate on the basis of sex. But Judge Roberts gave no guidance as to which version of heightened scrutiny he would apply, one that gives meaningful protection to women against sex discrimination, as Justice O'Connor and the majority of the Court have applied to date, or the Thomas-Scalia version that provides little real protection to women. His written record reinforces our concern on this point.

The very same concern applies to the right to privacy and the future of *Roe* v. *Wade*. Like Justice Thomas during his confirmation hearing, Judge Roberts said that there is a right to privacy and it applies to the marital relationship and the use of contraceptives in that context, but he refused to say how much further its protection would go. For Justice Thomas, we know the answer is not very far. In his first year on the court, he said *Roe* v. *Wade* should be overturned and later said there is no general right to privacy at all. John Roberts refused to say he disagreed with Justice Thomas in any way.

Judge Roberts has refused to disavow his past record. We don't have the Solicitor General records on the *Franklin* case or others. He said many times he believes in judicial restraint, but unfortunately, what we see from the record and from his testimony is that he has been restrained in protecting individual rights and freedoms but unrestrained when he has been seeking to narrow them and that is what led the National Women's Law Center to oppose his confirmation, because we so fear turning back the clock for all Americans and most especially women and the risks are simply too high. Thank you.

Chairman SPECTER. Thank you very much.

[The prepared statement of Ms. Greenberger appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mrs. Greenberger.

Our next witness is Mayor Bruce Botelho, Mayor of Juno, Alaska. He has served as State's Attorney General. He has been a distinguished Chairman of many of the Commissions on Criminal Justice and Youth; undergrad and law degrees from Willamette University. Thanks for joining us, Mr. Mayor, and we look forward to your testimony.

**STATEMENT OF HON. BRUCE BOTELHO, MAYOR OF JUNEAU, ALASKA AND FORMER ATTORNEY GENERAL, STATE OF ALASKA, JUNEAU, ALASKA**

Mayor BOTELHO. Thank you, Mr. Chairman.

It is a distinct honor to appear before this Committee to support Judge Roberts's confirmation to be Chief Justice of the Supreme Court, that is, his nomination. I do so not only as a public official who has observed his work up close, but also as a liberal Democrat whose views on several social issues are likely at odds with the majority of this Committee.

I came to know Judge Roberts while serving as Alaska's Attorney General. In January of 1997 I first hired John to represent the State in an Indian law case that we had lost before the Ninth Circuit Court of Appeals. Mr. Roberts prepared our petition for cert, which was granted. He subsequently briefed and successfully argued the case before the U.S. Supreme Court. We ultimately retained him on 8 appellate matters over the course of the following 7 years.

I had the opportunity to work closely with Judge Roberts on these cases of immense importance to my State, and it is on the basis of this working relationship that I urge confirmation of Judge Roberts.

Mr. Chairman, I was struck by the eloquence, without exception, of the opening statements offered by members of this Committee on Monday, but it was Senator Kohl's personal test for confirmation that particularly resonated with me. Aside from candor, Senator Kohl said that he would look for a person who is competent, has strong character and judicial temperament, someone who knows the law and can explain it to the common person. He would look for a person who has compassion for real people who are affected by the Court's decisions, and he said he would look for a person who understands the fundamental values of this Nation.

In applying Senator Kohl's approach, I offer this brief perspective on Judge Roberts. As you have all heard repeatedly, Judge Roberts possesses extraordinary legal skills. His briefs are technically perfect. They are clear, persuasive, and they are a pleasure to read. His writing style is one that is reachable by our citizens. Likewise, his oral presentation and argument style is straightforward, responsive and conversational.

Judge Roberts is a modest, respectful, polite and eminently approachable person. He has remarkable ability to engage people of our backgrounds.

I have two anecdotes I would share with you. The first, in order to get a better understanding of the issues in a submerged land case that existed between the State and Federal Governments, he decided that he wanted to explore the area. I recall with a great deal of fondness his interaction with the crew members of a small State Fish and Game vessel as we plied the waters of southeast Alaska. He was intensely interested in the crew as persons, in what they did, what they thought, and particularly their sense of the land and water surrounding us. He truly made them feel that they were part of a team.

And as an aside, Judge Roberts's decision to spend time traveling to southeast Alaska was emblematic of his passion for learning everything there was to know about a case, not just to know the law, but to know the facts firsthand. That is the first example.

The second one a little more personal and more recent. Early this summer, I contacted Judge Roberts and asked him whether he would be willing to meet with a group of Boy Scouts on their way to the National Jamboree just as part of their trip. He immediately agreed to do so. The night that his nomination was announced in July, I e-mailed him to give him both my congratulations and to tell him that I understood that under the circumstances he had better fish to fry than meet with my troop. His reply, which was sent at 2:00 a.m., began, "Nonsense. I can think of no more valuable use of my time." He met with these young men for nearly an hour and he focused on them in a way that made them feel that they were the most important people in the world at the moment. And their collective evaluation, Mr. Chairman, was "He's a pretty good guy."

Judge Roberts works collaboratively. He always sought out views and our critique at every stage of preparation. He delighted in engaging and dialogue with my staff, and made clear his willingness to learn from, as well as to teach his clients. This collaborative approach to problem solving will be particularly valuable on the Supreme Court.

Finally, Judge Roberts has an unparalleled reverence for the role of the law and justice in our society. He was always faithful to the text and context of the law. His judgment and common sense were exquisite. He did not enter the debate on any case we presented him with a predetermined outcome or view. He subjected ideas to rigorous examination to reach logical sound conclusions based on the facts and the law. While he, like all of us, may hold personal views on a wide range of subjects, Judge Roberts has the capacity to approach every issue with a freshness and openness. He will de-

cide cases, not causes, and he will declare the law as reason and justice lead him.

Working with Judge Roberts, I was fortunate to get to know the most remarkable and inspiring lawyer I have ever met. He will lead the Court in a way that will instill public confidence in the fairness, justice and wisdom of its judiciary.

[The prepared statement of Mayor Botelho appears as a submission for the record.]

Chairman SPECTER. Thank you very much.

Our next witness is Mr. Roderick Jackson, the plaintiff in *Jackson* v. *Birmingham Board of Education*, a Title IX case. He complained about inadequate funding for women's sports, and was the object of retaliation. A graduate of the University of Alabama and Alabama State, he is currently the Acting Head Coach of a girls basketball team at Ensley High School.

Thank you for coming in, Plaintiff Jackson.

**STATEMENT OF RODERICK JACKSON, COACH, ENSLEY HIGH SCHOOL, BIRMINGHAM, ALABAMA**

Mr. JACKSON. Good afternoon, Mr. Chairman and members of the Committee. My name is Roderick Jackson, and it is truly a privilege and honor to be here today, and I ask that you include my full statement for the record.

Chairman SPECTER. It will be made a part of the record, without objection.

Mr. JACKSON. It is hard for me to believe that I am actually here. I am just a teacher and Acting Head Coach of the Ensley High School girls basketball team in Birmingham, Alabama.

But my story shows the impact that the Supreme Court can have on the lives of regular citizens and how key a role the Court plays in making sure that our civil rights laws truly guarantee fair treatment for all.

I was born and raised in Birmingham, where I early on learned the value of taking responsibility for myself, my family and those in my charge. My father died when I was 2-years-old, so I had to help support the family, working my way through school all the way through graduate school. Other than the 6 years that I served in Army Reserves, I have spent my life in that community where I grew up.

From 1999 until May of 2001 I was the Head Coach of the girls basketball team at Ensley High School. We had a good team. The girls worked hard and they won many games. Six of my seniors actually received scholarships out of 7. But my team was not treated fairly. The girls had to practice in the outdated, unheated old gym with lumpy floors, while the boys practiced in the new regulation-size gymnasium. My team did not get enough funds to pay for buses to away games or equipment that we needed. We could not get access to basic things like ice when a player became injured.

To me this was just unfair, and I also thought it was against the law. So I did what I thought was the right thing. I went through the chain of command at my school in the school district and asked for equal treatment of my team.

The school ignored the unfairness. Instead of fixing the problems, they fired me from my coaching job. Being fired was the beginning

of a tough period for me. I not only lost the satisfaction of coaching, I also lost the extra income I would have earned.

I was labeled a troublemaker, a rabble rouser, and for 2–1/2 years I was turned down for every other coaching position that I applied for, and the young ladies at Ensley, more importantly, lost the only person that was willing to stand up for them.

So I went to court to try to get my job back, and with the help of the National Women's Law Center and the law firm of O'Melveny and Myers, I took my case all the way to the Supreme Court.

The Court, in a 5–4 decision written by Justice O'Connor, made clear that Title IX and laws like it were intended to protect people like me and my girls.

I came to Washington for the argument. It was truly a thrill. I felt like Justice O'Connor was looking straight at me right in the courtroom. In her opinion, she said that prohibiting retaliation against those who protest discrimination is essential to realizing the goals of the law. This decision and my involvement in this case had a significant impact on me, and I hope on others as well. The Court's decision sends a message that teachers and others like me can stand up for what is right when we recognize discrimination and bring it forward without being penalized as a result. In fact, people come up to me on the street in Birmingham almost weekly and thank me for what I did. But the decision could have easily gone the other way. A shift in even one vote would have left me without any remedy. That is why today's hearing and the Supreme Court confirmation process is so important to people like me.

Like many Americans, I have had a chance to follow some of the coverage and read up on the proceedings with great interest. I have heard and read a lot that raises questions about whether Judge Roberts would act to protect my rights or for those young ladies that I represent. Like Judge Roberts, I have a son and a daughter, and I will insist at every turn that my daughter have equal citizenship rights with her brother. But as I have learned the hard way, sometimes we need help from the Supreme Court to make sure you can do that.

I hope that this Committee will vote to confirm nominees who understand the key role of the Supreme Court in protecting civil rights, who recognize the significant impact of their decisions on everyday lives, and who will help to continue to make the promise of the law a reality.

I thank you.

[The prepared statement of Mr. Jackson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Jackson.

Our next witness is Ms. Henrietta Wright, the Chairman of the Board of Trustees of the Dallas Children's Advocacy Center. She worked full-time on President Carter's campaign staff in 1976, then for the Democratic National Committee; Yale grad, both B.A. and law degree, where she was on the Journal; now of counsel to the Goldberg law firm.

Thank you for coming in, Ms. Wright, and we look forward to your testimony.

**STATEMENT OF HENRIETTA WRIGHT, OF COUNSEL, GOLDBERG, GODLES, WIENER AND WRIGHT, AND CHAIRMAN OF THE BOARD, DALLAS CHILDREN'S ADVOCACY CENTER, DALLAS, TEXAS**

Ms. WRIGHT. Thank you, Mr. Chairman, members of the Committee. I am not here today to discuss—

Senator BIDEN. May I ask a procedural question? Excuse the interruption. Are they going to hold the vote for us?

Chairman SPECTER. The vote is scheduled to be held until 5 minutes to 4:00, so we are on a tight time schedule, but the answer is yes.

Senator BIDEN. The power of a Chairman. Thank you, Mr. Chairman.

Ms. WRIGHT. I will talk quickly.

Senator BIDEN. No, no, no. Take your time. I just wanted to make sure.

Ms. WRIGHT. I am not here today to discuss Judge Roberts's judicial opinions or his political views. Instead, I hope to give you some insight into John Roberts, the man, whom I have had the privilege and pleasure of knowing for almost 20 years. The President could not have made a better choice for Chief Justice of the United States.

I am a life-long Democrat. I served in President Carter's White House, working for Sarah Weddington. My political views have not disqualified me from being in John's close circle of friends. He himself does not have a doctrinaire approach to life.

One of the things I have liked most about John is that he has always been supportive of women and aware of the many difficult choices that some of us have faced. As his wife, Jane, and I made the long march to law firm partnership and motherhood, he was unstinting in his encouragement. When Jane or I had successes in our Washington law practices, John applauded them. When my daughter, Sierra, turned 3 and I decided to become a full-time volunteer, he understood and supported the reasons for that decision as well.

John is definitely a man who respects smart women. His wife has two more degrees than he does.

John's support of Jane's work is constant and genuine. As but one of thousands of examples, recently when Jane's family in New York held a celebration on the same day that she needed to be away on law firm business, John dressed and packed the children for the trip, drove them to New York, and spent several days at Sullivan family functions as a single parent, thinking nothing of it.

John is truly a lawyer's lawyer. His intellectual curiosity, especially about the law, is immense. He and I are both long-time members of the American Law Institute and have been together at many of those functions over the years. As you have seen demonstrated this week, he is capable of intelligently discussing any area of law that comes up.

John is a very likable, congenial person, and the Court will benefit from his persuasive ability and tact. It is not a given that lawyers, especially super-smart ones, have good social skills. Maybe as Chief Justice, John can help the Court produce greater consensus

in its opinion. He will also bring a dry, often self-deprecating wit to the proceedings.

I laughed and groaned to see articles picking apart a flippant sentence John wrote when he was much younger about whether homemakers should be encouraged to become lawyers. I could hear the smile in his voice when I read these remarks and felt certain that he had found a way to tell a lawyer joke on himself.

How someone handles disappointments in life says a lot about them. John and Jane went through considerable effort and anguish to have children, sometimes wondering if, as prospective first-time parents in their 40's, it would ever happen. It took a long time to arrange the first adoption, and it fell through just days before the baby was due to come home with them. Rather than being angry or devastated, John and Jane remained calm and positive.

Career disappointments came, too. John's first two nominations to the Court of Appeals for the D.C. Circuit were not acted on by the Senate. For 11 years, he never showed any bitterness about it. Instead, he appeared to relish the challenge of his years in private practice.

John seemed perfectly accepting of the possibility that he would never become a judge. But if merit truly determined judicial appointments, it could only be a matter of time before he would be on the bench, and even on the Supreme Court.

What do all of these highly personal impressions of John indicate for this Committee's consideration of him as a nominee? I have known John in many unguarded personal, private moments. I can assure you and the American people that what you see here and the man I have known is the Justice you will get. John Roberts is smart, tolerant, collegial, of even temperament, and loves the law.

From my experience, John Roberts has no agenda other than to apply the law as it is written. It will be a great credit to this Committee and to the rest of the Senate for his nomination to be speedily approved.

Thank you.

[The prepared statement of Ms. Wright appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Wright.

I have just been informed that a number of our colleagues have plane reservations, and they want to leave while we want to stay. So we are going to recess now, and we will be back shortly after the vote.

[Recess from 3:46 to 4:17 p.m.]

Chairman SPECTER. The hearing will resume.

The good news is that there are no more votes this afternoon, so we will not be interrupted again.

Our final witness on this panel is Ms. Beverly Jones, Lafayette, Tennessee, one of the two plaintiffs in *Lane* v. *Tennessee*. Ms. Jones is a graduate of Tennessee State University, is a certified court reporter, more than 15 years of court reporting experience. She has a mobility impairment, and she filed suit under Title II of the ADA against Tennessee, and she got the Court on a good day. It was 5–4 for her, unlike *Garrett*, which was 5–4 the other way.

Thank you from joining us, Ms. Jones, and we will be very much interested to hear what happened to you and your testimony.

**STATEMENT OF BEVERLY JONES, LAFAYETTE, TENNESSEE**

Ms. JONES. Thank you, Chairman Specter and members of the Judiciary Committee. My name is Beverly Jones, and even though Chairman Specter pronounced it LA-fayette, where I am from, it's La-FAY-ette, Tennessee. And I would like to thank the Committee for inviting me to testify in these confirmation proceedings.

If John Roberts is confirmed as Chief Justice, his decisions will impact the lives of Americans for decades to come. I hope that as you deliberate on his nomination, you will not underestimate the importance his role and decisions will have on everyone, including people like me.

If I may, Mr. Chairman, I would like to share with you the importance that the Constitution, the law, and the Supreme Court have had on my life, and for my rights as a person with a disability. I was a plaintiff in *Tennessee* v. *Lane*, a case that went up to the Supreme Court concerning the rights of people with disabilities to have access to the courts. The Supreme Court took the case to decide whether it could enforce the rights that Congress gave people like me under the Americans with Disabilities Act.

When Congress passed the Americans with Disabilities Act in 1990, it found that individuals with disabilities, and I quote, "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness" based on inaccurate stereotypes.

On July 26, 1990, when President George H.W. Bush signed the law, he affirmed this finding and declared that, just as we tore down the Berlin Wall to free the people of Eastern Europe, we would tear down the barriers that keep people with disabilities from participating in society. For me the passage of the Americans with Disabilities Act was like opening a door that had been closed for so long.

I lost my ability to walk due to an automobile accident in 1984 and have used a wheelchair since that time. At the time I became disabled, I decided that I would not allow what I wanted in life to be denied because of my physical limitations. At the time of my accident, I was a wife and mother, but had little education and limited job skills. A local judge and attorney encouraged me to look into becoming a court reporter, and from there my ambitions began.

I completed court reporting school the year that the ADA was passed. But to my surprise, when I began my first assignment, I found that I could not get into many of Tennessee's courtrooms and courthouses because they were inaccessible to people who used wheelchairs. I was forced to turn down jobs or face humiliating experiences.

Approximately seven out of ten courthouses in Tennessee were inaccessible when I filed my suit. In some cases, I could not even get in the door. In the years following the passage of the ADA, some courthouses became more accessible, but even in 1998, when my lawsuit was filed, a number of the courthouses I worked in remained inaccessible to me.

Courtrooms were located only on upper floors and reachable only by climbing stairs. I was often forced to ask complete strangers to carry me up the stairs or into rooms, including nonaccessible rest-

rooms. This experience was humiliating and frightening. But as a single mom supporting myself and two kids, I could not afford to quit my job or strictly limit my work to accessible courthouses.

After the passage of the ADA, I worked tirelessly to bring the law to the attention of public officials throughout Tennessee and to encourage them to follow the law's requirements to make public buildings, including courthouses, accessible.

Because the State of Tennessee challenged the constitutionality of the ADA, my case went through the courts for 6 years without any court reaching the substance of my claims. In 2004, my case reached the United States Supreme Court, which voted by a 5–4 margin to uphold my right to enforce the Americans with Disabilities Act's protections.

Many changes have been made in Tennessee as a result of the ruling, and I am now able to do my job with much greater ease and without humiliation or danger. My case is over. But what I have been able to accomplish with the help of Congress is not the end of the issue. For me it would be a hollow victory to see *Tennessee* v. *Lane* as the end of the road. There are too many others who need the protections of the law and the Constitution.

In fact, Congress's power to enact the ADA will be considered again on November 9, 2005, when the Supreme Court will hear a case called *Goodman* v. *Georgia.* This case involves a man who is in prison in Georgia and is a paraplegic, just as I am. He requires a wheelchair to move about. This man is confined in a 12-foot-by-3-foot cell for 23 to 24 hours a day because of the inaccessibility of the prison facilities. He has to sleep in his wheelchair because his bed is inaccessible, and he has suffered broken bones because of his attempts to transfer from his wheelchair.

On November 9th, the Court will consider whether Congress has the power to ensure that this man will be permitted to access the same services as every other prisoner in that facility. Just as I do not know Judge Roberts, I do not know Tony Goodman. I do not know if he is a good person or a bad person. But that is not the point. All I know is that just as I should not have had to endure the humiliation, embarrassment, fear, and pain that I did for more than 14 years, he should not either. And if John Roberts is confirmed to Chief Justice, he must know that there are many others like Tony Goodman who need the protection of the law.

If confirmed, the role that Judge Roberts will play in defining the boundaries of the Constitution and the power of Congress to protect citizens just like me is critical. It is my hope that the Senate will carefully review the record of John Roberts to determine if he is committed to the protection of the rights and freedoms of every American.

I am not here today as an expert on John Roberts's record. I am here today to tell my story. But I do know that there are many within the disabled community who believe that John Roberts's record with respect to disability rights raises serious concerns. I understand that John Roberts has advocated that the Americans with Disabilities Act should be narrowly interpreted to protect only the so-called truly disabled. Because my case involved Congress's power to enact the Americans with Disabilities Act, I understand just how important it is to ensure that the judges on our courts re-

spect Congress's authority to provide protections that are so desperately needed. Without the protections that Congress guaranteed in the Americans with Disabilities Act, my life and the lives of millions of others with disabilities would be a lot harder.

For all of these reasons, I urge the Senate to pay close attention to whether John Roberts has proven that he would ensure that the rights that people with disabilities fought so hard to secure are not stripped away.

Members of the Senate, I hope that you will give John Roberts's record very careful scrutiny before voting on his nomination. I hope that the rights of millions of Americans with disabilities are important enough to merit that type of careful consideration.

Thank you.

[The prepared statement of Ms. Jones appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Jones, for your very poignant story.

As I had said earlier, we have many, many witnesses today. We still have 12 more witnesses to hear. And while there are many questions which would be very fruitful, when we divided up the witnesses, 15 for the Democrats and 15 for the Republicans, we wanted to bring on as many people as we could to hear your stories and see your faces and take your pulse and see the quality of your testimony and passion, both for and against. But I am not going to ask any questions. I am just going to make one observation.

As to your case, Ms. Jones, I had a chance to talk to your lawyer, and there is very strong sentiment in this Congress on both sides of the aisle to protect Americans with disabilities. Senator Dole, who is not with us any longer, has been a real leader, but people on this dais now were very instrumental in that legislation. And we are not going to let the Supreme Court get away with congruence and proportionality. Your lawyer is nodding in the affirmative. I think that point was made fairly emphatically so that congressional will reflecting the people and having very important social programs will be carried out.

Senator Leahy, do you have questions?

Senator LEAHY. I don't have a question, but just to say this, Mr. Chairman. One, I applaud what you said, but when I voted for the Americans with Disabilities Act, I voted for the Act that I expected would be enforced. I voted for an Act that would open those doors. I voted for the Act so that Beverly Jones could go to work and others could, and one of my dearest friends who spends his life in a wheelchair, that he can go anywhere he wants. And if you knew him, you would know he wants to go where he wants.

We will keep on working to make sure it is enforced.

Chairman SPECTER. Thank you, Senator.

Senator LEAHY. That wasn't an empty gesture to vote for it. We want an Act that is actually going to work, and Republicans and Democrats alike joined hands on that one.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch, questions?

Senator HATCH. Yes. Ms. Jones, I managed the bill on the floor for our side, and was one of the prime authors, so we are on your side on this.

Ms. JONES. Thank you.

Senator HATCH. The Supreme Court is one thing, we are another, and we will surely try to make sure that your rights are protected.

I just have one question for you, Ms. Greenberger, and that is, has your organization ever endorsed a Republican nominee for the Supreme Court?

Ms. GREENBERGER. Well, our organization actually rarely takes positions. In fact, the very first time we ever—

Senator HATCH. Have you ever been in favor of a Republican nominee—maybe I should put it that way—for the Supreme Court?

Ms. GREENBERGER. We have rarely taken a position period, and I do not think that is probably—I do not think we have.

Senator HATCH. I do not either.

Ms. GREENBERGER. On the other hand, there are a number of Republican nominees for the Supreme Court that we have not opposed, and of course, many women's organizations that are a part in the coalition, were very strong supporters of Sandra Day O'Connor's nomination. At that period in our history we had not ever taken a position with respect to a judicial nomination and did not up until the late '80's.

I think what we learned over time as an organization that is so involved with the courts, is that when we work on legislation like Title IX or we try to represent clients like Mr. Jackson, if the judges are hostile and do not have the kind of open mind that we are looking for, whatever their political persuasion may be, then there really is not the sense of justice at the end of the day, and those legal rights do not really matter.

Senator HATCH. I think whether they are Republicans or Democrats, they ought to have an open mind on women's issues. I do not think there is any question about that.

Ms. GREENBERGER. Absolutely.

Senator HATCH. Your organization is closely affiliated with the Alliance for Justice and the National Organization for Women as well?

Ms. GREENBERGER. Well, we are a member of the Alliance. The National Organization for Women is an organization that we have worked with on a range of different issues, like many, many different types of organizations of all different sorts over the many years that we have worked, whether it is involving child care or involving some of the issues where, Senator Hatch, you have been a strong supporter, like child care.

Senator HATCH. I think it does some good. Let me ask you this. What I am trying to get to is do you know of any Republican, let us just say from Chief Justice Rehnquist, when he was nominated for Chief Justice, on through till today, who your organization, Alliance for Justice or NOW has ever supported or has ever found to be worthy of being on the Supreme Court?

Ms. GREENBERGER. Well, I cannot speak for those two organizations, but I know that there are a number of Republican judges over time who have been some of the strongest supporters for civil rights and women's rights. There has been a very proud tradition, a bipartisan tradition of justice and equity over the Nation's history that has not been limited by party. And that is certainly what I would hope that we would be able to see in the future.

In fact, we had not taken a position with respect to John Roberts for his Court of Appeals nomination, and did so this time, only as I said in my prepared testimony, because when we looked at the record that was available to us, we were honestly taken aback at how many of the core women's legal rights that are at the heart of our mission he had worked to narrow, and that is what led us to take the position, not his—not his party affiliation, not the administration that nominated him.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to first of all, Beverly Jones, I want to thank you. This is not an easy task to go out and talk about some of the physical challenges that you have had over the course of your life, but it is an extraordinary story and it has to be one that gives people great, great inspiration. It is just a really impressive story, and you deserve enormous credit for your own courage and perseverance.

It is interesting to know that there were four judges in the Supreme Court—even realizing the language that you read correctly from the ADA—that did not decide your way. And I can only imaging what your life would have been like if it had been 5.

Just a question about how much sort of discrimination or lack of understanding is out there with regard to people with disabilities that still needs addressing? Not that we can answer all of the problems or challenges, but how much of this do you still see out there? Do you want to make just a brief comment about the progress we are making or how far we still have to go?

Ms. JONES. Just briefly. I have used a wheelchair for 21 years, and I have seen great improvements, not only in Tennessee but across the country. However, there is still a lack of understanding, and I think a lot of it is people's lack of exposure to people with disabilities. I think I bring that to the table as far as an understanding because I was a person without a disability for 20 years. So I understand what people do not understand because until I was put in that position and became that person with the disability, I was not forced to look at it. So I think a lot of the problems out there today are based on just people not being exposed to people with disabilities for the most part.

Senator KENNEDY. Thank you.

Coach Jackson, I thank you so much for being here. I wanted to ask you—and admire you for your own courage in protesting the discrimination against young women. What would have been the impact if the Supreme Court had dismissed your case instead of recognizing that you had a right to challenge the retaliation against you?

Mr. JACKSON. Thank you for that question, Senator Kennedy. I think if the decision had went the other way, I think that decision would have sent a message to school systems and school boards across the Nation that it is okay to retaliate against persons who bring discrimination claims against the system. It would have been a big setback I think to not only Title IX and athletics, but also the other civil rights laws and anti-discrimination laws.

Senator KENNEDY. You think young women still are facing discrimination in sports today, colleges? Give us a quick thumbnail sketch.

Mr. JACKSON. There is no doubt in my mind that discrimination is still out there, even for persons who represent young ladies. For example, when you are a girls coach, it is even hard to move over to the boys position if it opens and if you apply for it. So once you are labeled a quote, "girls coach," it is like it is a step down and it should not be that way in my opinion.

Senator KENNEDY. Marcia Greenberger, you mentioned that Roberts's statement in a memo that it is a canard that women are discriminated against because they receive 59 cents for every dollar earned by men. Is there any justification for Roberts's assertion that such a wide pay gap between men and women is not evidence of discrimination against women?

Ms. GREENBERGER. There have been many studies. Of course, that was a statement that was made approximately 20 years ago, and I think if you asked most women in the country 20 years ago, was part of the pay gap due, at least part of the pay gap due to discrimination, I think they would say yes, I think their husbands would say yes too.

We have made progress, no question about it, but I think if you ask husbands or wives, men or women today, do they still see a problem of equal pay for women, the answer would be yes, and definitely a piece of that is still unfortunately sex discrimination. And it is not just a question of asking people. Studies have shown, from 20 years ago up until today, including Government studies, that an aspect of the pay gap can only be explained by discrimination.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Kyl.

Senator KYL. Mr. Chairman, I think all of us would like to both compliment these witnesses for their testimony, and also ask questions. In the interest of time I will not do that. I just would make one observation.

It is obvious that from the testimony that he gave, we cannot know how Judge Roberts would vote in cases that are going to come before him, but in law there is something called the best evidence rule. And perhaps the best evidence of the kind of person that Judge Roberts is, is illustrated by the testimony, for example, of Ms. Stetson, who talked about her role as a young mother, and an aspiring partner in a law firm, a person that he helped to mentor. And I think the kinds of things that she talked about in Judge Roberts as a person should not be forgotten by us when we consider the nature of the man that we are elevating to the United States Supreme Court. It may be the best evidence of the way that he will rule on cases as well. I certainly hope so.

I thank all of you for your testimony here.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Biden.

Senator BIDEN. Thank you very much, Mr. Chairman. This is an impressive panel, all of them.

You know, I may be mistaken, but I think other than Senator Kennedy, I voted for or against more Supreme Court Justices than anybody here, other than three other Senators on this panel. It has been an evolving process for me trying to figure out the right thing to do over the last 33 years.

I came to the conclusion about 10 years—well, that is not true—17 years ago, that there is only three ways I can decide to vote my hopes or my fears. One is that, do I know people well who know the nominee well? For example, when the former Supreme Court Justice from New Hampshire came up, I was one of the few Democrats who immediately strongly supported him and pushed in the Republican administration because there were four people, one a Republican Governor of New Hampshire and two others. One is now the Chief Justice of the Supreme Court of New Hampshire, a Democrat. The other was a Federal Judge from New Hampshire, a Democrat, and the third is another Democrat who heads up the National Education Association.

They all came down to see me, and they said, "Look, we share a vacation home with him on Lake Winnepesaukah, I tell you this guy's a straight guy, this guy doesn't have an agenda." And even though he did not have much of a record, that convinced me that I should vote my hopes. I am glad I did.

There is another way to look at it. You can look at what they have written and make your judgment based on that if you do not have any evidence on the first score.

And the third is, you look at what they say when they come before the Committee. I have been impressed by you, Ms. Stetson, as well as you, Ms. Wright, because I wish I knew you both better because you obviously care very much about this judge and you think he is going to be basically a mainstream, decent, honorable guy who will not take a narrow view of the Constitution. So it is worthwhile for me—the reason I am taking the time is to tell you that.

Also, what concerns me, I am very impressed by the testimony of Mr. Jackson and Ms. Jones, because you illustrate what is at stake here, what is at stake. And Ms. Greenberger sort of lays out the problem.

I submit for the record, Mr. Chairman, a series of questions I asked in this hearing of the Justice—of Judge Roberts, and he used the same language that Judge Thomas used with me. He said, "I have no quarrel with the majority opinion." And I would press him and say, "Well, do you agree or don't agree?" And he would say, "Well, I can't comment on that." Well, that is the same position that Judge Thomas took.

To give you an illustration of how fundamentally different that is, I am going to conclude by pointing out how different it would be in Mr. Jackson's case. In that case, writing for the minority opinion, Justice Thomas stated, "We require Congress to speak unambiguously in imposing conditions on funding recipients through its spending power, i.e., we didn't speak clearly enough, therefore, you can be fired."

Now, Justice O'Connor, a Republican appointee taking the same exact language said, and I quote, "Our repeated holdings constitute discrimination under Title IX broadly," broadly, and she reached a different result.

So I just raise for the panel and for anyone who is listening that the situation of Ms. Jones and Mr. Jackson and millions of people like them across America depend on things like whether or not it must be unambiguous, the language, as it is applied, or it must be applied broadly. That is the difference between life and death. That is the difference between freedom and lack of freedom. That is the difference between autonomy and no respect for autonomy. That is the difference between having the right to be let alone, as one famous Justice once said, and allowing the government to intrude into your life.

That is the decision I have to make, all of us have to make, and I must tell you, absent the testimony of you, Ms. Stetson, and you, Ms. Wright, I didn't think there was any prospect I could make it, but I have great respect for both of you, but I must tell you, I am—it comes down to that difference among honorable, decent, proud women and men who serve on the Court.

My question is, is Justice Roberts going to be a Scalia, a Rehnquist, or maybe a Kennedy? If I think he is going to be a Justice Scalia, who I like personally very much, I vote no. If I think he is going to be a Kennedy, I vote yes. If I think he is going to be a Rehnquist, I probably vote yes because it won't change anything.

But anyway, thank you for your testimony. It is helping me be more confused.

[Laughter.]

Chairman SPECTER. Thank you, Senator Biden.

Senator DeWine?

Senator DEWINE. I have no questions, Mr. Chairman.

Chairman SPECTER. Senator Feinstein?

Senator FEINSTEIN. I am sorry I missed much of this testimony, but I was just trying to read your brief, Ms. Greenberger and it is too much to digest quickly. It is a very impressive document.

But I was reading part of it and I wanted to ask you this question. Did you not think that the discussion on *Roe* with Senator Specter in particular, the discussion on *Griswold* and *Casey*, the discussion on *stare decisis* and reliance and the fact that *Roe* had been in place for 32 years and the findings of *Griswold* and *Casey* with respect to *Roe*, workability, that as Senator Specter has said, that super-precedent is really in play? I think I even heard him once say super-duper precedent. Could that be?

Chairman SPECTER. I said super-duper in the context of some 38 occasions when the Court has had the *Roe* issue before it and they could have overruled *Roe* had they decided to do so—

Senator FEINSTEIN. Right.

Chairman SPECTER.—so it became a super-precedent. With the reaffirmation, it may become a super-duper or maybe even more, super-duper-duper—

[Laughter.]

Senator FEINSTEIN. Super-duper-duper—

Chairman SPECTER.—38 times over.

Senator FEINSTEIN. But—

Chairman SPECTER. It has been a long hearing.

[Laughter.]

Senator FEINSTEIN. I wanted to ask you, because you watch all of this very closely, from the time you wrote this, would you write the same thing after the hearing?

Ms. GREENBERGER. Well, if you could indulge me, I just want to say one thing and correct something I said incorrectly which was in answer to Senator Hatch's question about whether—I hesitate to speak for other organizations, but I am pretty certain that the National Organization for Women actually did endorse Sandra Day O'Connor. He asked if any organizations, and specifically mentioned NOW, had ever endorsed a Republican nominee and I said I really didn't know, but I am pretty close to sure that they did with respect to Sandra Day O'Connor.

But now to this very, quite important question that you asked, we listened very, very closely, hoping to find some reason to put our fears at rest, and, in fact, when we wrote that report, we said that it was contingent—our judgment there was contingent on what happened at the hearing.

Unfortunately, what I heard at the hearing was a very articulate explanation by Judge Roberts of what all the factors are to be considered when you look at a precedent of the Supreme Court, but no indication on his part of how he would apply those factors. And each time he was pressed about whether it was a super-duper precedent, whether he was asked about it in the context of *Roe* or asked about it in the context of *Casey*, he said, which reinforced the essential holdings of *Roe*—

Senator FEINSTEIN. Let me stop you.

Ms. GREENBERGER.—as you well know—

Senator FEINSTEIN. Let me stop you here.

Ms. GREENBERGER. Yes.

Senator FEINSTEIN. I think there was significance in the fact that he laid it out at all, because he didn't have to do that. I didn't really expect he would ever answer that question one way or another, and I think it is an unrealistic expectation.

My interest was to see if he would be open to reviewing various things carefully and cautiously, or if he came in with a bias? We all grant that he is conservative, and there is nothing wrong with that.

Ms. GREENBERGER. Of course.

Senator FEINSTEIN. I mean, he is conservative. The nominee that I would anticipate from this President would have been really conservative, would have come in here and would have said what he was going to do and probably could have mustered the votes, but it would have been definitive.

I don't see anything that is definitive and I do see things that would allow one to believe that this is a fine legal scholar who will truly look at the law. I think he said he gave a serious regard to precedent. We pulled all his 50 cases. I can't imagine what my weekend is going to be like, reading those. But in any event, comment on this for a minute.

Ms. GREENBERGER. Well, I think that there has been a lot of discussion in the hearings about what it means to be a conservative Justice and the difference between being an active Justice who doesn't have respect for precedent to the same degree as a true conservative Justice would. And so there is nothing wrong with being

a conservative Justice, and clearly, many are on the Supreme Court right now.

When you look at what happened with the confirmation hearings of other nominees to the Supreme Court, what emerged with a number and especially with Clarence Thomas, the pattern was to describe what the law was and what the holdings were and to spend a lot of time describing it, and certainly Judge Roberts is brilliant. Everyone has said it. It is beyond dispute, and so he is fully familiar and perfectly capable and extraordinarily able when he describes what the holdings of courts are with respect to how you treat precedent.

So yes, he did that in a magnificent way. But when it came time to give any sense of what he would do with all those factors, he used the same formulation that Justice Thomas did in not signaling in any way how he would actually apply those factors, and you very effectively asked him specifically about each of the factors. You broke each of those down. I remember your questioning very well. He agreed with you, because you did a lot of that work in identifying each of the factors you consider when you review precedents and he agreed that those were factors. Of course, he said he would look at them with an open mind. I would expect him to say nothing less.

But he never gave any indication at the end of the day, and, of course, we knew he wouldn't, but in response to many other questions from those who may be holding out hope he would overturn *Roe* v. *Wade*, he gave them assurance, too, and that he did not feel bound by precedent and that there would be a lot of different ways of finally deciding.

And one of the—what I was struck by with *Griswold*, because you asked me about that, too—

Chairman SPECTER. Ms. Greenberger, could you summarize your thought here—

Ms. GREENBERGER. Okay.

Chairman SPECTER.—because we are running way over.

Ms. GREENBERGER. Okay. Sorry. What I was struck by—I will try to just do this in a sentence—with respect to *Griswold*, you went back actually just this morning and looked at his specific answers in comparison to Justice Thomas and it was absolutely eerie to see how close they were. Each one said they agreed with *Griswold*. Each one said they would not have a quarrel with *Eisenstadt* v. *Baird*, that talked about applying *Griswold* to unmarried couples.

And we looked at the testimony, and with Senator Deconcini asking Justice Thomas, "When you say you have no quarrel with something," and he used that exact formulation this morning with you, Senator Feinstein, also with respect to *Plyler* v. *Doe*, Justice Thomas was asked, "do you mean something different when you say you have no quarrel with than saying that you agree with," and Judge Thomas said, "Yes, I mean something different when I say I have no quarrel with."

Therefore, when I was listening so closely to those answers—

Chairman SPECTER. Ms. Greenberger—

Ms. GREENBERGER.—I did not come away—

Chairman SPECTER. Ms. Greenberger—

Ms. GREENBERGER. I will just finish. I did not come away with reassurance.

Chairman SPECTER. Ms. Greenberger, I am reluctant to interrupt you, but—

Ms. GREENBERGER. That is all right.

Chairman SPECTER.—we are way over time, way, way over time.

Do you have anything further, Senator Feinstein?

Senator FEINSTEIN. No.

Chairman SPECTER. Senator Sessions?

Senator SESSIONS. Coach Jackson, we are glad to have you here and thank you for your loyalty to your students and players and the courage to stand up. You know, I admire people who in businesses or a big organization like school systems and State government have the gumption to stand in there for what they believe in. I am sure it was a long battle and you are gratified by that result.

I am informed that while you are here, this may be the first time in 18 years you have missed one of your kids' games, is that correct?

Mr. JACKSON. Actually, that was last year when I came up for the Supreme Court argument.

Senator SESSIONS. For that case?

Mr. JACKSON. Right. Yes, sir.

Senator SESSIONS. That is a remarkable record of fidelity to your students and thank you for your service to young people in Alabama.

Mr. JACKSON. Thank you.

Senator SESSIONS. You know, I see Mr. Botelho and Ms. Wright, Democrats, I believe, that have expressed such strong support for Judge Roberts. I read in the record earlier today our former Democratic Attorney General Bill Baxley, an excellent, superb lawyer in the State who worked on three cases with Judge Roberts and I introduced his record, it was so effusive in his praise for Judge Roberts.

And, Ms. Stetson, on C–SPAN, I just happened to catch, late one night within the last week, an interview by a member of Hogan and Hartson, I believe, Ms. Brannan. Is that a member of the firm?

Ms. STETSON. Yes, she is.

Senator SESSIONS. And she said she had been on the campaign trail with John Kerry and was a Democrat, and it was just an incredibly beautiful statement by her, maybe 15 or more—maybe 30 minutes discussing her experience with Judge Roberts, how fair and objective he was, how much the firm admired him, how collegial he was, how he was highly intelligent but was not a bookworm, that he met the people in the firm, was always open to questions. Is that his reputation within the firm?

Ms. STETSON. That is absolutely his reputation within the firm. Everyone that I have spoken to about the judge, everyone who knows the judge, who worked with the judge, I think would come forward and say the same thing.

Senator SESSIONS. Well, I think it is important for us to note that Democrats also who know him and who are being objective and who may have voted for someone else other than President Bush for President are very supportive of Judge Roberts.

I know, Ms. Greenberger, that you sort of represent a coalition of groups that are the point people for the activist judiciary. I think that is fair to say. And I remember—and had it just pulled up and I found it—a 2001 New York Times article that discussed a retreat that the Democratic Senators had in 2001 for the purpose of forging a unified party strategy to combat the White House judicial nominees. And you and Professor Tribe and Professor Cass Sunstein appeared, according to the article, and it states that you said to them it was important for the Senate to change the ground rules of confirmations and not to confirm one simply because they were scholarly or erudite. So I guess my question to you is: Are you the architect of the filibuster strategy? Do you claim credit for that?

[Laughter.]

Ms. GREENBERGER. Well, as I am sure, Senator Sessions, you know, you can't trust always what reporters say in terms of the accuracy. I never talked about changing the ground rules for confirmations at all. So I am not certain about that article, but that certainly wasn't anything I would have said.

But what I did then and do believe now is that looking at somebody's record is absolutely essential. And I agree, I think, Senator Sessions, with you, too, that there are a lot of issues to be taken into consideration, personal qualities absolutely, but also the Supreme Court—and I know you have said this many times—makes an enormous difference in people's lives, and who will fill that precious seat of Chief Justice couldn't be more important.

Because you brought that article up, to me record is so essential, and there was one other point I wanted to make with respect to the record. I heard this morning a reference to a study of Judge Roberts's record on the D.C. Circuit. And, of course, he has not been a judge for very long, so by definition, it is a very limited record. And it was pointed out in the study, which I am the first to say I have not had a chance to see, that in some worker and labor issues, he actually sided more with the Democratic side of appointed judges. But the same article in the Washington Post that described that also said for civil rights and civil liberties cases, albeit for a very limited record, of course, according to this article he was four times more likely to vote against the plaintiffs in those cases for civil rights and civil liberties than the average appellate judge on the bench today. And that was very sobering, I must say, with respect to the record.

Chairman SPECTER. Thank you very much, Senator—

Senator SESSIONS. I think on those cases I believe the panels were about 97 percent unanimous on those rulings, and I would offer this article from the New York Times for the record.

Chairman SPECTER. Without objection, it will be admitted.

Senator Leahy has one follow-up question for Mr. Jackson.

Senator LEAHY. It is not really a follow-up. With running back and forth, I missed part of the schedule.

Coach, I admire you. I have sat in so many hearings with whistleblowers in government, Federal Government, State government. I know it is very, very tough to be a whistleblower. It is tough to stand up for equal treatment. We heard a bit earlier from John Lewis and Nathan Jones and other leaders in the civil rights move-

ment. Coach, you stood up in a very great tradition, in the great tradition where Rosa Parks sat down to make the same point, and Dr. King marched and others have protested and lobbied for justice. I think your children and your team should be very, very proud of you. I know I am. I hope your school appreciates you. I hope they value your participation. And I hope a lot of people in the country were listening to you because, by golly, if something is not being done right, stand up, speak up, and thank God there are people like you.

Mr. JACKSON. Thank you.

Chairman SPECTER. Coach Jackson, you are going to be regarded differently when you go back to your school.

[Laughter.]

Chairman SPECTER. But I am not sure which way.

Mr. JACKSON. Okay, okay.

Chairman SPECTER. To be commended by the Senate Committee, which I think this is one issue we can be unanimous on.

Thank you all very, very much.

Chairman SPECTER. We will move now to panel number five: Professor Fried, Professor Edelman—if panel number five would come forward, we would appreciate it.

Senator LEAHY. While they are coming forward, Mr. Chairman, could I ask consent that a number of letters regarding the nomination be included in the record?

Chairman SPECTER. Without objection, they will be made a part of the record.

Our first witness on this panel is Professor Charles Fried, Beneficial Professor of Law at Harvard, served as Solicitor General for 4 years; for 4 years was on the Supreme Judicial Court of Massachusetts as an Associate Justice; undergraduate degree from Princeton, law degree from Columbia, bachelor's and master's from Oxford, an extraordinary academic and professional record.

If the witnesses could move in and out, I would appreciate it. Professor Fried, we are going to start your time now because we are running very close.

**STATEMENT OF CHARLES FRIED, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND BENEFICIAL PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS**

Mr. FRIED. Thank you very much, Mr. Chairman.

It is a great privilege to be allowed to participate in this historic hearing for such an important event, and it is particularly a privilege because I have been watching these hearings, and I must say, they have been a model of intelligence, fairness, substantiveness, and civility.

Chairman SPECTER. Thank you.

Mr. FRIED. I warmly support Judge Roberts because I am persuaded he knows the difference between law and politics.

I think that not because I know him well—I hardly know him at all—but because I have studied his judicial writings.

Politics at its best, as this distinguished group of Senators knows, is the art of recognizing and doing the best you can for the people you are responsible for. The judge does his or her best, too,

but the judge is hemmed in by the law—not in any simple-minded way, not in any mechanical way, by the intent of the Framers only, by the text of the statute only. And Judge Roberts does not believe that. He has told you so, and in his opinions he has written so, but by precedent, by the words of the statutes, but also by legislative history, by tradition, and the craft of the law. Judge Roberts seems to understand this down to his shoes, understands it with grace and humanity.

My former boss, Dick Thornburgh, stole a number of my lines because I, too, wanted to read to you that first paragraph from the *Hedgepath* opinion, because it shows a man who not only has a head but a heart. But the other thing it showed was that though he has a heart as well as a head, he understood that if he were to say that what happened there violated the Constitution, he would be unfaithful to Supreme Court precedent, which he was bound to adhere to, and, in fact, he would have been really worse than unfaithful to it.

The other thing which he might have thought is, well, this is a terrible result. He said that it was a terrible result. And I can get away with it because the case is probably too trivial for the Supreme Court to take on review. But that is not the man who you are passing on today.

In that opinion, you see his authentic voice and character. As I read and hear some of the criticisms of Judge Roberts's judging, I wonder whether we are talking about the same man. I wonder whether the critics are not really complaining that Judge Roberts didn't start with the result, their result, and then wrestle the law around until it fitted. That is not the man you are passing on.

And when I think of some of the cases which he decided which have become controversial in these hearings, not just the French fry case but, of course, the hapless toad case as well, which Professor Bellia will be talking about, when you consider his decision about arbitration under the Federal Arbitration Act where there is a congressional Act mandating that there be a preference for arbitration, when I consider the opinion which he did not write but which he joined in the *Hamdan* case, what I see is a fidelity to law, not the pursuit of an agenda.

Thank you.

[The prepared statement of Mr. Fried appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Fried.

We turn now to Professor Peter Edelman from the Georgetown Law School, where he has been since 1982. He took leave from 1993 to work in President Clinton's administration as counselor to Health and Human Services Secretary Donna Shalala and as Assistant Secretary for Planning and Evaluation. He had worked as legislative counsel for Senator Robert Kennedy. He clerked for Supreme Court Justice Arthur Goldberg and Henry Friendly of the U.S. Court of Appeals.

Quite a background, Professor Edelman. Thank you for coming in today, and the floor is yours.

**STATEMENT OF PETER B. EDELMAN, PROFESSOR OF LAW, CO-DIRECTOR, JOINT DEGREE IN LAW AND PUBLIC POLICY, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.**

Mr. EDELMAN. Thank you, Mr. Chairman. I am very pleased to be here and appreciate the opportunity to testify and join Professor Fried in complimenting the Committee as a citizen on the civility of these proceedings and the way in which there is an opportunity to educate our country. I think after that we probably disagree.

I am here to urge that this nomination of Judge Roberts be rejected. The history of the decisions interpreting our Constitution is one that over the two-plus centuries is one of greatly increasing protection for the rights and liberties of our people. The evolution in the meaning of the open-ended language has meant more respect for individual rights and liberties against governmental over-reaching and at the same time more power for Congress to act to protect people against exploitation and injury by special interests. And as many witnesses have said, this has all made a great difference in the lives of millions of Americans, the two witnesses on the previous panel. So who sits on the Court matters really crucially for all of us.

Senator Biden talked about the record as one criterion before the earlier panel. Senator Kyl talked about best evidence. And I think that the best evidence we have here is really a long record over a long period of time, unlike some nominees that come before this Committee, not just his judicial record. And to me—and I did start out looking into this and doing the reading without a particular view other than knowing Judge Roberts's reputation as a very intelligent and able lawyer and as a conservative. But what I have concluded is really that it adds up to a troubling likelihood that we have here a nominee who as Chief Justice is really going to try to turn the clock back on this pattern of protection that I talked about.

It is not about one particular case that might be overruled. As to any one case, as important as it is, it is difficult to figure out what he might do. It is really about his judicial philosophy across the board in a whole lot of areas. It is how he views the Constitution as a whole. And it is where that will take him in particular cases and many different kinds of questions.

He says a lot of the memos from the early 1980's were as a young staff lawyer done at the behest of his superiors. I think he is too modest, because you look at that and over and over again those memoranda that often he wrote on his own initiative or in response to a question, recommendations for action were requested, there was no decision already made. And he was at the right fringe of even his conservative colleagues in the Reagan administration. And so that is the issue here, and this is kind of a pure case about the direction that a nominee is going to take.

There is no question about his intelligence, his ability as a lawyer, his integrity, his character. Those are not in issue. The issue is one of a conservatism that I think really radically threatens the meaning of the Constitution as we know it.

He said the other day that judging is like being an umpire, just calling the balls and strikes, and I am not one for adding to the

pile of sports analogies here. But, you know, if the umpire stands two steps to the right behind the catcher, strikes are going to look like balls and many balls are going to look like strikes. And so I think the analogy is remarkably disingenuous.

Constitutional interpretation is not like calling balls and strikes. Why do we have 5–4 decisions? These are matters of first impression where the precedent is to be looked at, but they are there because the decision has not been made on the issue. And so what we are here is trying to see—trying to compare these strong differences of view that exist, 5–4, about the meaning of the text, because that is the heart of it, the intention of the Framers, and all the other relevant history and societal values. And so it is subtle and complex, and there is a deep division and debate, and that is why this nomination is so important.

We are really looking at a question of what our Constitution is all about, and we are looking at whether it is about fundamental principles of protection of individual rights and liberties or really a much more cramped and crabbed view of those things.

You know, we have changed over the course of a century. The cramped view was where we were 100 years ago, and I am afraid from looking at the record here that as a Chief Justice Judge Roberts is going to work to take us back in time.

Many of you remember the hearings—we all remember the hearings on Judge Bork's nomination. He made things easy for the Committee. He put it all in one article in the Indiana Law Journal. There it was and the Committee could decide, the Senate could decide.

Judge Roberts is what I call Bork by accretion, bit by bit, memo by memo, speech by speech, and now opinion by opinion. And I think what it adds up to is far more erratically conservative than Judge Bork.

And so if you go through the list of issues—Senator Kennedy, you asked him about a series of civil rights issues. Others have asked about other matters. When you add them all up, I think you have a pattern in each of these areas—civil rights, civil liberties, access to justice, a whole series of things—and then the pattern adds up to a pattern. And so that is why I am here really to testify, because I think that what the pattern adds up to is a dangerous recipe for our Nation, one that may result in injury and renewed vulnerability for literally millions of Americans who fought for decades and even centuries to be included in our constitutional promises.

So I do urge the Committee and the Senate to reject this nomination. Thank you for the chance to testify.

[The prepared statement of Mr. Edelman appears as a submission for the record.]

Chairman SPECTER. Breaking protocol just a little, Professor Edelman, do you really think Judge Bork made it easy for the Committee?

[Laughter.]

Mr. EDELMAN. I think—

Chairman SPECTER. You don't have to answer that question.

Mr. EDELMAN. I appreciate the comment, Senator, Mr. Chairman.

Chairman SPECTER. Our next witness is Professor Patricia Bellia from Notre Dame, an extraordinary academic record, summa cum laude from Harvard, Yale Law School graduate, clerked for Justice O'Connor, and before that, Judge Cabranes of the Second Circuit. Thank you for coming in today, Professor Bellia, and we look forward to your testimony.

**STATEMENT OF PATRICIA L. BELLIA, PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL, SOUTH BEND, INDIANA**

Ms. BELLIA. Thank you, Mr. Chairman, and other distinguished members of this Committee. It is an honor for me to appear before you in support of the President's nomination of John Roberts to be Chief Justice of the United States. I have never worked with Judge Roberts. Indeed, I have never met him. But during my time in Washington as a law clerk and as a lawyer in the Justice Department, I have had the privilege to know his work as an advocate before the Supreme Court.

More recently, in my teaching and research in constitutional law and other areas, I have come to know his work as a judge on the U.S. Court of Appeals for the D.C. Circuit. In my view, the best evidence of how a nominee will perform as a judge is how he has performed as a judge. I have read all of the opinions that Judge Roberts has written in his time on the D.C. Circuit. His service on that court demonstrates beyond doubt that he resolves cases with competence, care and fair-mindedness. Most importantly, his jurisprudence on the court of appeals demonstrates in decided fashion that Judge Roberts does not seek in his decisions to advance any platform of any current political ideology. He has joined and written opinions upholding claims of criminal defendants and joined and written opinions denying such claims. He has both accepted and rejected challenges to executive agency action claimed to be unlawful. He has interpreted statutes with great care, with a primary focus on the text that Congress has enacted, but never categorically dismissing any evidence that is probative of congressional intent.

His opinions, be they for the court or for himself, display no rancor; rather, they are notable for the respect and care with which they outline any disagreement he might have with the position of litigants or his colleagues on the court. Nor do his opinions betray any impatience for the claims of any class of litigants. The occasional hints of exasperation in Judge Roberts's opinions are reserved for the district court judge or the administrative agency that has decided upon the rights and claims of individuals without providing the considered explanation to which he believes all persons who find themselves before our tribunals are entitled. It is, therefore, no surprise to find in Judge Roberts's opinions an extensive and careful scrutiny of the individual claims that each case squarely presents, no more and no less.

There is not the time here for me to analyze each opinion that Judge Roberts has written on the court of appeals, and my written testimony examines in detail two areas of structural constitutional law in which Judge Roberts's work has been subject to criticism, the first involving questions of congressional power and the second involving questions of Executive power, particularly in foreign af-

fairs. Here I will simply allude to the first of those controversies and explain briefly why I believe that the criticism are unfounded.

A claim has been made that Judge Roberts takes an unduly narrow view of Congress's power under the Commerce Clause, one that endangers a variety of civil rights statutes and environmental regulations that Congress has justly designed to protect equal rights of all Americans in the environment in which we live. This concern stems from Judge Roberts's opinion in a case called *Rancho Viejo* v. *Norton*, the hapless toad case. In that case, a housing developer, after losing a Commerce Clause challenge to a particular application of the Federal Endangered Species Act, sought rehearing of its claim before the full court of appeals. The active members of the D.C. Circuit declined to rehear the case, and Judge Roberts dissented from that denial of rehearing.

It is important to establish precisely what Judge Roberts's dissent says and what it does not say. The dissent does not show that Judge Roberts believed the Endangered Species Act to be unconstitutional as applied in this case or as applied in any other case. Rather, he believed that the particular methodology that the court employed in deciding the case was out of step with Supreme Court doctrine. He took care to point out that en banc review would afford the court the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent. Rather than demonstrating a hostility to congressional power, the dissent demonstrates a concern that courts provide the right reasons for their decisions. That concern is, of course, well founded as the reasons that courts provide in support of their decisions are central to the corpus of law that will guide judicial action in subsequent cases.

A discussion of a single opinion in isolation certainly cannot capture the depth and care and respect for every litigant that Judge Roberts's opinions display, and I would welcome the opportunity to discuss other aspects of Judge Roberts's opinions in response to your questions. But I believe that his jurisprudence on the court of appeals reflects the best of what we can and should expect of a nominee to the Supreme Court of the United States. His decisions defy categorization as conservative or liberal, Republican or Democrat. Indeed, Judge Roberts himself has refused to characterize himself as subscribing to any particular judicial philosophy. He says that he simply decides every case as it comes before him according to the law as best he can discern it. What he has accomplished thus far on the court of appeals demonstrates that he has truthfully represented himself to the American public. Simply put, he has demonstrated that he possesses one of our Nation's foremost legal minds, that he employs that mind with full fairness and integrity, and in all of this that he well deserves our trust to lead our Nation's judiciary.

Thank you.

[The prepared statement of Ms. Bellia appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Bellia. Thank you for being so close to the time. Three seconds yielded back.

Our next witness is Professor Judith Resnik, the Arthur Liman Professor of Law at Yale. Interesting to see that they have a chair for Arthur Liman, who was in law school when I was there. She teaches on the feminist theory gender procedure, co-chair of the Women's Faculty Forum, a member of the Ninth Circuit Gender Bias Task Force—that is quite a title—and co-author of the monograph "Effects of Gender."

Thank you very much for coming again, Professor Resnik, and we look forward to your testimony.

**STATEMENT OF JUDITH RESNIK, ARTHUR LIMAN PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT**

Ms. RESNIK. Thank you. I am honored to participate, and I have submitted a written statement for the record. In these 5 minutes—

Chairman SPECTER. It will be made a part of the record in full.

Ms. RESNIK. Thank you. I am going to make five fast points.

First, while I am here because I was invited by this Committee, we are all here in this room with a TV because the Constitution has invited us all. The Constitution has committed to the political branches of the United States the decision about who shall be our life-tenured judges. The President nominates, the Senate confirms. We are part of a national teach-in about America, its values, and what the courts stand for.

In recent years, the confirmation process has been criticized. Some have been difficult. But conflict is not an artifact of these cameras or of the conflicts over Bork and Thomas.

It goes back hundreds of years. Remember that in the 1790's, the Senate did not affirm the Chief Justice because they disagreed with John Rutledge's view of a treaty with England. In the 19th century, it was a debate about railroads and unions. We have seen time and again that we debate our values through this process.

So in other words, this hearing is not only about John Roberts, it is about us, Americans, what we care about for our system of justice. Point one.

Point two. This is no ordinary hearing, even though it is about a life-tenured appointment to the United States Supreme Court. This is about who is going to be the Chief Justice of the United States, the 17th person in our entire history to hold that position. The job of the Chief has not remained static. It has grown enormously over the 20th century. As a law professor of the Federal courts and of adjudication and civil procedure, we get to credit William Howard Taft and, most recently, the extraordinary work of William Rehnquist. The person who wears the robe of the Chief Justice, striped or basic black, doesn't only wear one hat, but many hats.

Senator Kennedy, Senator Thurmond talked about this person as the major symbol of justice in the United States. More than that, this person has enormous power over the administration of justice in the United States. In addition to being the head of the United States Supreme Court, this person is the CEO, the chief executive officer of the entire Federal judicial system—1,200 life-tenured judges, a budget of more than $4 billion, a staff of more than 30,000 working in 750 courthouses around the United States, hearing hundreds of thousands of cases every year for all of us. The

Chief is the head of the policymaking body for the Federal judiciary. The Chief picks about 50 judges who sit on specialized courts dealing from foreign surveillance to product liability. The Chief picks 250 people to serve on the committees that make the rules that we all litigate by in the Federal system. The Chief sets the agenda for the Federal courts through its annual state of the judiciary address.

Now, this repertoire of powers is startling and actually anomalous for a democracy. Unlike what judges do in court, working openly, giving decisions, accountable, transparent, the administrative powers are not easily seen, probably not even known to lots of people. Further, unlike most administrators, the Chief has that power, at least under current practices, for life. The President has term limits. You all have to run. Even administrators move on. Not so under current practice.

Now, this package of power is not constitutionally mandated. The Constitution only mentions the Chief once, and it is in terms of the impeachment of the President. So given that this is the rare occasion of how much we think about the Chief Justice, I would be remiss not to mention that there is a chance that we could rethink the issue of the Chief Justice rotating 4-, 5-year, 6-year terms.

Quick recap: Point one, an opportunity to reflect on American values, take our constitutional temperature. Point two, an extraordinary appointment, the unique roles of the Chief.

Point three, therefore this is the occasion to figure out what the qualifications and requirements for the Chief are, which gets me to my answer, Point four, the Chief Justice of the United States should be the chief advocate for justice in the United States, should be the person insistent on access to the courts. Clear, the courts are vital. The Chief Justice should be committed to an independent and vibrant branch of Government called the third branch. The Chief Justice should come here telling you, the Congress, that it needs more resources, needs more access, should be the guardian at the gate of justice. We need the Chief to be sure that the President, the Executive, respects the independence of adjudication and that the Congress does as well. Most important, we need a Chief Justice who understands that law has to be a source of strength for those who don't have it, who need it; not only a source a strength for those who already have the resources, who can already get easily into court. Those are the litmus tests of which we can be proud.

My fifth and final point: What does the nominee's record tell us thus far? I have reviewed only written materials from 1981 to 1986, when he was a policymaking lawyer and signing them in his own name; only decisions on the D.C. Circuit; only published essays and transcripts—nothing from the SG's Office, nothing from private practice, because we can't know what his own personal views are.

I regret to report that, at least as of this set of materials, Judge Roberts has not expressed an affirmative vision of deep enthusiasm for the role of courts for adjudication for the needs that courts fill for ordinary Americans. When given the opportunity to argue for courts for their accessibility, when given the opportunity to argue the Department of Justice should lend its hand to the needy Ameri-

cans in need of more resources, when given the opportunity to interpret statutes to let us into court, in general the nominee has argued against the use of courts.

There has been some shorthand in these hearings for some of those decisions. I feel obliged to mention at least one other. There is a case called *Booker*, which is about a problem all of us face, where the courthouse door is closing on us because we have cell phones and credit cards that mandate we go to arbitration. There is an Equal Action to Justice case, there are several others. There are many instances in the record in which, at least thus far, the nominee has not—

Chairman SPECTER. Professor Resnik, would you summarize your testimony, please?

Ms. RESNIK. I am just closing right now. What we are looking for in the Chief Justice is a person who will celebrate courts and the role they play in a vital, economically stable democracy. And that is the question before the Senate: Is this person's record the one to commend this person for that job?

Thank you.

[The prepared statement of Ms. Resnik appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Resnik.

Our next witness is Professor Christopher Yoo, professor at Vanderbilt University Law School, a distinguished academic record, a graduate of Harvard, an MBA at the Anderson School at UCLA and Northwestern Law School, clerked for Justice Kennedy, and practiced with Hogan & Hartson.

Thank you very much for coming in, Professor Yoo, and the floor is yours for 5 minutes.

**STATEMENT OF CHRISTOPHER S. YOO, PROFESSOR OF LAW, VANDERBILT UNIVERSITY LAW SCHOOL, NASHVILLE, TENNESSEE**

Mr. YOO. Thank you, Mr. Chairman, members of the Committee. It is an honor to be here to testify in support of John Roberts's nomination as Chief Justice of the United States.

I have had the chance to observe Judge Roberts from three different vantage points—first as an associate working the appellate group of Hogan & Hartson, second as a law clerk watching Judge Roberts argue before the Supreme Court of the United States, and third as a member of the faculty of the Vanderbilt University Law School reading his judicial opinions.

Because there are many other colleagues here in a position to testify to his excellence as an appellate advocate and to his performance on the Court of Appeals, I will focus my remarks on the time Judge Roberts and I spent at Hogan & Hartson. I am sure Senator Biden will be gratified to hear that, during his time at Hogan & Hartson, John Roberts demonstrated to me an open-mindedness, an ability to bring people together, that would serve him well as Chief Justice. He also treated everyone around him with respect and decency. I had the chance to witness these qualities first-hand in the support and compassion that he showed to me when a tragedy struck my family.

Judge Roberts's open-mindedness is evident in his decision to join Hogan & Hartson when leaving the White House Counsel's Office in 1986. Hogan has long prided itself on its ability to embrace attorneys from across the political spectrum. To cite just two prominent examples, its ranks include former House Minority Leader Bob Michel and such leading Democrats as former Chairman of the House Subcommittee of Health and the Environment, Paul Rogers. It is also a firm that takes seriously the bar's obligation to provide free legal services to public interest organizations and to individuals who are unable to afford them. Judge Roberts was exceptionally well-liked throughout the firm. His regular lunch partners reflected the underlying diversity of the firm itself.

Even more telling is his decision to return to Hogan after his successful stint as Principal Deputy Solicitor General. At a time when firms were lining up for the chance to hire him, including firms that attract those who wish to surround themselves with like-minded colleagues, Judge Roberts preferred to return to a more balanced and politically diverse environment.

Judge Roberts's open-mindedness can also be seen in the manner in which he developed Hogan's appellate practice. Although the practice group was never large, the attorneys he hired reflected the diversity of the entire firm. Indeed, I suspect that he takes considerable pride in the fact that nearly half of the associates brought into the appellate group under his leadership were women, and that the women with whom he worked most closely on Supreme Court and appellate matters are now partners in the appellate group.

He also represented a broad range of clients with diverse and even conflicting ideologies without requiring that every client's position match his own personal views. His reputation for fairness and willingness to engage all viewpoints were so well-established that Democratic attorneys general and Governors did not hesitate to hire him to represent their interests. In the process, he successfully advocated positions on behalf of clients, on environmental protection, and race-conscious remedies that did not match what many might regard as the standard conservative position on those issues.

The pattern of fairness and open-mindedness that is apparent in his professional decisions is consistent with my own experiences working with Judge Roberts. He brought the same probing intellect and a rigorous professionalism to every aspect of each case, searching through every possible viewpoint in the process of deciding how best to approach it. Simply put, Judge Roberts's tenure at Hogan & Hartson suggests a person who is fair and who is willing to engage and consider all points of view before making up his mind.

My other memory of Judge Roberts from our time together at Hogan is the respect with which he treated everyone around him, from senior partners to secretaries and paralegals to law students who were only working at the firm for a summer. He was always supportive and encouraging even while holding us to the highest professional standards.

He also never forgot the personal side of the people who worked for him. I had the chance to see this aspect of Judge Roberts's character first-hand shortly after I rejoined the firm after my Supreme Court clerkship. I was working full-bore on a slate of cases. My fa-

ther-in-law had just arrived in the D.C. area to celebrate the recent birth of my second son, Brendan. Shortly after my father-in-law arrived, he was admitted to the intensive care unit of Arlington Hospital. After a three-and-a-half-month battle for his life, he eventually died.

Judge Roberts reacted the way we wish everyone would. The minute he found out about my father-in-law's illness, he offered his sympathy and support. He rearranged my assignments to make it possible for me to make my family my first priority. He often checked in on me, always with a thoughtful gesture and a kind word. And when my father-in-law passed away, he released me from all of my assignments on a moment's notice, placed me on paid leave of absence so I could take care of my family when it needed me, even though I was facing a number of deadlines and doing so would mean taking on considerable work himself.

When I returned, he welcomed me back with open arms, without a single word about the problems caused by the abruptness of my departure. For John Roberts, it was all very simple. It was just the right thing to do.

At the same time, Judge Roberts has a humility that is somewhat surprising in someone so accomplished.

Chairman SPECTER. Professor Yoo, would you please summarize at this point?

Mr. YOO. In short, I am convinced that John Roberts possesses the open-mindedness, compassion, and humility that the Senate seeks in the members of our Nation's highest court. He combines these qualities with a respect for the law and for the Supreme Court as an institution that leave no doubt in my mind that he would make an admirable Chief Justice.

Thank you.

[The prepared statement of Mr. Yoo appears as a submission for the record.]

Chairman SPECTER. Thank you, Professor Yoo. That was a good transition, to ask you to summarize and to go right to "in short."

Our next witness and final one on this panel is Professor David Strauss. And extraordinary academic background. A member of the Magna Cum Laude Harvard Law School Club—not too many of you. Judge Roberts is one. Two years at Oxford. An attorney advisor in the Carter Justice Department. Worked on the Judiciary Committee here as special counsel during the Justice Souter nomination proceedings. And has been at the University of Chicago for some time, 18 cases before the Supreme Court.

You're on, Professor Strauss.

**STATEMENT OF DAVID STRAUSS, HARRY N. WYATT PROFESSOR OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILLINOIS**

Mr. STRAUSS. Thank you very much, Mr. Chairman, members of the Committee. It is an honor to appear before you.

My purpose here is, really, not to pass judgment on John Roberts, someone I admire very much in many ways, but rather to speak about a development in the subject I teach and study, constitutional law, something that has happened in that area in the last generation that is very significant and directly relevant to this

hearing and to the judicial appointments process generally, and that development is a change in the nature of judicial conservatism. You can see the change if you look at what President Nixon said when he appointed Justice Rehnquist, and what President Bush, who of course has nominated Justice Rehnquist's successor has said.

President Nixon said he wanted to appoint a judicial conservative, and he identified his model. His model was Justice Harlan. President Bush, of course, has identified his models, and his models are Justice Scalia and Justice Thomas. All these people are judicial conservatives, but there is a world of difference between the two different kinds of conservatism. The hallmarks of Justice Harlan's work were deference to Congress and respect for precedent. The hallmarks of the new conservatism is something close to the opposite of that, a skeptical attitude toward the work of Congress, and a willingness to overturn precedent. And it is really that difference, not the difference between liberals and conservatives, but the difference between these two different kinds of conservatism that make the stakes in the judicial appointments process very high at this point in our history.

I identified a number of areas in my written remarks where I think the stakes are high. Let me just mention two here. The first is Congress's power to address the problems facing the American people and to protect the rights of the American people. I think it is fair to say that the power of Congress to do those things is under challenge in the judiciary today in a way it has not been since before the Great Depression, and this is true not just in the case of the now-famous toad, but in area after area, and many of which the hearings have discussed, in the area of environmental protection, workplace safety, consumer protection, campaign finance, the rights of the disabled as we heard, the free exercise of religion, age discrimination, gender discrimination, the protection of intellectual property rights, and all of those areas there are significant efforts under way in the judiciary to limit in important ways the power of Congress to do what it has been doing now for the better part of a century, protecting the rights and serving the needs of the American people.

The other area is of course the right of privacy. The modern right of privacy was essentially an invention of Justice Harlan, a judicial conservative that President Nixon cited as a model when he appointed Justice Rehnquist. It was an opinion Justice Harlan wrote that was the font of privacy law that has extended not just in the case of abortion, but in many other areas, not just in the case of reproductive rights, but in many other areas today.

Justice Harlan took a view of privacy that rested on a general and expansive reading of American traditions. He did not expect people claiming rights to point to some specific tradition or some specific body of law. He understood that the questions were more difficult than that. The right of privacy now, if anything, is more important, indeed much more important than it was when Justice Harlan wrote, "With changes in reproductive technology and end-of-life technologies that make these questions all the more acute."

The question whether we will have a Justice Harlan-like approach to the right of privacy or a skeptical approach to the right

of privacy that questions whether it even exists and evinces a desire to confine it as narrowly as possible, that question it seems to me is very much on the table, and will be a question that will be with us for the next generation.

I don't want to be alarmist about this. The law doesn't change overnight. These are not changes that will occur maybe not even with this appointment, but there are points in the history of the Supreme Court—the New Deal was one, the civil rights revolution was one—there are points in the history of the Supreme Court where the Court rethinks and redefines its relationship to the other branches of Government and its relationship to the rights of individuals. We may be at such a point. There are indications that we are at such a point. We have not passed it yet, but the next few appointments to the Supreme Court will determine whether this is an era in which the Supreme Court redefines its relationship in a way that is basically unknown to Americans living today. Those are the stakes presented by this appointment and by other appointments that this Committee will face.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Strauss appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Strauss, for those profound comments.

This is an extraordinary panel which could yield a lot of fruits with a lot of questioning, except that we have six more witnesses and it is almost 6 o'clock.

I am going to start by yielding to Senator Feinstein.

Senator FEINSTEIN. I have no questions. Thank you, Mr. Chairman.

Chairman SPECTER. I am glad I yielded to you, Senator Feinstein.

[Laughter.]

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. Mr. Fried, it is an honor to have you with us. I was a member of the Department of Justice when you served as Solicitor General and you represent the best in American law, and I am pleased to see you are at Harvard and teaching students what American law is all about.

I notice that the legal publications have declared that Judge Roberts is the premier appellate court practitioner in America, in a generation. You argued before the Supreme Court. I do not think you are personal friends with Judge Roberts, but from your observations, how do you rank him as a scholar and as a practitioner in the Supreme Court?

Mr. FRIED. As a practitioner, he is the best. As a scholar, he does not exist. He does not purport to be a scholar. He has not written scholarly articles. That is not his business. And in that respect he is very much like some of the greats. Earl Warren was not a scholar when he went on the Court and had no written articles. Henry Friendly wrote all his articles after he became a judge. Similarly, I think with Benjamin Nathan Cardozo. So it does not denigrate Judge Roberts to say scholarly is not what he has done. Perhaps he shall, but he has not so far.

Senator SESSIONS. With regard to his service on the court and his express philosophy of being a neutral umpire, one who decides a case before the court and not one to impose any personal or political views through his opinions. Is that consistent, in your opinion, with the classical American tradition of law?

Mr. FRIED. It is the best tradition, Senator, the very best tradition.

Senator SESSIONS. Would you agree with one witness at our hearing who said if you believe and cherish your liberties, your liberties are much safer with a judge who shows restraint than one who is an activist?

Mr. FRIED. Well, I have never understood what that restraint-activist contrast is meant to show. But I think my liberties are safest with a judge who will listen to the facts of my case, will listen to my lawyer's arguments, and will decide on the basis of them, rather than a judge who comes in with an agenda or with a predisposition or perhaps even with a philosophy.

Senator SESSIONS. And if they are faithful to the Constitution, in the long run our liberties are protected in that fashion also, are they not?

Mr. FRIED. The rule of law is our greatest protection, Senator.

Senator SESSIONS. Thank you, Mr. Chairman.

Thank you for your service to your country and sharing these thoughts with us today.

Chairman SPECTER. Thank you, Senator Sessions.

Now that we have saved so much time, I am going to take a few minutes on a question or two.

Professor Resnik, you advance a fascinating suggestion that the Chief Justice position might be rotated. Suggest that by an Act of Congress?

Ms. RESNIK. There are many different possibilities.

Chairman SPECTER. You would not expect them to make a deal among themselves.

[Laughter.]

Ms. RESNIK. Well, actually because the role of the Chief Justice is a mixture of about dozens of statutes that this Congress episodically enacted and many customs, it would be possible for the Court to develop a custom that would alter the allocation of authority.

Chairman SPECTER. How about an Act of Congress? That is something we can do something about. We do not seem to have too much influence on the Court even with our confirmation process.

Ms. RESNIK. Congress has—

Chairman SPECTER. Because once confirmed, we never hear from them. They never call, they never write.

[Laughter.]

Chairman SPECTER. Can Congress pass an Act to rotate the Chief Justice job?

Ms. RESNIK. In my view and reading of the Constitution, yes, Congress has the authority to decide if the chief justice ship is a position that could be inhabited by one member of the Court for a certain period of time, and then by another. In addition—

Chairman SPECTER. Would that be reviewable by the Court?

Ms. RESNIK. Well, we believe that every statute can be considered for its constitutionality. So of course the Court could consider it. And then question would be—

Chairman SPECTER. They would not have a conflict of interest?

Ms. RESNIK. Well, the Court has actually developed a rule called the Rule of Necessity, which is to say that it says when everyone is disqualified, then no one is disqualified. There was actually a Supreme Court in Texas, old decision in the 1920s that says when everyone is disqualified, we have to go find an extra ad hoc court for a moment. So there are differences depending on the State or Federal system, but right now the Court would—in fact, as you know, the Court has considered challenges that say that you have unfairly diminished their salary under Article III, and the Court has said, "We have to sit on those cases because here we are," and have decided sometimes yes and sometimes no under the Article III guarantee of no diminution of salary.

Chairman SPECTER. Have we been successful in diminishing their salary?

Ms. RESNIK. According to the Court, you have. There have been a couple instances—

Chairman SPECTER. So we have a formula where we can do that constitutionally?

Ms. RESNIK. You have—in your hat as Members of Congress you can pass statutes that the Court then reviews. You may not diminish their salary, but the close questions come up on things like if you are prospectively altering COLAs, cost-of-living increases, or you are changing the benefits or annuities. Those are the kinds of instances that come up. There have been a few class actions by some judges who are doing that, and as you know, the Chief Justice of the United States was here, Chief Justice Rehnquist was a wonderful advocate, greatly concerned about the—

Chairman SPECTER. Professor Resnik, I want to stay within 5 minutes so I want to move on, if I may.

Ms. RESNIK. Certainly.

Chairman SPECTER. Professor Strauss, you gave a fascinating analysis, but you did not tell us whether you are for or against Judge Roberts. Do you care to do that?

Mr. STRAUSS. Actually, Senator, with all respect, I do not.

Chairman SPECTER. There has been another witness here who did not answer questions. You have some precedent.

[Laughter.]

Mr. STRAUSS. Well, I cannot say this will come before me in another capacity so I do not want to prejudge it.

I do not want to—my expertise is in constitutional law. I feel comfortable talking about that. I do not want to claim the sort of familiarity with Judge Roberts's record. I have not had the conversations with him that Members of the Committee have had, and I do not think it would serve a purpose to take sides.

Chairman SPECTER. I respect that.

Professor Fried, I have read, and wanted it confirmed, and I sent my Chief Counsel to confirm it, that you had written on the subject of *Roe* v. *Wade*, that you thought it was wrongly decided, but that it would not be reversed. Did you take a position on whether it should be reversed as well as the two propositions I articulated, be-

cause they would not be inconsistent to think it was wrongly decided and think that having lasted so long that it ought to stay.

Mr. FRIED. I think it will not be reversed, and I do not think it should be reversed. Not only has it become—

Chairman SPECTER. Even though you were against the decision?

Mr. FRIED. It was wrongly decided initially, as not only I, but Archibald Cox, Paul Freund, and others thought, but it has become, as you say, a super precedent, and not only has it become—

Chairman SPECTER. Only super with 38 chances to reverse it?

Mr. FRIED. Super duper, if you wish.

Chairman SPECTER. Oh, I do. Thank you very much. That is the first authentication I have had.

Mr. FRIED. It is not only that it has been reaffirmed as to abortion, but that it has ramified, it has struck roots, so it has been cited and used in the *Lawrence* case, the homosexual sodomy case, in some of the opinions in the right-to-die cases, in the *Troxall* case, which is the grandparent visiting right case. So it is not only that it is there and it is a big tree, but it has ramified and exfoliated, and it would be an enormous disruption.

Chairman SPECTER. That is what?

[Laughter.]

Mr. FRIED. So you not only get branches, you get leaves.

Chairman SPECTER. Exfoliated.

Mr. FRIED. It has got all of that, and that means—

Chairman SPECTER. I know what exfoliated means. I just did not hear you.

[Laughter.]

Mr. FRIED. Since I do not know Judge Roberts except most casually and I certainly have never discussed it, if you want a prediction from me, I would predict that he would never vote—not never—but he would not vote to overrule it for the reasons that I have given.

Chairman SPECTER. Well, that is a topic of extensive discussion in the cloakrooms of the Senate and on the Senate floor and in the hallways. Senator Feinstein and I were talking about it, whether he would or would not, and there are clues, but no certainty.

I am past time. I would really like to engage in some more discussion but I have duties to proceed.

Senator DeWine has joined us. I am confident this will be a no question response, but I will ask the question. Senator?

Senator DEWINE. Very short.

Professor Resnik, I know you had some comments about the Chief Justice and you had an exchange with the Chairman in regard to the rotation of the Chief Justice. Just kind of a general question. Are you troubled in any way by the growing authority of the Chief Justice, or do you want to comment about that at all?

Ms. RESNIK. Yes. I write about the Federal courts—

Senator DEWINE. I understand that.

Ms. RESNIK.—and I have raised concerns about this because I think that this is too large a charter, some of it coming back to the Senate. The Congress has given in several statutes direct authority to the Chief Justice to appoint other—from life-tenured judges, judges to sit on courts. That does not have to be the way that judges are assigned. They could, for example, be assigned to spe-

cialized courts by taking all of the judges on the courts of appeals through some random rotation. And there is a lot of—

Senator DEWINE. The FISA Court, for example, is appointed by the Chief—

Ms. RESNIK. There is a colleague, another law professor named Theodore Ruger at the University of Pennsylvania who has analyzed the appointments on that court and has a law review article detailing it. He actually reports that the Chief Justice has—who is the one who has the count of about 50 appointments of other judges to specialized panels or courts.

The Congress also could, for example, the Judicial Conference of the United States, which is the major policymaking body, that could be chaired by, again, a rotating group of court of appeals judges. The many committees that are being appointed—many other judiciaries around the world are dealing with this question. How do we provide all the justice we need to for all of our citizens, have it organized, be sure that there is a voice that comes to tell the world about its need, and then not develop a kind of bureaucracy that means that judges are losing their role as adjudicators as they seek to set agendas and set future agendas.

It is a hard problem that everyone is facing because we need lots of judges. If you go back at the turn of the century, the 1900's, fewer than 100 judges around the United States, life-tenured. Fast forward, between magistrate and bankruptcy judges, we have got 2,000. They need organization, they need equipment, they need staffs. They need all these things. But at the same time, we also need to cherish the role of open, visible, accessible courts, and that is the challenge and I think that the Congress and the courts could work together, as they have over the last century to create this great system, in rethinking the allocation of authority.

Senator DEWINE. That is very helpful. Thank you.

Chairman SPECTER. Thank you very much, Senator DeWine.

Thank you very much. You have been a very enlightening panel, lights of brain power, six professors in a row. It is a tribute even to this hallowed room. Thank you.

Chairman SPECTER. On to panel six. Ms. Diana Furchtgott-Roth from the Hudson Institute, Secretary Reich, Rabbi Polakoff, et cetera, if you will all take your seats.

Our first witness is Ms. Diana Furchtgott-Roth, a Senior Fellow and Director of the Hudson Centers for Employment Policy, had been the Chief Economist at the Department of Labor. She previously served as Chief of Staff of the President's Council of Economic Advisors and 2 years as Deputy Executive Director of the Domestic Policy Council. She has a Bachelor of Arts in economics from Swarthmore and a Master's from Oxford.

Thank you for joining us, Ms. Furchtgott-Roth and we look forward to your testimony.

## STATEMENT OF DIANA FURCHTGOTT-ROTH, SENIOR FELLOW, HUDSON INSTITUTE, WASHINGTON, D.C.

Ms. FURCHTGOTT-ROTH. Thank you very much.

Chairman SPECTER. Is this going to be a Power presentation?

Ms. FURCHTGOTT-ROTH. No. No, it isn't.

Chairman SPECTER. Power Point presentation? The floor is yours.

Ms. FURCHTGOTT-ROTH. Mr. Chairman and members of the Committee, I am honored to be invited to testify before your Committee today on the subject of Judge John Roberts and his record on women's economic issues.

I have followed and written about these issues for many years, and with your permission, I would like to submit my written testimony for the record.

Chairman SPECTER. Without objection, it will be made a part of the record in full.

Ms. FURCHTGOTT-ROTH. Some observers are concerned about Judge Roberts's attitudes towards women. I believe his record is supportive of women and that the policies he advocated are in women's best interests.

Women made extraordinary progress during Ronald Reagan's Presidency. President Reagan's goals of spurring growth by lowering taxes were extremely popular. After Congress enacted his tax cuts during his first term, he was reelected in 1984 with over 60 percent of the vote. Congress then enacted further tax cuts proposed by President Reagan, and by the end of his Presidency, the tax rate for the median family had fallen from 24 to 15 percent. As taxes were reduced, the economy expanded and women were some of the main beneficiaries of that economic growth.

In the 1980's, women moved rapidly into the workforce. At the same time, their unemployment rates fell. Women's earnings compared to men's grew faster in the 1980's under President Reagan than in any other decade in U.S. history.

Women also progressed in education in the 1980's. By 1990, women were earning over half of all B.A. and M.A. degrees. That is still true today. More women got M.B.A. and law degrees and more became doctors and lawyers.

Now the United States leads the industrialized world in job creation and unemployment rates of 4.9 percent are among the lowest. Unemployment rates for women in many other countries are double our rate.

Even though women were so successful in the 1980's, some are concerned about Judge Roberts's views on comparable worth. Some believe that if comparable worth had been implemented, women would have made even more progress. But that concern is misguided. Comparable worth doesn't mean equal pay for equal work, which is already the law and which is the principle that President Reagan and Judge Roberts supported. Instead, comparable worth means equal pay for entirely different categories of jobs based on categories of workers as determined by government officials.

Comparable worth supporters claim that it is unfair that some mostly male occupations, such as sewer workers, are paid more than some mostly female occupations, such as clerical specialists. But for better or for worse, our economic system rewards American workers on the basis of how much the public values their service and is actually willing to pay for their services, not based on how much an official says that it is worth.

Some jobs have higher earnings than others because people are willing to pay more for them. Many jobs are dirty and dangerous, such as oil drilling, construction work, mining, and roofing. These jobs are primarily performed by men. Women aren't excluded from

these jobs, but they often choose careers with a more pleasant environment and potentially more flexible schedules, such as teaching, communications, and office work. Many of these jobs pay less.

Proponents of comparable worth cite an example in Oregon. There, female clerical specialists were given raises of over $7,000 a year to bring them in line with male senior sewer workers. Everyone, given the choice of working in an office or a sewer at the same salary, would choose the office. You just have to pay people more for work about and in sewers.

Women's progress in the 1980's would have been hampered by comparable worth. Comparable worth would have worked against women because artificially high wages would have prevented them from being hired. When wages get too high, employers cut back on numbers of workers. Comparable worth assumes that women cannot ever succeed in certain fields on their own, but need government assistance.

Some observers have criticized Judge Roberts because they disagree with memoranda he wrote on Title IX and college athletics in the early 1980's. In particular, Judge Roberts wrote in 1982 that Title IX only applied to specific programs receiving Federal aid and not to all programs in a particular educational institution, but that was what Title IX required at the time, as corroborated by the Supreme Court in 1984. The Supreme Court ruled that only the program that actually received Federal funds, rather than the entire college or university, need to comply with Title IX. As I wrote in a book in 2001, the six-to-three opinion effectively prevented the Office of Civil Rights at the Department of Education from investigating a college athletic department for Title IX violations unless that department was the direct recipient of Federal funds, which most were not.

In writing about Title IX, Judge Roberts argued persuasively that the executive branch and regulatory agencies should comply with Congress's direction. He correctly wrote in a 1982 memo—

Chairman SPECTER. Ms. Roth, could you summarize your testimony at this point?

Ms. FURCHTGOTT-ROTH. Yes. Yes. I will summarize my testimony by saying that Congress changed the law in 1987 by passing the Civil Rights Restoration Act of 1987 and that Judge Roberts's comments on Title IX, if the law had been in place in 1982, his comments would have been very, very different.

And in short, I would like to say that wage discrimination laws and Title IX guidelines aren't a decision for judges, but for Members of Congress. It is Members of Congress who decide on the laws and give the executive branch the authority to design and implement these regulations. Therefore, it would be up to you, Senators, to evaluate the costs and the benefits of the issues. And should he be confirmed as Chief Justice, Judge Roberts's role will be to interpret the laws and adjudicate disputes containing the laws that you were going to pass. Thank you very much.

Chairman SPECTER. Thank you.

[The prepared statement of Ms. Furchtgott-Roth appears as a submission for the record.]

Chairman SPECTER. Our next witness is Professor Robert Reich, who had been Professor of Social and Economic Policy at Brandeis

until he recently joined the Goldwin School of Public Policy at the University of California. He served as Secretary of Labor during President Clinton's first administration and subsequently published a book entitled, Locked in the Cabinet. Before taking office during the Clinton administration, he was a member of the faculty of Harvard's Kennedy School of Government. He has a B.A. from Dartmouth, a Master's from Oxford University, where he was a Rhodes Scholar with President Clinton, and a law degree from the Yale Law School.

I am pleased to see you again, Professor Reich, Secretary Reich. I have some questions left over which you did not answer when I questioned you when you were Secretary of Health and Human Services, which we will get to promptly.

Mr. REICH. That is because I was Secretary of Labor, Mr. Chairman.

[Laughter.]

Chairman SPECTER. Well, no wonder I couldn't understand what you were doing.

[Laughter.]

**STATEMENT OF ROBERT B. REICH, FORMER SECRETARY OF LABOR AND UNIVERSITY PROFESSOR AND MAURICE B. HEXTER PROFESSOR OF SOCIAL AND ECONOMIC POLICY, BRANDEIS UNIVERSITY, WALTHAM, MASSACHUSETTS**

Mr. REICH. Mr. Chairman and members of the Committee, I have prepared testimony and with your permission I will submit it for the record.

There has been much discussion in these hearings about social values, and I want to put on the table something that maybe has not received quite the attention it should, and that is economic values. And I don't think I have to tell the Committee what almost everybody knows, and that is that wealth and income and the power that come from wealth and income are more concentrated in fewer hands as a proportion of the population today than we have seen since the 1920s, and by some measures since the gilded age of the 1890s.

Now, if this doesn't present issues of economic morality, I don't know what does, and it comes to the fore with regard to Congress and the Supreme Court in a whole series of protections, some of them very old, some of them going back to the 1920s and 1930s and 1940s, having to do with workplace protections, unemployment insurance, interpretations of Social Security, interpretations of minimum wage, the ways in which we treat our working people in this country.

Now, I heard Judge Roberts, at least to the best of my memory, in the last couple of days tell this Committee that he would rule on the side of the little guy when the Constitution told him to and he would rule on the side of the big guy when the Constitution was on the side of the big guy. Now, I assume that he is talking about little guy and big guy in figurative terms, in terms of economic power and wealth and status in society. But last time I looked at my Constitution, it doesn't say anything about average working people or big guys or little guys at all.

In fact, there have been times in our history where the Supreme Court came down consistently on the side of wealth and power and against little guys, against average working people. Up until 1937, for example, the Supreme Court threw out a lot of State and Federal regulation that was intended to help average working people.

Judge Roberts has a record—it is not much of a record. It is something of a gamble for all of us. But let me reveal a little bit of autobiographical detail that perhaps you did not know, and I do this not to burnish my otherwise impeccable Republican credentials but simply to tell you that I know something about a particular institution. I started out my life in Government as Assistant to the Solicitor General where I had a chance to brief and argue Supreme Court cases. And my first boss was Robert Bork.

Now, in those days, the Solicitor General's office regarded its primary client as the Supreme Court, not the administration. It wasn't until the mid-1980s that there was a new position created in the Solicitor General's office called the Special Deputy. That was a political position. It was a political deputy, and it was about values. That political deputy was there for a very simple reason: to make sure that the Solicitor General's office and the briefs and arguments before the Supreme Court were in consistency, were consistent with the values of the President in terms of social values, economic values, whatever have you.

I have read Judge Roberts's memoranda, and there is no question in my mind, having had that experience in the Solicitor General's office, that he came down consistently, uniformly on the side of very conservative economic and social values. I am not criticizing him for it, but I think it is very important that you know that.

Here in this hearing he said, for example, he refused to affirm *Wickard* v. *Filburn*. Now, you know as well as I do, over the last 10 years more than 30 times the Supreme Court has struck down, either in whole or in part, laws of this Congress. Ten of those, at least, have been based on the Commerce Clause. *Wickard* v. *Filburn* in my knowledge, in my experience, is a cornerstone of building the protections of a strong Federal Government for average working people. His refusal to affirm that I find personally quite troubling.

There has been reference also to the hapless toad. Well, we know that he was looking for other ways, perhaps, to find that Endangered Species Act constitutional. But look at that logic in that particular case. When he says Congress didn't really have authority under the Commerce Clause to protect the life of a hapless toad that, for reasons of its own, lives its entire life in California, well, obviously people are not toads—at least the last time I looked—but what about protecting the job safety of a hapless retail worker who, for reasons of her own, lives her entire life in Pennsylvania, or a hapless coal miner who, for reasons of his own, lives his entire life in West Virginia?

Let me just finally say this: One Justice can make all the difference to our entire system of Federal protections. One Justice. The Court did change its mind in 1937, as I said before, and it stopped striking down laws that protected people, average working people, not because, as popularly understood, FDR threatened to

pack the court. No. In fact, the Court made that switch before it even knew that FDR had a court-packing scheme. The Justice—

Chairman SPECTER. Professor Reich, could you summarize your testimony at this point?

Mr. REICH. I will do it in one sentence. The Justice who made that switch was Justice Roberts, Justice Owen Roberts. And it would be a cruel joke of history if a namesake almost 60 years later turned the Court backward.

Thank you.

[The prepared statement of Mr. Reich appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Reich.

Our next witness is Rabbi Dale Polakoff, President of the Rabbinical Council of America, whose membership consists of more than 1,000 ordained rabbis. He serves as Rabbi of Great Neck Synagogue, Long Island, a faculty member of the North Shore Hebrew Academy, a graduate of Yeshiva where he majored in psychology.

Thank you very much for joining us today, Rabbi, and we look forward to your testimony.

## STATEMENT OF RABBI DALE POLAKOFF, PRESIDENT, RABBINICAL COUNCIL OF AMERICA, GREAT NECK, NEW YORK

Rabbi POLAKOFF. Thank you, Mr. Chairman, and other distinguished members of the Committee. Good afternoon, or, perhaps, good evening. Thank you for inviting me to participate in these hearings.

The Rabbinical Council of America includes congregational rabbis, teachers and academicians, military chaplains, some of whom serve today in Iraq, Afghanistan, and other areas of the world, health care chaplains, organizational professionals, and others. I am here this afternoon to offer a statement of support for the nomination of Judge John G. Roberts to be Chief Justice of the United States.

My remarks about Judge Roberts begin this afternoon with broad brush strokes because the desired qualities of judges within the Jewish tradition are defined in just such broad brush strokes. We are enjoined to choose principled judges who refrain from showing favoritism to individuals or causes. We seek judges who are people of truth, whose words and decisions inspire confidence in those who rely upon them. Our tradition recognizes the tremendous responsibility borne by those who judge others and sees in their dispensing of truth and justice a divine partnership ensuring the continuation of a moral society.

At a time in which many in our society seek moral moorings and spiritual strength, I am certain that these broad values are also the values embraced by this great country in which we are privileged to live. Values of principle, values of truth, and values of responsibility are part of the foundation of religious ethics upon which our Nation has been built. And I am confident that Judge Roberts represents the embodiment of such values.

Within these broad brush strokes, though, are many hues of color, and it is the responsibility of this Judiciary Committee to try to determine how Judge Roberts sees those colors.

As a representative of the clergy of a minority faith community, I and my colleagues are also interested in an area of seminal importance to us, namely, the relationship between religion and state in society. In an effort to gain insight into Judge Roberts's understanding of that relationship, as defined by the Free Exercise and Establishment Clauses of the First Amendment, we were encouraged by a memorandum written to Counsel Fred Fielding on August 20, 1984, regarding remarks to be made by President Reagan to an ecumenical prayer breakfast. Then-Counsel Roberts suggested that the references to "church" or "churches" be changed to references to "religion" or "religions." He noted that, and I quote, "Many of our citizens do not worship in churches but in temples and mosques." We believe that this comment demonstrates a sensitivity and appreciation for the diversity of religious faith in America, and we hope is a harbinger of Judge Roberts's view in this crucial area.

There are those who suggest that Mr. Roberts's subsequent participation in presenting the view of the United States in several religion cases should be of concern. In this matter, we rely on the guidance of the Institute of Public Affairs of the Union of Orthodox Congregations of America, a sister nonpartisan religious organization. Their research indicates that in each of the cases, the positions advocated by the United States were neither extreme nor even unreasonable interpretations of the Religion Clause's requirements.

As members of this Committee are well aware, the contours of religious liberty in this Nation are still being shaped by the Supreme Court. Should the Senate confirm Judge Roberts, he will be on the Court this term, when, in the case of *Gonzales* v. *O Centro Espirita*, it will again examine the extent to which minority religions will have their religious liberty protected against Government interference, and Congress's ability to protect that liberty through laws like the Religious Freedom Restoration Act, which many of you championed a decade ago.

While we cannot be certain, we are optimistic that a Justice Roberts will be supportive and solicitous of religious liberty in America. His answers this week to questions you and your colleagues have asked him about the Constitution's Religion Clauses were indeed reassuring.

The Rabbinical Council of America has taken this public position of support for the nomination of Judge Roberts in the spirit of this year's celebration of 350 years of American Jewish history. The Jewish community, like so many other faith communities, has greatly benefited from the religious liberty guaranteed by our Constitution. We have been able to build houses of worship and study and to create communities reflective of our values and traditions. We believe it, thus, appropriate through our active participation in this process that we acknowledge our debt of gratitude to America, to a Nation that has pledged to uphold the conviction that liberty and equal justice under law are for all.

Thank you very much.

[The prepared statement of Rabbi Polakoff appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Rabbi.

Our next witness is Dr. Susan Thistlethwaite, President of the Chicago Theological Seminary, a Ph.D. from Duke University, a master's of divinity summa cum laude, undergraduate degree from Smith, the author of several books and op-ed pieces in various newspapers.

Thank you for joining us, Dr. Thistlethwaite, and we look forward to your testimony.

**STATEMENT OF SUSAN THISTLETHWAITE, PRESIDENT, CHICAGO THEOLOGICAL SEMINAR, CHICAGO, ILLINOIS**

Ms. THISTLETHWAITE. Thank you, Chairman Specter, and members of the Committee. My name is Susan Brooks Thistlethwaite. I am president and professor of theology at Chicago Theological Seminary. My academic training is in historical theology. My teaching and writing have emphasized contemporary religious life, with particular attention to religion and social justice. It is an honor to be asked to give testimony before the Senate Judiciary Committee, and with your permission, I will submit it for the record.

Our Constitution's promises, such as the right to live free of tyranny and be able to worship freely, are generous, even extravagant promises. They are promises made after freedom had been won from tyranny—a tyranny both political and ecclesiastical. They are promises made to the best of the human spirit as created by God.

In the limited documents available to discern John Roberts's views, there is evidence—and I have cited detail in my written testimony—that his judicial posture is more toward permissiveness in religious establishment and is less than vigorous in the defense of religious minorities and their freedoms. He refers to the so-called right to privacy, has objected to affirmative action, but has favored expanding both the authority of law enforcement and Presidential authority. Very disturbing to me is the view, and I quote, "The Geneva Convention is unenforceable in U.S. courts and, in any case, does not apply to detainees labeled 'enemy combatants.'" I submit to you the threat to the moral health of the Nation of this view is extremely grave.

A Supreme Court Justice entrusted to interpret the Constitution must embrace the fundamental element of our democracy. We will strive to be a body politic rooted in justice and fairness for all citizens. A Justice entrusted to interpret the Constitution must understand that the protection of the free exercise of religion and the prohibition of any establishment of religion are particularly critical to the way in which in this Constitution promises to establish justice.

Few Americans have understood the promises inherent in our Constitution better than Dr. Martin Luther King, Jr. Dr. King in his "I Have A Dream" speech was able, as few before or since, to reach into our constitutional past and proclaim the deep sense of the words that the Constitution was a promissory note to which every American was to fall heir. King argued that so far this promissory note to African-Americans had been returned: insufficient funds. But the promise held. The promise for King was a dream, but not a fantasy.

Dr. King's vision, as is well known, was a deeply theological vision. It is perhaps less well known that the Framers of the Con-

stitution also drew on a theological vision and that their prohibition of the establishment of any religion and their insistence on the protection of the free exercise of religion was made for religious reasons. The thought of John Locke on whose work the Founding Fathers such as Thomas Jefferson drew is instructive. Locke, like others in the 17th century, had seen the terrible results of religious wars, as Catholics and Protestants struggled for power in England. His own faith finally led him to believe that it is only in the absolute protection of human civil society from any control by religious authorities that people are enabled to come to have faith in God. It was for a theological reason, not a secular one, that both Locke and Thomas Jefferson separated church and state and prohibited establishing one religion over any other. In that way, they protected religious freedom.

In Jefferson's "A Bill for Establishing Religious Freedom," he argues, "The plan of our holy author of our religion is not to propagate it by coercion." They made this simple point: God does not need the help of the state for there to be faith.

From our vantage point in the 21st century, we can see the Framers were right. They did not just protect political freedom. They protected religious freedom. It is no accident that the United States through all of its history so far has been free from the terrible effects of religious war. The Framers of the Constitution knew what they were about.

As retiring Justice Sandra Day O'Connor wrote in an opinion last term, "Those who would renegotiate the boundaries between church and state must, therefore, answer a difficult question: Why would we trade a system that has served us so well for one that has served us so poorly?"

What has become evidence in the last half of the 20th century and into the 21st is that our society is becoming more genuinely religiously diverse. The Harvard Pluralism Project has documented that the United States is rapidly becoming the most religiously diverse nation in the world. Such increasing religion pluralism calls for even greater vigilance both in protecting religious minorities and clearly avoiding even the appearance of the establishment of any particular religion. The Constitution is a document that seeks to implement a vision of fundamental human rights, a vision of a society such as none in history has seen before, a vision that would establish justice, promote the general welfare, and secure the blessings of liberty.

I have been impressed with the incisive mind of John Roberts. That is a necessary but not a sufficient credential for Chief Justice. I am not as convinced that he believes in the dream that is the United States of America.

Thank you.

[The prepared statement of Ms. Thistlethwaite appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Dr. Thistlethwaite.

We now turn to Governor John Engler, President of the National Association of Manufacturers, the largest industry trade group in the United States, served as Governor of Michigan for three terms, and before that, had extensive experience in the Michigan State Legislature; Chairman of the National Governors Association, a

graduate of Michigan State, and a law degree from the Cooley School of Law.

Thank you for coming in today, Governor Engler, and the floor is yours.

**STATEMENT OF JOHN ENGLER, FORMER GOVERNOR OF MICHIGAN, AND PRESIDENT, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C.**

Mr. ENGLER. Mr. Chairman, Senator Leahy, and distinguished members of this Committee, I am pleased to be here today to testify in support of the nomination of Judge John Roberts to be the next Chief Justice of the United States Supreme Court.

This is an important moment for the National Association of Manufacturers because it is the first time that we have participated in a proceeding of this type. I would like to take a minute just to explain why we have taken this historic step.

When I joined the NAM on October 1st of last year, I did bring that experience you referenced, 20 years in the Michigan legislature, 12 years as Governor of Michigan, from 1991 to 2003. During that time as Governor, I felt that Michigan businesses were facing crushing legal costs and barriers. I also learned and saw first-hand laws that I had helped write in the State Senate or signed as a Governor were in many instances ignored, rewritten, or set aside by judges unclear about or dismissive of their sworn duties.

In part because of this, the legal environment for doing business in Michigan had become unpredictable, unfavorable, and unacceptable. As Governor, I set out to change this by recruiting to the judiciary individuals who were committed to uphold the law and not legislate from the bench. During 12 years as a Governor I appointed more than 200 judges to the Michigan courts, and that included three State Supreme Court justices, each of whom has a record of faithfully interpreting and applying the law.

Now, as a result of these appointments, coupled with equally needed and important tort reform legislation, cases filed with the Michigan circuit courts dropped by some 17 percent between 1997 and 2004. The legal costs of doing business in Michigan declined. People of Michigan, through this debate and period of time, came to understand that the certainty and predictability the judges help foster when they follow the law not only can lead to a better business climate but, necessarily then, are key to jobs and prosperity.

The same can be true at the national level. Nationally, our legal system today consumes some 2.3 percent of GDP. Its cost is actually about 7 ½ times as high as that of any of our key trading partners. The high cost of lawsuit abuse continues to be an impediment to our ability to compete in the global economy.

Now of course much of the solution to this doesn't like with the Federal courts but in State legislatures and the Congress, which must write clear laws that recognize these realities. That is why the NAM continues to advocate asbestos reform that has been the subject of much hard work by this very Committee, and further tort reform in areas like products liability.

Now, that said, to achieve a business environment that is fair and predictable and where the rules are clearly spelled out and adhered to, it is essential to have judges who will apply the rules the

legislature or the Congress establishes in a fair and predictable manner. The United States Supreme Court must set the example. The need for this fundamental fairness and predictability is why the NAM decided that the time had come to take positions on judicial nominations.

After reviewing Judge John Roberts's record, we are convinced he is eminently qualified to lead the Court. Judge Roberts has the intellect and the experience needed to understand and address complicated transactions and difficult legal problems. At the same time, he is committed to applying the law rather than applying his own personal views. This philosophy is essential if we are to remain a Nation guided by the rule of law.

Finally, John Roberts understands the importance of clarity when deciding cases and the practical consequence of decisions for business. I might add that, really, none of the current members of the Court come from a recent private-sector kind of background. Judge Roberts does. He brings that. Accordingly, if confirmed, Justice Roberts will add an important voice to the Court's deliberations because of his strong experience of how litigation affects major commercial transactions. This background will assist the Court in identifying cases that present business issues of national importance for its review and also in understanding the practical ramifications of rules set out through its decisions.

As I close, let me make it clear that the NAM also didn't seek to determine if Judge Roberts will reach or is likely to reach a particular outcome favorable to business. The principal difficulty with an outcome-based approach is that the outcomes a Justice should reach ought depend on what the duly enacted law is. In many areas, different companies and businesses will disagree on what the pro-business result actually is.

Therefore, the National Association of Manufacturers is not looking for Justices biased in favor of or against business or whose decisions reflect or are likely to reflect a pro-business outlook, but rather, for a Justice who will properly and impartially apply the law. We are convinced Judge Roberts is such a Justice, and I respectfully urge this Committee to set in a timely manner his nomination before the full Senate.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Engler appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Governor Engler.

Our final witness is Ms. Karen Pearl, interim president of Planned Parenthood Federation of America. For 10 years prior to becoming the interim president, she was the president and CEO of Planned Parenthood of Nassau County. She has been a preschool teacher, working with children with disabilities, and has a master's degree in counseling from New York University.

Thank you for coming in today, Ms. Pearl. The floor is yours.

**STATEMENT OF KAREN PEARL, INTERIM PRESIDENT, PLANNED PARENTHOOD FEDERATION OF AMERICA, NEW YORK, NEW YORK**

Ms. PEARL. Mr. Chairman and distinguished members of the Committee, I am Karen Pearl, interim president of Planned Par-

enthood Federation of America. I am honored to be here today to express the concerns and hopes of our patients and America's pro-choice majority.

I come before you not as an individual, but as a representative of millions. Through Planned Parenthood's 850 health centers, we provide health services to nearly 5 million women, men, and young people every year. One in four American women will visit a Planned Parenthood center in her lifetime. These women represent Americans from every walk of life and from every part of the country.

What is at stake in these hearings is nothing less than women's lives and women's health. Americans deserve a Supreme Court that will protect, not take away, our basic freedoms.

The record of John Roberts reveals a nominee who, as Chief Justice, is not likely to uphold constitutional protections for the right to choose abortion. And while we have fought hard for that right and will fight just as hard to protect it, Planned Parenthood does everything in our power to reduce the need for abortion. Yet there are forces at work in this Nation who seek to restrict comprehensive sex education, contraception, and emergency contraception—the very things that would decrease the number of abortions in this country.

In his response to questions from some of the members of this Committee, Judge Roberts has refused to state that he accepts and will protect a woman's constitutional right to choose, a right that has been part of the fabric of our society for nearly two generations. We ask that you oppose his nomination to the lifetime position of Chief Justice of the United States Supreme Court.

Five years ago, in *Stenberg* v. *Carhart*, four of the nine Justices made it clear that they support either overturning *Roe* v. *Wade* or significantly gutting it. To do so would seriously threaten constitutional protections against government regulations that threaten women's health and safety. To do so would send us back to a pre-*Roe* era where women did not have an equal place at life's table and when making child-bearing decisions was a perilous enterprise.

The American people deserve a Chief Justice who will uphold *Roe*, and yet Judge Roberts co-authored a brief, filed on behalf of the Government in *Rust* v. *Sullivan*, that stated *Roe* was wrongly decided and should be overruled. It is hard for me to understand, Senators, how a decision that for the past three decades has helped women participate equally in society could have been wrongly decided. It is hard for me to understand why a decision that allowed women to realize their dreams should be overruled.

We at Planned Parenthood are faced with the prospect of violence and intimidation every day of our lives. On my first day on the job at Planned Parenthood, a sign was posted on the front door that threatened, "Anyone who enters will be killed." And as I volunteered as a clinic escort, violent protesters hit us with their signs. In the *Bray* case, Judge Roberts is one of the authors of a brief arguing in support of the legal position of violent clinical protesters. Nowhere in the brief did the Government disavow the actions or the tactics of the violent demonstrators, not even in a footnote.

When women's health centers in Wichita, Kansas were being blockaded in 1991, a district court issued an injunction against the protesters to protect women who were attempting to enter the centers. Judge Roberts was involved in a highly unusual intervention that sought to lift the injunction, even though the injunction was preventing violence and safeguarding women.

This week, Judge Roberts repeatedly refused to answer whether he will protect the basic rights and freedoms of all Americans. Senator Specter himself pointed out that *Roe* has been reaffirmed by the Supreme Court multiple times. Notably, Judge Roberts has acknowledged that there is a right to contraception. He is comfortable making these statements, but he steadfastly refuses to acknowledge the same about the right to abortion.

As a legal matter, we believe that the right to choose abortion is as settled a fundamental right as the right to contraception. No one should be confirmed to a lifetime position with the power to take away the right to choose, who does not accept that proposition. When Judge Roberts answers questions about *Griswold* and *Eisenstadt* but refuses, when it comes to *Roe* and *Casey*, Judge Roberts is drawing lines of convenience, not rules of law.

No matter how remarkable the person or impressive the resume, a nominee for Chief Justice ought to be able to tell the American people whether the Constitution allows States to ban abortion. Judge Roberts has refused to do so, even when pressed by you.

We still do not know whether a Roberts's Court would preside over the creation of two Americas, one where women with means can obtain abortions even if they are not legal, and one where women without resources cannot.

When our patients' safety is at stake, when the ability of families—

Chairman SPECTER. Ms. Pearl, would you summarize at this point, please?

Ms. PEARL. I will. Private decisions about their lives is at stake, when women's status in our society is at stake, accepting anything less than clarity would simply be irresponsible.

You all know that Justice Harry Blackman wrote the majority opinion in the *Roe* v. *Wade* decision. In the decades following that decision, as more Justices on the Court ruled to overturn *Roe*, Blackman wrote, "A chill wind blows." His words echo hauntingly today.

Senators, I urge you to not confirm Judge John Roberts as Chief Justice, and I thank you so much for the honor and privilege of addressing you today.

[The prepared statement of Ms. Pearl appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Pearl.

Just a few questions. The hour is growing late. Ms. Pearl, the hearing has dealt extensively with the concerns that you have addressed, a woman's right to choose, and it boiled down really to Judge Roberts's statement that he felt he could not speak to that issue as a matter of judicial independence in a context where there are cases on the docket which raise the issue, unlike *Griswold* which has been pretty well established as a right to privacy, something I asked him about, and others did.

Do you think that—I know you would like to have an answer. People who want to overrule *Roe* would also like to have an answer. But do you think there is any basis for Judge Roberts's statement that he simply cannot prejudge the matter before it comes before him as a matter of independence, judicial independence, and that he cannot sell his vote one way or another?

There are people on this panel on both sides of the issue. I think we are divided among the 18, 9 to 9. Does he not have a point that he cannot prejudge the case?

Ms. PEARL. Senator, thank you. I do not think that that is correct. We are not asking him to prejudge any case. We have not presented him with any facts of any particular case.

Chairman SPECTER. But you are asking him to say he would sustain *Roe* v. *Wade*, a woman's right to choose.

Ms. PEARL. We are asking him whether the precedent that has been established, and as you said, reaffirmed 38 times, is settled law of this land, established rights. Women have counted on that right for almost two generations, for 32 years. It is hard to believe that that is not something that ought to be considered settled law. It was the *Roe* decision that was only 1 year after the *Eisenstadt* decision, so the timeframe should not matter, and it has been looked at so many more times. This is, you know, the decision—the question of whether and when to become a parent is such a fundamental right that it is hard to believe that it is even open for any kind of question. And if Judge Roberts was willing to talk about the right to privacy as it relates to contraception, he ought to have been able to talk about it as it relates to abortion.

Reproductive rights are simply not to be negotiated.

Chairman SPECTER. Professor Reich, going back to your JD from Yale, what is your evaluation of the issue of judicial independence and not soliciting votes on this Committee or in the Senate by a promise one way or the other on *Roe* v. *Wade* when the issue is on the docket for the Supreme Court in the next term?

Mr. REICH. I think it is entirely dependent, Mr. Chairman, on how settled the case is. That is, if you have something that is a super, super, super-duper precedent, as you repeatedly talk about it, then it would seem to me entirely appropriate for a candidate, a nominee to say, "I would follow a super-duper precedent just like *Wickard* v. *Filburn*."

On the other hand, if it is up in the air, if it really is up in the air, if there are a lot of 5–4 decisions, it is likely to come before him, he does not want to reveal his cards right now because it would be inappropriate, then it is a different story.

In this case it seems to me that *Roe* v. *Wade* is the law of the land. It has been there for many years. Why cannot a nominee simply say clearly, "I support *Roe* v. *Wade* as the law of the land?"

Chairman SPECTER. Unlike the right to privacy or contraceptives for marriage or for single people, there is a great debate—I do not have to describe it for you—a great debate in this country about the subject. If the definition, if it is up in the air or settled, I do not think, as you heard me say, that we could ask him about his decision. But on the factors which Ms. Pearl articulates, he testified he would give them great weight.

It is really unpredictable as to what any nominee is going to do. Who would have predicted that Justice Kennedy would have supported *Roe* v. *Wade*? The cases are legion in the history of the Court. The only consistency is one of surprise.

Rabbi Polakoff, has your organization taken a position on any Supreme Court nominees in the past?

Rabbi POLAKOFF. No, Mr. Chairman, we have not, but we feel that in a generation, and certainly in today's society, with traditional values and religious ethics threatened, that it is important for there to be a spiritual voice added to the hearings by this distinguished group, and that is why we are here today.

Chairman SPECTER. Governor, my time is almost to expire, but I have time for a question. Does this mean the National Association for Manufacturers is going to become more politically active like supporting asbestos reform?

[Laughter.]

Mr. ENGLAR. You can count on that, Senator.

Chairman SPECTER. Thank you very much. Thank you very, very much. Thank you super-duper much.

[Laughter.]

Mr. ENGLAR. I thank you, and I am hoping that the expeditious conclusion of this matter will allow a little bit of floor time for that important topic.

Chairman SPECTER. This Committee has done its job. Now it is up to the floor time of the leader.

Senator Leahy.

Senator LEAHY. I am so tempted, but I will withhold.

Chairman SPECTER. Senator Hatch.

Senator HATCH. Let me ask, Ms. Pearl, let me ask you the same question I asked Marcia Greenberger, for whom I have great respect as well. Since Justice Rehnquist or even before, has Planned Parenthood ever approved or endorsed or accepted or been favorably disposed towards any Republican nominee to the United States Supreme Court?

Ms. PEARL. Thank you, Senator. I would like to start by saying that Planned Parenthood does not make these kinds of decisions on any kind of partisan basis. It is not that we approve or disapprove of Republican nominees, approve or disapprove of Democratic nominees.

To your specific point, however, I am mostly certain—and I am very happy to go back and check and send you a letter to confirm—that Planned Parenthood did not take a position on Justice Sandra Day O'Connor's nomination to the Supreme Court.

Senator HATCH. But that is the only one you can recall?

Ms. PEARL. That is the one that I recall right now, yes.

Senator HATCH. I know your group is a close ally of the National Organization for Women. They have testified I think in almost every one except this one. Both of your groups, for example, I think are members of the Leadership Conference on Civil Rights?

Ms. PEARL. We are not.

Senator HATCH. You are not.

Ms. PEARL. We actually have an application pending.

Senator HATCH. NOW opposed Justice John Paul Stevens's nomination in 1975, saying his record showed he would, quote, "bend

over backwards" to limit the right to abortion. We all know that did not happen. NOW opposed Justice Anthony Kennedy's nomination in 1987 saying his record shows a "total lack of commitment to equality and justice under law."

I had a flyer that I saw circulated in 1990 by the National Organization for Women opposing the nomination of David Souter. It says, "Stop Souter or women will die."

The reason I raise this, and because as we all know, these Justices have supported abortion rights. I personally do not know where Justice Roberts is on that issue, and I do not think you do, nor do I think anybody else does, because he has never really opined on it. Now you cite cases where he was working for the Reagan administration, which clearly was against *Roe* v. *Wade*. But he was a staff attorney making the legal arguments that they wanted him to make, which is quite a bit different from saddling him with that particular philosophy.

Now, it turns out that the absolute and categorical certainty of those positions against Justices Stevens, Kennedy and Souter were just plain wrong. And that is where I am having some difficulty here. Did your group participate in the Stop Souter Rally that advertised on that flyer that went out? Did you participate in that?

Ms. PEARL. I honestly, I do not know the answer to that.

Senator HATCH. I do not either, but I seem to recall that Planned Parenthood did, and they had a right to if they wanted to. It is just that the position was wrong.

So what I am saying is it is one thing to think a person may be going to vote a certain way on the Court, but you do not know how Justice Roberts will vote. I do not know how he will vote. You may be right. You may be wrong, as—I think Planned Parenthood was part of it, NOW, the Alliance for Justice, NARAL, the Leadership Conference on Civil Rights, they were all wrong on those three Justices.

If we make these decisions solely because somebody thinks somebody might not live up to what they think the law should be, there would be very few people ever privileged to serve on the United States Supreme Court if both sides started to play that game.

All I can say is this, is that your organization is a great organization. I do not agree with some of the policies, but I have also supported you with regard to some aspects of the work that you are trying to do, but not on the abortion side of it. It seems to me that there is a responsibility to not prejudge people who have the eminent qualifications that Judge Roberts has, and that worries me just a wee bit. But I have been interested in your testimony and certainly have listened to it, as I have to all of yours.

I welcome my old friend, Robert Reich here. He is always a controversial person who makes us all think more all the time, and you have done it here again today, deliberately I know. And I do respect you and appreciate you, and I like alternative points of view. I think that is a good thing for our society, and you certainly present plenty of them for us to think about up here, both Democrats and Republicans.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I welcome the panel and I particularly welcome Bob Reich, who has been a long-time friend. I have been a great admirer of all of his strong commitments to public policy and public life generally. It has been an extraordinary career for he and his wife as well, who shared a strong commitment to public service.

Dr. Reich, let me ask you. Judge Roberts, in one of his statements, said the courts are passive institutions. Is that—how do you react to that as a concept? Is that your view about what the courts are, what the courts can be, what the courts should be in trying in particular to help the country respond to this extraordinary challenge, which all Americans are reminded of this past couple of weeks with Katrina, when we sort of tore back the fabric of America, the Gulf States, and saw so many people that have been left out and left behind. We are not talking about handouts. What we are talking about is a hand up.

Should not the courts be a part of a process where the Executive and the Congress and the courts are moving in harmony to try and make this a fairer country and more equitable land? And if that is so, what is your reaction to the comment that the courts are passive institutions?

Mr. REICH. Senator, the courts are not passive. Anybody who watches carefully, reads Supreme Court opinions, looks at the history of the Supreme Court, understands that they are far from passive institutions.

Interpretations of the 14th Amendment, Equal Protection Clause have historically changed the face of this Nation in terms of bringing minorities and women into the mainstream.

When I was Secretary of Labor, one of my duties was to implement the Family Medical Leave Act. Well, that was a hard-fought piece of legislation. You know, you were actively involved. The first piece of legislation passed by the Clinton administration that we got through, at least signed into law by Bill Clinton. Well, we did some regulations pursuant to that, some common-sense regulations struck down by this Supreme Court in a very close 5–4 decision, it seems to me. I believe I am right. Said that that particular regulation simply required that an employer notify an employee of his or her family medical leave rights was inconsistent with the purpose of the Act.

Well, a judgment that a particular regulation is inconsistent with the purpose of an Act is not a neutral, passive decision. The Court is an active instrument of public policy. It has values, social policy, economic policy.

And look, Senator, all of you, I understand. This is a tough one. This is a roll of the dice. I mean you do not have—there is not a lot—there are not a lot of decisions, not a lot of Court decisions. There are some memoranda you had difficulty getting from the administration, a lot of pieces of information. But—and it is presumptuous of me to tell you what to do, but the stakes are so huge here for the country. I do not see how you can, in good faith, given that the Court is not a passive institution, turn the country over to a Court—and it will be turning the country over to a Court where you just do not know what is going to happen.

Senator KENNEDY. I was somewhat disappointed that in the various areas of public policy where Judge Roberts had been so active, I mean he had obviously solicited the job to serve in the administration. He was selected by the administration to serve in the Justice Department, and he felt very comfortable ideologically being there, all of which I respect, and his commitment to public service. But he wanted to be in there and he felt very comfortable, and he was promoted all the way through there.

So he had these series of memoranda stating administration position, and there was always the question whether this was just stating the position or what percent of this was his own views.

The point that I thought was somewhat disappointing, when he was asked, given that was 20 years ago, what was your position today on these issues? And it seemed to me to be pretty ordinary that people would say, "Look, those were my views then, those of the administration. Today I look at X, Y and Z, whether it is on the issues of civil rights, whether it is on women's rights, whether it was on the issues on *Grove City*"—which was always amazing to me, after we had fought through all of the Civil Rights Act, that an individual could feel—and with all the money that was going to universities with tuition, which was keeping them running—that you would have an individual that would say, "Well, we wanted just program specific, so if they do not discriminate in the admissions or the financial office and the admissions office, they can discriminate wherever they want at the university."

I mean after we had gone through so much in terms of the battle to end discrimination, and the American people were at a position where they felt that we should not permit taxpayers to be funding for discriminatory purposes.

I think my time is over. I think the Chairman might give you 15 seconds or something to respond.

Mr. REICH. Senator, what has come out so far is this man is obviously a nice fellow, people like him. He is a very, very bright, if not brilliant jurist, and an extremely thoughtful lawyer. But he has certain ideological predispositions. He has values. Those values are way to the right of the mainstream in America. I do not think there is any question about it. And so it is up to all of you to decide whether you want to put somebody in as Chief Justice who is that far to the right. I think it is as simple and direct as that.

Senator KENNEDY. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Sessions.

Senator SESSIONS. I see Senator Hatch left, but here is the "Stop Souter or women will die" ad I just found, so I guess that did not prove to be a good prediction, except a lot of women partially born have died since Justice Souter went on the Court.

Chairman SPECTER. Make that part of the record, Senator Sessions?

Senator SESSIONS. Yes, I would offer that for the record.

Chairman SPECTER. Without objection.

Senator SESSIONS. I think, Mr. Reich, that Judge Roberts has a value that he has expressed articulately, beautifully, repeatedly, that he loves the law, he loves the Court, and he believes a Court

has a role to be a neutral arbiter, and not to impose its personal views. And I do not think he brings that because he may be politically conservative and believes in lower taxes or whatever he believes in politically. I think that is his deepest and highest value that was repeatedly stated here many, many times, and I think that is exactly what we need in the courts of America today, and I think the people of this country will be more respectful of the Court if the Court returns to that role. That is my personal view.

Ms. Thistlethwaite, I tried to think over the years about appropriate approaches to the church/state issue. I am Methodist myself and been involved in some of these things. I see you are a liberation theologist, but let me say this: you have expressed some pretty strong views about the need for a wall between church and state, and just yesterday, the Supreme Court—a district court, following what it thought was the command of the Ninth Circuit, ruled that the Pledge of Allegiance, which has "under God" in it, is unconstitutional. Do you have an opinion about that? I think it is in some ways consistent with some rulings in the Supreme Court, as I shared with Judge Roberts, and I think it is perhaps inconsistent with others. How do you feel about the wisdom of having those words in the Pledge of Allegiance?

Ms. THISTLETHWAITE. Well, I am very interested, Senator Sessions, to know whether you think people will be increased in their faith if they just say those words repetitively. I don't know what the goal is if it is not to establish a deistic religion, because if it is to include the words so that they can be historical, as I am citing from the Founders, God doesn't need your help.

So if it is historical, that was added to the Pledge of Allegiance. It was not even original in the Pledge. I look at the people out on the street demonstrating. They seem to feel, the people in favor, after the, you know, press show us the pictures of people demonstrating after this decision was made, and the people seem to feel it is prayer. And if it is prayer, then I think it is unconstitutional.

Senator SESSIONS. Well, what about—I guess you would further say that we should take "In God We Trust" off the coins?

Ms. THISTLETHWAITE. Do I think it is a good idea to confuse Caesar and God? No, I don't. Render unto Caesar what is Caesar's and to God what is God's. I don't think that is a good idea.

Senator SESSIONS. You would oppose then the Chaplain of the United States Senate?

Ms. THISTLETHWAITE. Pardon me?

Senator SESSIONS. Do you oppose the position of Chaplain in the United States Senate?

Ms. THISTLETHWAITE. Do I think you all need spiritual guidance? [Laughter.]

Senator SESSIONS. That is part of it, perhaps.

Ms. THISTLETHWAITE. I think it is okay if you rotate it around. But I am not the constitutional lawyer. I am a pastor. I am kind of in favor of pastoral care.

Senator SESSIONS. Well, I would say this: I think that it is an absolute truth that our Government was founded on a principle that we are created beings with certain inalienable rights. And when you get in a secular-like, Marxist ideologies, they have no re-

spect for life, not the same degree of it, and I think it is a unique portion of our great American spirit that every human being is respected specially because we believe they were created, and such words as "under God" or "In God We Trust" I think are not sectarian. I do not believe they establish a religion, but simply reflect a consensus view of probably 90 percent of Americans that there is a higher being, and I think that the Supreme Court authorities on these matters are somewhat strained and confusing, and perhaps Judge Roberts can improve that. I certainly hope so.

I see my time is up. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Coburn, you have the last word.

Senator COBURN. Thank you, Mr. Chairman.

Since I do, I would just like to compliment you and Senator Leahy.

Chairman SPECTER. I am sorry. We can't hear you.

[Laughter.]

Senator COBURN. I will say it again and again and again. If my budget is increased, I would be happy to say it.

But, you know, as a freshman Senator, the way this hearing has been conducted, the leadership that you, Mr. Chairman, and you, Mr. Leahy, have conducted it under, I think is reflective of good qualities of the United States and the country. And it kind of leads me to the questions that I have, especially for Dr. Thistlethwaite, the last statement that you said, you are not convinced that John Roberts believes in the dream of America. And I am just wondering: Could anybody of conservative values believe in that dream? Is it possible? Because if—and I don't know John Roberts actual—I go to bed at night worrying if he is on the Supreme Court, I have completely opposite views than Planned Parenthood, certainly about reproduction and other issues. But the question is can somebody have values different, conservative values and believe in the dream of America and be a good judge? Is that possible?

Ms. THISTLETHWAITE. I was very impressed by the gentleman who spoke last on the last panel who was testifying to the fact that the definition of the word "conservative" has changed. And I think—

Senator COBURN. Well, I don't want to get into a discussion about the definition of "conservative." I am a known quantity, all right? I am a known quantity. People know my opinions. I am not very quiet about them, sometimes to my own ill benefit. But the fact is it talks about what Senator Kennedy talked about, and Senator Feinstein: Do they have a heart? And the question is: Can somebody have a set of values that are different than what you perceive to be okay for the American dream and still have the heart of a Senator Kennedy and make a good judge? And I am very confused about what I consider a very inflammatory statement about Judge Roberts in your closing, because what it does is it castigates people into categories, the very thing Jesus said we don't do. And to me it is concerning that we have this decision that we have already decided how he is going to decide. Well, I want to tell you, I spent 2 hours with him, and I am as pro-life as they come, and I cannot tell you where he is going to be. And I tried to find

out. And if I spent 2 hours with him, how in the world do you all know that he is not going to be? And how do you know based on the history of the judges that have come before this Committee before, who the same claims were made about, and the opposite results came about?

And I think it undermines the testimony, and I think it lends for us to go back and reconsider as a Nation, all of us, the people I represent, the viewpoints I represent, and the viewpoints you represent. Maybe we don't know people's heart as well as we think we do when we speak out to make such a charge that John Roberts, you are not convinced he believes in the American dream.

Well, I tell you what. I am convinced he does. And I am also convinced that he has got a great heart. And I have spent hours upon hours here, and I have spent hours with him, and I have spent hours upon hours reading everything that has been brought up about John Roberts. And I think he has got the heart for the American dream. And I would hope—and I will close where I ended. What we need in our country is more pulling together rather than pulling apart. And certainly if that can happen anywhere, it can happen in our country.

I will dedicate myself to try to do that—on everything but spending. I will make that exception. But I will work to pull together, because we are not really all that far apart. We are not that far apart. But we magnify and enlarge the areas where we are apart. And the love from the Almighty, that is what he wants in front of us. And it is my hope as we finish in the things that we do in this Committee in the future—and John Roberts's career, whatever it is going to be, will be a manifestation that he believes in the dream.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Coburn.

Ms. THISTLETHWAITE. May I reply?

Chairman SPECTER. Dr. Thistlethwaite, do you want to make a comment?

Ms. THISTLETHWAITE. Yes.

Chairman SPECTER. Go ahead.

Ms. THISTLETHWAITE. I wish I had been able to see more than 10 percent, and it was said 10 percent is approximately the documents. I wish that we had been able to see more. I was hoping that the hearings would reveal more. But I can only tell you what is in my heart, and that is that the dream of the Constitution, that it does protect, that it is about the little guy, I am not convinced. And I just—you asked me to tell you what I think, and I tried to do the best I could.

Chairman SPECTER. Thank you very much, Dr. Thistlethwaite, for your comments. They are obviously very, very deeply heartfelt. I think that has been reflected in these hearings very, very extensively.

Thank you, panel, for your very profound testimony. We have had 30 witnesses in today who have been very profound, excellent, insightful. I want to thank my colleagues for their attendance. We have worked in 4 days to take on an arduous task, and we have worked late, Tuesday, Wednesday, and Thursday into the evenings, and the attendance here—based on the experience I have had on

this Committee for 25 years, the attendance has been excellent because Senators are very, very busy. Everybody has a half a dozen places where he or she has to be at any time, and the attendance has been really very good.

And I thank specially Senator Leahy for the leadership which he has provided. We have conferred at every step of the way and have had agreement at virtually every step of the way. And where we haven't had agreement, it has been a very amicable agreement to disagree, and not on the big points. On the big points we have come to terms.

I want to thank Mike O'Neill, chief counsel, and Bruce Cohen, chief counsel for Senator Leahy, and the staffs. Staffs on the Judiciary Committee didn't have an August. They can pluck August right off the calendar. They examined 71,000 pages of documents, and they are used to all-nighters because they are all students and scholars and have had a lot of all-nighters. So I thank the staff for doing that extraordinary job.

I think it not inappropriate to say that Senator Frist, the Leader, has commented about the many good reports he has had at a time when the Congress has been under a lot of scrutiny for the hurricane and a lot of problems. It can be characterized by others. We were asked to conduct dignified hearings, and except for very minor occasions where the witness might have been permitted a little more opportunity to respond, it has been very, very, very, very smooth sailing. So I am appreciative as the Chairman for what we have done.

Before yielding to Senator Leahy, I would like ask unanimous consent that documents be included in the record, and the record will remain open for 24 hours so that questions can be submitted. And then we will be moving ahead to an executive session by agreement on the 22nd, a week from today. And Senator Leahy and I are in agreement on trying to keep the speeches short—long statements for the record, but to 10 minutes if we can, providing that leadership. All the Senators have their own rights, and we don't want to impose upon them, but where we have tried to establish time limits, there are 17 Senators on this Committee who like to see the 18th observe the rules. And all of us are willing to take some cutback when we have been able to move with dispatch and get our business done. But Senators, we are a notorious group. People wanted to know when we were going to finish this hearing today, and I said earlier, "When the last Senator stops speaking." Now I am stopping.

Senator Leahy?

Senator LEAHY. I think that is a hint to me. I want you to know, first off, it has not been totally happy. On this side, we wanted to go through tomorrow and Saturday, Mr. Chairman. We are terribly disappointed you did not make that possible. And, of course, Governor Engler knows what we are saying.

To be serious, this is a serious matter. I want to compliment the key witness, Judge Roberts, for sitting here. We did ask him a lot of questions. Some he answered, some he did not. He knows our feelings on both sides of the aisle on that. He spent, I know, almost 3 hours with me and he spent hours upon hours with other members on both sides of the aisle.

Now we will vote. I have no idea how I will vote. I suspect I will probably be announcing it at some time prior to our hearing, but by Thursday I and the others on this Committee will have to vote. I think we have as strong a record as we are going to have, and I compliment the Chairman in that regard. And I compliment both his chief of staff, Mike O'Neill, and mine, Bruce Cohen, for this. But the people—the Chairman is right in mentioning those who have worked throughout August. I came down here during August and checked in on what they were doing. It was extraordinary. I know from the folders scattered throughout my farm in Vermont the other day that they were making sure I knew what they were doing and that I would work with them.

But it is extremely important for the country. I don't come into this with a preordained idea how I am going to vote. I do want to vote, though, on what is best for my country. I do love my country. I wouldn't serve here if I did not.

My maternal grandparents came to this country from another country not speaking the language. Both my grandfathers were stonecutters. Both would be proud that I had the opportunity to be here. It is a great opportunity. I don't take it lightly.

We have said several times that it is only 101 people who get to speak for all 280 million Americans on this: the President when he makes the nomination and the 100 Senators. I think the 100 Senators have to make the best decision possible. We have a great duty here in the advice that we will give the rest of the Senate. I don't take that lightly.

I do compliment the Chairman. He and I have talked many, many times through this. He has accommodated the wishes of people on my side of the aisle, as he has on his side of the aisle. And we will find out Thursday how we are going to vote. And I appreciate the panels. Many of you have sat through here all day, a long time. I know many of you very well. I know how busy your schedules are. I appreciate you being here.

Thank you, Mr. Chairman.

Chairman SPECTER. I saw Judge Roberts briefly in the hall, and he looked much relieved, and I thanked him for his good humor. It is a great tribute to our Constitution. The President nominates, the executive branch works in, and the legislative branch and our Committee and later the full Senate, and the judiciary. It is a great separation of power and great coordination. It is a great privilege to be a part of the system, and that concludes our hearing.

[Whereupon, at 7:10 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

# QUESTIONS AND ANSWERS

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, DC 20001-2866

JOHN G. ROBERTS, JR.
CIRCUIT JUDGE

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September 21, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

Enclosed are my responses to the written questions of Senators Biden, Brownback, Feingold, Feinstein, Kennedy, Kyl, Leahy, Mikulski, and Schumer, in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Joseph R. Biden, Jr.**

**The deference courts give to precedent – *stare decisis* – is a key issue in the confirmation of any Supreme Court Justice. During his testimony before this Committee, then-Judge Clarence Thomas said:**

> ***stare decisis* provides continuity to our system, it provides predictability, and in our process of case-by-case decision making, I think it is a very important and critical concept.**

**After saying that – and being confirmed – Justice Thomas has gone on, in more than 35 cases, to express a willingness to reexamine a breathtaking range of well-settled constitutional law. As we've come to learn and as Justice Scalia has explained recently, Justice Thomas "doesn't believe in *stare decisis*, period."**

1. **What can you tell the American people to convince us that what you've said about the importance of *stare decisis* at your confirmation hearings will, if confirmed, actually guide you when you are faced with deciding whether or not to follow a particular precedent?**

RESPONSE: I have placed my views concerning stare decisis in the context of a broader conception of the proper role of a judge in our constitutional system of government. That broader conception focuses on what I regard as essential judicial humility — the humility to appreciate the limited nature of the judicial office, the humility to be open to the considered views of colleagues on the bench, and the humility to appreciate that judges operate within a system of precedent shaped by other judges over the centuries. The fact that my views on stare decisis are grounded in a broader view of the proper judicial role helps substantiate their significance.

**At his confirmation hearing, Judge Souter had this to say on *stare decisis* and the factors to consider when contemplating overruling a previous case:**

> **Some such doctrine or some such rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed to simply random decisions on a case-by-case basis....**
>
> **One of the factors which is very important I will throw together under the term reliance. Who has relied upon that precedent, and what does that reliance count for today?**
>
> **We ask in some context whether private citizens in their lives have relied upon it in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now....**

> **We look to whether legislatures have relied upon it, in legislation which assumes the correctness of that precedent....**
>
> **We look to whether the court in question or other courts have relied upon it in developing a body of doctrine.**

2. **Do you agree with Justice Souter's analysis?**

   a. **If not, what parts do you not agree with?**

   b. **Specifically, do you agree with Justice Souter's characterization of the importance of considering reliance interests?**

   c. **How important do you personally think it is to take into account the reliance interests of private citizens?**

   d. **How important do you personally think it is to take into account the reliance interests of legislatures?**

   e. **How important do you personally think it is to take into account the reliance interests of courts?**

RESPONSE: I agree with Justice Souter that stare decisis is an important legal principle; it embodies basic rule of law values such as reliance, fairness, predictability, and judicial integrity. See Payne v. Tennessee, 501 U.S. 808, 827 (1991). The doctrine also serves as an important check on judges. As Alexander Hamilton explained in Federalist No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

Stare decisis analysis takes into consideration a number of factors, including whether the precedent in question has proven workable over time, whether it has been eroded by subsequent developments in the law, and the extent to which it has given rise to settled expectations. As a general matter, the reliance of both private citizens and legislatures are recognized as important factors in determining how much weight to give prior precedent under principles of stare decisis. See generally Payne v. Tennessee, 501 U.S. 808, 827–28 (1991). Additionally, considerations of stare decisis have special force in the area of statutory interpretation because Congress is free to alter the Court's prior interpretation if Congress disagrees with it. See Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197 (1991).

The Supreme Court has explained that it approaches the reconsideration of its decisions "with the utmost caution." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). I am, however, unaware of any particular case that counsels such caution because of a court's reliance. Stare decisis promotes a policy of consistent, even-handed, and predictable decision-

making, but the reliance interests to which the Court typically looks are those of individual citizens, of legislatures, or of society more generally.

**3. Do you agree that different types of cases and issue areas generally have stronger reliance interests at stake and the Supreme Court should be especially hesitant to overrule cases in those areas?**

**a. How strong a factor do you think the reliance interest should be in contract-commercial cases?**

**b. How strong a factor do you think the reliance interest should be in free speech cases?**

**c. How strong a factor do you think the reliance interest should be in Establishment Clause cases?**

**d. How strong a factor do you think the reliance interest should be in liberty clause privacy cases?**

RESPONSE: Reliance is among the many factors that a court considers in determining whether to revisit a prior holding. As a general matter, stare decisis does apply with greater force to particular types of cases. The Court has frequently explained that stare decisis is at its strongest when the Court is dealing with a statutory, as opposed to constitutional, decision. See, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989).

The Court has also held that "considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)). See also State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

As in any case, the reliance interest present in any "free speech," Establishment Clause, or "liberty clause privacy case" is a factor that a court considers under principles of stare decisis. Even though the Court has explained that the doctrine of stare decisis generally applies with less force in constitutional cases as compared to statutory interpretation cases, "any departure from . . . stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984); see also Vasquez v. Hillery, 474 U.S. 254, 266 (1986) ("[T]he careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons.").

**One of the Justices you've mentioned in the past that you've most admired, Justice Robert Jackson said this in 1944:**

> **I suppose we would not much disagree about the theoretical significance of the doctrine of *stare decisis*, however sharply we might divide about applying it to specific cases. (Decisional Law and *Stare Decisis*, 30 ABA J. 334 (1944)).**

**4. Do you agree with this statement?**

RESPONSE: I certainly agree that stare decisis is a doctrine of theoretical significance. The principle embodies essential rule of law values: reliance, fairness, predictability, and judicial integrity. I also regard it as significant in a practical sense, and am confident that Justice Jackson did, too: no legal system could function in a coherent way if basic questions were revisited at the start of each new day. As with other legal principles, the Justices from time to time reach different conclusions concerning the application of stare decisis in particular cases; I understand that to be the essence of Justice Jackson's point.

**During your hearing, you discussed the relationship between the Supreme Court's decision in *Brown v. Board of Education* and the doctrine of *stare decisis*. You noted that John W. Davis argued for the Board, as you put it: "You need to be worried about the social consequences of upsetting this decision. People have lived their lives this way. If you overturn this, it's going to be disruptive, the consequences are going to be bad." You said you agree with the outcome of *Brown*, which rejected Davis's arguments, in favor of, as you put it, the rule of law.**

**5. In your opinion, why did the "rule of law" in *Brown* outweigh these reliance interests?**

**a. Speaking generally, in cases that call into question longstanding precedents, how will you know when the "rule of law" should demand the disruption of the settled expectations surrounding those precedents?**

RESPONSE: The principles of stare decisis look at a number of factors, including the settled expectations stressed by Davis during his argument. On the other side of the ledger there may be competing considerations such as whether a particular precedent has proven to be unworkable; whether the doctrinal bases of a decision have been eroded by subsequent developments; and whether the factual premises have so far changed as to render the prior holding unjustifiable.

Several of these factors were present in Brown. The "separate but equal" approach of Plessy v. Ferguson was unworkable; it was in fact not leading to equal treatment. In addition, intervening precedents of the Court, most prominently Sweatt v. Painter, 339 U.S. 629 (1950), on which Thurgood Marshall heavily relied, had begun eroding the precedential force of Plessy. There is no categorical rule for when such considerations

justify the impact on settled expectations of overruling a prior precedent under principles of stare decisis; the Court's stare decisis precedents highlight the pertinent factors that must be weighed in the context of particular precedents.

**In 1923, the Supreme Court in the *Adkins* case ruled that the liberty clause outlawed Congress from providing women a minimum wage. In 1937, the Court in *West Coast Hotel v. Parrish* overruled *Adkins*.**

6. **Judge Roberts, do you agree with the decision in *Parrish* to overrule *Adkins*?**

   a. **If so, what justified not following precedent in that 1937 case?**

RESPONSE: I agree that West Coast Hotel Co. v. Parrish correctly overruled Adkins. Lochner era cases — Adkins in particular — evince an expansive view of the judicial role inconsistent with what I believe to be the appropriately more limited vision of the Framers. As Justice Frankfurter observed, the Court must give "due regard to the fact that [the] Court is not exercising a primary judgment but is sitting in judgment upon those who have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 122, 164 (1951) (Frankfurter, J., concurring). The Lochner era Court wrongly re-weighed legislative determinations, striking down laws that entitled women to minimum wage, Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923), and laws that prohibited bakers from working more than ten hours, Lochner v. New York, 198 U.S. 45 (1905). Overruling Adkins, the West Coast Hotel Court adopted an approach more consistent with judicial restraint, recognizing that Washington State's minimum wage laws for women were a reasonable "exercise of the protective power of the state." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937). The Court in West Coast Hotel found several additional reasons for reexamining the prior decision in Adkins, including "[t]he importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened." Id.

7. **At her hearing, Justice Ginsburg said: "The discussion of *stare decisis* in the central part of the [*Casey*] opinion is excellent." Do you agree with *Casey*'s analysis of *stare decisis* - specifically the analysis and application of *stare decisis* by the joint opinion of Justices O'Connor, Thomas, and Souter? How would you characterize the application of *stare decisis* made by the *Casey* opinion of Justices O'Connor, Kennedy, and Souter?**

RESPONSE: As a precedent on the significance of precedent, Casey is entitled to weight under the principles of stare decisis as is any other precedent of the Supreme Court. Several of the Court's opinions have set forth an analysis of stare decisis and I would look to all of these cases. For me to say whether I agree with the analysis of stare decisis in Casey, however, would plainly constitute a comment on the correctness of a decision in an area that could come before the Court in the future.

**The majority and dissenting opinions in *Jackson v. Birmingham Board of Education* took very different approaches to statutory interpretation. The majority stressed the importance of interpreting the word "discrimination" in Title IX "broadly." The dissenters, in contrast, wrote that Congress had not included causes of action for retaliation "unambiguously" in Title IX.**

**8. Putting aside how you would have voted in that case, which general approach to statutory interpretation – the majority or the dissent – is closer to your reading of statutes?**

RESPONSE: For the reasons mentioned in response to Question 7, I do not believe that it is appropriate for me to discuss my approach to statutory interpretation in the context of Jackson v. Birmingham Board of Education — a case decided just last term.

I can, however, comment on the general question of how I approach issues of statutory interpretation — and in particular the issue of whether terms should be construed broadly or narrowly. As a general matter, statutory interpretation, "begins with the statutory text, and ends there as well if the text is unambiguous." BedRoc Ltd. v. U.S., 541 U.S. 176, 183 (2004); see Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). The "preeminent canon of statutory interpretation" requires a judge to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." BedRoc, 541 U.S. at 183 (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)). The Supreme Court has repeatedly instructed that statutes written in broad, sweeping language should be given broad sweeping application. In some situations, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." See, e.g., Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998). Statutes should therefore be interpreted broadly when a broad interpretation is consistent with congressional intent and interpreted narrowly when a narrow interpretation is consistent with congressional intent. When the text itself is ambiguous on the question, I employ the traditional judicial tools of statutory construction to divine congressional intent. See, e.g., Consumer Elecs. Ass'n v. FCC, 347 F.3d 291 (D.C. Cir. 2003).

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Sam Brownback**

1. **Article IV, Section 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Notwithstanding the Full Faith and Credit Clause, many states have established a so-called "public policy exception" which permits such states not to recognize "public acts, records, and judicial proceedings" of other states when contrary to such states' public policy.**

   A. **Does the public policy exception violate the Full Faith and Credit Clause?**

   B. **Do you believe the public policy exception may violate any other constitutional provision, and if so, which provision(s)?**

   RESPONSE: The Court's precedents make clear that in certain cases, the public policy exception does not violate the Full Faith and Credit Clause. The clause itself has two aspects. First, it governs the extent to which a state may decline to apply the law of another state. In this area, the Court's precedents provide that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979). Second, the clause requires that states recognize the judgments of other states. The Supreme Court has declined to permit the application of the public policy exception to judgments. See Baker by Thomas v. General Motors Corp., 522 U.S. 222, 232-33 (1998). These decisions represent precedents of the Court, entitled to respect consistent with principles of stare decisis.

   I have not had occasion to consider whether the public policy exception implicates any other constitutional provisions. If I am confirmed, and if a litigant were to raise such a claim before the Court, I would consider the matter in the context of the factual circumstances of a particular case and in light of the arguments presented by the parties.

2. **The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."**

   A. **Should the Eighth Amendment's prohibition on cruel and unusual punishment be evaluated based on contemporary understanding of what criminal sanctions are cruel and unusual?**

**B. If your answer to (A) is yes, what factors or sources of law is it appropriate for a court to consider in discerning such a contemporary understanding?**

**C. What constitutes an "unusual" punishment for purposes of the Eighth Amendment?**

**D. Has any Supreme Court case finding a punishment to be cruel and unusual explicitly discussed why a certain form of punishment is in fact unusual, and/or explained the standard by which a punishment would found to be unusual?**

RESPONSE: The extent to which the Court should draw on contemporary understanding to decide what constitutes "cruel and unusual punishment" is a matter of continuing controversy on the Court. The Court's decisions in this area regularly observe that what is cruel and unusual must be evaluated in light of "the evolving standards of decency that mark the progress of a maturing society." See Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The application of this principle has been a source of deep disagreement on the Court — disagreement that can in part be traced to the language of the Eighth Amendment, which is susceptible to both broad and narrow interpretations.

The Court appropriately looks to "objective factors to the maximum extent possible" in discerning the contemporary understanding of what constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977). The actions of state legislatures represent the "clearest and most reliable objective evidence of contemporary values." Penry v. Lynaugh, 492 U.S. 302 (1989). It is important in this area, as elsewhere, that a judge be ever mindful of the limited role of the judge: "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." Coker, 433 U.S. at 592.

It is difficult to define "unusual" in the abstract, and I am not aware of a case where the Court has specifically explicated the meaning of "unusual." The Court decides whether a particular punishment is "unusual" by looking both to the kind of punishment and to the relation of the punishment to the crime. Under the Court's precedents, both inquiries take into account societal notions of the appropriateness of the punishment at issue.

As in other areas, I would apply the Eighth Amendment to the particular circumstances of cases that arise, guided by the meaning of the Constitution and the precedents of the Court, consistent with principles of stare decisis.

**3. As you know, the Fourteenth Amendment provides in part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."**

**What vitality, if any, do you believe the Privileges and Immunities Clause of the Fourteenth Amendment has today?**

RESPONSE: The Privileges and Immunities Clause was given a narrow construction by the Court in the Slaughterhouse Cases, 83 U.S. 36 (1872). The Court, however, did recently hold that the clause protects certain aspects of the right to travel. In Saenz v. Roe, 526 U.S. 489 (1999), the Court used the Privileges and Immunities Clause to strike down a California law restricting the welfare benefits of persons who had lived in California for less than one year, on the ground that the law penalized newly-arrived residents. Saenz represents a precedent of the Court as to the applicability of the Privileges and Immunities Clause, and is entitled to weight under principles of stare decisis.

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Russell D. Feingold**

**1. On September 13, I asked about the arguments you made in *Wilder v. Virginia Hospital Association* and *Gonzaga University v. Doe*. In the course of our discussion of those cases, you stated that you have litigated both for and against a broad reading of 42 U.S.C. § 1983, the federal law that allows Americans to sue state and local actors who deprive them of their rights under the Constitution or federal statutes. Specifically, you stated:**

> **"And the determination in the *Gonzaga* case about what should be shown and what has to be shown is one of the precedents of the Court that I would follow, as any other, consistent with rules of stare decisis. That's not an area in which I have any particular view. I've argued both sides of that issue. On behalf of plaintiffs, I argued in favor of it, and on behalf of defendants, against it."**
>
> **a. Please provide examples of cases in which you argued on behalf of plaintiffs that a personal statutory right exists that can be enforced in an action under § 1983.**

RESPONSE: I argued on the side of a plaintiff seeking to enforce federal statutory rights under § 1983 in Pharmaceutical Research & Manufacturers of America v. Walsh, 123 S. Ct. 1855 (2003). PhRMA had filed suit under § 1983 seeking to enjoin implementation of a Maine prescription drug law on the ground that it was preempted by the federal Medicaid Act. On behalf of the U.S. Chamber of Commerce, I filed an amicus brief in support of the petitioner, in which I argued that the state law was preempted. The Court ruled against the petitioner, but the Justices differed over the appropriate rationale. The concurring opinions of Justices Scalia and Thomas cited Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and suggested that PhRMA could not bring an action to seek enforcement of the Medicaid Act under § 1983. Justice Thomas's opinion stated: "Under this Court's precedents, private parties may employ 42 U.S.C. § 1983 or an implied right of action only if they demonstrate an 'unambiguously conferred right.'" 123 S. Ct. at 1878 (citing Gonzaga v. Doe, 536 U.S. 273, 283 (2002)).

I also argued in favor of enforcement of federal statutory rights under § 1983 in California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519 U.S. 316 (1997). In Dillingham, a construction firm sued under § 1983 to enforce federal rights guaranteed by the National Labor Relations Act and ERISA. The question before the Court was whether a California law governing wages paid to persons in apprenticeship programs was pre-empted by federal law. I participated in an amicus brief filed on behalf of the Associated General Contractors of America (AGCA), in which we sought to defend the reasoning of two similar Ninth Circuit decisions that had enforced AGCA's federal rights in actions under § 1983.

In addition, I was recalling in my testimony several cases in which I have argued on behalf of § 1983 plaintiffs seeking to enforce constitutional rights. These include: Barry v. Little, 669 A.2d 115 (D.C. 1995), in which I represented a class of District of Columbia residents in a § 1983

action, and argued that the District violated due process when it terminated welfare benefits through a change in eligibility standards; Hudson v. McMillian, 503 U.S. 1 (1992), in which, representing the United States as amicus curiae, I argued on behalf of a Louisiana prison inmate who had filed suit under § 1983 against several corrections officers, alleging that the officers had used excessive force while attempting to restrain him; Washington v. Harper, 494 U.S. 210 (1990), in which I argued as an amicus on the side of a mentally-ill inmate in a Washington prison who had filed a suit under § 1983 challenging the State's attempt to administer psychiatric medication against his will as a violation of due process.

**b. Please provide examples of cases in which you argued a position contrary to your position in *Gonzaga,* that in order for a statutory right to be enforceable under § 1983, the Court must find that Congress clearly intended to authorize a private right of action to enforce that right in Federal court.**

RESPONSE: As noted above, an argument based on Gonzaga was adverse to the petitioner in the PhRMA case, whom I supported as an amicus. Also, my argument in Gonzaga was not that a statutory right was unenforceable under § 1983 unless the statute itself authorized a cause of action. It was uncontested that the statute did not include an implied private right of action. As my brief in the case stated, the issue was whether — despite the absence of a statutory cause of action — "Congress nonetheless 'unambiguously' expressed the intent in [the Act] to confer individual rights enforceable in private damages actions under [§ 1983]." Since Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), the Court has required that a statute clearly confer individual rights in order to be enforceable under § 1983. My arguments in § 1983 cases have been premised on the Court's decision in Pennhurst.

**2. In both *Wilder* and *Gonzaga*, you argued that in order for a statutory right to be enforceable under § 1983, the Court must find that Congress clearly intended to authorize private enforcement of that right in federal court. Do you agree that in both cases, the Supreme Court rejected that particular interpretation of § 1983?**

RESPONSE: It is true that certain federal rights may be enforceable through § 1983 where Congress has not clearly intended to provide a cause of action. This is because § 1983 itself can provide the necessary cause of action. At the same time, not all federal laws confer rights enforceable through § 1983: "it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under [§ 1983]." Gonzaga v. Doe, 536 U.S. 273, 283 (2002). In Gonzaga, I argued that FERPA was not intended to confer such rights; in Wilder, I made a similar argument with respect to the Boren Amendment. The Wilder Court concluded that the rights created by the Boren Amendment were sufficiently specific and definite to be enforceable under § 1983. In Gonzaga, the Court reached the opposite conclusion, and "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." Gonzaga, 536 U.S. at 283.

**3. On September 15, I asked about your view of plaintiffs' lawyers who represent injured persons in product liability and medical malpractice cases, given that your work in private practice has primarily been on behalf of defendants. You disagreed with my assertion about your legal practice, and stated that you have also represented plaintiffs' interests, citing antitrust cases as an example.**

**a. Please provide further details about your representation of plaintiffs in antitrust cases, including case names and citations to published opinions where available.**

RESPONSE: My representation of antitrust plaintiffs includes the following cases:

At the petition stage in the Supreme Court:

Los Angeles Land Co. v. Brunswick Corp. (No. 93-1290), cert. denied, 510 U.S. 1197 (1994). I represented Los Angeles Land Co., a real estate development company attempting to build a bowling center, in a suit under § 2 of the Sherman Act.

Hydranautics v. Filmtec Corp. (No. 95-1887), cert. denied, 519 U.S. 814 (1996). I represented Hydranautics, a small technology research company, in a suit under § 2 of the Sherman Act.

Hospital Service Dist. No. 1 of Tangipahoa Parish v. Surgical Care Center of Hammond, L.C. (No. 99-210), cert. denied, 528 U.S. 964 (1999). I represented Surgical Care Center in a suit under § 2 of the Sherman Act.

CSU, LLC v. Xerox Corp., (No. 00-62), cert. denied, 531 U.S. 1143 (2001). I represented CSU, LLC., a copier service firm, in a suit under the Sherman Act.

Before courts of appeals:

United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc). I represented 18 states and the District of Columbia in a Sherman Act suit against Microsoft.

American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc., 103 F.3d 1147 (9th Cir. 1997). I represented American Professional Testing Service, Inc., a bar preparation service, in a Sherman Act suit against Harcourt.

Willis-Knighton Medical Center v. Bossier City, 178 F.3d 1290 (5th Cir. 1999). I argued on behalf of Willis-Knighton Medical Center in a Sherman Act suit against the City.

Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc., 198 F.3d 246 (6th Cir. 1999). I argued on behalf of Park Avenue Radiology Associates, a two-person radiology practice, in a suit against an operator of five Memphis, Tennessee-area hospitals.

**b. Please provide examples of your representation of plaintiffs in personal injury cases or plaintiffs in cases where an individual was suing a corporation, including case names and citations to published opinions where available.**

RESPONSE: I have represented individuals in actions against corporations on many occasions, including the following:

In Feltner v. Columbia Pictures Television Inc., 523 U.S. 340 (1998), I argued in the Supreme Court on behalf of an individual against whom Columbia Pictures had brought a copyright infringement action.

In Rockland Industries, Inc. v. Chumbley (No. 87-1220), cert. denied, 485 U.S. 961 (1988), I represented an individual inventor of a window heat loss prevention system who had sued Rockland Industries for breach of contract.

In Adams v. CSX Transportation, Inc. (No. 96-626), cert. denied, 519 U.S. 1041 (1996), I participated in the representation of individual bondholders who sought to compel CSX to make interest payments.

In Ashcraft & Gerel v. Coady, 244 F.3d 948 (D.C. Cir. 2001), I represented a lawyer in a suit against his former firm.

In Bocock v. Huntington Nat'l Bank, No. 01-6171 (6th Cir.), and Deusner v. Firstar Corp., No. 01-6068 (6th Cir.), I participated in representing individuals on appeal in suits under the Consumer Lending Act.

In Haft v. Dart Group Corp., No. 95-7555 (3d Cir.), I participated in representing an individual on appeal in a suit for breach of contract against his former employer.

In Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc., 198 F.3d 246 (6th Cir. 1999), I represented a two-person radiology practice on appeal in an antitrust suit against an operator of five Memphis, Tennessee-area hospitals.

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Dianne Feinstein**

**When you and I discussed the *Casey* decision you said:**

> **"Well, that determination in Casey becomes one of the precedents of the Court, entitled to respect like any other precedent of the Court, under principles of stare decisis."**

**However, later in your discussion with me and other Senators you acknowledged the Court does view precedent differently. Specifically, you said in a discussion with Senator Cornyn:**

> **"The factors that the court looks at in deciding whether to overrule prior precedent or not do not depend upon what the decision is or what area it's in, other than some various things we've talked about. For example, a statutory decision is much less likely to be overturned than a constitutional decision, just because Congress can address those issues themselves."**

1. ***Since some precedents are entitled to different standards of "respect" than others, can you clarify what "respect" Casey is entitled to?***

RESPONSE: Stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808 (1991). Thus, the Court approaches the reconsideration of any of its decisions "with the utmost caution." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

Although every decision of the Court is entitled to the respect due precedent, the Court has explained that stare decisis is at its strongest when the precedent involves the interpretation of a statute. See, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). This simply reflects the recognition that in cases involving constitutional interpretation, the Court's mistakes "cannot be corrected by Congress." Vieth v. Jubelirer, 541 U.S. 267, 305 (2004); Agostini v. Felton, 521 U.S. 203, 235-36 (1997). It continues to remain true that "any departure from . . . stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

2. ***What role, if any, does the amount of time that has passed since a decision was made [play]?***

RESPONSE: Please see my response below to Question 3.

3. ***If a decision is older does it deserve more respect than a more recent decision? Or does a decision that has been made recently lead to the conclusion that because the question has been addressed so recently it should not be reopened?***

RESPONSE: The Court has stated that the force of the doctrine of stare decisis stems, in part, "from the length of time [decisions] have been on the books." United States v. Morrison, 529 U.S. 598, 622 (2000) (reaffirming United States v. Harris, 106 U.S. 629 (1883), and In re Civil Rights Cases, 109 U.S. 3 (1883)). As a general matter, the older a decision, the more weight it is given under stare decisis analysis.

Of course, time alone is not determinative. In Shaffer v. Heitner, 433 U.S. 186 (1977), for example, the Court overruled the approach to in rem jurisdiction established a century earlier in Pennoyer v. Neff, 95 U.S. 714 (1878). On the other side of the ledger, there may be competing considerations such as whether or not a particular precedent has proven unworkable; whether the doctrinal bases of a decision have been eroded by subsequent developments; and whether the factual premises have so far changed as to render the prior holding irrelevant or unjustifiable. In such cases, the Supreme Court may find that a previous decision should be overturned. Brown v. Board of Education and West Coast Hotel v. Parrish, for example, reversed decisions that had been on the books for decades.

**As you know, there were several Senators who asked you about the right to privacy. When discussing a right to privacy with Senator Specter and whether it exists in the Constitution you said:**

> **"Senator, I do. The right to privacy is protected under the Constitution in various ways."**

**Then when Senator Kohl asked if you agreed with the *Griswold* decision to extend this right of privacy to contraception you said:**

> **"I agree with the *Griswold* court's conclusion that marital privacy extends to contraception and availability of that. The Court, since *Griswold*, has grounded the privacy right discussed in that case in the liberty interest protected under the due process clause."**

**You then went on to say:**

> **"Well, I feel comfortable commenting on *Griswold* and the result in *Griswold* because that does not appear to me to be an area that is going to come before the court again."**

**I have a few follow up questions regarding your answers.**

1. ***Please explain why you agree with conclusion in Griswold.***

RESPONSE: Although the word "privacy" is not mentioned in the Constitution, I believe that privacy interests are nonetheless implicated by a number of constitutional provisions, including the "liberty" protected by the Due Process Clause of the Fifth and Fourteenth Amendments. Prior to Griswold, the Court had recognized constitutional protection for certain privacy interests, including in the Meyer and Pierce cases that specifically addressed such interests through the rubric of the "liberty" protected by the Due Process Clause. While the Griswold majority did not employ this precise method of analysis, more recent decisions in this area have.

I do not suggest that the meaning of "liberty" is self-evident, and believe that in seeking to discern the nature of the privacy interests protected as part of "liberty" judges need to be vigilant to ensure that they do not simply enact their personal preferences into law. I do believe, however, that the Clause can be interpreted with appropriate restraint, through constant appreciation of the limited nature of the judicial role, and reliance on our Nation's history, tradition, and practices. In my view, the outcome in Griswold is consistent with such an approach.

2. ***How did you reach the conclusion that is Griswold settled law?***

RESPONSE: As I indicated in my oral testimony, I have drawn a pragmatic line between questions that are unlikely to come before the Supreme Court, and areas of law that are likely to

come before the Court, as did all the current sitting Justices. In my view, Griswold falls in the former category. I am not aware of any recent attempts to criminalize the use or sale of contraceptives. Indeed, not only would the statute at issue in Griswold be anomalous today, many have noted that enforcement of it was anomalous in 1965, when the Court decided the issue. Therefore, I think it was appropriate for me to comment on the case.

3. ***What makes you believe that the questions of privacy involved in Griswold will not appear before the Court?***

RESPONSE: I did not mean to suggest that questions implicating some aspect of the right to privacy are unlikely to come before the Court again in the future. It is virtually certain that they will; indeed, several cases involving the privacy line of jurisprudence will be heard in the upcoming Term.

My approach, rather, was to address specific controversies that are unlikely to be re-examined. I chose to speak about Marbury v. Madison because the power of judicial review over cases properly before the Court is well established, even though the implications of that power may continue to present legal questions. I chose to address Brown v. Board of Education because the unconstitutionality of segregation in public schools is well established, even though other applications of the Equal Protection Clause continue to come before the courts.

It is exceedingly unlikely that any state would attempt to pass legislation affecting the use of contraceptives by married couples. I therefore concluded that I could comment on the outcome of Griswold, and in the course of doing so, comment on the constitutional right to privacy.

**During questioning from Senator Specter he asked you several questions about stare decisis. When Senator Specter asked you about the principles of stare decisis, you discussed the factors to be considered, including settled expectations. You then said:**

> **"Whether or not particular precedents have proven to be unworkable is another consideration on the other side -- whether the doctrinal bases of a decision had been eroded by subsequent developments. For example, if you have a case in which there are three precedents that lead and support that result and in the intervening period two of them have been overruled, that may be a basis for reconsidering the prior precedent."**

1. ***If a precedent is altered or modified but not overruled does that serve as a basis for reconsidering the prior precedent?***

RESPONSE: The fact that a precedent has been altered or modified would not, standing alone, dictate revisiting that precedent in a subsequent case. The question is instead, under principles of stare decisis, whether a prior decision's "underpinnings [have been] eroded, by subsequent decisions." United States v. Gaudin, 515 U.S. 506, 521 (1995).

2. ***When evaluating a precedent do you look at the original case or the subsequent case?***

RESPONSE: I am not aware that there is a categorical approach to the question; to the extent a precedent has been previously modified by the Court, the applicable rule of law is set forth in the subsequent decision, and it would seem that the pertinent question would be, under stare decisis, whether to adhere to that rule of law. At the same time, intervening decisions can shed light on the prior decision as well. For example, in Brown v. Board of Education the Supreme Court overruled Plessy v. Ferguson in part because intervening precedents had undermined the authority of Plessy. In Sweatt v. Painter, 339 U.S. 629 (1950), the Supreme Court had held that a segregated law school simply did not provide an equal educational opportunity. And in McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), the Court held that every student at a state-supported graduate school, regardless of his race, was entitled to equal treatment at the hands of the state.

3. ***Senator Specter asked you about the 38 cases where Roe could have been overturned and wasn't. You pointed out that the Court did not address the issue in many of those cases. Does that distinction make a difference in evaluating the weight of precedent?***

RESPONSE: The Supreme Court recently reiterated that questions in a case that are "neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedent." Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S. Ct. 577, 586 (2004) (quoting Webster v. Fall, 266 U.S. 507, 511 (1925)). As such, decisions that do not specifically address Roe do not have the same precedential effect as the express re-examination of Roe's holding in Casey.

*4. Are some of the factors to be considered when evaluating precedent more dispositive than others?*

RESPONSE: There is no categorical approach to which considerations are dispositive under principles of stare decisis; the Court's stare decisis precedents highlight the pertinent factors that must be weighed in the context of particular precedents. In order to safeguard the basic rule-of-law values embodied in stare decisis — reliance, fairness, predictability, and judicial integrity — stare decisis analysis takes into consideration a number of factors, including whether the precedent in question has proven workable over time, whether it has been eroded by subsequent developments in the law, and the extent to which it has given rise to settled expectations.

Aside from these observations, however, it is difficult to say in the abstract which factors carry more weight; different factors are implicated in different cases, and the balance is never precisely the same.

**As you acknowledged in the hearing there are often close questions of law and reasonable and intelligent people can disagree. In an exchange between you and Senator Kohl about the brief you signed in *Rust v. Sullivan* you said,**

> **"I don't think there's anything in there that suggests we think or thought that anybody at that time who disagreed was unreasonable. That was our legal position. The other side's was obviously presented in those cases. "**

**Then when Senator Hatch asked you about whether reasonable people can differ on issues you said: "Oh, certainly."**

**When discussing the baseball analogy with Senator Cornyn, the question came up about your approach to the law and whether there are so-to-speak "right" answers. You said:**

> **"I do think there are right answers. I know that it's fashionable in some places to suggest that there are no right answers and that the judges are motivated by a constellation of different considerations and, because of that, it should affect how we approach certain other issues.**
>
> **That's not the view of the law that I subscribe to. I think when you folks legislate, you do have something in mind in particular and you it into words and you expect judges not to put in their own preferences, not to substitute their judgment for you, but to implement your view of what you are accomplishing in that statute.**
>
> **I think, when the framers framed the Constitution, it was the same thing. And the judges were not to put in their own personal views about what the Constitution should say, but they're just supposed to interpret it and apply the meaning that is in the Constitution. And I think there is meaning there and I think there is meaning in your legislation. And the job of a good judge is to do as good a job as possible to get the right answer."**

**We can all acknowledge that reasonable people can disagree on important issues. On any given day in the Senate several of us can read language in a bill and come to vastly different conclusions about what the words mean or what their effect is. As has been seen on the Court since the founding of our country, and among the Framers, it is clear that brilliant minds can disagree about what the Constitution means. And as I pointed out during your hearing, in the last 10 years, there have been 193 5-4 decisions of the court, again among great minds.**

1. ***Given the reality that brilliant minds can have legitimate and differing views of the exact same language in a statute or in the Constitution, can you explain how you would determine the "right" answer?***

RESPONSE: To be clear, I do not believe that when judges disagree, one of them has abdicated his or her responsibilities as a judge. Yet I believe that every judge acting in good faith should approach each issue by analyzing the legal materials at his or her disposal with a mind toward

finding the better legal answer, and not simply choosing between two reasonable interpretations based on personal preferences. If one does not accept that there are "right" answers, it seems to me that one would have to view the law, and the process of judging, in an entirely different light. If legal texts and arguments could not yield determinate answers, then only the will of the judges could. That would result in a rule of men, not the rule of law.

In my view, a judge interpreting a constitutional or statutory provision should use the traditional judicial tools of interpretation at his disposal to come to the best resolution of the question before him. In any case, I would start with the text of the relevant provision and the precedent in the area, and, when appropriate, would also consider historical practices and understanding, canons of interpretation, and legislative history.

2. ***You said that it is important to look at what the Framers or the legislators were thinking when the words were drafted, but since different Framers and different legislators have different intent, whose intent is controlling?***

RESPONSE: You are right to say that I believe an understanding of the Framers' intent is vitally important in analyzing a legal text. But I do not mean to say that we should attempt to read the minds of drafters of the text, or that we should try to divine how they would have decided the case. Rather, I believe we should gauge their intent by the words that they have written, with the aid of accepted tools of interpretation. If the framers of some legal text decided to use broad language, we should hold them to their word and apply their provision as it is written.

You are of course correct that different drafters may have different intent, which is why any analysis of intent must begin with the text upon which they actually agreed. Beyond that, the Court's precedents provide guidance on materials considered probative in ascertaining the intent of the Framers as a group.

3. ***Can you explain how you come to the conclusion there is a "right" answer when there are strong and valid arguments on many issues, including Constitutional interpretations?***

RESPONSE: Our legal system has always recognized that there may well be compelling arguments on both sides of a legal issue — that is the essence of the adversary system. And it would be naive not to recognize that the resolution of some questions is harder than others; your point about 5-4 decisions confirms that. But when legislators passed legislation or when the Framers drafted the Constitution, they were deciding issues entrusted to them by the electorate. And when a dispute arises in a case before the courts over what these representatives decided, it becomes the role of the judge to discern the answer to that question — to decide what was decided — and not to decide the policy issues in the first instance himself. As Chief Justice Marshall explained in Marbury v. Madison, "[i]t is emphatically the province and duty of the judicial department to say what the law is" — not what it should be.

4. ***In those close cases involving a close question of the law, what will you look to when determining which way to fall?***

RESPONSE: I will consider all the traditional tools of interpretation available to me. For example, my opinions on close questions of statutory interpretation evince a willingness, when necessary, to go beyond the text to resolve ambiguity, to look in a considered way to legislative history, appropriate canons of construction, considerations of purpose, and the like. I apply such traditional tools as guided by applicable precedent under principles of stare decisis, conscious of the limited nature of the judicial role and open to the considered view of colleagues similarly wrestling with the close question.

**In answering Senator Schumer's question about the *Wickard* cumulative impact test, you stated:**

> **"If the activities are commercial in nature, you get to aggregate them under Wickard against Filburn that we've talked about; you don't have to look at just that particular activity, you'd look at the activity in general."**

**Your belief that the *Wickard* test should apply only "if the activities are commercial in nature" casts some doubt on whether or not the *Wickard* test would be applicable to the protection of threatened species under the Endangered Species Act.**

- ***Do you believe that an analysis of whether the Endangered Species Act "substantially affects interstate commerce" should examine only the individual species at issue, or apply the Wickard test and look at the cumulative effect on interstate commerce of all endangered species?***

RESPONSE: In answering Senator Schumer's question about Wickard, I was putting forth my best understanding of the Supreme Court's Commerce Clause jurisprudence. In any case where they were relevant, I would apply Wickard and the Court's decision in Gonzalez v. Raich, 125 S. Ct. 2195 (2005), as I would any other precedent in other areas of law. That said, it seems to me that your question puts forth a hypothetical that may come before the Court. The Supreme Court has not addressed whether the aggregation principle announced in Wickard and reiterated in Raich would compel it to examine the cumulative economic impact of all endangered species, instead of the particular species at issue in the case. In accordance with the practice of other nominees to the Court, I would not want to suggest which approach I would take, nor would I want to develop a position without the benefit of considered arguments on both sides of the issue.

**During the hearings, you discussed your judicial philosophy with Senator Hatch. Specifically, you stated:**

> **"I tend to look at the cases from the bottom up rather than the top down. And I think all good judges focus a lot on the facts. We talk about the law, and that's a great interest for all of us. But I think most cases turn on the facts, so you do have to know those. You have to know the record."**

**Then when talking with Senator Sessions you stated:**

> **"That's right. And the big difference when you get up to the Court of Appeals is that the facts are not really in play anymore. Somebody's been determined -- they think you are guilty or they buy your versions of the events.**
>
> **The Court of Appeals usually just looks at the legal issues."**

***1. What role do the facts play in your evaluation at the appellate level?***

RESPONSE: Once a case comes before an appellate court, findings of fact have already been made. These factual determinations are transmitted to the appellate court in the record of the case. I did not mean to suggest, however, that facts play no role in the appellate process. On the contrary, while the appellate court determines the legal issues in dispute, it generally cannot resolve the case without applying the legal standard to the facts at hand.

For example, the Supreme Court has held that a person may invoke the Fourth Amendment's prohibition against unreasonable searches and seizures if that person has a "reasonable expectation of privacy." See, e.g., Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring)). In concrete cases, however, a judge cannot answer in the abstract whether a person has a reasonable expectation of privacy in any given situation. Instead, whether a person's expectation of privacy is "reasonable" turns on the facts of the particular case. Compare Minnesota v. Olson, 495 U.S. 91 (1990) (holding that an overnight guest had a reasonable expectation of privacy in the premises where he was staying); with California v. Greenwood, 486 U.S. 35 (1988) (holding that residents of a house did not have a reasonable expectation of privacy in garbage they discarded and exposed to the public). Thus, while appellate courts do not engage in the business of fact-finding, their legal decisions are inextricably intertwined with the facts of the case before them.

***2. What about the real world impact of your decisions?***

RESPONSE: In my view, the real world impact of a court's decision is often an important consideration in the court's determination of the case. That is not to say that judges should tailor their analysis of the law based on what they regard as the most desirable result in terms of impact — I do not believe that. But to take one example, if a particular legislative construction would lead to deleterious consequences in the real world, it is reasonable to question whether Congress actually intended that construction.

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Edward M. Kennedy**

**Willingness to Expand Rights**

**You have said you take a modest view of the role of the judiciary, but you must be aware that the courts also have a historic role of doing justice – protecting minorities or the powerless from what is often called the tyranny of the majority. Your repeated statements here about the limited role of judges raise a concern that you don't support that part of the judicial role, and that concern is heightened by the memos from your years in the Reagan Administration. During that time, there were people, in the Administration on several occasions who took a broader view than you did of the role of the courts in redressing wrongs and meeting the need for civil rights legislation.**

**1. Was there any occasion where you argued that courts or Congress should pursue a broader view of strengthening civil rights or protecting civil liberties than others did?**

RESPONSE: I explained in my response to the Judiciary Committee's Questionnaire that "the framers insulated the federal judiciary from popular pressure in order that the courts would be able to discharge their responsibility of interpreting the law and enforcing the limits the Constitution places on the political branches. Thoughtful critics of 'judicial activism' — such as Justices Holmes, Frankfurter, Jackson, and Harlan — always recognized that judicial vigilance in upholding constitutional rights was in no sense improper 'activism.'" Response to Question 28.

In addition, I have argued for broader protection of civil rights on many occasions, including in the following cases:

In United States v. Halper, 490 U.S. 435 (1989), I argued on behalf of an individual that the Double Jeopardy Clause barred the imposition of civil penalties under federal law against someone who had been convicted and punished under federal criminal law for the same conduct. In a unanimous opinion, the Court agreed.

In Washington v. Harper, 494 U.S. 210 (1990), I argued as an amicus on the side of a mentally-ill inmate in a Washington prison who challenged the State's attempt to administer psychiatric medication against his will as a violation of due process.

In Hudson v. McMillian, 503 U.S. 1 (1992), representing the United States as amicus curiae, I argued on behalf of a Louisiana prison inmate who had filed suit against several corrections officers, alleging that the officers had used excessive force while attempting to restrain him. I argued that the inmate was not required to show a "significant injury" as part of his claim that the officers' conduct amounted to cruel and unusual punishment under the Eighth Amendment.

In Feltner v. Columbia Pictures Television Inc., 523 U.S. 340 (1998), I argued on behalf of an individual sued for copyright infringement that he was entitled to a jury trial under the Seventh Amendment.

In the case of Barry v. Little, 669 A.2d 115 (D.C. 1995), I represented a class of District of Columbia residents receiving general public assistance benefits, and argued that persons whose benefits had been terminated by a change in eligibility standards had been denied due process.

**Hamdi v. Rumsfeld**

**In Hamdi v. Rumsfeld, the Administration took the position that it could deny access to the courts to anyone it seized as an enemy combatant in the war on terror. Citizens or non-citizen – could be swept up – at home or abroad – and sent off to prison indefinitely with no chance to convince a court that they were innocent. The prospect of the government arresting people and holding them in secret without time limits and without any recourse for review is terrifying.**

**We have always condemned other societies where governments can simply make people "disappear." In this country, we have protections against this kind of abuse. Yet, with this extreme assertion of authority, President Bush has rejected the guarantee of due process that is the heart of the rule of law in our society.**

**You testified that the President has an obligation to uphold the Constitution and make his own independent determinations about what is and what is not constitutional. Where Congress has provided general grants of authority, such as the Authorization to Use Military Force passed after the 9/11 attacks, how much deference should be given to the President when the President is interpreting his own power? Please do not restrict your answer to referring to Youngstown. Assuming its application, your views on statutory interpretation will be extremely important.**

**1. What will be your approach to interpreting Presidential power in such areas?**

RESPONSE: Issues concerning the limits of Executive authority, especially during wartime, are among the most serious the Court faces. I have repeatedly referred to Youngstown because it offers a useful framework for thinking about these issues, and yet is adaptable to the myriad factual and legal contexts in which questions about Presidential power are likely to arise. As to the issue of deference, certain matters may fall within the Executive's special capacity, such as the President's power as commander-in-chief to direct troops on the battlefield. In such cases, the President may be entitled to considerable latitude. Where his actions fall within an area of overlap with Congressional authority, the President may be entitled to a lesser degree of deference.

**Executive Authority**

**You testified in response to Senator Durbin's questions that the anti-torture statute - the subject of the Justice Department's Torture Memorandum - would not be unconstitutional merely because it conflicted with the President's commander-in-chief authority.**

**1. To be clear, is there any other reason why the statute might be unconstitutional? Does it fall squarely within the Congress's power to make rules for the armed forces?**

RESPONSE: As with any analysis of the extent of the President's authority, the established framework for deciding whether presidential action is constitutional was laid out in Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). First, Justice Jackson stated that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Id. at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Id. at 637. Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. If a statute — such as the anti-torture statute — is held to prohibit certain executive action, a reviewing court will find itself in the third category of the Youngstown analysis. In such a situation, the court must first decide whether the President's asserted power falls within his own constitutional authority, and, if so, whether the legislative prohibition falls within Congress's.

If I am confirmed and this question comes before me, I would employ the framework outlined above, considering the matter in the context of the factual circumstances of the particular case, and in light of the arguments presented by the parties.

**In response to questions from Senator Leahy, you seemed to suggest that, as a matter of statutory interpretation, the anti-torture statute does not apply to the President.**

**2. Do you think the statute prohibits the President from authorizing the torture of prisoners?**

RESPONSE: While Senator Leahy and I were discussing the Youngstown framework, I noted that "the first issue for a Court confronting the [Youngstown analysis] would be whether Congress specifically intended to address the question of the President's exercise of authority or not." I did not mean to state a view regarding whether the anti-torture statute (or any other statute) does or does not apply to the President. Rather, I was articulating the proposition that, in order for a court to decide which of Justice Jackson's

Youngstown categories is the appropriate one under which to analyze a President's asserted power, the court must first decide whether or not Congress has authorized the President's actions, prohibited them, or has not spoken either way.

## Criminal Issues

### Criminal sentencing

**The United States has the highest incarceration rates in the world and it's on the rise even while the country is experiencing historically low rates in crime. Over 2 million people are in federal or state prisons. Two-thirds of prisoners are African American or Hispanic. Twelve percent of all young African-American men are incarcerated.**

**Women are the fastest-growing part of the prison population and as many as 700,000 people with mental illnesses are incarcerated each year. More than 1.5 million children have a parent behind bars. Obviously, the impact of jail for these individuals -- and their families -- does not end on the last day behind bars.**

**The problems in the criminal justice system and prisons affect all communities. Estimates suggest that one in every ten prisoners in the country is raped. We still don't know how many more are victims of sexual abuse and exploitation. We do know that the system is not perfect and innocent people are sometimes sent to prison and we know that ninety percent of those accused of crimes are poor.**

**Barry Scheck, co-founder of the Innocence Project, recently testified before this Committee that there have been 159 post-conviction exonerations based on DNA evidence. In forty-five of those cases, the real perpetrator was then apprehended.**

**Much has been written about the possibilities for more exonerations based on DNA evidence. But 80% of cases involving wrongful convictions have other causes, such as ineffective lawyers, misconduct by prosecutors or police, fraudulent evidence, mistaken identifications, false confessions, or perjury.**

**1. Given the realities I have just highlighted, what is your view on the severity of federal sentences and high incarceration rates? Based on your experience as a judge, what is your view of mandatory minimum sentencing?**

RESPONSE: The prevalence of crime carries with it many societal consequences, one of the most serious being that innocent people are sometimes swept up in efforts to stamp it out. No American—and certainly no judge—welcomes the fact that among the more than one million criminal convictions handed down yearly in the United States, some are erroneous. It is the role of judges in both the state and federal systems to be constantly vigilant in guarding against wrongful convictions.

The Court's precedents understand the Eighth Amendment to include a "narrow proportionality principle that applies to noncapital sentences." Ewing v. California, 538 U.S. 11, 20 (2003). In Solem v. Helm, 463 U.S. 277 (1983), for example, the Court struck down a sentence of life imprisonment without possibility of parole that was imposed upon the defendant after his seventh nonviolent felony conviction. At the same

time, the Court has stated that the choice of "sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." Ewing, 538 U.S. at 25.

**In a 2003 speech to the American Bar Association, Justice Anthony Kennedy called for major changes in sentencing and corrections. He said: "Our resources are misspent, our punishments too severe, our sentences too long." He also said, "I can accept neither the wisdom, the justice nor the necessity of mandatory minimums. In all too many cases, they are unjust."**

**Judge Roberts, in your confirmation hearings in 2003, you told Senator Durbin that, "[at] the core of constitutional liberties, we don't group people according to characteristics and say, well, you share this characteristic and so you must be like this." You said, "We treat people as individuals."**

**Also during that 2003 hearing, in response to a question I asked, you said, "As a judge, you need to apply the law fairly – without regard to persons."**

**I would like to know how you reconcile these two statements in the context of sentencing of criminal defendants.**

**2. Do you think the current federal sentencing system does a sufficient job of treating people as individuals? What is your view on the impact that mandatory minimums have on fairness in sentencing?**

RESPONSE: I agree that criminal sentencing requires accommodating the various purposes of punishment. There is on the one hand a need for fairness and uniformity in sentencing. It is generally thought that persons who commit the same crimes should receive similar punishment. Yet, there is also a concern that sentences be tailored in a manner that takes some account of individual circumstances. These aspects of criminal sentencing may on occasion be in tension, and it is primarily the role of the legislature to strike the appropriate balance. Of course, after the Court's decision in United States v. Booker, 125 S. Ct. 738 (2005), the issue of federal sentencing is likely to play out in the federal courts for some time to come.

**As a lawyer in the Attorney General's office, you worked on efforts to establish a commission to investigate organized crime during the 1980's on the theory that such a commission would be in the best position to analyze data on specific topics and make policy recommendations.**

**I would like to know more about your views on independent agencies – and how independent they should be. As you know, the United States Sentencing Commission was established as a result of the enactment of the Sentencing Reform Act of 1984. Over several years, this Committee worked together in a spirit of bipartisan cooperation to pass that bill.**

**As we intended when we passed that legislation, the Commission is an independent agency in the judicial branch. One of its key roles is to establish sentencing policies**

**for the federal courts, to research sentencing practices throughout the country and to make recommendations to Congress.**

**In recent years, one policy recommendation made by the Sentencing Commission was the elimination of all mandatory minimum statutes, because they disrupt the federal sentencing guidelines, which are intended to provide certainty and fairness within the criminal justice system.**

**3. What is your view on the Sentencing Commission's recommendation against mandatory minimum sentences? As an independent agency, should the Sentencing Commission be primarily responsible for analyzing the need for further federal sentencing reform?**

RESPONSE: It is important that the federal judiciary continue to examine the operation of the court system. These efforts may include making policy recommendations to Congress about matters of particular concern. This was, for example, one of the primary reasons for the establishment of the Judicial Conference, which is tasked with "mak[ing] a comprehensive survey of the condition of business in the courts of the United States." 28 U.S.C. § 331. I do not think it would be appropriate for me to state a particular view about the Sentencing Commission's recommendation regarding mandatory minimums. Nevertheless, initiatives to work more closely with Congress on issues affecting the court system are likely to lead to better relations between the judicial and legislative branches.

**As set forth by the Sentencing Commission, the federal sentencing guidelines authorize judges to consider a wide range of so-called "relevant conduct" in deciding sentences. They can consider information not presented to the jury and can even consider information related to charges on which a defendant was acquitted by a jury.**

**Recent Supreme Court decisions have identified constitutional problems when judges find facts not considered by a jury or admitted by a defendant.**

**In one of your recent decisions, United States v. Smith, you upheld a sentencing enhancement based on a number of facts, including the defendant's conduct on an uncharged offense.**

**4. Based on your experience with that case, what is your view on the appropriateness of sentencing based on facts not considered by a jury or admitted by a defendant?**

RESPONSE: The per curiam opinion in United States v. Smith, 401 F.3d 497 (2005), was an attempt to apply the remedial aspect of the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005). In Booker, the Court ruled that the Guidelines were no longer mandatory, but that judges were still required "to take account of the Guidelines together with other sentencing goals." 125 S. Ct. at 764. Our court ruled in Smith that the sentencing judge had in effect already done what Booker required in imposing a sentence greater than what was mandated by the Guidelines. The decision in Smith stated no view about whether Booker, or any of its forerunners, were rightly decided; it simply applied the law. I do not think it would be appropriate for me to state a view on the issue now, as it is one that will almost certainly come before the Court again.

**Death Penalty**

**Perhaps more than any other area of Supreme Court law, the death penalty has tested the sensibilities of individual justices and resulted in concrete changes in constitutionality and propriety. Justice Harry Blackmun's public renunciation of the death penalty in *Callins v. Collins*, where he said "From this day forward, I no longer shall tinker with the machinery of death," is the most famous. But, Justice Sandra Day O'Connor's evolution was notable too.**

**In 1989, she refused to declare capital punishment for the moderately mentally retarded unconstitutional. But in July 2001, Justice O'Connor stated "After 20 years on [the] high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country." In 2002, she joined a majority of the Court in holding the death penalty unconstitutional for the mentally retarded. And last year, she joined the majority that required defense lawyers to dig more aggressively for information that might persuade a jury to choose life imprisonment instead of the death penalty in the sentencing phase of a capital case. So her priorities clearly evolved.**

**1. Do you believe that this country's death penalty jurisprudence can continue to "evolve?"**

RESPONSE: The extent to which the Court's death penalty jurisprudence should "evolve" and how much it should draw on contemporary understanding to decide what constitutes "cruel and unusual punishment" is a matter of continuing controversy on the Court. The Court's decisions in this area observe that what is cruel and unusual must be evaluated in light of "the evolving standards of decency that mark the progress of a maturing society." See Trop v. Dulles, 356 U.S. 86, 100–01 (1958). The application of this principle has been a source of deep disagreement on the Court — disagreement that can in part be traced to the language of the Eighth Amendment, which is susceptible to both broad and narrow interpretations.

**2. If so, what kind of objective measures would you use to make that determination? Can you give us some examples of death penalty topics which might reflect "progress of a maturing society" in the future?**

RESPONSE: The Court looks to "objective factors to the maximum extent possible" in discerning the contemporary understanding of what constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977). The actions of state legislatures represent the "clearest and most reliable objective evidence of contemporary values." Penry v. Lynaugh, 492 U.S. 302, 331 (1989). The Court has explained that, for similar reasons, the practices of sentencing juries afford "a significant and reliable objective index" of societal mores. Coker, 433 U.S. at 596.

It is important in this area, as elsewhere, that judges be ever mindful of their limited role: "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." Coker, 433 U.S. at 592. As in other areas, I would apply

the Eighth Amendment to the particular circumstances of cases that arise, guided by the meaning of the Constitution and the precedents of the Court, consistent with principles of stare decisis.

**3. Given your hostility to the Supreme Court as 4th or 5th guesser on death penalty issues, can you honestly say that you have an open mind on this issue? What evidence can you point to that you can keep an open mind?**

RESPONSE: My comments about the Court serving as the fourth or fifth guesser under habeas corpus were made in the early 1980s, and reflected the state of habeas corpus law at that time prior to judicial and legislative reforms that addressed some of the concerns in the area. If questions in this area come before me as a judge or, if confirmed, as a Justice, I would approach those questions with an open mind, guided by precedent under principles of stare decisis, conscious of the limited nature of the judicial role, and open to the considered views of my colleagues on the bench.

**In exercising its judgment about the constitutionality of executing juveniles and the mentally retarded, the Court looked at, among other things, laws of other countries and international authorities, which are "instructive" for interpreting the Eighth Amendment's ban on cruel and unusual punishment.**

**4. What is your view about the relevance of laws of other countries in developing our Eighth Amendment jurisprudence?**

RESPONSE: Without commenting on any particular Supreme Court decision, relying on foreign law as precedent generally presents two concerns. The first has to do with democratic theory. Even though judges are not directly accountable to the people, their role is consistent with democratic theory because they are appointed through a process that allows for participation of the electorate. If a court relies on a decision of a foreign judge, however, no President accountable to the people appointed that judge, no Senate accountable to the people confirmed that judge, and yet that judge is playing a role in shaping a law that binds the people in this country. The second concern is that reliance on foreign law fails to limit judicial discretion in the way that reliance on domestic precedent does. As Alexander Hamilton explained in Federalist 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." But foreign law vastly increases the scope of that discretion, because it offers "something for everyone" and can be used or not used depending on the result a court would like to reach.

**The Supreme Court held that defendants have wide latitude to raise any aspect of their character, or record, or circumstances of their offenses in seeking a sentence less than death.**

**5. Do you feel you can follow the established precedents in this area? How much weight would you give to precedents in death penalty cases? Please explain.**

RESPONSE: Just last term, in Tennard v. Dretke, 124 S. Ct. 2562 (2004), the Supreme Court held that the sentencer in a capital case must be permitted to give full effect to any mitigating evidence which met the low threshold for relevance. See also Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). Tennard v. Dretke — and the line of cases it relied on — are precedents of the Court, and just like any other precedent, entitled to weight under stare decisis analysis.

**Questions on Miranda & Exclusionary Rule**

**In criminal law, certain rights to privacy are clear. The Fourth Amendment protects against unreasonable searches, and the Fifth Amendment protects against compelled self-incrimination. I would like to get a better understanding of your views of the Court's longstanding interpretations of these rights.**

**In the Miranda case nearly 40 years ago, the Supreme Court held that police had to inform suspects about their Fifth Amendment right to remain silent and to have an attorney. The Court has long held that the only way to protect citizens against unreasonable searches was to prohibit the use of unlawfully obtained evidence at trials. Long-standing privileges protect confidentiality between husband and wife, clergy and parishioners, physicians and patients, and attorneys and clients.**

**These basic rules are an important part of criminal law and procedure, but many of us are concerned about recent trends to chip away at these protections.**

**1. Do you believe it is within the Court's role to impose rules such as Miranda or the Exclusionary Rule?**

RESPONSE: In Dickerson v. United States, 530 U.S. 428 (2000), the Court held that, because Miranda had announced a rule of constitutional import, Congress could not supersede that rule by legislation. Speaking more broadly, the Court has recognized its power to impose rules in two sets of circumstances. First, the Supreme Court "has supervisory authority over the federal courts," and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." Carlisle v. U.S., 517 U.S. 416, 425–26 (1996). Of course, "Congress remains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." Dickerson, 530 U.S. at 437–38 (2000).

The Court has also recognized, in certain circumstances, the need for judicially-created guidelines to prevent constitutional violations. For example, the Court has explained that the Fourth Amendment's exclusionary rule was adopted to effectuate the right of persons "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Illinois v. Gates, 462 U.S. 213, 254 (1983).

**In the decision of U.S v. Dickerson, Chief Justice Rehnquist wrote that Miranda was of "constitutional import." In an interview shortly after the decision, you called the ruling on Miranda a "loss for conservatives." [Roberts' Interview with WFAA/ABC's Dallas Affiliate on July 2, 2000].**

**2. Does that mean you think it's not appropriate for courts to establish rules like Miranda to make constitutional rights effective? Or, is this an example of judges going too far?**

RESPONSE: I was asked, during the July 2, 2000, interview about some of the cases that conservatives had "lost" during the Supreme Court's most recent term (October Term 1999). I mentioned that some of those cases might not "be as serious as they look." I cited Dickerson — which upheld Miranda over a supervening Congressional statute — as an example, because the holding in Dickerson was based in part on stare decisis grounds.

**During his confirmation hearings, Justice Thomas answered questions about his views on Miranda and the Exclusionary Rule and noted the need for judicially-created guidelines to prevent constitutional violations. He stated that these rules deter law enforcement officials from unconstitutional practices and said such rules were not evidence of "judicial activism."**

**The Fourth Amendment was enacted in response to the use of blank search warrants by British officers to search the homes of colonists. These tactics so alienated the colonists that it helped fuel the battle for independence. Since that time, the Fourth Amendment has continued to have a fundamental role in restraining government and preventing police abuse. Looking the other way only promotes official lawlessness, arbitrary enforcement, and disrespect for law.**

**In a January 1983 memo, you cited a study finding that more felony drug arrests were not prosecuted as support for your view that the Exclusionary Rule should be abolished. You wrote: "The study shows that the exclusionary rule resulted in the release of 29% of felony drug arrestees in Los Angeles in one year - a far cry from the highly misleading 0.4% figure usually bandied about. This study should be highly useful in the campaign to amend or abolish the exclusionary rule." [Memo from John G. Roberts to Kenneth Cribb, Jr. re: New Study on Exclusionary Rule, January 4, 1983]**

**3. What made you think that this statistic was evidence that the Exclusionary Rule was responsible for decisions by prosecutors not to pursue these arrests? Were you suggesting that this isolated statistic for a group of narcotics cases could justify such a dramatic change in the entire code of criminal procedure?**

RESPONSE: The study I quoted analyzed the number of felony drug arrestees in Los Angeles who were released because of the application of the exclusionary rule to the facts of their case. Evidence obtained in a police search that violates the Fourth Amendment — because the police did not have probable cause to conduct the search, did not seek a warrant, were issued a facially invalid warrant which failed to specify with particularity the thing to be searched, or participated in a search that was for any other reason "unreasonable" — may not be introduced as evidence in a criminal trial. That evidence, and any derivative evidence, is barred by the exclusionary rule.

The Court does not consider the exclusionary rule an all-or-nothing proposition. Despite a broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in every circumstance, Illinois v. Gates, 462 U.S. 213, 254 (1983); it has "been restricted to those areas where its remedial objectives are thought most efficaciously served," United States v. Leon, 468 U.S. 897, 908 (1984). This is due, in part, to the Supreme Court's recognition of the "well known" costs of applying the rule. California v. Minjares, 443 U.S. 916, 919–20 (1979). The focus of the trial is diverted; the physical evidence excluded is normally reliable; truthfinding is deflected; and the guilty may be set free. Stone v. Powell, 428 U.S. 465, 489–91 (1976). In deciding whether to extend the exclusionary rule to another context, the Court weighs these costs against the deterrent effects of exclusion. See United States v. Calandra, 414 U.S. 338, 347–48 (1974). The memorandum from which you quoted concerned proposals to amend the exclusionary rule, in part to recognize that there may be circumstances, when police are operating in good faith, in which it does not serve its deterrent purpose. The Supreme Court adopted a limited good faith exception to the exclusionary rule in the Leon case.

**A few weeks after you brought this study to the attention of White House lawyers, Attorney General William French Smith testified before the Senate Judiciary and used this study as a justification to abolish the Exclusionary Rule. Relying upon the statistic you had highlighted, he made the sweeping assertion that: "The exclusionary rule has substantially hampered our law enforcement efforts." He further stated, "The suppression of evidence has freed the clearly guilty, diminished public respect for the law, distorted the truth-finding process, chilled legitimate police conduct, and put a tremendous strain on the courts."**

**The Supreme Court did, in fact, create new exceptions to the Exclusionary Rule in 1984. According to other documents, the Reagan Administration would have supported a decision that went even further and abolished the Exclusionary Rule entirely. The Office of Legal Counsel was asked to consider legislative proposals to allow evidence to be used in trial even if it was obtained as a result of a clear violation of the Fourth Amendment.**

**4. What was your view on this issue during your years in the Reagan Administration? Were you in favor of eliminating the Exclusionary Rule? Do you still have that view now? Do you believe that, even if obtained unconstitutionally, all evidence should be admissible because it aids the search for the truth?**

RESPONSE: The views of the Reagan Administration were clear with respect to the exclusionary rule. As an Associate Counsel to the President, it was my job to articulate administration policy — not my personal views. If questions in this area come before me as a judge or, if confirmed, as a justice, I would approach those questions with an open mind, not on the basis of whatever personal views I may have held over 20 years ago when I addressed such questions in an entirely different capacity. I can say, however, that it is not my view as a general matter that all evidence, even if obtained unconstitutionally, should be admissible because it would aid in the search for truth.

**5. What is your view on the Supreme Court's decision that the Exclusionary Rule should be applied to both federal and state criminal proceedings based on the view that no one is to be convicted on unconstitutional evidence? As in other cases where you opposed existing remedies, if you oppose the Exclusionary Rule as a remedy for Fourth Amendment violations, what remedies do you support?**

RESPONSE: I have no quarrel with the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961), holding that the exclusionary rule applies to state as well as federal proceedings. The Reagan Administration's proposal to reform the exclusionary rule included consideration of various proposals to deter violations of the Fourth Amendment, short of exclusion of the evidence in all cases. Those included, for example, administrative sanctions against officers conducting an illegal search, unless the officers were acting in good faith.

**Eavesdropping and search warrants under the act have mushroomed since September 11th and the passage of the PATRIOT Act, which eliminated the requirement that the purpose of the surveillance or search must be "primarily" for intelligence, rather than a criminal investigation. As a result, *any* intelligence purpose will suffice. Even if the main purpose is for a criminal investigation, and the intelligence aspect is merely incidental, authorities do not have to seek an ordinary search warrant.**

**6. What role should the courts have in monitoring these warrants in a criminal trial when secretly-obtained evidence by a search or wiretap is introduced by the government? What is your view on whether the government can be trusted to continue to operate in complete secrecy, immune from the adversary process?**

RESPONSE: In October 2001, Congress amended FISA to change "the purpose" language in 50 U.S.C. 1804(a)(7)(b), to "a significant purpose." Thus, section 1804(a)(7)(b)'s wording became "that a significant purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(7)(b) (2004). In In Re Sealed Case, 310 F.3d 717 (FISCR 2002), the U.S. Foreign Intelligence Surveillance Court of Review held that this provision — permitting government surveillance of an agent of a foreign power if foreign intelligence is a "significant purpose" of such surveillance — does not violate the Fourth Amendment.

**The increasing scope of electronic and other surveillance is troubling, both for those who do not want an intrusive government, and for those who want a productive counterterrorism policy. The wider the eavesdropping, searches, and other surveillance, the more the material collected is of no value. It's a fishing expedition. The government is expanding surveillance to include ordinary individuals without any connection to terrorism or criminal conduct.**

**7. As Justice O'Connor stated, the "war on terrorism" should not be a "blank check." The question is: to what extent should the courts monitor the Executive's use of these unchecked surveillance powers? At what point do these Executive**

**practices threaten the balance of power among the three branches and the continued vitality of First and Fourth Amendment rights?**

RESPONSE: In the Fourth Amendment context, the "touchstone" of constitutionality is reasonableness; the Court has eschewed bright-line rules and "litmus-paper tests," instead engaging in a fact-specific examination of the "totality of the circumstances." See, e.g., Ohio v. Robinette, 519 U.S. 33, 39 (1996). This approach generally requires a reviewing court to "balanc[e] the need to search against the invasion which the search entails." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

**In a recent decision by the DC Circuit, *United States v. Jackson*, you dissented from the majority opinion that excluded evidence obtained in violation of the Fourth Amendment rights. You said that you "wholeheartedly subscribe[d]" to views of Judge Edwards in his concurring opinion on the important role of judges in protecting privacy from unreasonable government intrusion, but you still dissented in the case.**

**That seems to raise a question about other constitutional exclusionary rules, such as evidence obtained in violation of the Fifth Amendment on Self-Incrimination, the Sixth Amendment on Right to Counsel, and the Fourteenth Amendment Due Process Clause.**

**8. Would you do away with these exclusionary rules as well? Can you explain further your dissent in *United States v. Jackson*?**

RESPONSE: Nothing in my dissenting opinion in United States v. Jackson, 415 F.3d 88 (D.C. Cir. 2005), suggested doing away with the exclusionary rule. The question for the court was whether the circumstances of a traffic stop presented "a fair probability that contraband or evidence of a crime [would] be found" in the trunk of the car Mr. Jackson was driving. As I explained in my dissent, "I wholeheartedly subscribe to the sentiments expressed in the concurring opinion about the Fourth Amendment's place among our most prized freedoms.... But sentiments do not decide cases; facts and the law do." On the law, there was no dispute; the majority, concurrence, and my dissent in United States v. Jackson all agreed that, if the officers had probable cause to search the trunk, they did not need a warrant to comply with the Fourth Amendment. See California v. Acevedo, 500 U.S. 565, 574 (1991). If the officers did not have probable cause, no warrant would issue in any event. As for the facts, an experienced district court judge had concluded — and I agreed — that the circumstances gave rise to probable cause to search the trunk. The circumstances included the facts that the officers encountered an unlicensed driver operating an unregistered car with a broken tag light and stolen tags at 1:00 am.

**Given your writings on the topic of "judicial activism" and "judicial restraint," I would like to know your views on this subject. In your draft article on "Judicial Restraint," you asserted that "The basic reasons for avoiding judicial policymaking are fairly clear." You seemed to express a negative view of a trend in "modern courts" to "enshrine fundamental rights not discernible in the Constitution."**

**9. In the criminal justice context, does your view of judicial activism change? For example, what is your opinion of the Miranda and the Exclusionary Rules? Are they examples of judicial activism?**

RESPONSE: The draft article in question was prepared for Attorney General William French Smith, and was intended to reflect his views. I understand "judicial activism" to refer to a judge who has transgressed the limited role assigned to the judicial branch under the Constitution, and has either undertaken to exercise the legislative function by imposing his own personal policy preferences under the guise of legal interpretation, or has arrogated to himself the executive function by imposing his policy views of how the law should be administered.

The holding in Miranda was recently reaffirmed by the Court in Dickerson v. United States, 530 U.S. 428 (2000). Although the precise contours of the exclusionary rule have been shaped by various judicial decisions, United States v. Leon, 468 U.S. 897 (1984), I am not aware of any litigation revisiting its basic protections.

**Questions on Gun Control**

**At a 1993 House hearing on a bill to increase the number of prisons and impose mandatory minimum sentences, you said, "[t]he most effective way to reduce crime is to catch criminals, convict them, and then punish them swiftly and surely. That may seem obvious, but there is a good deal of rhetoric these days to the effect that we cannot respond to the crime problem simply by locking up criminals. Maybe not, but it's a good place to start."**

**1. What did you mean when you said this? Why not have strong gun laws to make it more difficult for criminals to get guns in the first place?**

RESPONSE: The statement that you quote was meant to express the view that part of effective law enforcement must include a criminal justice system that punishes criminals. I also noted, however, that locking up criminals is a necessary, but not sufficient, component of an effective solution to our crime problem. Directly after the statement you quote in your question, I stated that "[o]f course we should look to the root causes of crime and address them through things like enterprise zones and tenant ownership of public housing." I went on to say, however, that "in the meantime, we still need to deal effectively with the criminal who sticks a gun in a victim's face, a victim who may have had just as deprived a childhood as the gunman and may have been brought up in just as deprived a neighborhood and, yet, like the vast majority of Americans in the most deprived circumstances has, nonetheless, chosen to follow the law."

An analysis of any particular gun regulation and its effect on crime falls squarely within legislative — not judicial — competence, and I would not presume to pass judgment on that issue.

**In your dissenting opinion in *Rancho Viejo v. Norton*, you said that the Commerce Clause did not give the federal government authority to ban the possession of guns near schools.**

**2. In your view, how much authority does Congress have under the Commerce Clause to regulate firearms? Can it regulate the possession of firearms, in addition to their manufacture and sale?**

RESPONSE: In my dissent from denial of rehearing en banc in Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. 2003), I noted that the Supreme Court had "upheld [a] facial Commerce Clause challenge[] to legislation prohibiting the possession of firearms in school zones . . . ." Id. at 1160 (citing United States v. Lopez, 514 U.S. 549 (1995)). As I stated before the Committee, there may be other ways for Congress to pursue such objectives, such as by imposing a jurisdictional requirement meant to ensure that any regulated gun possessed in a school zone had been transported in interstate commerce. It is my understanding that Congress has done so.

As a general matter, Congress's powers under the Commerce Clause have been said to reach "three broad categories of activity." Lopez, 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate . . . those activities that substantially affect interstate commerce." Id. at 558–59. If a case came before me challenging Congress's power to regulate any activity, I would begin the analysis with that framework applied to the particular facts of the case.

**The Senate recently passed a law to give the gun industry broad immunity from state and federal lawsuits. It would exempt the industry from basic principles of liability and substitute special rules for such suits. It orders state courts to dismiss pending cases against gun sellers, even if the validity of those cases under state law had already been established.**

**3. Are there any limits on the power of Congress to dictate results to state courts in pending cases? And to do it retroactively? Isn't the independence of state courts threatened when Congress orders pending cases against an industry to be dismissed?**

RESPONSE: As you note, the Senate recently passed the legislation in question. Given that this legislation may be enacted into law, it would inappropriate for me to comment on possible constitutional challenges to it. If the bill does become law, any such constitutional challenge could well come before the Court, and — if confirmed — I would approach it with an open mind in light of the record and arguments of the parties.

**4. Isn't it inconsistent for you to say that Congress can't order gun restrictions near local schools, but can order state courts to dismiss lawsuits against the gun industry?**

RESPONSE: I have said neither that Congress cannot order gun restrictions near local schools, nor that Congress can order state courts to dismiss lawsuits against the gun industry. I have not expressed any view of the constitutional propriety of either of these exercises of congressional authority.

**As Erwin Griswold, Former Dean of Harvard Law School and Solicitor General under President Nixon wrote, in 1990:**

> **"... that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law."**

**The federal courts have never struck down a gun law on Second Amendment grounds. Recently, the National Rifle Association has encouraged its members to**

**boycott Conoco Phillips for opposing a state law to prevent employers from banning guns in cars at the company's parking lot. NRA Executive Vice President Wayne LaPierre said, "[a]cross the country, we're going to make ConocoPhillips the example of what happens when a corporation takes away your Second Amendment rights."**

**In your 2003 confirmation hearing, you said, "*Roe v. Wade* is the settled law of the land."**

**5. Would you agree with Dean Griswold that Second Amendment law is equally settled and that the Amendment is no barrier to strong gun laws?**

RESPONSE: The Supreme Court has not addressed a Second Amendment case since United States v. Miller, 307 U.S. 174 (1939), in which it held that the sawed-off shotgun at issue in that case did not constitute "arms" within the meaning of the Second Amendment. Id. at 178. As noted in my response to Questions 6–8, there is currently a circuit split on the issue of whether the Second Amendment protects a "collective" or "individual" right. The Supreme Court may be called upon to resolve that split. Resolution of that issue would not, in itself, determine whether a particular enactment violated the Second Amendment.

**6. Do you believe that the Second Amendment guarantees an individual's right to own a firearm for reasons unrelated to service in a state militia?**

RESPONSE: Although the Supreme Court has not spoken on this issue, three conflicting theories seem to have emerged in the courts of appeals. Some circuits subscribe to what might be called the "collective rights" theory, under which the Second Amendment only protects rights of states to organize militias and the Amendment may not be invoked by private individuals. See, e.g., Silveria v. Lockyer, 312 F.3d 1052 (9th Cir. 2003); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999); Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Warin, 530 F.2d 103 (6th Cir. 1976). Other circuits have adopted what might be termed the "quasi-collective rights" theory, under which the Second Amendment only protects an individual right to bear arms in connection with their service in an organized state militia. See, e.g., United States v. Wright, 117 F.3d 1265 (11th Cir. 1997); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384 (10th Cir.); Cases v. United States, 131 F.2d 916 (1st Cir. 1942). Finally, one circuit recently adopted the view that the Second Amendment protects an individual right to bear arms. See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

Because of this sharp split among the circuits regarding this issue, it is likely that this question will reach the Supreme Court soon. I therefore believe it would inappropriate to comment on the merits of any one of the theories that have been put forth by various courts. If I am confirmed, and if this question comes before the Court, I would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties.

**7. If so, how do you reconcile your view with the express language of the Second Amendment, which refers to a "well regulated Militia"? Doesn't the individual rights view read the militia language out of the Amendment?**

RESPONSE: Please see my above response to Question 6.

**8. If not, how do you reconcile your view with the express statement of the Supreme Court in *United States vs. Miller* in 1939 that the Amendment must be interpreted in light of its militia purpose?**

RESPONSE: Please see my above response to Question 6.

**Immigration/Immigrants' Rights**

**Plyler v. Doe - Right to Public Education for Undocumented Children**

**As you know, *Plyler v. Doe* was a Supreme Court decision in 1982 which guaranteed a free public education for undocumented immigrant children. The question was whether, consistent with the equal protection clause of the 14th Amendment, a state could deny to undocumented school-age children the free public education that it provides to U.S. citizen children or legal aliens. The Court held that it could not. Yet, in a Justice Department memo co-written by you, you criticized the decision and suggested the Administration could have obtained a contrary result if the Solicitor General had filed a brief supporting the State reciting "the values of judicial restraint".**

**1. What is your current view on *Plyler v. Doe*? Do you believe the Court should reconsider this precedent and why or why not? What is your personal view, not legal view on whether undocumented children should have access to public education?**

RESPONSE: Plyler v. Doe, 457 U.S. 202 (1982), is a precedent of the Court and entitled to respect under principles of stare decisis. As for my personal view on the underlying questions, I stated at the hearing that I believed all children should be educated. That, however, is a different question from the issue in Plyler: whether the Texas law was unconstitutional. I would not assume that the dissenters in the Plyler case — including Justices White and O'Connor — were any less committed on a personal level to the importance of educating children than their colleagues in the majority.

**As Justice Brennan wrote, "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries... whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."**

**2. If the Supreme Court exercised "judicial restraint" here, what do you believe would have been the impact on society of having a "subclass of illiterate children?"**

RESPONSE: The four dissenters in Plyler "fully agree[d] that it would be folly — and wrong — to tolerate creation of a segment of society made up of illiterate persons," 457 U.S. at 242, and I agree with that assessment. As I read the various opinions in the case, there was no dispute on that point.

**Rights of Noncitizens Under the Constitution**

**All legal scholars would say that anyone present in the United States has core due process rights, no matter what their legal status is.**

**1. What are your views on the rights of illegal immigrants in the United States generally? Do they have the same constitutional rights as United States citizens? Which constitutional amendments do you believe apply equally to citizens and noncitizens?**

RESPONSE: In considering whether aliens may invoke the protections of the Constitution, the Supreme Court has differentiated between aliens who have entered the United States and those at the point of entry. The Court has held, for example, that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" of the Fifth Amendment, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953), including its equal protection component, see Mathews v. Diaz, 426 U.S. 67 (1976). See also Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). The Court has also held that the Equal Protection and Due Process guarantees of the Fourteenth Amendment apply to aliens, even if they have entered the country illegally. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982); Yick Wo v. Hopkins, 118 U.S. 356 (1886). "But an alien on the threshold of initial entry," the Court has held, "stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" Shaughnessy, 345 U.S. at 212 (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

The Court has also ruled on the applicability of other constitutional rights to aliens. For example, the Court has held that excludable aliens are not protected by the First Amendment, United States ex rel. Turner v. Williams, 194 U.S. 279 (1904), while resident aliens are, Bridges v. Wixon, 326 U.S. 135 (1945). The Court has also held that aliens are protected by the Just Compensation Clause, Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), and the Sixth Amendment, Wong Wing v. United States, 163 U.S. 228 (1896). The decisions in these cases are highly dependent upon the particular constitutional provision at issue and upon the facts before the Court. If I am confirmed, and if such an issue were raised before the Court, I would approach the issue with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties, with due regard for the doctrine of stare decisis.

**Plenary Power Doctrine**

**As you know the plenary power doctrine over immigration matters began with the Supreme Court decision in the Chinese exclusion case, *Ping v. the United States*, in 1889. This doctrine basically gives the legislative and executive branches broad and often exclusive authority over immigration decisions. Many academic commentators criticize the doctrine, but it seems to be alive and well in the courts.**

**1. What are your views on the plenary power doctrine in immigration law?**

RESPONSE: In Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Supreme Court stated that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Id. at 588–89. But to say that the political branches are "largely immune" from judicial review in these areas is not to say that they are wholly immune. The Harisiades Court noted that "[i]t is . . . probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution." Id. at 590. And while the political branches have historically had vast authority over immigration policy, the Court noted in Zadvydas v. Davis, 533 U.S. 678 (2001), that the political branches' authority is nonetheless "subject to important constitutional limitations." Id. at 695. The question whether judicial review over a decision of immigration policy made by the political branches is appropriate is highly dependent upon the facts of any particular case. If I am confirmed and such a case comes before the Court, I would approach it with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties, with due regard for the doctrine of stare decisis.

**2. A Supreme Court in decision 1991 (*Zadvydas v. INS)* stated that the plenary power "is subject to important constitutional limitations." Do you agree with the Court or do you believe there should be an automatic deference to the political and legislative branches of the government?**

RESPONSE: Please see my response to Question 1.

**Meaningful Judicial Review: Habeas Corpus Relief**

**There are efforts to further limit judicial review for immigrants. Any limits on rights guaranteed by the Constitution deserve careful and deliberate consideration. Habeas corpus is a bedrock principle of U.S. law, reaching back to Magna Carta, six centuries before the Constitution. It has long been used as a safeguard for people facing unlawful detention and deportation by the government, and is a constitutionally-protected right. It is a fundamental principle of American justice and we owe it to future generations not to undermine the values inherent in the nation's great legal tradition. It's my understanding that the Supreme Court held in the *St. Cyr* case in 2001 that habeas corpus review guaranteed under the Constitution, must be preserved.**

**1. What is your view on the role of habeas corpus to challenge immigration detention decisions? Did you agree or disagree with the Court's analysis in the *St. Cyr* case?**

RESPONSE: The Supreme Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001), dealt, as you suggest, with habeas review of executive detentions of aliens, not with collateral review of state court criminal convictions. The Court held that as a matter of statutory interpretation, that the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), did not preclude federal habeas review of the question whether decisions concerning the deportation of resident aliens are within the Attorney General's discretion. In dictum, however, the Court stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" St. Cyr, 533 U.S. at 301 (quoting Felker v. Turpin, 518 U.S. 641, 663–64 (2001)). In dissent, Justice Scalia argued that the Suspension Clause did not "guarantee[] any particular habeas right that enjoys immunity from suspension," id. at 338, but rather precluded Congress from temporarily suspending whatever habeas review is available at any given time except in cases of rebellion or invasion. See id. at 336–41. Since there is a lively debate about the substance of the Suspension Clause among the Justices, and since the issue may well come before me if I am confirmed, I believe it would be inappropriate to comment on the merits of any argument.

**Indefinite Detention**

**1. What are your views on noncitizens who are detained with no prospect of their being returned to their home country because we don't have repatriation agreements with those countries or there are no functioning governments? Should they be detained indefinitely, or should they be released under supervision?**

RESPONSE: In Zadvydas v. Davis, 533 U.S. 678 (2001), the Supreme Court held that, as a matter of statutory construction, federal authorities may not indefinitely detain removable aliens that have previously entered the country. See id. at 699. This holding was in large part based on an invocation of the canon of constitutional avoidance — aliens that have entered the country enjoy the protections of the Due Process Clause, see, e.g., Wong Wing v. United States, 163 U.S. 228 (1896), and a reading of the statute that would allow for indefinite detentions would raise serious constitutional concerns. See Zadvydas, 533 U.S. at 689. In Clark v. Martinez, 125 S. Ct. 716 (2005), the Court extended its holding in Zadvydas to inadmissible aliens who are not afforded the protections of the Due Process Clause. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Although reading the statute to allow indefinite detentions of inadmissible aliens may not raise serious constitutional concerns, the same statute can only mean one thing as applied to all situations within its ambit. See Clark, 125 S. Ct. at 722–23 ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.") Therefore, under current federal law as interpreted by the Supreme Court, the federal government does not have the authority to detain removable aliens indefinitely. As a judge on the D.C. Circuit, and if confirmed, as a Justice of the Court, I will treat these precedents as I will treat any other precedents of the Court, consistent with principles of stare decisis.

## Civil Rights

### Affirmative Action and *Rice v. Cayetano*

**At the end of our discussion on the last day of questioning, we touched briefly on *Rice v. Cayetano*. You cited it as an example of a case in which you argued in favor of affirmative action. Actually, the *Rice* case did not involve an "affirmative action" program at all according to common understanding of the term. It involved a challenge to the practice in Hawaii of allowing only Native Hawaiians to vote in the election of members to a board of a trust established to benefit Native Hawaiians. The primary argument in your brief was that the issue did not involve racial classifications of any kind.**

**1. How could that be an example of your advocacy for affirmative action?**

RESPONSE: The position of those challenging the statutory provisions at issue in Rice was certainly that the statutes considered race and that such consideration of race — regardless of whether such considerations benefited minority populations which had been discriminated against historically — violated the Constitution. Those opposed to the statutory provisions benefiting Native Hawaiians relied extensively on the Supreme Court precedents invalidating other affirmative action programs, such as Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). See, e.g., Brief for Petitioner, at 28–30; Reply Brief for Petitioner, at 17, 20.

**2. Even if we agree, for the sake of argument, that your position in the case was somehow in favor of "affirmative action," isn't it true that the "affirmative action" you were advocating was exclusively for Native Hawaiians and perhaps Native Americans? Weren't your arguments in the case so specific to native peoples that they would not apply, for instance, to African Americans or Latinos? Please explain in detail.**

RESPONSE: At the time I argued the Rice case, the Supreme Court had made clear that classifications based on race would generally be subject to strict scrutiny. See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Therefore, in order to put forth the best legal argument on behalf of my client's position, I tried to avoid the strict scrutiny standard of review by distinguishing the nature of the relationship between the Native Hawaiians and the state from that of other racial minorities. The case involved statutory provisions directed solely at Native Hawaiians; it seems to me unsurprising that the legal arguments were similarly framed.

**3. Is it accurate to say that there are no examples in your record of cases in which you advocated in favor of race-conscious affirmative action programs to benefit African Americans, Hispanics, or Asian Americans? If that is not accurate, please cite the specific examples you have in mind, and provide in detail the reasons that you believe they qualify as affirmative action.**

RESPONSE: I participated in the Legal Reasoning program sponsored by my former law firm, which was designed to prepare students from minority and disadvantaged backgrounds entering law school so that they were better prepared to succeed once they arrived. I regard such programs as a vital adjunct to efforts to increase the representation of minority and disadvantaged students in entering classes.

**Franklin v. Gwinnett County Public Schools**

**In *Franklin v. Gwinnett County Public Schools*, the trial court dismissed a high school student's sexual harassment claim because the court believed she was not entitled to damages. If the Supreme Court had accepted your argument in the case that Ms. Franklin was *not* entitled to damages, she and many others like her would not only have lost out on a remedy; they would have been unable to bring a claim in court *at all.***

**1. What role did you have in deciding what position the government would take in the *Franklin* case?**

RESPONSE: The government originally participated in the case in response to an order from the Supreme Court inviting the Solicitor General to file a brief expressing the view of the United States. See 498 U.S. 1080 (1991). I am not at liberty to discuss internal deliberations among counsel representing the government concerning the position of the government.

**2. When you filed the brief, did you consider its consequences for victims of discrimination if your interpretation of the statute was accepted?**

RESPONSE: The issue before the Court in Franklin was what remedies were available under the implied right of action at issue in the case. The courts had to address that issue because Congress had not spelled out either a cause of action or what remedies were available if one were implied by the courts. In helping to prepare the government's position, I did not see my role as determining what would be good policy under the law, but instead as trying to construe the statute that Congress had enacted.

**3. Did you think it plausible to believe that Congress would have intended students like Franklin to have no remedy whatsoever for the injuries she suffered as a result of such discrimination? If so, please explain in detail your reasoning.**

RESPONSE: While the Administration's position in Franklin was ultimately rejected by the Supreme Court, the court of appeals that heard the case had ruled 3–0 that Title IX did not contain a cause of action for damages for plaintiffs such as Franklin, based on that court's interpretation of prior Supreme Court rulings. See Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990).

**4. In your response to, Senator Leahy's questions, you suggested that the Administration believed that "back pay" and "injunctive relief" would be appropriate remedies. But you never answered his question about how "back pay" could be appropriate relief for a teenage student or how a student who had already graduated from the school could benefit from an injunction. Please explain how back pay could have been an approach to remedy for Ms. Franklin in your view?**

RESPONSE: I did not mean to suggest that back pay or injunctive relief would have provided Ms. Franklin with an appropriate remedy. In my response, I was trying to convey to the Committee that the case involved the availability of a damages remedy for all title IX plaintiffs. Many of those plaintiffs are in a position to pursue injunctive or backpay relief.

**5. Although you testified that you did not condone the discrimination to which Ms. Franklin was subjected, you nonetheless defended your brief in the case as an accurate reflection of Congressional intent. Do you still believe that Congress does not intend damages to be a remedy in Title IX cases?**

RESPONSE: I was not advancing my personal beliefs in the Franklin case; I was one of six attorneys in the Department of Justice who signed an amicus brief advancing the Administration's position. I fully accept the Supreme Court's 9–0 ruling in Franklin as precedent, and I have no cause or agenda to revisit that decision.

**Brown v. Board of Education – Racial Discrimination**

**Judge Roberts, in discussing the case of *Brown v. Board of Education* and its holding that segregation of school children on the basis of race is unconstitutional, you said that the Court's conclusion, quote, "was that they didn't care if the effects were equal."**

**In reviewing the *Brown* decision, however, it's clear that the Court cared very much about the effects. The Court stated that:**

**"Segregation of white and colored children in public schools has a detrimental effect upon the colored children." It also said that segregation "affects the hearts and minds of black children in a way unlikely ever to be undone." It rejected the defense that segregated schools could ever be truly equal.**

**1. In light of this specific language in the Court's opinion, do you agree that the Court in the Brown case was in fact very much concerned about the effects of segregation and its real harm to African American children?**

RESPONSE: I agree that the Court examined and acknowledged the effects of segregation on African American children. But the Court ultimately looked beyond the specific harms demonstrated by the record, to the general stigma caused by the legal recognition of segregation. The passage you quote goes on to make that precise point: "The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." Brown v. Board of Education, 347 U.S. 483, 494 (1954). Thus, the Court struck down all legal segregation in public schools, regardless of the particular harm demonstrated by a particular record. Id. at 495. ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

**Brown is widely understood to be a rejection of the doctrine of original intent of the framers. But, during the hearing, you suggested, based on recent research by Professor McConnell, that it was perfectly consistent with the framers' intent.**

**2. Is that the basis upon which you agree with the decision?**

RESPONSE: The framers' specific intent to outlaw segregation — if they had such an intent — is not the primary basis of my agreement with Brown. The point I tried to make before the Committee was that, whatever specific evils the framers sought to address, the Fourteenth Amendment plainly evinces their choice to address them through broad principles such as equal protection. I think the proper role for the Court is to enforce the Amendment as the framers wrote it.

**Brown relied on the stigma caused injury done by the separation of the races under**

**segregation. During the hearings, you stated that it was the classification by race that caused the unlawful discrimination.**

**3. Do you think all uses of racial classification by government, including affirmative action, is constitutionally objectionable?**

RESPONSE: Under the precedents of the Court, affirmative action programs are constitutional if they are narrowly tailored to serve a compelling state interest. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 326 (2003). In Grutter, the Court recognized diversity in higher education as a compelling state interest, and held that the narrow tailoring prong is satisfied by programs that provide individualized consideration to applicants. Affirmative action cases continue to come before the Court, and I do not think that I should comment in any way that would appear to prejudge the outcome in a particular case.

**14th Amendment – Racial Discrimination**

**An important element of much conservative constitutional theory is the view that Justices should adhere to the "original intent" of the Constitution.**

**1. Without referring to particular cases, what do you see as the original intent of the Fourteenth Amendment to the Constitution?**

RESPONSE: Please see my response to Question 2 below.

**2. Do you think that "color-blindness" was the motivating idea behind the Fourteenth Amendment, despite the fact that the Reconstruction Congress passed much legislation designed specifically to impair the lives of African Americans, such as the creation of the Freedmen's Bureau?**

RESPONSE: I think the best evidence of the original intent of the Fourteenth Amendment is its text, which speaks of the privileges and immunities of citizenship, of due process, and of equal protection.

I agree, of course, that the Amendment protects against discrimination based on race. The Supreme Court has ruled against the notion that race-based classifications are per se unconstitutional, see Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.' "); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1990) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' "), and I would start with those precedents in any case implicating this area of the law.

**14th Amendment – Gender Discrimination**

**In *United States v. Virginia* (the VMI case), Justice Ginsburg, writing for the majority, stated that a law that discriminates based on sex will be struck down unless the government can supply an "exceedingly persuasive justification" for it. Justice O'Connor adopted the same standard when writing for the majority in 1982 in the Mississippi University for *Women v. Hogan* case. However, Justice Rehnquist wrote in a concurring opinion in the VMI case that he did not support the "exceedingly persuasive justification" standard for reviewing laws and policies that discriminate on the basis of sex. Justice Scalia applied what he called "intermediate scrutiny" in the case, but used it to uphold the exclusionary admissions policy. Justice Thomas did not participate in the decision, but in later cases, regardless of his view on the constitutionality of the statute or practice instead he agreed that heightened scrutiny is the appropriate standard for gender discrimination (See, e.g., *Nevada Dept. of Human Resources v. Hibbs* (dissenting); *Grutter v. Bollinger* (dissenting); *Nguyen v. INS* (concurring)).**

**In responding to questions from Senator Biden, you said you believed that sex discrimination requires intermediate scrutiny under the Constitution. In response to a question from Senator Durbin, you recognized that Justice Ginsburg in *Virginia* adopted a standard for sex-based classifications that you defined as requiring "exacting rigor ... well beyond the rational relation test."**

**1. Do you agree with the Court's decision in the VMI case that the government must demonstrate an "exceedingly persuasive justification" for sex discrimination, as articulated in Justice Ginsburg's and Justice O'Connor's majority opinions?**

RESPONSE: As the opinion in the VMI case makes clear, the Court there applied what is frequently referred to as "intermediate scrutiny." That standard requires that a gender-based distinction be justified as substantially related to an important government interest. See United States v. Virginia, 518 U.S. 515, 533 (1996). The "exceedingly persuasive justification" language you note is a further articulation of that basic standard. I have no quarrel with the approach set forth in the VMI case.

**2. If not, what standard would you apply to evaluate sex discrimination under the Equal Protection Clause?**

RESPONSE: Please see my above response to Question 1.

**3. What do you think of Justice Scalia's position in the *VMI* case that the courts should not interfere with institutions that discriminate against women when that discrimination is part of the traditions of the institution?**

RESPONSE: I do not believe that Justice Scalia meant to suggest that an institution's traditions are controlling in a gender discrimination case. Because this is an area that is likely to come before the Court, it would not be appropriate for me to comment any further.

**Grove City College v. Bell and the Civil Rights Restoration Act**

**Memoranda you drafted as an assistant to Attorney General William French Smith indicate that long before the *Grove City College* case was argued in the Supreme Court, you supported the view that if the only federal financial assistance a school receives is federal loans to students, it should not be subject to civil rights laws such as Title VI, Section 504 of the Rehabilitation, and Title IX. In a December 8, 1981 memo, you wrote that you "recommend[ed] acceding to" a proposed change in Department of Education regulations that "would provide that an institution would not be deemed to be receiving federal financial assistance, and thus covered by the anti-discrimination statutes, merely because students attending the institution receive federal financial assistance in the form of loans." You made this recommendation – which the Administration ultimately rejected and did not support in the *Grove City College* case – although you knew it conflicted with "longstanding administrative interpretation to the contrary" and although your analysis showed that this interpretation was not required by the legislative history of the civil rights laws.**

**1. In hindsight, do you continue to believe that you made the correct recommendation?**

RESPONSE: I wrote the memorandum dated December 8, 1981, in response to a proposed change by the Department of Education to its interpretation of the scope of Title VI, Title IX, and § 504 of the Rehabilitation Act. The question the Attorney General asked me to consider was not whether I agreed with the proposed change; the Department of Education, whose expertise and purpose is to consider the effects of such changes, had already made that decision. The only question before me was whether the Department of Education's interpretation of these statutes was a permissible one that would be upheld by the courts. After considering the relevant legal arguments, I came to the conclusion that the Department's position was legally tenable. Accordingly, I recommended that the Attorney General "acced[e]" to it.

**2. In making this recommendation, did you give any thought to the effect it would have on minority, female, or disabled students, employees, and on job applicants to these colleges and universities? If so, please explain why you did not include these considerations in your memo.**

RESPONSE: Please see my above response to Question 1.

**3. When Congress acted to overturn the aspect of the *Grove City College* case that restricted application of Title VI, Title IX, the Rehabilitation Act, and the Age Discrimination Act of 1975 to programs that directly receive federal funds, you argued that the legislation would "radically expand the civil rights laws to areas of private conduct never before considered covered."**

**4. Please explain in detail why you believed that the Civil Rights Restoration Act was "radical."**

RESPONSE: I did not believe that the Civil Rights Restoration Act was "radical." Rather, I argued that it would "radically expand" civil rights laws beyond what any previous civil rights laws were ever thought to cover. Several provisions of the proposed Act — before the introduction of the Dole Amendment — went beyond the "restoration" of what many understood to have been the pre-Grove City civil rights regime. The Administration supported the Dole Amendment because it worked to overturn the "program-specificity" holding in Grove City, which was the main cause of concern for many, without otherwise disturbing the civil rights laws.

The memorandum from which you quote considered Secretary Bell's proposal to overturn that aspect of Grove City basing coverage on student aid, if the program-specificity aspect of Grove City were to be overturned as proposed in the Civil Rights Restoration Act. My memorandum recommended against revisiting the conclusion that coverage under the civil rights statutes was triggered by student aid.

**5. Do you still believe that the Civil Rights Restoration Act was radical? If so, please explain.**

RESPONSE: Please see my above response to Question 4.

**Right to Vote**

**During your hearing, I asked whether you believe that the right to vote is a fundamental constitutional right. You testified that the right to vote is "precious" and "preservative of all other rights." By this answer, did you mean to indicate that you believe there is a fundamental right to vote under the U.S. Constitution? Please explain in detail.**

**1. If not, how should we read the appearance of the phrase "right to vote" in the 15th, 19th, 24th and 26th amendments?**

RESPONSE: The right to vote is certainly fundamental, in the sense that it guarantees the exercise of the many other freedoms we enjoy as a people. As you note, the right to vote is secured in several amendments to the Constitution: the 15th gave African-Americans the right to vote; the 19th extended the right to women; the 24th ensures that the right to vote is not obstructed by poll taxes; and the 26th extends the right to all persons eighteen years of age or older. The fact that so many amendments concern the right to vote is indicative of the right's importance. In addition, the Court's precedents understand the right to vote to encompass a requirement that each person's vote carry similar weight and that voting districts not be drawn so as to dilute the effect of certain persons' votes.

**2. If so, does this create a problem with respect to large disenfranchised populations such as the people of Washington, D.C or Puerto Rico, who have no voting representation in Congress?**

RESPONSE: The Court has not ruled that persons living outside the states — in the District of Columbia, for example — are constitutionally entitled to voting representation in Congress.

**Privacy**

**You testified that liberty interests are protected under the Fourteenth Amendment.**

**1. Do you agree that there are liberty interests not enumerated in the Bill of Rights whose infringement triggers strict or heightened scrutiny?**

RESPONSE: I do — the Court has long identified certain liberty interests as fundamental and has subjected laws affecting those interests to heightened judicial scrutiny. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 719–21 (1997).

**2. You testified that you agree with the conclusions in *Griswold* and *Eisenstadt* that marital and individual privacy extends to the use and availability of contraception. Why?**

RESPONSE: The two decisions stand on somewhat different foundations. The rationale that has come to be accepted for Griswold is that of Justice Harlan, whose dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), grounded a right to marital privacy in the Due Process Clause of the Fourteenth Amendment, in light of a tradition of keeping home and family free from unwarranted government intrusion. In Eisenstadt, the Court relied primarily on the Equal Protection Clause to strike down a law that prohibited the dispensing of contraception for unmarried persons, while simultaneously allowing it for married persons. As I said at the hearing, I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, but includes protection for privacy.

**3. Justice Scalia has said that he would resign if he believed that his duty as a judge required affirming the right to abortion. Do you disagree with him about that?**

RESPONSE: It would not be appropriate for me to comment on a statement by a Justice relating to his personal views. As I told the Committee at the hearing, there is nothing in my personal views that would prevent me from carrying out my judicial duties fairly and impartially, in accordance with the judicial oath.

**Gay Rights – Romer v. Evans and Lawrence v. Texas**

**I understand that, while you were a partner at Hogan and Hartson, you helped gay rights leaders prepare for their Supreme Court argument in *Romer v. Evans*. The Court struck down a voter-approved Colorado initiative to allow discrimination against gays and lesbians in many aspects of daily life that most Americans take for granted, such as jobs, housing, or the opportunity to obtain an education. It would have permitted discrimination by restaurants, hotels, medical providers, banks, and even local shopping malls.**

**1. Were you in favor of the efforts to overturn the Amendment? Please explain the legal theory that allows you to reach that conclusion.**

RESPONSE: As I discussed at the hearing, I frequently assisted other lawyers in preparing their arguments for the Court. Often this included holding moot court sessions for attorneys. Indeed, I never turned down a request of this kind. In Romer, as in other cases, I assisted in the preparation of the arguments not because I had a particular view about the outcome, but because I saw it as part of my duty as a lawyer. My own view was not relevant to my participation, and I do not think it would be appropriate for me to state a view now.

**In its Reply Brief, Colorado argued that it was tolerant and had repealed its anti-sodomy law, but wanted to signal that heterosexuality is best for people, and homosexuality should not generally be the basis for a "discrimination" claim. The Supreme Court, however, found that the breadth of the Amendment was a violation of the law itself, since it put gay people outside the protection of the law.**

**2. Do you agree with the conclusion of the Court that the scope of the Amendment placed gays and lesbians outside the law's protection?**

RESPONSE: In Romer, the Court held unconstitutional an amendment to the Colorado Constitution prohibiting anti-discrimination laws protective of homosexuals. The amendment, the Court ruled, violated equal protection because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination." 517 U.S. at 627. In this sense, the Court found that the amendment placed homosexuals outside the law's protection. As for my own view of the Court's conclusion, I have adhered to a practice of not discussing recently decided cases involving issues that are likely to come before the Court, as did all the sitting Justices during their confirmation hearings. Romer is a recent decision of the Court, and the implications of its holding continue to be explored. I therefore do not think it would be appropriate for me to state a view about the Court's decision.

**Question on Lawrence v. Texas and Stare Decisis:**

**In *Lawrence v. Texas* (2003), the Supreme Court overturned its 1986 opinion in *Bowers v. Hardwick*.**

**1. Was the Court right to overrule the precedent that upheld bans on sodomy? Why?**

RESPONSE: The Court in Lawrence took into account several factors in considering whether Bowers v. Hardwick, 478 U.S. 186 (1986), should be overruled. The principles applied in Lawrence are those the Court has applied in other cases in which it has considered overruling one of its precedents. These principles include whether there has been reliance on the earlier decision, whether the earlier decision was well-reasoned, whether its rationale has been eroded by subsequent legal or practical developments, and whether the rule announced in the earlier decision has proven workable. These considerations themselves represent precedent regarding when a decision should be overruled. If I were to be confirmed, I would of course be guided by those very same factors in deciding whether to reconsider a precedent of the Court.

**2. What were the constitutional principles at issue in that case that warranted a new direction?**

RESPONSE: Please see my above response to Question 1.

**3. What factors would you have examined if you were assessing whether to reject the *Bowers* precedent?**

RESPONSE: As with any case where a precedent was called into question, I would look to the principles of stare decisis that the Court has set forth. These principles include whether there has been reliance on the earlier decision, whether the earlier decision was well-reasoned, whether its rationale has been eroded by subsequent legal or practical developments, and whether the rule announced in the earlier decision has proven workable.

**United States v. Fordice**

**You filed an opening brief in *United States v. Fordice*, a case in 1992 involving racial discrimination in Mississippi's university system. Your brief contained the following statement: "Nor do we discern an independent obligation flowing from the Constitution to correct disparities between what was provided historically black schools in terms of funding, program facilities, and so forth – and what was provided historically white schools." That statement was highly controversial, and it was later retracted in a reply brief stating that "the time has now come" to eliminate such historic disparities, and that "[s]uggestions to the contrary in our opening brief . . . no longer reflect the position of the United States." Your name did not appear on the reply brief.**

**1. Please explain why you did not sign the reply brief.**

RESPONSE: It is the regular practice in the Office of the Solicitor General that reply briefs on the merits are signed only by the Solicitor General. Thus, in the case you reference, six government lawyers signed the opening brief, but only the Solicitor General signed the reply brief.

**2. Please describe in detail any views you expressed in the Solicitor General's Office about the remedy in the Supreme Court in *United States v. Fordice*. In addition, please indicate all reasons why the Solicitor General's Office changed its position on the remedy between the opening brief and the reply brief.**

RESPONSE: This question calls for the disclosure of internal deliberations among counsel for the United States within the Office of the Solicitor General concerning positions to take in a case then pending before the Supreme Court. For the same reasons that internal documents embodying such deliberations have not been disclosed, I am not at liberty to reveal such privileged communications.

**After your nomination was announced by President Bush, did you review any of the documents requested in the letter of July 29, 2005 from the Democratic Members of the Senate Judiciary Committee, which were not provided to the Committee? If so, for each such document,**

**Please identify the document;**
**Please state who was present when you reviewed it; and**
**Please provide a copy of the document.**

RESPONSE: I have not reviewed any of the requested documents.

**Response of Judge John G. Roberts, Jr.**
**to the Written Question of Senator Jon Kyl**

**Should your statements at the hearing on your nomination be construed to imply that all substantial problems with federal habeas review that are of potential concern to policymakers have been resolved, or to recommend against any further reform of the federal habeas system as it exists today?**

RESPONSE: No, my statements should not be so construed. Congress has broad power to legislate regarding the availability and scope of habeas relief. The decisions Congress makes in this regard are policy choices that are best left to the judgment of legislators. My statements at the hearing were intended only to provide context for the memorandum I authored in the early 1980s. In stating that "Congress responded to [the] sorts of concerns" I expressed in the memorandum, I did not mean to suggest any views on whether further habeas reform was necessary or desirable.

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Patrick J. Leahy**

**1. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home." Do you believe the Constitution protects that personal autonomy as a fundamental right?**

RESPONSE: I understand the Fourteenth Amendment's Due Process Clause to extend beyond freedom from physical restraint to include substantive protection of liberty. Those aspects of personal liberty that the Court has held protected by the Due Process Clause safeguard individuals against unwarranted government intrusion. The home is also protected by the Constitution's guarantee of liberty, as confirmed by "[t]he right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures" in the Fourth Amendment.

**2. In any given generation, does the Supreme Court have the authority to look at current American society, culture and mores to determine that there are new needs or freedoms that should be considered fundamental rights, or that there are new groups that may in certain circumstances be considered suspect classes?**

RESPONSE: A judge's role is to decide cases. If a case should arise in which a party claims the protection of the Constitution, the role of the judge is to consider the arguments impartially, consistent with the judicial oath. The Court has the authority to decide those cases in a manner consistent with the meaning of the Constitution and the Court's precedents, under principles of stare decisis. I do not believe that authority is diminished by the fact that a particular claim has not been recognized before or a particular argument is new.

**3. During your hearing, you frequently cited Chief Justice Rehnquist's opinion in *Payne v. Tennessee* as a precedent that you would consult when considering the doctrine of stare decisis. That opinion suggests that constitutional decisions in the commercial context deserve more respect than those involving individual liberties. Do you agree?**

RESPONSE: One consideration under stare decisis is the extent to which an earlier decision has induced reliance. The Court has consistently stated that decisions regarding property are especially likely to induce reliance because property rights depend on settled expectations. This of course in no sense reflects a view that commercial cases are more important than constitutional ones; it instead reflects the principle that, in the commercial area, it is often more important that an issue be decided than that it be decided in a particular way.

**4. How would you analyze and determine constitutionality in the following hypothetical: If before the Supreme Court's decision in *Brown v. Board of Education* in 1954 Congress had enacted a law that stripped all federal courts, including the Supreme Court, of jurisdiction to hear cases and appeals concerning the segregation of public schools, would such a law have been constitutional?**

RESPONSE: Such a hypothetical law certainly would have raised very grave constitutional issues. As I noted at the hearing, I have not had occasion to consider the constitutionality of such "jurisdiction-stripping" legislation in recent years, and would not want to opine in the abstract on whether such laws are constitutional. Of course, bills of this kind — not regarding segregation, but other issues — are regularly introduced in Congress. If such a bill were to become law, and be challenged before the Court, I would consider the matter in light of the arguments presented by the litigants, beginning with the applicable precedents of the Court.

**5. Since you left law school, what in your view are the most significant cases the Supreme Court has decided and why do you consider them the most significant?**

RESPONSE: The Court has decided many cases of significance since I left law school. The cases that have received the most public attention have tended to arise out of the 14th Amendment, for example: Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); and Grutter v. Bollinger, 539 U.S. 306 (2003). Several decisions, while perhaps receiving less attention, have had significant consequences for the law and the legal system, for example: I.N.S. v. Chadha, 462 U.S. 919 (1983), which held congressional veto provisions unconstitutional; Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which has been very important in the area of administrative law; and Apprendi v. New Jersey, 530 U.S. 466 (2000), which eventually led the Court to declare mandatory federal sentencing guidelines unconstitutional. This list is by no means exhaustive; the Court has decided many other significant cases over the last twenty-five years.

**6. In the 1944 case *Ex parte Endo*, the Supreme Court articulated a "clear statement" rule for interpreting statutes that limit liberty in wartime. It said that when asked to find implied powers in a wartime statute, the Court must assume that Congress "intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language [it] used." Do you believe the clear statement of principle announced in the *Endo* case is settled law?**

RESPONSE: The task for a judge interpreting a federal statute, during wartime and otherwise, is to arrive as close as possible to the meaning Congress intended. The various canons and presumptions the Court applies are a means of ascertaining that intent. Ex parte Endo, 323 U.S. 283 (1944), announced one such presumption and on that issue represents a precedent of the Court, entitled to respect under principles of stare decisis. The Court has not had many occasions to apply the Endo presumption since it was first announced, and thus has had little opportunity to clarify its scope and application. At all times, it is the role of the judge to consider the issues dispassionately and impartially, and to resolve cases in accordance with the law.

**7. In 1983, you worked on an article on habeas corpus reform that was ultimately published by Paul Weyrich's Free Congress Foundation as authored by Attorney General William French Smith. The article calls the time spent on habeas corpus applications "a**

**particularly questionable indulgence," especially where it delays the carrying out of death sentences. It argues that habeas corpus "has little or no value in avoiding injustices or ensuring that the federal rights of [state] criminal defendants are respected." And it concludes by stating that the availability of habeas corpus to state prisoners to challenge their convictions in federal court "may well be an institution whose time has passed." Do you agree with these views today?**

RESPONSE: The views expressed in the article you refer to are those of its author, Attorney General Smith. It is my understanding that the article's criticisms of successive habeas petitions were shaped by the legal landscape of the early 1980s. That landscape has changed in the wake of subsequent congressional statutes modifying federal habeas review. I have not had occasion to examine the arguments made in the Attorney General's article in light of that shift. The question of whether further habeas reform is appropriate is primarily a policy matter for Congress.

**8. On behalf of Senator Carl Levin: Judge Roberts, according to your Senate Questionnaire you were interviewed for nomination to the Supreme Court by Vice President Cheney, Andrew Card, Karl Rove, Alberto Gonzales, Scooter Libby and Harriet Miers earlier this year on behalf of the President. With whom have you had discussions about your views on legal issues during the period from January 2005 up to the President's announcement of your nomination to the Supreme Court? Did you discuss with any of those individuals or others your views on the following:**

**a. whether or not abortion related rights are covered by the right of privacy in the Constitution;**

**b. powers of the President;**

**c. constitutionality of allowing prayer in public places;**

**d. the scope of the right of habeas corpus for prisoners;**

**e. the extent of congressional authority under the Commerce Clause of the Constitution;**

**f. affirmative action; and**

**g. the constitutionality of "court stripping" legislation aimed at denying Federal courts the power to rule on the constitutionality of specific activities or subject matter.**

RESPONSE: I do not recall discussing my views on any of these issues with anyone during the relevant period of time in connection with my nomination. I may have discussed some of these issues since January 2005 in connection with the discharge of my responsibilities as a judge on the Court of Appeals for the D.C. Circuit, but I do not understand your question to seek such information, and would not regard it as appropriate for me to respond if it did.

**9. On behalf of Senator Robert C. Byrd: The doctrine of preemption has been adopted as our national security policy. In your view, where does the President derive authority to undertake a preemptive strike against another country in the absence of an imminent threat? How do you reconcile such action by a President with the power granted the Congress by the Constitution to declare war?**

RESPONSE: The Constitution allocates war powers both to the President and to Congress. Article II of the Constitution assigns the President the role of Commander-in-Chief of the armed forces. Article I gives Congress the powers to declare war, "to raise and support Armies," and "to make Rules for the Government and Regulation of the land and naval Forces." When the branches clash in the exercise of these powers, the Court's first task is to clearly define the nature of the controversy — in particular, to determine whether Congress has somehow authorized the President's actions, or prohibited them, or to decide that the case falls in a gray area. This is the framework Justice Jackson laid out in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which has become the Court's guiding framework in this area. The hypothetical scenario in your question is very difficult to analyze in the abstract, as the legal and factual context can be extremely important. The constitutionality of a President's initiation of military action could depend on any number of factors, including in particular the extent to which the action was authorized by Congress. If confronted with any such question as a judge, I would analyze it with an open mind, in light of the precedents of the Court under principles of stare decisis. My decision would be based on the rule of law.

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Dianne Feinstein**
**Submitted on behalf of Senator Barbara Mikulski**

**The Griswold decision and it progeny established the implied right of privacy in the Constitution. How would you use the provisions of the Constitution and its Amendments to the Constitution to support the right of privacy in other instances?**

RESPONSE: As I stated in my testimony before the Committee, there are several provisions of the Constitution that protect privacy. For example, the Fourth Amendment protects the right of the people to be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures." The First Amendment protections of speech and religious freedom safeguard privacy of conscience. Further, as I also stated before the Committee, privacy interests are protected as an aspect of the "liberty" safeguarded under the Due Process Clauses of the Fifth and Fourteenth Amendments. The question of whether particular asserted interests are within the scope of protected liberty is one that the Court has held turns on careful consideration of our Nation's history, traditions, and practices, assessed in light of the Court's precedents under principles of stare decisis, with an appreciation of the limited nature of the judicial role.

**Can you tell this Committee specifically what would be protected under the liberty clause in light of current Supreme Court precedent and do you find any constitutional weakness in those arguments?**

RESPONSE: The Supreme Court's jurisprudence makes clear that "[f]reedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Foucha v. Louisiana, 504 U.S. 71 (1992)).

The Court's jurisprudence has also recognized that the Due Process Clause protects substantive liberties that extend beyond freedom from physical constraint. In Washington v. Glucksberg, 521 U.S. 702, 720 (1997), the Court listed various rights protected under current Supreme Court precedent under this aspect of the Due Process Clause. I do not think it appropriate for me to comment on any "constitutional weakness" concerning such precedent.

**What kinds of facts and circumstances would you need in order to decide that there was a constitutionally protected right to privacy in the reproductive rights context?**

RESPONSE: The Court explained how it goes about assessing particular claims that an interest is a privacy right protected as part of the liberty safeguarded under the Due Process Clause in Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997). In that case, the Court stated that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause." Id. at 721 (citation omitted). In the specific context of reproductive rights, the applicable precedents include Casey and Roe. I would consider questions of the sort you pose in light of these and other precedents of the Court, under principles of stare decisis.

**Do you think there's a "level playing field" in the United States? Specifically with regards to access and implementation of hiring, pay and employment rights, access to education and schools, imposition of the death penalty, sentences and prisons, and other civil rights issues?**

RESPONSE: While our society has made significant progress toward racial and gender equality, I have no doubt that we still have a long way to go. Congress has the authority to act within its power to, as you say, level the playing field and provide all Americans with an equal opportunity to succeed.

**If not, in your view, may a government affirmative action program be justified to level the playing field or promote diversity?**

**What about to remedy discrimination? Why or why not?**

RESPONSE: The Supreme Court held in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), and Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), that classifications based on race are subject to strict scrutiny. These cases also held that affirmative action programs are permissible if they are meant to remedy specific instances of past discrimination. More recently, the Court held in Grutter v. Bollinger, 539 U.S. 306 (2003), that promoting diversity in higher education can serve as a "compelling state interest" to satisfy the strict scrutiny standard to which racial classifications are subject. Since these issues are continuously being raised before the Court, I believe it would be inappropriate for me to comment at greater length. If confirmed, I would consider these issues in the context of the factual circumstances of the particular case, in light of the arguments presented by the parties, and decide them according to the rule of law.

**Do you believe that private employers can create voluntary affirmative action plans that comport with Title VII? Why or why not?**

RESPONSE: In United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), the Supreme Court held that certain voluntary race-conscious affirmative action plans do not violate Title VII. If confirmed, I would treat that precedent with the same respect as any other precedent, consistent with principles of stare decisis.

**Do you think that international law and norms, specifically the treaties and other international laws that the United States has signed, have any role to play in interpreting our own constitutional standards, for example in connection with exempting minors from the death penalty or prohibiting torture?**

RESPONSE: As a general matter — and without commenting on any particular Supreme Court decision or specific issue — relying on foreign law as precedent for interpreting our Constitution presents two concerns. The first has to do with democratic theory. Even though judges are not directly accountable to the people, their role is consistent with democratic theory because they are appointed through a process that allows for participation of the electorate through the Senators whom they elect. If a court relies on a decision of a foreign judge, however, no President accountable to the people appointed that judge, no Senate accountable to the people

confirmed that judge, and yet that judge is playing a role in shaping a law that binds the people in this country.

The second concern is that reliance on foreign law fails to limit judicial discretion in the way that reliance on domestic precedent does. As Alexander Hamilton explained in Federalist 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." But foreign law vastly increases the scope of that discretion, because it offers "something for everyone" and can be used or not used depending on the result a court would like to reach.

**The Voting Rights Act of 1965 is one of the most important pieces of legislation in American history. What is the proper role of the Federal courts and the Executive branch in insuring that all Americans are provided with the right and the incentive to participate in our electoral system?**

RESPONSE: The right to vote is preservative of all other rights. Thus, I agree that the Voting Rights Act is one of the most important pieces of civil rights legislation in American history.

As a general matter, the duty of the Executive Branch with respect to the Voting Rights Act — as with any other statute — is to "take care that the laws be faithfully executed." U.S. Const., Art. II, § 3. Section Five of the Voting Rights Act further imposes pre-clearance and other responsibilities upon the Department of Justice. I also know that the Department of Justice actively participates in litigating other voting rights matters around the country, either on its own or assisting in private litigation. The duty of the courts is to decide cases that arise under any federal statute according to the rule of law.

**Following 9/11, there are serious issues of national security but how do we balance these with every citizen's right to be protected from unwarranted government scrutiny and intrusion, rampant and possibly unnecessary data collection, and potential misuse of this data? Where do you draw the line between First Amendment rights and National Security?**

RESPONSE: As a general matter, public safety and the right of every person to be free from unwanted governmental intrusions are both prominent concerns that animate the Supreme Court's interpretation of the Fourth Amendment. As the Supreme Court has explained, the constitutional "touchstone" of a search or seizure is reasonableness. See, e.g., Ohio v. Robinette, 519 U.S. 33, 39 (1996). This approach generally requires a fact-specific inquiry into the totality of the circumstances, id., in which a reviewing court "balanc[es] the need to search against the invasion which the search entails." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

The First Amendment preserves some of our most treasured and basic rights — preserving the freedoms of speech, religion, press, and association. Yet it is elementary that national security and foreign relations may at times require confidentiality. See, e.g., Snepp v. United States, 444 U.S. 507, 509 n.3 1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.") The Supreme Court has

struggled to draw a line between these competing concerns; if confirmed, I would look to the Court's precedents under principles of stare decisis, with an eye to an appropriate balance between civil liberties and national security, in accord with the Framers' vision in the Constitution.

**Your testimony regarding a past memorandum about gender discrimination is unclear about the level of scrutiny you would give these types of cases. At the time that you wrote the memo, the Supreme Court had already concluded that gender was a suspect classification entitled to intermediate scrutiny. Yet your memo on this issue implies that even intermediate scrutiny should not be given to gender discrimination issues even though it was the law of the land at that time. Please describe specifically what your memo was advocating and why?**

RESPONSE: As I stated before the Committee, I was using the term "heightened scrutiny" in the memorandum you cite to refer to "strict scrutiny." For the proposition that gender classifications do not warrant "heightened judicial review," I cited Rostker v. Goldberg, 453 U.S. 57 (1981). In that case, then-Justice Rehnquist's opinion for the Court employed the "intermediate scrutiny" standard announced in Craig v. Boren, 429 U.S. 190 (1976), and decided that an all-male draft does not violate the Fifth Amendment's equal protection component because "the Government's interest in raising and supporting armies is an 'important governmental interest'" under the intermediate scrutiny standard. Rostker, 453 U.S. at 70. As this citation to Rostker makes clear, my memorandum indicated that gender classifications are not subject to "strict scrutiny" but are subject to "intermediate scrutiny."

**And please advise the Committee what your view is on intermediate scrutiny and whether you believe it is a constitutionally sound precedent of the Court.**

RESPONSE: The Supreme Court's precedents have recognized that intermediate scrutiny applies to gender classifications, see, e.g., United States v. Virginia, 518 U.S. 515 (1996); J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1986); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976), as well as to classifications on the basis of illegitimacy, see, e.g., Clark v. Jeter, 486 U.S. 456 (1988). If confirmed, I will treat these cases with the same respect as any other precedent, consistent with principles of stare decisis.

**Judge Roberts, during your hearings you testified that the in the documents that the Committee has from your time in the Reagan and Bush Administrations you were acting to advance the policies of the Administration that you worked for and that the opinions expressed were not necessarily your own. Can you tell the Committee why you went to work for the Reagan Administration and later the Bush Administration?**

RESPONSE: I worked for the Reagan and first Bush Administrations because doing so afforded me the opportunity to serve my country and two Presidents whom I greatly admired and respected. I feel very fortunate to have had those opportunities.

**Did the policies of the Administration ever factor into your decision to take any of these positions?**

RESPONSE: Yes. I was generally sympathetic with the policies of both administrations.

**Can you tell us which policies you disagreed with?**

RESPONSE: I am sure there were policies both within the areas I worked, and outside those areas, with which I disagreed. Throughout the confirmation process I have followed the lead of all the sitting Justices and have not discussed my personal views on policy matters. I have done so because my personal policy preferences do not play a role in my decisions as a judge on the D.C. Circuit and would not play a role in my decisions as a Justice if I am confirmed.

**Responses of Judge John G. Roberts, Jr.**
**to the Written Questions of Senator Charles E. Schumer**

1. **Over the course of your hearing, you said on multiple occasions that you have "no quarrel" with particular holdings of the Supreme Court. In Justice Thomas's confirmation hearings, he similarly used the term "no quarrel" to describe his perspective on a number of holdings of the Supreme Court. Senator DeConcini asked him, at one point, whether having "no quarrel" meant that he agreed with the Court's holding; he simply said "I mean do not disagree with it" (Confirmation Hearings of Clarence Thomas, p. 414). Justice Thomas later voted to overrule several of those rulings with which he had "no quarrel."**

   a. **Please explain more precisely what you mean by "no quarrel." Does it mean that you agree with the holding?**

   b. **Can we expect your use of the expression "no quarrel" to carry as much weight as Justice Thomas's use of the same words?**

   RESPONSE: What I meant during my oral testimony when I stated that I have "no quarrel" with a particular decision of the Supreme Court is that I would treat that decision as precedent, like any other opinion of the Court, consistent with principles of stare decisis. I tried to make clear that I would bring to the Court no agenda to revisit the particular precedent at issue, and that I would bring to any case implicating that precedent no preconceived view contrary to that precedent. Consistent with my position before the Committee, I do not think I can comment on whether I agree with the holding in such cases. All the current sitting Justices have similarly drawn a line with respect to answering questions about their opinions on cases. I do not presume to know what Justice Thomas meant in saying that he had no quarrel with particular cases.

2. **Particularly, you expressed that you had "no quarrel" with the majority's determination in *Moore v. East Cleveland*, the court's conclusion in *Eisenstadt v. Baird,* or the decisions in *Franklin v. Gwinnett County Public Schools*, *Tennessee v. Lane*, and *Plyer v. Doe.***

   a. **Do you similarly have no quarrel with the holding in *Roe v. Wade*? What about the reasoning in that case?**

   b. **Is there any Supreme Court case that has not been overturned with which you *do* have a quarrel? Bear in mind, in your answer, that we understand that, under the principles of *stare decisis*, expressing a "quarrel" with a particular decision does not mean that you would look to overrule it, given the opportunity. Therefore, your identification of a decision with which you do have a quarrel will in no way be interpreted to indicate your vote on a**

**case should the issue come up in the future.**

RESPONSE: As I noted before the Committee, issues related to abortion continue to come before the Court, including at least two cases scheduled for the upcoming Term. I do not think that I can express a view on the holding, or reasoning, of Roe v. Wade, without crossing the line that I have drawn and maintained before the Committee, of not commenting on issues that are likely to come before the Court, as have all the sitting Justices. Roe and Casey would be the relevant starting points with respect to consideration of any case arising in the area, and I would treat them as such, just as I would the pertinent precedents in any other area of law.

Sometimes a decision is uniformly acknowledged as having been eroded in precedential effect, without having been expressly overruled. For example, as I indicated in response to a question from Senator Leahy, I would be surprised if any reasonable arguments could be made today in support of Korematsu v. United States, 323 U.S. 214 (1944), which upheld the exclusion from large areas of the country a group solely on the basis of its ethnicity. Because I view the repudiation of Korematsu as widely accepted, I would not give that decision the weight typically accorded to precedent. I believe the same could be said of Buck v. Bell, 274 U.S. 200 (1927).

Where there is disagreement on the continuing validity of a decision, however, I do not think I can comment on the case. I agree, of course, that a Justice's view on the correctness of a decision is not the only relevant factor in deciding whether the precedent should be revisited — I have commented that disagreement with a precedent poses, not answers, the question whether it should be revisited — but I do not think that fact allows me to comment on areas where there is continuing litigation and debate.

3. **Would you have decided the *Rancho Viejo* case differently if it had come after the Supreme Court's decision in *Gonzales v. Raich*?**

RESPONSE: To be clear, I did not decide anything concerning the merits in the Rancho Viejo case. Rather, I dissented from a denial of rehearing en banc because of concern expressed by another circuit court of appeals that what I understood to be the panel's approach was in tension with Supreme Court precedent on the Commerce Clause. I explicitly explained that rehearing en banc would allow the court to consider other grounds for sustaining the Endangered Species Act that did not raise that concern. I did not join another opinion dissenting from denial of rehearing en banc that did express a view on the merits. See 334 F.3d 1158, 1160 (2003).

The question in Ranch Viejo — whether the regulated activity was economic in nature — is antecedent to the issue in Raich — whether Congress may regulate intrastate economic activity under an aggregation theory. Therefore, it is not clear how Raich would have affected the analysis in Rancho Viejo. That said, if Raich had been on the books, the

panel's opinion in Rancho Viejo might have employed a different analysis, so I cannot definitively say whether I would have voted to rehear the case.

4. **In the *Rice v. Cayetano* case you argued that the case was not about race, but rather, a special trust relationship between Congress and the indigenous people of Hawaii based on their unique legal and political status. So like Senator Kennedy, I disagree with your characterization of this case as an affirmative action case. Besides the *Rice* case, and besides your involvement with Street Law and the Legal Reasoning program at your firm, can you identify any instances when you argued for broader protections of civil rights?**

RESPONSE: The position of those challenging the statutory provision that benefited Native Hawaiians at issue in Rice v. Cayetano was certainly that the statutes considered race and that such consideration of race — even to benefit minority populations which had been discriminated against historically — violated the Constitution. Those opposed to the statutory provisions benefiting Native Hawaiians relied extensively on the Supreme Court precedents invalidating other affirmative action programs, such as Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). See, e.g., Brief for Petitioner, at 28–30; Reply Brief for Petitioner, at 17, 20.

Other examples of instances in which I argued for broader protections of civil rights include the following:

In United States v. Halper, 490 U.S. 435 (1989), I represented an individual who had been convicted of filing false Medicaid claims, had paid a fine, and had served a sentence of imprisonment. The government thereafter sought to impose civil penalties for the same false Medicaid claims. The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. I argued that the aspect of the Double Jeopardy Clause forbidding successive punishments was not limited to the criminal context, but applied in certain circumstances to civil penalties as well. In a unanimous opinion authored by Justice Blackmun, the Court agreed.

In Washington v. Harper, 494 U.S. 210 (1990), a mentally-ill inmate in a Washington prison challenged the State's attempt to administer psychiatric medication against his will. The question presented was whether, in deciding to medicate the inmate, the State afforded him the process required by the Due Process Clause of the Fourteenth Amendment. I participated in a brief filed on behalf of the American Psychological Association, arguing that the inmate had not been afforded a truly impartial hearing. The Court held that the procedures established by the prison met the requirements of due process.

In Hudson v. McMillian, 503 U.S. 1 (1992), a Louisiana prison inmate filed suit against several corrections officers, alleging that the officers had used excessive force while attempting to restrain him. The question before the Court was whether Hudson was required to show a "significant injury" as part of his claim that the officers' conduct amounted to cruel and unusual punishment under the Eighth Amendment. Representing the United States as amicus curiae supporting the inmate, I argued that the "significant injury" test was inappropriate because it lacked any basis in the Constitution or in the Court's prior Eighth Amendment decisions. The Court agreed, ruling that where the claim is excessive force, a plaintiff need not show a "significant injury," but only that "prison officials maliciously and sadistically use[d] force to cause harm." Id. at 9.

In Feltner v. Columbia Pictures Television Inc., 523 U.S. 340 (1998), a district court granted summary judgment against the petitioner in a copyright infringement suit. The question before the Supreme Court was whether the petitioner had a right to have his claim determined by a jury. I represented the petitioner, and argued that both the Copyright Act and the Seventh Amendment of the United States Constitution guaranteed a right to jury trial in copyright infringement cases. Writing for eight Justices, Justice Thomas rejected my Copyright Act argument, but agreed that the Seventh Amendment created a right to jury trial in such cases and remanded the case to district court so that a jury trial could be held.

I participated in the briefing and argued Barry v. Little, 669 A.2d 115 (D.C. 1995), before the District of Columbia Court of Appeals, on a pro bono basis. I represented a class of District of Columbia residents receiving general public assistance benefits — the neediest people in the District. On behalf of that class, I argued that a change in eligibility standards that resulted in a termination of general public assistance benefits without an individual evidentiary hearing denied class members procedural due process. I asserted that class members had a limited entitlement to continued receipt of welfare benefits, and that even if new standards were to be applied, benefits could not be terminated in the absence of an individual evidentiary hearing. The Court of Appeals ruled against my position and upheld the legislative alteration of standards and accompanying automatic termination of benefits.

5. **You said repeatedly at your hearing that the liberty element of the due process clause of the Fourteenth Amendment provides substantive as well as procedural protections. You also said that you thought your view was one that would be accepted by every member of the current Supreme Court. In a concurring opinion that was joined by only Justice Thomas, however, Justice Scalia said the following:**

> **"If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation." *United States v. Carlton*, 512 U.S. 26, 39 (1994).**

**Do you agree that what Justice Scalia said in this decision implies that he and Justice Thomas believe that "substantive due process" is not a right guaranteed by the Constitution? Please distinguish your own perspective on substantive due process from the one endorsed by Justices Scalia and Thomas in the above passage.**

RESPONSE: As I said at my hearing, I believe the liberty element of the Due Process Clause of the Fourteenth Amendment provides substantive as well as procedural protections. I also believe that every member of the Supreme Court, including Justices Scalia and Thomas, has, at one point or another, agreed with this formulation. For example, Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, wrote that "[i]t is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality opinion). Similarly, Chief Justice Rehnquist, in an opinion joined by Justices O'Connor, Scalia, Kennedy, and Thomas, noted that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

6. **In his dissent in *Bush v. Gore*, Justice Stevens wrote that the claim of the petitioners (the Bush campaign) must necessarily have been based on an "unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed." He went on to write the following:**

> **"Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."**

a. **Do you agree with this statement? Do you have any quarrel with it?**

b. **You worked as a consultant for the Bush campaign in this case; given your role in that case and the warning Justice Stevens has issued about our ability to trust the judiciary, how can you reassure the American people that you will be "an impartial guardian of the rule of law"?**

**If you refuse to answer this question because, as you told Senator Kohl, "the issue about the propriety of Supreme Court review in matters of disputed electoral contests... is a matter that could come up again," please explain in more detail why. The Court itself pointed out that its decision in *Bush v. Gore* was limited to the specific factual situation presented by that case. The opinion stated explicitly that "our consideration is *limited to the present circumstances*, for the problem of equal**

**protection in election processes generally presents many complexities."**

RESPONSE: To the extent your question seeks my views on the correctness of the recent decision at issue, I have explained that, like all the sitting Justices, I consider it inappropriate for me to comment. While it is true that the precise facts presented in Bush v. Gore are not likely to come before the Court again, it is not at all improbable that other election disputes will. While the Court in Bush v. Gore stated that its "consideration is limited to the present circumstances," I believe that statement was not meant to deprive the decision of all precedential weight but, rather, to make clear that the precise facts of the case were unique. And while it is undoubtedly true that "the problem of equal protection in election processes generally presents many complexities," the equal protection principles at issue in Bush v. Gore may be implicated in future cases.

More generally, I believe that a fair consideration of my record and background leave no doubt that I would be "an impartial guardian of the rule of law." That is what the American Bar Association concluded, in rating me unanimously well qualified. That is what is amply reflected in the briefs and opinions that I have authored during my time as a litigator and a judge. As a lawyer, although I was representing the views of my clients, my first priority was always to advocate within the bounds of honest and reasonable legal argument. As a judge, I have not aimed to promote an ideological agenda but instead have decided cases according to the particular facts, the arguments presented by each side, and in accordance with the rule of law.

7. **You will recall that earlier this year, during the controversy surrounding the Terri Schiavo case, Congress passed a law specifically creating a federal cause of action for Terri Schiavo's parents. Congress took this action after the claims of Terri Schiavo's parents had been considered and rejected more than a dozen times by state and federal courts. You have criticized Congress, in the context of the Violence Against Women Act, by saying that "we've gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law" (NPR's *Talk of the Nation*, June 24, 1999)**

   a. **Was the Schiavo case an example of that kind of Congressional overreaching? Was the medical condition of one person the appropriate place for Congress to intervene?**

   b. **Is it a good idea for Congress to write legislation aimed at a specific case, especially after numerous courts have already issued decisions in the matter?**

**After Congress sent this case back to the 11th Circuit, the court again rejected the claims of Terri Schiavo's parents by a 10-2 vote. And, in a concurring opinion, a Republican-appointed judge criticized President Bush and Congress for acting "in a manner demonstrably at odds with our founding fathers' blueprint for the**

**governance of a free people" by undermining the separation of powers and the independence of the courts.**

**c. Do you agree with the sentiment expressed in this opinion? In other words, in your view, did this legislation undermine the independence of the courts?**

RESPONSE: As a judge, it is not generally my place to question the wisdom of congressional enactments. That would conflict with my view that a certain modesty and humility characterize the judicial function. A judge's role is to decide whether Congress has acted within its power under the Constitution and, if so, to decide the case before him according to Congress's expressed intent. Therefore, I believe it is inappropriate for me to comment on whether any particular congressional action was "appropriate" or "a good idea." The only relevant question for me as a judge with respect to congressional legislation aimed at a specific case is whether Congress was acting within its constitutional authority in passing that legislation.

Supreme Court precedent sets forth a partial framework for analyzing the constitutionality of legislation aimed at specific litigation. Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992), is particularly relevant. There, in upholding a law aimed at specific litigation, the Court distinguished between statutes that amend preexisting laws and statutes that direct results under old law. See id. at 438-39. The Court held that statutes that serve to amend preexisting laws are permissible, even if they are directed at particular cases, and that the statute at issue in Robertson was such a law. Id. at 441. The Court did not have occasion to decide whether statutes that direct results under old law violate the Constitution, although that is one possible reading of the Court's precedent in United States v. Klein, 80 U.S. 128 (1872). Thus, in analyzing the constitutionality of any statute that is focused on particular litigation, I would begin with the Robertson standard. If I found that the statute was meant to direct results in particular cases, I would then engage in a detailed analysis of the Klein case, other relevant precedent, and separation of powers principles.

8. **During the hearing, Senator Brownback compared the case of *Plessy v. Ferguson* with the case of *Roe v. Wade*. Do you see any appropriate analogy between *Plessy* – which upheld the principle of separate but equal for black Americans - and *Roe* – which affirmed a woman's freedom to make reproductive decisions for herself?**

RESPONSE: I have reviewed Senator Brownback's statements during the hearings with respect to Plessy and Roe, and understand him to be making a point concerning the stare decisis effect of application of a precedent in subsequent decisions, rather than drawing any analogy between the two cases with respect to the questions at issue on the merits. As your question suggests, the two cases concern the disparate issues of whether "separate but equal" satisfied the Equal Protection Clause and whether the right to an abortion is encompassed within the privacy interests protected under the Due Process

Clause.

9. **At her confirmation hearings, when pressed to distinguish the Supreme Court's line of privacy cases – including *Roe* – from the much-discredited decisions in *Dred Scott* and *Lochner*, then-Judge Ginsburg responded as follows:**

> **"In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines."**

**Do you – like Justice Ginsburg – see a "sharp distinction" between those two lines of cases?**

RESPONSE: I have noted both my view that Dred Scott and Lochner were incorrectly decided and egregious examples of judicial activism, and my view that the "liberty" protected by the Due Process Clause is not limited to freedom from physical restraint, but includes protection for privacy, and that this protection is not only procedural but substantive as well. It is clear, therefore, that I see a sharp distinction between Dred Scott and Lochner, on the one hand, and privacy appropriately protected as a component of liberty under the Due Process Clause, on the other. I have previously explained that I do not regard it as proper to comment on whether I believe Roe v. Wade was correctly decided, because cases implicating the issues arising in that area continue to come before the Court.

10. **We began to discuss, at your hearings, your characterization of Justices Marshall and Brennan as an "activist duo." We did not get to finish that conversation, so let me ask more specifically. In a memorandum to the Attorney General in the early 1980's, you criticized the Solicitor General for filing an amicus brief on the side of a deaf child in *Board of Education v. Rowley*. You wrote the following:**

> **"[T]he dissenting opinion Justice White, joined by an activist duo Justices Brennan and Marshall, specifically relied on the assertion in the government's brief of an activist role for the courts. * * * In this case a conservative majority of the Supreme Court turned back an effort by activist lower court judges to impose potentially huge burdens on the states – even though it had to fight the arguments of the Justice Department to do so."**

a. **Why did you choose the words "activist duo" to describe Justices Brennan and Marshall?**

b. **Do you stand by your statement that Justices Brennan and Marshall were an**

**"activist duo"?**

c. **Can you name any other activist Justices?**

d. **Are Justices Thomas and Scalia also an "activist duo"?**

e. **Can there be activists on the left, as well as on the right?**

RESPONSE: As I stated at my hearing, my comment was a reflection of the views of the Attorney General at the time, views that the Attorney General had expressed on various occasions. The characterization of the dispute in Rowley as implicating issues of judicial activism was not introduced by me in the memorandum; the opinions of various judges throughout the progress of the litigation are fairly read as framing the debate in such terms. See Board of Education v. Rowley, 458 U.S. 167, 190 n.11 (1982); Rowley v. Board of Education, 632 F.2d 945, 953 (2d Cir. 1980) (Mansfield, J., dissenting). The discussion in my memorandum reflects that fact.

I have described certain past decisions of the Court — including Dred Scott, Lochner, and Adkins — as activist decisions, and accordingly it would be appropriate to label Chief Justice Taney and Justices Peckham and Sutherland as activist judges, at least to the extent of their authorship of those opinions. By an activist judge I mean one who exceeds the properly limited role of the judiciary and decides cases according to his or her own policy preferences, rather than according to the rule of law. Such a flaw can apply to judges of any political background.

11. **In 1985 you wrote a memo about a recently decided Supreme Court case, *Wallace v. Jaffree*, which involved issues relating to the separation of church and state. In that memo, you wrote: "Rehnquist . . . tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided." We began, but did not finish, discussing this at the hearing. Your memo was surprising, given your invocation of "modesty" and "stability." You were speaking approvingly of Rehnquist's attempt to "revolutionize" a well-settled area of law.**

**In that memo, you also criticized the opinion of Lewis Powell in the same case, criticizing it as a "lame concurring opinion focusing on *stare decisis*." As you know, Justice Powell, in voting to retain the *Lemon* test, noted that the earlier precedent was a carefully considered opinion of the Chief Justice, was decided by a 7-2 margin, and had been undisturbed for fourteen years.**

a. **Do you still stand by your analysis?**

b. **Whether one agrees or disagrees with the *Lemon* test, which Rehnquist**

**sought to eliminate, what are we to make of your endorsement of Rehnquist's attempt to "revolutionize" an important area of constitutional law?**

c. **How do you square these comments with your commitment to judicial modesty?**

d. **What are we to make of your derisive comment about Justice Powell's reliance on *stare decisis*, the pillar of stability in our jurisprudence? How do these comments reflect a commitment to judicial "modesty"?**

e. **What exactly was "lame" about Justice Powell's reliance on *stare decisis* in his opinion?**

f. **Are there other Supreme Court opinions that have invoked *stare decisis* that you think were "lame" for doing so?**

RESPONSE: I wrote the memorandum you quote in my capacity as a staff attorney in the White House Counsel's office. The Reagan Administration believed that moments of silence in school were constitutional. Any administration has the prerogative to advance particular constitutional interpretations, and the Reagan Administration — like all others — attempted on occasion to do so. You describe the area of the law as "well-settled," but as the memorandum noted, this particular case generated no fewer than six separate opinions.

More than twenty years after the fact, I have no recollection that would allow me to explain further my description of the various opinions in the memorandum. My role as a lawyer for the Administration was to promote the views of my client vigorously and therefore judicial modesty was not at issue for me. As a judge, however, I have no client and no agenda to promote. My only agenda is to uphold the rule of law. I believe that my judicial record reflects that modesty.

With respect to whether I believe that there are examples of cases in which the Court should have overruled prior precedent but did not, the answer is yes. For example, cases such as Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); and Adair v. United States, 208 U.S. 161 (1908), the Supreme Court struck down various economic regulations based on the theory of due process announced most famously in Lochner v. New York, 198 U.S. 45 (1905). As I have stated, I believe that the Lochner decision and its progeny were wrongly decided, should not have been followed by the Supreme Court, and that the Court was correct to overrule this line of cases in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

12. **Do you agree with the landmark decision in *NY Times v. Sullivan* (1964), which held that public criticism of public figures is acceptable unless motivated by actual**

**malice? Who do you believe constitutes a public figure under this standard?**

RESPONSE: New York Times v. Sullivan is a precedent of the Court, and I would start with it in any case implicating this area of the law. The application of that precedent, however, continues to present issues for the Court. In particular, the scope of the definition of a "public figure" has been the subject of numerous decisions. See, e.g., Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (committing a crime does not necessarily render one a public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (receipt of significant amounts of federal funding does not necessarily render one a public figure); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (attorney who litigated a civil case against a police officer was not a public figure). In recent years, lower courts have continued to pass upon the public/private figure distinction. See, e.g., Lohrenz v. Donnelly, 350 F.3d 372 (D.C. Cir. 2003); Carr v. Forbes, Inc., 259 F.3d 273 (4th Cir. 2001). I therefore must be careful in answering your question, so as not to comment on an area that may come before me.

The Gertz Court described public figures as follows:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345. I have no quarrel with this basic formulation, and would start with it and other pertinent Supreme Court precedents in evaluating who qualifies as a public figure.

13. **Do you believe the Supreme Court was correct to strike down the Communications Decency Act in *Reno v. ACLU* (1997) on the grounds that pornography on the Internet is protected by the First Amendment?**

RESPONSE: Responding to this question would require me to indicate my views on whether Supreme Court cases in areas likely to come before the Court again were correctly decided. For reasons I have articulated before the Committee, I do not consider it appropriate for me to respond to such questions.

14. **Do you agree with the 1976 decision in which the Supreme Court held that Congress could not extend the Fair Labor Standards Act to state and city employees (*National League of Cities v. Usery*), or do you agree with the later 1985 decision, which held that Congress could (*Garcia v. San Antonio Metropolitan Transit*, overruling *Nat'l League of Cities*). Was the Court right to overturn its precedent nine years later? Why or why not?**

RESPONSE: Responding to this question would require me to indicate my views on whether Supreme Court cases in areas likely to come before the Court again were correctly decided. For reasons I have articulated before the Committee, I do not consider it appropriate for me to respond to such questions.

15. **Do you agree with the 1989 decision in which the Supreme Court held that it was constitutional to execute minors (*Stanford v. Kentucky*), or do you agree with the later 2005 decision, which held that it was unconstitutional (*Roper v. Simmons*). Was the Court right to overturn its precedent 16 years later? Why or why not?**

RESPONSE: Responding to this question would require me to indicate my views on whether Supreme Court cases in areas likely to come before the Court again were correctly decided. For reasons I have articulated before the Committee, I do not consider it appropriate for me to respond to such questions.

16. **You have spoken a bit about the rules of standing; an important related issue is justiciability. Where is the line between questions that are political and questions that are appropriate for a court to decide?**

    a. **Do you agree, as the Supreme Court held in *Baker v. Carr* (1962), that courts could appropriately consider the claims of voters who were being underrepresented in the state legislature? Why or why not?**

    b. **Do you agree, as the Supreme Court held in *Powell v. McCormack* (1969), that courts could appropriately consider the challenge of a duly-elected member of Congress who was prohibited from taking his seat by other members of that body? Why or why not?**

    c. **Do you agree, as the Supreme Court held in *Bush v. Gore* (2000), that the Court could appropriately consider a challenge to disputed state election law? Why or why not?**

    d. **What power does the Supreme Court have to intervene in state election laws (as in *Bush v. Gore*)? What role should the Supreme Court be playing in disputed elections?**

RESPONSE: I believe that the holding in Baker v. Carr is correct. It is well accepted that courts can appropriately consider constitutional challenges to legislative apportionment, and as a practical matter I do not believe that basic question is likely to come before the Court again.

While the Court in Baker v. Carr acknowledged that there were many situations in which

it was not empowered to consider claims because they presented "political questions," it also pointed out that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Baker v. Carr, 369 U.S. 186, 217 (1962). Simply because a claim can be characterized as "political" does not mean that the Court can disclaim its responsibility to enforce the Constitution and laws. When a valid Equal Protection claim is brought before a court, whether it has to do with apportionment, racial discrimination, or anything else, a court has not only the power but the responsibility to consider it on the merits. Cf. Cohens v. Virginia, 19 U.S. 264, 404 (1821) ("[Courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

I have no quarrel with the approach to the "political question" doctrine reflected in the opinion for the Court in Powell v. McCormack, 395 U.S. 486 (1969). There, the Court reached the merits of a case brought by a duly-elected member of the House of Representatives, who had been prohibited from taking his seat by other members of that body. In finding that the case was justiciable, the Court applied a framework for the political question doctrine first laid out in Baker v. Carr. Specifically, the Powell Court rejected the argument that Article I, Section 5 of the Constitution ("Each House shall be the judge of the elections, returns and qualifications of its own members . . . .") reflected a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Powell, 395 at 548 (quoting Baker, 369 U.S. at 217). The Court reasoned that the Constitution itself contained the standards that the House was to apply, and that the Court could decide whether the decision of the House comported with those standards. Id. The Court also rejected the argument that a decision on the merits would create a "potentially embarrassing confrontation between coordinate branches," as it would merely involve the interpretation of constitutional text — a well-established judicial role. Id. (citing Baker, 369 U.S. at 217).

Regarding Bush v. Gore, I do not feel it is appropriate to comment on the propriety or merits of the decision, or on the propriety of considering challenges to disputed state election law in any particular situation. But I certainly agree, and believe it is well-settled, that federal courts may entertain challenges to disputed state election law when those challenges raise federal questions. For example, it is appropriate for a court to consider a challenge claiming that a state election law unlawfully discriminates on the basis of race, see, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (entertaining a Fourteenth and Fifteenth Amendment challenge to redrafting of municipal boundaries). I believe the Supreme Court should play the same role in federal claims arising from disputed elections as it does in any other area — that of the final arbiter of federal law.

**17. You spoke several times at the hearing about *Griswold v. Connecticut*. I have several follow-up questions:**

**a. You have said that you support the Court's conclusion in *Griswold v.***

***Connecticut*, but I would like to know why. There is no right to privacy in the text of the Fourteenth Amendment. I understand that there are privacy rights inherent in the Fourth Amendment and the First Amendment, and I would like you to avoid focusing on those in your answer. Please explain why you think that the Fourteenth Amendment includes a right to privacy that extends to contraception between married couples? Moreover, would you have reached the result the *Griswold* Court reached in the same way the majority opinion did?**

**b. Given the precedent prior to *Griswold*, do you think that the Court's decision in that case was akin to playing umpire in a baseball game? Critics of the decision have repeatedly chastised the Court for inventing a free-standing right to privacy, or fashioning a Fourteenth Amendment right to privacy out of Amendments – such as the First Amendment and Fourth Amendment – that previously had no application to those particular circumstances. For instance, the relationship between the parental right to control a child's education and the right to privacy from state interference in intimate relationships is not obvious on first glance. If the proper role of a judge really is not to *make* law, but simply to interpret it, how was the Court's decision in *Griswold* consistent with the proper judicial role?**

**c. Do you, moreover, agree with the following line from *Griswold*: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Is this reasoning consistent with a philosophy of judicial restraint and modesty?**

**d. Finally, the Court stated as follows: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Do you agree with that reasoning? After all, we do not allow married couples to use illegal narcotics in the privacy of the bedroom, and police may well search bedrooms for cocaine or methamphetamines if they obtain a search warrant. Please explain what it is, precisely, about contraception that in your view places it outside of the reach of the state, and explain what exactly it is in the text or history of our founding document that leads you to this conclusion.**

RESPONSE: The word "privacy" is not mentioned in the Constitution, but the word "liberty" appears in the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court's earliest precedents articulating privacy interests under the Due Process Clause, such as Meyer and Pierce, grounded those interests in the "liberty" protected by the Clause, and the Court's more recent precedents have done so as well. In some sense,

this effort to determine the meaning of "liberty" is not qualitatively different from the effort to interpret other terms. For example, the Court has interpreted the Speech and Press component of the First Amendment to cover areas — such as the right of association, see NAACP v. Alabama, 357 U.S. 449 (1958) — and specific activities — such as the wearing of armbands, see Tinker v. Des Moines School District, 393 U.S. 503 (1969) — that are not specifically listed in the Amendment itself. Such decisions need not be viewed as atextual; rather, they reflect the judicial interpretation of what constitutes "speech" under the First Amendment.

That said, I believe that any interpretation, and especially that of broadly-worded provisions, requires judges to guard against the incorporation of their personal preferences into the law. In the area of due process, I believe such restraint can best be achieved through constant appreciation of the limited nature of the judicial role, and reliance on our Nation's history, tradition, and practices. In my view, the outcome in Griswold is consistent with such an approach.

I do not think decisions in this area undermine the umpire analogy. A judge who did not regard his role as that of an umpire, but instead as that of a player, would feel free to decide such questions on the basis of his own social policy preferences. I do not.

As my answer indicates, I view privacy interests as being protected as part of the liberty specified in the Due Process Clauses of the Fifth and Fourteenth Amendments (as well as in the First and Fourth Amendments, as referenced in the question). That is not the precise analysis used by the Griswold majority, but it has since become the framework of the Court in considering the right to privacy.

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September 28, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

**RE: Nomination of John G. Roberts, Jr. for Chief Justice of the United States**

Dear Senator Specter:

Please find enclosed the responses of the American Bar Association Standing Committee on Federal Judiciary to questions posed by Senator Leahy following the presentation of our testimony to your committee during the confirmation hearing of Judge John G. Roberts, Jr., to be Chief Justice of the United States.

We appreciate the opportunity to work with you and the members of your committee.

If you have any further questions, please do not hesitate to contact us.

Very truly yours,

Thomas Z. Hayward, Jr.
Chair (2003-2005)

Stephen L. Tober
Chair (2005-2006)

cc: Honorable Patrick J. Leahy
Barr Huefner

**Questions from Senator Patrick Leahy for Stephen Tober, Thomas Hayward and the American Bar Association's Standing Committee on Federal Judiciary September 12-15, 2005**

**QUESTION**

1. The ABA Standing Committee of Federal Judiciary released its initial rating for Judge Roberts's nomination to be Associate Justice on August 17, 2005, just a day and a half after the National Archives released about 5,000 pages of John Roberts's files from his time in the White House, and a day before another 43,000 or more were made public.

   Why did the Committee release its rating of Judge Roberts before so many of the relevant documents could be reviewed? I know that ABA President Michael Greco, in a letter of August 23, 2005, indicated that the Committee "routinely has submitted its evaluation several weeks prior to the nominee's scheduled hearing," and that it could continue to review information after the rating was released, but why not wait until as much information as possible could be evaluated?

**ANSWER**

The Senate Judiciary Committee had requested that we forward to them the evaluation of Judge Roberts within the customary thirty-five (35) days after the nomination was made. The Standing Committee and its investigators worked around the clock to achieve that objective. The documents that were made available prior to the Committee's vote were reviewed by the principal investigator, Pamela A. Bresnahan. The documents and indices released subsequent to the rating were reviewed as indicated in the letter to Senator Specter dated September 14, 2005. As stated therein, the principal investigator reviewed indices and documents of the nominees that were made available by the National Archives and then selected substantive memoranda on diverse subjects that were reviewed by the Chair and forwarded to the Northwestern Reading Committee for its further evaluation and to members of the Standing Committee for their consideration. After Judge Roberts was nominated to be Chief Justice, additional interviews were conducted regarding his managerial ability. The Committee had the opportunity to re-evaluate or change its rating: the nominee's rating remained "Well-Qualified," after subsequent review of the documents released by the National Archives and subsequent review of his management abilities.

**QUESTION**

2. Your Committee's publication, "Standing Committee on Federal Judiciary, What It Is and How It Works," states that the Committee focuses on three criteria: integrity, professional competence and judicial temperament. It further states that, "in investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law." Could you please explain in detail what you learned about Judge Roberts that would indicate he is compassionate and committed to equal justice under the law?

**ANSWER**

All persons interviewed by the investigators indicated that Judge Roberts was highly qualified in terms of integrity, professional competence and judicial temperament. Several respondents indicated that Judge Roberts was thoughtful, careful and cared deeply about the rule of law and that all persons were treated equally under the rule of law. Our testimony quotes several of their responses.

**QUESTION**

3. In assessing Judge Roberts's integrity, did you consider the views of legal scholars (see attached) relating to his failure to recuse himself in the *Hamdan* case, as contrasted with his decision to recuse himself from a case in which the ABA was involved?

**ANSWER**

Yes. We considered the views expressed in the attached articles as well as the analyses of other lawyers and ethics experts who did not agree that Judge Roberts should recuse himself from the *Hamdan* case. The principal investigator, Pamela Bresnahan, who represents lawyers and law firms in professional responsibility matters, also reviewed the press reports and writings of various lawyers regarding *Hamdan* and concluded reasonable minds could differ on the issue of recusal.

**QUESTION**

4. Did anyone on the Standing Committee or either of your Reading Committees review any documents, including the documents related to the 16 cases requested by the Democratic members of the Judiciary Committee, having to do with Judge Roberts's time as Principal Deputy Solicitor General to Ken Starr?

**ANSWER**

The question is unclear. We reviewed all of the documents made available by the National Archives.

**QUESTION**

5. The Practitioner's Reading Committee, one of two reading teams that reviewed the nominee's writings, included four former high-ranking political appointees in the Reagan Department of Justice. One worked closely with the nominee while he was Special Assistant to the Attorney General, while another worked for him in the Office of the Solicitor General. Most notably, the Reading Committee included Professor Charles Fried, whose partisan politics have been clear throughout his career. Professor Fried served as Ronald Reagan's Solicitor General, argued for the Republican Florida House of Representatives in connection with the 2000 election, and is the faculty advisor to the Harvard chapter of the Federalist Society, a highly partisan debating society that is committed to supporting judges with political agendas who would turn the courts dangerously to the right. Indeed, Professor Fried is such an outspoken advocate for Judge

Roberts's nomination that he appeared before this Committee during the nomination hearing to testify in his behalf. Maureen Mahoney, another member of your Reading Committee, not only worked for the nominee at the Department of Justice, she also came to testify in support of this nomination at the recent hearing and described herself as his friend for 25 years, telling how he recommended her for nomination to a federal judgeship several years ago.

Why did your Committee appoint people with such distinctly partisan political affiliations and personal ties to the nominee to a Committee that is supposed to be dedicated to what Michael Greco, President of the ABA, described as a "non-partisan, non-ideological, comprehensive peer review?" Even if you don't believe any of the people involved would have done anything improper, can you understand why there is the appearance of impropriety when people with a possible bias toward the nominee are involved in evaluating his fitness for the Supreme Court? Looking back, do you think it was a mistake to include these people on the Reading Committee? Another Supreme Court nominee will soon be coming to your Committee for evaluation. Will you commit to appointing only objective reviewers with no personal or political ties to the nominee the next time and for the future?

**ANSWER**

Both Reading Committees included a cross section of the legal and scholarly community, and included prominent Democrats. The committees were selected prior to there being any nomination, so it was impossible to know whether any of the members had relationships with the ultimate nominee. They all concluded, no matter what their party affiliations, that this nominee's writing and professional competence were superb. With regard to Supreme Court nominations going forward, Mr. Tober has requested and has received assurances from the chairs of the new academic and practicing lawyer reading groups now in place that no member of those groups will speak out publicly nor testify on the nomination until such time, if at all, that the entire confirmation process has been concluded and a Senate vote has been taken.

**QUESTION**

6. Were any of the members of the Practitioner's Reading Committee who were members of the Reagan Administration -- Donald Ayer, Charles Renfrew, Maureen Mahoney or Charles Fried -- involved in reviewing documents from the Reagan Administration relating to the nominee or written by the nominee that were released by the National Archives in connection with this nomination?

**ANSWER**

No. The Northwestern Law School Committee members reviewed selected documents from the documents that were reviewed by the investigator and the chair.

**QUESTION**

7. How many documents from the total released by the National Archives did members of the Standing Committee review for themselves, or did they just rely on the report of the Reading Committees?

**ANSWER**

The Standing Committee's principal investigator reviewed all document indices and representative substantive documents authored by the nominee that were made available by the National Archives. The review by our investigator took well over 100 hours. She selected documents for the Chair to review, who then forwarded documents for review by both the Northwestern Reading Committee and the members of the Standing Committee. After a thorough evaluation of this additional material, the Northwestern Reading Committee did not change its opinion of the nominee, and the Standing Committee did not choose to change its rating of "Well-Qualified."

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September 1, 2005

Honorable Senator Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Senator Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter and Senator Leahy:

On behalf of the undersigned disability, aging, civil rights and social justice organizations, we write to you regarding the nomination of John G. Roberts to be an Associate Justice of the U.S. Supreme Court. As the nomination and confirmation process now begins to unfold, we strongly urge you to consider the extraordinary impact that Judge Roberts, if confirmed, will have on the lives, liberties, and constitutional rights of the tens of millions of Americans with physical, mental, cognitive, and developmental disabilities.

We applaud Senator Leahy's determination to obtain the release of withheld documents that would shed further light on Judge Roberts record. Each day, as new documents are uncovered, we get a clearer picture of Judge Roberts views many of which lie outside of the mainstream. For example, Reagan Administration documents demonstrate Roberts role in attempting to undermine the Equal Employment Opportunity Commission (EEOC) and the Washington Post reported on August 30th, that Roberts uncritically passed along demands that the administration repeal a requirement of government contractors to hire the handicapped.

We also applaud Senator Specter's letter of August 23rd to Mr. Roberts seeking his opinions on the "judicial activism" demonstrated by the Rehnquist Court, especially in regard to the narrowing of the Americans with Disabilities Act (ADA) and the failure to respect the intent of Congress in crafting this historic and bipartisan law.

Sen. Specter clearly outlined many of the concerns of the disability community in objecting to the Court's "judicial activism in functioning as a super-legislature" and the disregard exhibited by a pattern of declaring "acts of Congress unconstitutional notwithstanding the enormous evidentiary support for Congress' public policy determinations."

Mr. Roberts does, in fact, have a very different view of "judicial activism." In Board of Education v. Rowley, 458 U.S. 176 ( 1982 ), an 8-year-old student who was deaf sought to have a sign language interpreter provided to assist her in school. The trial court ruled that federal law required the state to provide an interpreter for her. The appeals court affirmed. Roberts, while at the Justice Department, wrote a memo to the Attorney General criticizing these decisions. Roberts stated that the lower courts, in an exercise of

judicial activism, used the vague statutory language to overrule the board and substitute their own judgment of appropriate educational policy.

Mr. Roberts' views in this regard are further demonstrated by his serving on the Legal Advisory Council of the National Legal Center For The Public Interest. This extreme organization has promoted the very "judicial activism" Sen. Specter has decried and has attacked ADA civil rights protections in numerous forums including its publication of a document belittling Congress' authority and entitled "Civil Rights and the Disabled: The Legislative Twilight Zone."

Sadly, Mr. Roberts' record reveals that he would not only continue this trend of "judicial activism" but would further it, risking our remaining protections spared only by Justice Sandra Day O'Connor siding with the majority in 5-4 decisions including historic cases such as Tennessee v. Lane, 541 U.S. 509 (2004).

Our concerns are illustrated by Mr. Roberts' 2000 television interview, in which he declared that the Rehnquist Court was not "conservative" enough. Roberts, of course, later convinced the Rehnquist Court to eliminate ADA protections for millions of Americans with disabilities especially those with epilepsy, diabetes, mental illness and work-related injuries.

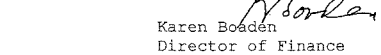
In Toyota Motor Manufacturing v. Williams, 534 U.S. 184 ( 2002 ), Roberts successfully argued to the Supreme Court that a woman who had developed severe bilateral carpal tunnel syndrome and tendonitis from working on the assembly line at an auto manufacturing plant could not prevail in a suit against her employer for failing to accommodate her disability. Roberts argued that she was not a person with a disability because she was not sufficiently limited in major life activities outside of her job. Roberts brief greatly distorted the extent of the woman"s limitations. As a result of Roberts distortions, the Rehnquist Court held that the test for coverage under the ADA is a narrow one that must be strictly applied, and it articulated a more stringent test than the test set forth by Congress in the law itself.

Indeed, Judge Roberts has a long history of advocating for the weakening of legal protections for children and adults with disabilities under the ADA, Section 504 of the Rehabilitation Act, Child Welfare Act, and education law, as well as the legal underpinnings of such laws including Congress commerce power. Attached, please find an overview compiled by the Bazelon Center for Mental Health Law entitled John Roberts Problematic Record on Disability Rights.
http://bazelon.org/issues/disabilityrights/judicialnominees/roberts.htm

We share Sen. Specter's concerns that, in the Rehnquist Court, we are witnessing judicial activism to roll back federal protections including the ADA with the use of "manufactured rationales used by the Supreme Court to exercise the role of super legislature and make public policy decisions which is the core Congressional role under the Constitution." Based on his record, we are concerned that the ADA, a bipartisan law that seldom attracts public attention similar to the hot-button issues often debated in the context of Supreme Court confirmation hearings, might be further weakened should Judge John Roberts be confirmed.

We call on the Senate Judiciary Committee to allow testimony from representatives of the disability community and to fully examine Judge Roberts record and views in regard to the Americans with Disabilities Act (ADA) and disability rights protections generally.

Sincerely,



Karen Boaden
Director of Finance

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September 6, 2005

Dear Senator,

AdvanceUSA heartily supports the nomination and confirmation of Judge John Roberts, Jr. to the Supreme Court of the United States, and we urge you to do the same.

The legal acumen and judicial temperament of Judge Roberts is distinguished and undeniable. His reputation for professionalism and skill is clear in light of the "well qualified" rating the American Bar Association granted him. His confirmation by the Senate in 2003 to the District of Columbia Circuit Court of Appeals demonstrates the broad bi-partisan support he has received and now deserves.

There have been many attacks on Judge Roberts subsequent to his nomination by President Bush on Tuesday, July 19, 2005. These attacks have ranged from the silly to the sinister, from the Roberts children's wardrobe to the anachronistic account of his legal opinions and an abortion opponent's illegal protest activity.

The nomination of John Roberts followed consultation on an unprecedented scale by the White House. This nomination deserves the dignity and respect that is the underlying principle of the Senate's finest moments and tradition. Specifically, the nomination of John Roberts deserves fair and dignified hearings, vigorous factual debate, and a fair up-or-down vote by the full Senate in time for the commencement of the next Supreme Court term beginning Monday, October 3, 2005.

AdvanceUSA requests that you use your influence and position as a United States senator to ensure that each of these components occurs. Further we urge you to vote in favor of Judge John Roberts' confirmation to the Supreme Court of the United States.

Sincerely,
Dr. Carl Herbster
President

cc: Senator Bill Frist, Majority Leader
Senator Arlen Specter, Judiciary Committee Chairman
Senator Rick Santorum, Senate Republican Conference Chairman
Senator Mitch McConnell, Senate Majority Whip
Senator Jon Kyl, Republican Policy Committee Chairman

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August 3, 2005

PRESIDENT
NAN ARON
CHAIR
JAMES D. WEILL

Dear Senator,

Americans want a Supreme Court justice who is committed to the independence of the Court, and who will protect individual rights, freedoms and legal safeguards. That is why the facts that are now being revealed about John Roberts' role in the Reagan Justice Department and White House are disturbing. They show a man deeply involved in legal and political decision–making, who was committed to cutting back our government's and our courts' role in protecting American's civil and constitutional rights. Coupled with Judge Roberts' limited record on the bench, the Reagan-era documents raise additional questions about the still largely unknown legal views that Judge Roberts holds.

For senators to make a fully informed judgment about whether to confirm Judge Roberts to a lifetime seat on the Supreme Court, these questions require answers. The recently released Reagan-era documents cover only part of Judge Roberts' career in the early 1980s. The White House says that additional documents relating to Judge Roberts' service as Associate White House Counsel to President Reagan are forthcoming. But it has publicly refused to release any documents pertaining to Judge Roberts' service as the high-ranking, politically-appointed deputy in the Solicitor General's Office.

The Judiciary Committee Democrats recently made a limited request for documents on sixteen of the cases the Solicitor General's Office handled during Judge Roberts' tenure. The White House must provide those documents and the remaining White House Counsel documents within a timeframe that allows Senators to examine them fully prior to the hearings. In addition, Judge Roberts must provide substantive answers about his legal views at his hearing. Without the documents and without meaningful answers, senators will not have the critical information they need to carry out their advice-and-consent duties as the Constitution envisions.

The burden remains on Judge Roberts to demonstrate his commitment to an independent court that is protective of all Americans. It is the constitutional responsibility of senators to make sure that the American public learns the facts about Judge Roberts' legal philosophy -- his method of constitutional interpretation, his loyalty to precedent and his respect for our well-established freedoms and legal protections.

Sincerely,

Nan Aron
President

**PRELIMINARY REPORT ON THE NOMINATION OF D.C. CIRCUIT JUDGE JOHN G. ROBERTS TO THE UNITED STATES SUPREME COURT**

***NOTE:* This is a preliminary analysis of Judge Roberts' record. It does not purport to be comprehensive. A comprehensive report will be forthcoming.**

President Bush has nominated D.C. Circuit Judge John G. Roberts to the Supreme Court. Judge Roberts does not have an extensive public record. What exists suggests that he "may combine the stealth appeal of Souter with the unwavering ideology of Scalia and Thomas."[1] To fulfill its advise-and-consent role on judicial nominations, the Senate must question Judge Roberts closely to obtain a fuller understanding of his judicial philosophy. It must also obtain the voluminous records pertaining to Judge Roberts' years of service in the Reagan and George H. W. Bush Justice Departments. Through its investigation, the Senate must ultimately determine whether Judge Roberts will be fair, impartial and respectful of the progress our courts, legislatures and executive agencies have made over the past half century in guaranteeing individual rights and freedoms, protecting workers and consumers and safeguarding the environment.

Judge Roberts' limited public record raises concerns. In his brief two years on the D.C. Circuit, and consistent with the view taken by the conservative organizations he was affiliated with prior to becoming a judge, Judge Roberts has indicated an affinity for going further than either the current Supreme Court or any appeals court in curbing federal authority to address issues of national importance. The view he expressed in one case involving the Endangered Species Act, if taken to its logical conclusion, could threaten a wide swath of workplace, public safety and civil rights protections. In addition, in his years of service as a political appointee in the administrations of Presidents Reagan and George H.W. Bush, Judge Roberts participated in advancing legal policies that sought to weaken school desegregation efforts, the reproductive rights of women, the Congressionally-created rights of those who would protect the environment, church-state separation and the voting rights of African Americans.

Unlike some of the potential nominees formerly rumored to be on the president's "short list," Judge Roberts enjoys the support of not only mainstream conservatives, but far right conservatives as well.[2] Judge Roberts' legal views are not yet well known to Americans, but they are likely well known within the inner circle of the Bush Administration. And given the administration's track record of selecting ideologically-driven, divisive candidates for the bench, it would be unsurprising if, as President Bush

[1] Tony Mauro, *Is John Roberts the Next Justice?*, LEGAL TIMES, Feb. 21, 2005.
[2] *See, e.g.*, *id.;* Peter Baker and Susan B. Glasser, *Activists Gear Up For Nominee Fight,* WASHINGTON POST, July 3, 2005 (Jan LaRue of Concerned Women of America voicing support).

pledged and as the hard right has demanded, Judge Roberts embraced a judicial philosophy mirroring the radical philosophies of Justices Thomas and Scalia.[3]

In private practice and government service, Judge Roberts proved that he is an exceptional lawyer. His capabilities, however, are not enough to qualify him for a seat on our nation's highest court. A lifetime appointment to the Supreme Court is a privilege, and comes with a responsibility, that requires more. Every nominee bears the burden of showing that he or she is even-handed, unbiased and committed to equal justice. Alliance for Justice is eager to find out, during the confirmation process, whether Judge Roberts possesses these characteristics.

## I. BRIEF BIOGRAPHY

John G. Roberts was born on January 27, 1955. He received a B.A. from Harvard College (*summa cum laude*) and a J.D. from Harvard Law School (*magna cum laude*), where he was managing editor of the Law Review. After law school, Judge Roberts clerked for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and for then-Associate Supreme Court Justice William Rehnquist.

Judge Roberts was confirmed to a seat on the U.S. Court of Appeals for the D.C. Circuit a little over two years ago, in May 2003. Before his confirmation, he was a partner at the D.C. law firm of Hogan & Hartson, where he was in charge of the firm's appellate practice, frequently arguing cases before the U.S. Supreme Court.

Judge Roberts held significant positions in both the Reagan and George H.W. Bush administrations. From 1981 to 1982, he served as special assistant to U.S. Attorney General William French Smith, and then spent four years as associate counsel to President Reagan.[4] From 1989 to 1993, he served President George H.W. Bush as Principal Deputy Solicitor General. In 1992, Bush nominated Roberts to the U.S. Court of Appeals for the D.C. Circuit, but his nomination lapsed before it could be considered.

Before becoming a judge, Roberts was affiliated with several arch-conservative legal organizations. He was a member of both the Republican National Lawyers' Association and the National Legal Center for the Public Interest. He also served on the Legal Advisory Council of the latter group,[5] whose mission is the promotion of "the rights of individuals, free enterprise, private ownership of property, balanced use of

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[3] Baker and Glasser, *supra note* 2 ("Everything I know about him would say he would fit that profile of Scalia and [Clarence] Thomas,' said Jan LaRue, counsel to the Concerned Women for America, a conservative group.").

[4] *Biographical Sketches of the Judges of the U.S. Court of Appeals for the D.C. Circuit, John G. Roberts*, http://www.cadc.uscourts.gov/internet/internet.nsf/Content/Stub+-+Biographical+Sketches+of+the+Judges+of+U.S.+Court+of+Appeals+for+the+DC+Circuit (last visited June 22, 2005).

[5] Other Board Members and Legal Advisors of the Center include prominent conservatives, such as Douglas Kmiec, C. Boyden Gray and Kenneth Starr.

private and public resources, limited government, and a fair and efficient judiciary"[6] – shorthand for a conservative, anti-government legal agenda hostile toward environmental and worker protections. In addition, Judge Roberts stated in his Senate Judiciary Committee questionnaire for his nomination to the D.C. Circuit that he "regularly participate[s] in press briefings sponsored by the . . . Washington Legal Foundation,"[7] a right-wing legal organization that litigates on behalf of corporate interests and wealthy property owners challenging environmental and other regulations.

At Hogan & Hartson, Judge Roberts had a successful, high profile appellate practice. Some of his noteworthy cases included: *Toyota Motor Mfg., Kentucky v. Williams,*[8] where, on behalf of Toyota, he successfully argued that the Americans with Disabilities Act did not require Toyota to provide a workplace accommodation to a worker who acquired carpal tunnel syndrome on the job;[9] *Fox Television Stations, Inc. v. Federal Communications Commission,*[10] where, on behalf of Fox, he successfully argued that Fox was not subject to ownership rules designed to prevent monopolization; *Adarand Constructors, Inc. v. Mineta,*[11] where, appearing on behalf of the Associated General Contractors of America as *amicus curiae,* he argued that Congress failed to make sufficiently specific findings to justify an affirmative action program for Department of Transportation contractors;[12] *Rothe Dev. Corp. v. United States Dep't of Def.,*[13] where, also on behalf of AGCA as *amicus curiae*, he successfully challenged as unconstitutional the Department of Defense's affirmative action program granting bid preferences to small, minority-owned businesses;[14] *Bragg v. West Virginia Coal Association,*[15] where, on behalf of the National Mining Association as *amicus curiae*, he successfully used sovereign immunity doctrine to defeat a Surface Mining Control and Reclamation Act[16] challenge by affected West Virginia citizens to the state's practice of issuing permits to mining companies to extract coal by blasting the tops off of mountains and depositing the debris in nearby valleys and streams; and *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,*[17] where, following his nomination to the D.C. Circuit, he represented the Tahoe Regional Planning Agency in successfully defending its development moratorium on a pristine portion of Lake Tahoe against a "takings" challenge by landowners.

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[6] National Legal Center for the Public Interest, *Mission*, http://www.nlcpi.org/mission.htm (last visited June 22, 2005).
[7] John G. Roberts, *Responses to Senate Questionnaire, Question 12, printed in Confirmation Hearing on Fed. Appointments: Hearing Before the Senate Comm. on the Judiciary United*, 108th Cong. 304 (2003).
[8] 534 U.S. 184 (2002).
[9] Brief for Petitioner, *Toyota Motor Mfg., Kentucky v. Williams*, 2000 U.S. Briefs 1089 (2002) (no. 00-1089).
[10] 280 F.3d 1027 (D.C. Cir. 2002).
[11] 534 U.S. 103 (2001).
[12] Brief for the Associated General Contractors of America as Amicus Curiae, *Adarand Constructor, Inc. v. Mineta*, 2000 U.S. Briefs 730 (2001) (No. 00-730).
[13] 262 F.3d 1306 (Fed. Cir. 2001).
[14] Because we do not have Roberts' brief in this case, we cannot lay out with any certainty the precise arguments he made. Given the issue in the case, however, it seems clear that the brief must have argued against the use of race in affirmative action programs.
[15] 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).
[16] 30 U.S.C. §1201.
[17] 535 U.S. 302 (2002).

## II. JUDGE ROBERTS' TWO YEARS ON THE BENCH

Though his tenure on the U.S. Court of Appeals for the D.C. Circuit has been brief, a few decisions in Judge Roberts' limited record raise questions about the role he might play on the Supreme Court. To date, he has embraced, in dissent, an unprecedented, restrictive view of Congress' power to enact environmental legislation; validated, in dissent, a labor regulation that imposed onerous financial reporting requirements on unions; and inferred, again in dissent, that Congress implicitly intended to do away with previously authorized federal lawsuits by soldiers tortured in Iraq during the Gulf War.

**Environmental Protection-Curbing Congress' Authority.** Judge Roberts' vote in the case of *Rancho Viejo, LLC v. Norton,*[18] demonstrates that he is likely to stake out hard-line positions that severely limit the authority of the federal government to address national concerns. Indeed, despite the efforts of a handful of identifiably right-wing dissenters on the Fourth and Fifth Circuits, neither the Supreme Court nor any circuit court has adopted Judge Roberts' crabbed view of Congressional power under the Commerce Clause, and his own court had previously rejected it. Early this summer, in a significant case, *Gonzales v. Raich,*[19] the Supreme Court – and even Justice Scalia – effectively rejected the overly narrow view of federal power that Judge Roberts advanced in *Rancho Viejo.*

*Rancho Viejo* involved a challenge by a developer of a large California real estate project to a regulation promulgated under the Endangered Species Act. The regulation required the removal of a fence that interfered with the habitat of an endangered species, the arroyo toad. The developer argued that the regulation exceeded Congress' authority under the Commerce Clause. A panel of the D.C. Circuit rejected the claim, unanimously holding that the regulation was a valid exercise of Congressional authority because the "take" that it targeted was a commercial development, which had a clear, substantial effect on interstate commerce.[20] The panel decision found the issue in the case to be controlled by a prior D.C. Circuit decision, *National Association of Home Builders v. Babbitt,*[21] which had applied recent Supreme Court Commerce Clause jurisprudence to uphold endangered species regulations.

When the developer applied for rehearing *en banc*, the Court voted 7-2 against the motion, with three conservative Republican appointees (Judges Ginsburg, Henderson, and Randolph) joining four Democratic appointees. Implying that the D.C. Circuit's precedent ought to be overturned, Judge Roberts joined with only Judge Sentelle to dissent. Each authored short, separate opinions strongly suggesting that the endangered species regulations exceeded Congress' Commerce Clause powers. Judge Roberts

[18] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).
[19] No. 03-1454, 2005 U.S. LEXIS 4656 (June 6, 2005).
[20] 323 F.3d 1062 (D.C. Cir. 2003), *reh'g denied*, 540 U.S. 1218 (2004), *and cert. denied*, 541 U.S. 1006 (2004).
[21] 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

asserted that a law that regulates neither the channels of nor goods transported in interstate commerce is valid under the Commerce Clause only if, in *all* of its applications, it regulates activity that substantially affects such commerce. In other words, he believes that, in determining a law's constitutionality under the Commerce Clause, a reviewing court should characterize the object of the law as narrowly as possible; and if in so doing, the court finds that the law regulates something that is purely intrastate activity not having substantial effects on interstate commerce, it should strike the law down. Thus, despite Congress' express assertion that the ESA was aimed at the aggregate effects of commercial activities on endangered species, Judge Roberts argued for construing the ESA regulation at issue as targeting simply the intrastate activity of toad-taking, rather than the clearly commercial activity that resulted in such taking. And because intrastate toad-taking does not itself affect interstate commerce, he strongly hinted that he thought the regulation was unconstitutional.

The effect of Judge Roberts' views on Congress' Commerce Clause authority might threaten to undermine a wide swath of federal protections, including many environmental, civil rights, workplace and criminal laws – which, if examined in the narrowest sense, may be construed as regulating certain, purely intrastate activities not having substantial effects on interstate commerce. Perhaps for that reason, the Supreme Court, by a 5-1-3 vote, implicitly rejected Judge Roberts' views in *Gonzales v. Raich*, which upheld the federal government's power to prosecute individuals who, under state law, legally grew medical marijuana for their own consumption upon a doctor's recommendation. The majority opinion emphasized that Congress has the "power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[22] Concurring with the majority, even Justice Scalia said: "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."[23]

Despite his support for curbing Congressional power in *Rancho Viejo*, Judge Roberts nevertheless followed Supreme Court precedent in *Barbour v. Washington Metropolitan Area Transit Authority*,[24] to allow a disability discrimination suit to go forward over the D.C. government's claim of sovereign immunity. A D.C. employee with bipolar disorder sued the Washington Metropolitan Area Transit Authority under Section 504 of the Rehabilitation Act, claiming it discriminated against him because of his disability. WMATA argued that it had not waived its sovereign immunity by accepting federal transportation funds and that, in any event, Congress did not have the authority, under the Spending Clause, to condition the receipt of such funds on an immunity waiver. Joining Judge Merrick Garland's majority opinion, Judge Roberts rejected WMATA's arguments. He adhered to binding Supreme Court precedent, which gives Congress wide latitude to use its Spending Clause powers to condition grants of federal funds on states' agreement to subject themselves to suit for violating federal

[22] *Raich*, 2005 U.S. LEXIS 4656, at *29.
[23] *Id.* at *60 (Scalia, J., concurring).
[24] 374 F.3d 1161 (D.C. Cir. 2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 18786 (D.C. Cir. 2004).

law.[25] The Court has not struck down an act of Congress on Spending Clause grounds in more than a half century. Nevertheless, in his dissent in *Barbour,* Judge Sentelle endeavored to push the law toward that goal, arguing that the condition on the accepted funding – non-discrimination – was not sufficiently related to the funding's purpose – transportation – to authorize reliance on the Spending Clause to extinguish D.C.'s sovereign immunity.

**Validating Efforts to Burden Organized Labor.** In *AFL-CIO v. Chao,*[26] the D.C. Circuit addressed the validity of new regulations that significantly expanded the type and detail of information unions must provide on annual financial reports submitted to the Labor Department under the Labor Management Reporting and Disclosure Act (LMRDA). First advanced in the early 1990s by Newt Gingrich and others to "weaken our opponents and encourage our allies,"[27] the rules were adopted in 2003 by current Labor Secretary Elaine Chao. They substantially changed the financial reporting scheme that had been in place for nearly 40 years and imposed on unions onerous reporting requirements that are not imposed on either corporations or non-profit organizations.

The AFL-CIO challenged the rules on grounds that they exceeded the Secretary's statutory authority. A three-judge panel on the D.C. Circuit upheld new itemization provisions, which, among other things, require unions to list individually and provide detailed information about expenditures of $5,000 or more. But by a 2-1 vote, the court struck down another provision requiring reporting on financial involvement (even tangential) in trusts, saying that by requiring "general trust reporting," the rule improperly exceeded the Secretary's statutory authority to prescribe only those reporting rules necessary to prevent evasion of union reporting requirements. Judge Roberts dissented from this part of the ruling, asserting that the LMRDA gave the Secretary broad discretion to implement the trust reporting provision. The majority criticized Judge Roberts for missing "the salient point" that, because the LMRDA "itself limits the Secretary's authority with respect to trust reporting," the challenged rule improperly "reaches information unrelated to union reporting requirements and mandates reporting on trusts even where there is no appearance that the union's contribution of funds to an independent organization could circumvent or evade union reporting requirements ..."[28]

**Implying Elimination of Congressionally-Authorized Lawsuits.** In *Acree v. Republic of Iraq,*[29] 17 U.S. soldiers, who had been tortured prisoners of war in Iraq during the Gulf War, filed suit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein using the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Several months after the trial court granted default judgment in favor of the officers, the government sought to intervene to vacate the judgment and divest the court of jurisdiction, based on a new law and corresponding presidential order intended to

[25] *See, e.g., South Dakota v. Dole,* 483 U.S. 203 (1987).
[26] 2005 U.S. App. LEXIS 9889 (D.C. Cir. May 31, 2005).
[27] Letter from Newt Gingrich to Lynn Martin and Clayton Yeutter, February 19, 1992 (on file).
[28] *Id.* at **37.
[29] 370 F.3d 41 (D.C. Cir. 2004), *reh'g en banc denied,* 2004 U.S. App. LEXIS 17830 (D.C. Cir. 2004), *and motion granted and cert. denied,* 125 S.Ct. 1928 (2005).

protect the newly-formed Iraqi government. On appeal, two of the judges on the panel, Harry Edwards and David Tatel, rejected the government's jurisdictional argument. They ruled that the new law, passed in 2003, did not bar suit because it only withdrew laws impeding assistance to or funding for the new Iraqi Government, not laws involving federal court jurisdiction under the FSIA. The majority nevertheless dismissed the case, holding that the terrorism exception to FSIA authorized suit against certain kinds of defendants, but not the governmental entities named in the soldiers' complaint.

Judge Roberts agreed that the case should be dismissed, but for a different reason. Contrary to the majority, he asserted that the 2003 law did encompass the terrorism exception to FSIA and thus that, through a presidential order, it deprived federal courts of jurisdiction over suits against Iraqi officials. Like the majority, Judge Roberts acknowledged that the jurisdictional question was a close one. Indeed, he acknowledged that the majority had case law supporting its ruling. Yet he said that he, too, had supporting case law and that his reasoning, on balance, made more sense. The result was that while the majority erred on the side of at least theoretically preserving the officers' Congressionally-authorized right to sue, Judge Roberts struck the balance in favor of eliminating that right altogether.

**Constitutional Claims**. In *Hedgepeth v. Washington Metropolitan Area Transit Authority*,[30] Judge Roberts wrote an opinion allowing state governments to arrest children for minor offenses authorizing issuance of a citation for adults. The opinion, joined by Republican-appointed Judges Henderson and Williams, rejected the civil rights claims brought on behalf of a 12-year-old girl who had been handcuffed, arrested and taken away by the police for eating a french fry in the D.C. Metro. The girl claimed that her equal protection rights had been violated because, under then-D.C. law, an adult in the same situation would only have been given a citation, while the police were required to arrest her since she was a juvenile. Rejecting the claim, Judge Roberts asserted that the D.C. law was subject to the most deferential kind of judicial review – rational basis review – since juveniles are not a suspect class and do not enjoy a fundamental right to freedom from restraint when there is probable cause for arrest. Judge Roberts concluded that the D.C. law was constitutional because, although perhaps unwise, it was "rationally related to the legitimate goal of promoting parental awareness and involvement with children who commit delinquent acts."[31]

Judge Roberts also held that a recent Supreme Court case, *Atwater v. City of Lago Vista*,[32] foreclosed the girl's other claim that the arrest violated her Fourth Amendment right to be free from unreasonable seizures. *Atwater* held that the Fourth Amendment does not protect against arrest and detention for minor offenses, like seat belt violations, even where the maximum penalty for the offense is a small fine. The girl distinguished *Atwater* by pointing out that, unlike in *Atwater*, where the Supreme Court was principally concerned about creating a non-rigid constitutional standard that would hobble an officer's discretion to decide, in the heat of the moment, whether to arrest or issue a

[30] 386 F.3d 1148 (D.C. Cir. 2004).
[31] *Id.* at 1156.
[32] 532 U.S. 318 (2001).

citation, D.C. law afforded officers no discretion in her case and mandated arrest. As a result, the girl claimed, her arrest should be subjected to a reasonableness review, rather than *Atwater*'s blanket rule. Rejecting the claim, Judge Roberts concluded that "the most natural reading of *Atwater*" precludes reasonableness review whenever an arrest, including the girl's, is supported by probable cause.[33]

## III. GOVERNMENT EXPERIENCE

### A. The George H. W. Bush Administration

During the administration of President George H.W. Bush, Judge Roberts served as principal deputy solicitor general. He was the "political deputy" in the Solicitor General's office, appointed for the purpose of advancing the administration's legal agenda in the federal courts. As the political deputy, Judge Roberts had the authority to help shape the administration's official views. He co-authored briefs in a number of noteworthy cases.

Because the Solicitor General's Office is expected to take the side of its client, the United States, in cases directly implicating the federal government, this report does not address any positions Judge Roberts advanced in favor of upholding federal executive branch policies, federal criminal convictions or sentences, or acts of Congress – unless he publicly spoke out in favor of such a position, or unless the argued-for position was utterly contrary to established law. Accordingly, this report is principally limited to cases where the Solicitor General's Office, with input from Judge Roberts, affirmatively chose to participate in a case as a "friend of the court," or *amicus curiae*.

#### *1. Environmental Protection*

As acting solicitor general, Judge Roberts was the government's lead counsel before the Supreme Court in *Lujan v. National Wildlife Federation*,[34] a case brought by citizens seeking to enforce environmental protections in response to the government's decision to open 4,500 acres of public land to mining activity. The citizens asserted that they would be injured by the government's decision to open the land to mining, citing recreational activities in which they had engaged and planned to engage in the future in that area.

Despite express statutory authorization for such suits, Roberts argued that the plaintiffs, members of the National Wildlife Federation, had no right to file the claims, because they had not presented sufficient proof of the impact of the government's actions on them. He asserted that the D.C. Circuit, which *had* granted them standing to sue, had "'presum[ed]' facts that the parties did not -- and perhaps cannot -- allege on their own."[35] A closely divided, 5-4 Supreme Court agreed with Roberts, tightening standing

[33] *Hedgepeth*, 386 F.3d at 1159.
[34] 497 U.S. 871 (1990).
[35] Reply Brief for Petitioners at 1, *Lujan v. Nat'l Wildlife Fed'n*, 1989 U.S. Briefs 640 (April 6, 1990) (No. 89-640).

requirements for federal cases so as to make it harder for individuals to challenge governmental actions detrimental to the environment.

In a 1993 *Duke Law Journal* article, Judge Roberts defended the Bush Administration's restrictive view of environmental standing not only in *National Wildlife Federation,* but in a similar, though more far-reaching case, *Lujan v. Defenders of Wildlife.*[36] *Defenders of Wildlife* was the first decision ever to expressly constrain Congress' ability to authorize citizen-initiated challenges to government actions.[37] In the law journal article, Judge Roberts wrote in support of Justice Scalia's opinion in *Defenders of Wildlife*. In the case, members of an environmental organization sued under the citizen suit provision of the Endangered Species Act to compel the federal government to consider the potential harms to endangered species overseas before enacting programs that might affect those species. Justice Scalia's opinion was joined by Justices White, Rehnquist and Thomas, tempered by Justices Kennedy and Souter (who concurred with most of the opinion, but cautioned as to its limitations),[38] and rejected by Justice Stevens (who disagreed with Justice Scalia altogether, but concurred in the judgment) and Justices Blackmun and O'Connor (who dissented). Judge Roberts agreed with Justice Scalia's holding that, although the plaintiffs presented specific details about both their past and anticipated activities involving the endangered species, they had not presented sufficient evidence to show the imminent injury-in-fact necessary to obtain standing.

Judge Roberts took issue with scholarly criticism of Justice Scalia's opinion – and implicitly with the concurrences and dissents – for suggesting that Congress had some latitude to define cognizable injuries. He also chafed at the scholarly criticism for effectively calling Justice Scalia's opinion an act of judicial activism that undermined the legislature's intent. In Judge Roberts' (and Justice Scalia's) view, the Constitution does not permit Congress to transform a matter of public interest, like environmental protection, into a judicially-enforceable, individual interest by permitting all citizens to sue, regardless of whether they suffered concrete injury; rather, Congress must heed its limited constitutional role. Justice Blackmun's dissent pointed out that what Justice Scalia's (and Judge Roberts') "anachronistically formal view of the separation of powers" does is, more narrowly, authorize a "slash-and-burn expedition through the law of environmental standing" and, more broadly, remove from Congress some of its power to check the actions of the Executive, to whom it often initially delegates wide discretionary enforcement powers, as under the ESA.[39]

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[36] 504 U.S. 555 (1992).

[37] John G. Roberts, Jr., *Comment: Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

[38] 504 U.S. at 580 (Kennedy, J., concurring) ("As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." (citations omitted)).

[39] *Defenders of Wildlife*, 504 U.S. at 602, 606 (Blackmun, J., dissenting).

### 2. *School Desegregation*

Judge Roberts co-authored two briefs on the government's behalf arguing for an end to court supervision in school desegregation cases. In a 1990 case, *Oklahoma City Public Schools v. Dowell,*[40] the *amicus* brief he co-authored sought to limit a school district's exposure to court-enforced school desegregation decrees.[41] Judge Roberts argued that Oklahoma City schools, which had been declared "unitary" in 1977, could not again be subjected to a desegregation decree in 1985. He took this position in spite of the fact that the school board's decision to eliminate busing in elementary schools had resulted in returning a number of schools that had previously been desegregated to one-race status. In a 5-3 split, with Justice Souter not yet participating, the Supreme Court held that the board did not have to remain under court-ordered supervision and that it could implement proposed changes, so long as the result did not constitute a new violation of the Equal Protection Clause. In a dissent joined by Justices Blackmun and Stevens, Justice Marshall wrote:

> The majority today suggests that 13 years of desegregation was enough. . . . Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed. I therefore dissent.[42]

The next year, Judge Roberts filed another *amicus* brief in *Freeman v. Pitts*,[43] a case with similar facts. In *Freeman*, after acknowledging that the DeKalb County, Georgia school system was still segregated and had failed to fulfill several "unitariness" factors – "teacher and principal assignments, resource allocation, and quality of education" – the district court nonetheless removed the system from supervision, instructing it to remedy the remaining factors.[44] A group of parents of public school students sought to ensure the court's continued jurisdiction over the schools, which had employed *de jure* segregation through 1969, until they achieved "unitary" status. The Eleventh Circuit granted the parents' request, reversing the district court and holding that a school system that allocated fewer resources to black children and remained segregated had to prove that it had shown total fulfillment of all factors of "unitary status" for several years:

> School boards violated the Constitution by operating dual systems. To remedy this violation, they must eliminate *all* of the dual system's vestiges. . . . The factors operate, in part, as an indicator of more intangible vestiges. . . . A school achieves unitary status or it does not.

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[40] 498 U.S. 237 (1991).
[41] Brief for the United States as Amicus Curiae, *Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991) (No. 89-1080).
[42] *Dowell*, 498 U.S. at 251-52 (Marshall, J., dissenting).
[43] 503 U.S. 467 (1992).
[44] *Id.* at 484 (citing district court decision).

> We will not permit resegregation in a school system that has not eliminated all vestiges of a dual system.[45]

In his *amicus* brief siding with the school system, Judge Roberts argued that a system whose racial makeup had changed due to demographic shifts in residential patterns allegedly unrelated to prior discrimination could not be required to eliminate racial imbalances and that the court could lift a desegregation decree even if all six factors for "unitary status" had not been fulfilled.[46] The Supreme Court agreed, reversing the Eleventh Circuit's order that the district court retain oversight until the school system had achieved complete unitary for several years and allowing the school system to try to achieve unitary status on its own, without further court oversight. Judge Roberts and the government thus succeeded in loosening the requirements for what school systems that had previously engaged in *de jure* discrimination had to prove in order to undo a court-enforced desegregation decree.

Justice Souter warned in his concurrence that the remaining vestiges of discrimination – including funding disparities and trailers at only the majority-black schools – could, and often do, contribute to the "independent" migration of white families from the school district; as a result, he cautioned, the district court must continue to monitor the situation to prevent resegregation. Three other Justices – Blackmun, Stevens, and O'Connor – agreed that the Eleventh Circuit's decision required remand but disagreed sharply with the majority's contention that the school system had substantially complied with the decree. They noted the school system's ability to influence the residential choices made by white families and the effect that such choices would have on disparities and segregation in the system, and they urged the lower court, on remand, to investigate that issue in making its final decision.

### *3. Reproductive Choice*

In two cases, Judge Roberts advocated positions adverse to women's reproductive rights. In *Bray v. Alexandria Women's Health Clinic,*[47] he co-authored the government's *amicus* brief in a private suit brought against Operation Rescue by a clinic it had targeted.[48] The brief argued that, although Operation Rescue admittedly sought to prevent women from obtaining abortions by obstructing access to clinics, it was not engaged in a conspiracy targeting women because of their gender and thus was not subject to suit under the federal civil rights conspiracy statute. The government acknowledged that only women could become pregnant, but asserted that, at worst, Operation Rescue was discriminating against pregnant people, not women.

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[45] *Pitts v. Freeman*, 887 F.2d 1438, 1446-47 (11th Cir. 1989).
[46] Brief for the United States as Amicus Curiae, *Freeman v. Pitts*, 503 U.S. 467 (1992) (No. 89-1290).
[47] 506 U.S. 263 (1993).
[48] Brief for the United States as Amicus Curiae, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985).

The Supreme Court accepted Roberts' argument in a closely divided, 5-1-3 decision, with Justices O'Connor, Stevens, and Blackmun dissenting. Justice Souter concurred in part with the Court's holding but rejected Roberts' arguments:

> It is also obvious that petitioners' conduct was motivated "at least in part" by the invidious belief that individual women are not capable of deciding whether to terminate a pregnancy, or that they should not be allowed to act on such a decision. Petitioners' blanket refusal to allow any women access to an abortion clinic overrides the individual class member's choice, no matter whether she is the victim of rape or incest, whether the abortion may be necessary to save her life, or even whether she is merely seeking advice or information about her options. Petitioners' conduct is designed to deny *every* woman the opportunity to exercise a constitutional right that *only* women possess. Petitioners' conspiracy, which combines massive defiance of the law with violent obstruction of the constitutional rights of their fellow citizens, represents a paradigm of the kind of conduct that the statute was intended to cover.[49]

Judge Roberts also co-authored the government's brief in *Rust v. Sullivan*,[50] the case in which the Supreme Court upheld newly revised regulations that prohibited U.S. family planning programs receiving federal aid from giving any abortion-related counseling or other services. The provision barred such clinics not only from providing abortions, but also from "counseling clients about abortion" or even "referring them to facilities that provide abortions."[51] Roberts' brief argued that the regulation gagging the government-financed programs was necessary to fulfill Congress' intent not to fund abortions through these programs, even though several members of Congress, including sponsors of the amendment dealing with abortion, disavowed that position and even though the Department of Health and Human Services had not previously interpreted the provision in such a restrictive manner.[52] Despite the fact that the case did not directly implicate the holding of *Roe v. Wade*,[53] Roberts' brief argued that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled. . . . [T]he Court's conclusion[] in *Roe* that there is a fundamental right to an abortion . . . find no support in the text, structure, or history of the Constitution."[54]

#### *4. State Sponsorship of Religion*

[49] *Bray*, 506 U.S. at 324 (Souter, J., concurring) (footnotes omitted).
[50] 500 U.S. 173 (1991).
[51] 42 U.S.C. 300, tit. X, § 1008.
[52] A 1978 memorandum from the Department of Health and Human Services stated that, "This office has traditionally taken the view that... the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by [the regulation at issue]." Memorandum from Carol C. Conrad, Office of General Counsel, Dep't of Health, Education & Welfare, to Elsie Sullivan, Ass't for Information and Education, Office of Family Planning, BCHS (April 14, 1978).
[53] 410 U.S. 113 (1973).
[54] Brief for the Respondent at 9, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 1392).

Judge Roberts co-authored two briefs arguing for an expanded role for religion in public schools. In one case, he co-authored a government *amicus* brief before the Supreme Court in which he argued that public high schools should be allowed to conduct religious ceremonies as part of a graduation program.[55] The Supreme Court rejected that view.[56] In the other, the government argued that barring a religious group from meeting on school grounds violates the Equal Access Act, while granting access does not violate the Establishment Clause.[57] The Supreme Court agreed.[58]

### 5. *Prisoners' Rights*

While in the solicitor general's office, Judge Roberts co-authored an *amicus* brief arguing that the Supreme Court should limit the rights of prisoners.[59] He argued that the Ninth Circuit had erred in denying summary judgment for the state on a prisoner's claim that prison guards in several institutions violated his Eighth Amendment rights by facilitating sexual assaults by other inmates. The brief asserted that the Ninth Circuit test – which allowed a court to dismiss an *in forma pauperis* complaint only if it could take judicial notice that the alleged facts did not occur – was improper. Criticizing what it felt was that court's excessive leniency toward *in forma pauperis* prisoner litigants, the brief quoted an earlier dissent by Justice Rehnquist, asserting that "[t]he potential for abuse of [the *in forma pauperis* statute] is especially acute in the context of suits by prison inmates. Such individuals not only have no financial disincentive to mount such claims, but may look upon bringing suit as a means to 'obtain a short sabbatical in the nearest federal courthouse.'"[60] Judge Roberts' brief argued that "frivolous" claims could be dismissed if the judge believed that an attorney would have refused to file the complaint for fear of being sanctioned and stated that this claim was clearly frivolous. The Supreme Court agreed that the standard set by the Ninth Circuit was too high and remanded the case for further review, but with instructions that the lower court weigh all facts in the plaintiff's favor.

## B. <u>The Reagan Administration</u>

As special assistant to Attorney General William French Smith in the Justice Department, Judge Roberts participated in the Reagan Administration's efforts to defeat widely-supported Congressional efforts to extend voting rights protections. Some records regarding Judge Roberts' participation in these efforts have become publicly available, but many are heavily redacted and others have not been disclosed. What the unredacted portions appear to reveal is that Judge Roberts was involved in the effort to prevent Congress from overturning the result in the 1980 decision, *Mobile v. Bolden*,[61] which weakened certain sections of the Voting Rights Act. In *Bolden,* the Supreme Court

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[55] Brief for the United States as Amicus Curiae, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014).
[56] *Lee v. Weisman*, 505 U.S. 577 (1992).
[57] Brief for the United States, *Bd. of Educ. of Westside Cmty. Sch v. Mergens.*, 496 U.S. 226 (1990) (No. 88-1597).
[58] *Bd. of Educ. Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990).
[59] Brief for the United States as Amicus Curiae, *Denton v. Hernandez*, 504 U.S. 25 (1992) (No. 90-1846).
[60] *Id.* at 7 (citing *Cruz v. Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting)).
[61] *Mobile* v. *Bolden*, 446 U.S. 55 (1980).

decided that individuals claiming certain violations of the act, such as minority vote dilution, had to prove not just that a defendant's actions had a discriminatory effect, but also that the defendant acted with discriminatory intent. Both the House and the Senate strongly supported amending the law to overturn the holding in *Bolden* and reinstate the "effects" standard. The bill originally passed the House by a vote of 389-24; an amended version passed the Senate 85-8; the same amended version passed the House unanimously.[62] A *Christian Science Monitor* article noted:

> At final passage, the only surprise was the size of the majority. Even Sen. Strom Thurmond (R) of South Carolina, once the Senate's most vocal foe of civil-rights legislation, voted yes. So did fellow Republican Orrin G. Hatch, a conservative who had voiced grave concerns about the bill.[63]

The administration, however, had opposed the effort,[64] favoring instead what the *Washington Post* called a "virtually impossible" standard for many civil rights plaintiffs to meet.[65]

While in the Reagan Justice Department, Judge Roberts also advised the Attorney General about the Justice Department's disagreement with a U.S. Commission on Civil Rights report, which asserted that mandatory busing and "the fullest use of . . . affirmative action" were necessary.[66] Judge Roberts explained DOJ's position that "the objective of a proper desegregation remedy" was simply "the end to official discrimination on the basis of race."[67] Adherence to such a position would have effectively eliminated much of the government's legal responsibility to eradicate the effects of prior discrimination.

Additional information is needed to determine the extent of Judge Roberts' involvement in these matters. The Senate should obtain and scrutinize complete, unredacted copies of all records involving Judge Roberts' participation in the development of the Reagan Administration's legal policies.

## IV. PUBLISHED ARTICLES AND PUBLIC STATEMENTS

### A. Law Review Articles

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[62] *Voting Rights: Be Strong*, WASHINGTON POST, Jan. 26, 1982; Julia Malone, *Voting Rights Act; Even Conservative Senate Heeds Civil-Rights Groups*, CHRISTIAN SCIENCE MONITOR, June 21, 1982; Caroline Rand Herron, *Senate Uncorks Voting Rights*, N.Y. TIMES, June 20, 1982.
[63] Malone, *supra* n. 61.
[64] Critical portions of the FOIA documents that might reflect Roberts' personal positions on this issue were redacted, making it impossible to document the actual level and substance of his influence and involvement.
[65] *Voting Rights: Be Strong*, WASHINGTON POST, Jan. 26, 1982.
[66] Memorandum, John Roberts to Attorney General re Summary of [U.S. Commission on Civil Rights Chairman] Flemming Correspondence, October 5, 1981 (quoting U.S. Commission on Civil Rights report).
[67] *Id.*

As a law student, Judge Roberts authored two law review articles arguing for the courts to expansively interpret clauses of the Constitution dealing with economic regulations. In one, he argued in favor of requiring courts to examine the wisdom of economic regulations under the Takings Clause.[68] In another, he discussed a then-recent case decided under the Contracts Clause. In both articles, he argued against a "strict construction" of the Constitution's text.[69]

The view Judge Roberts advanced in his article on takings would lead courts to look over the shoulder of state and federal governments to ensure the utility of economic regulations – i.e., to ensure that the public benefits of any regulation outweigh the costs to a regulated landowner. Judge Roberts embraced as a "[f]irst [a]pproximation" for determining whether a regulation constitutes a taking a test put forward by Professor Frank Michelman. The test obligates courts to find that a compensable taking occurs whenever the costs of enduring the regulation – including the economic and psychological to both directly affected property owners and any unaffected property owners who might feel less secure as a result – exceed the costs of awarding compensation.[70] Judge Roberts went on to argue that the Michelman test ought to be refined so as to further restrain government action. He specifically asserted that, in addition to weighing the landowners' costs against the compensation costs, a court also must examine, as matter of "fairness," whether a regulation's "net utility is either minimal or nonexistent. Just as such measures generate greater demoralization costs for purposes of the utility analysis, so too they compound the regulated party's sense of unfair sacrifice."[71]

The Supreme Court has rejected such a searching inquiry into the wisdom of economic regulations. Just last month, in *Lingle v. Chevron, USA,* the Court unanimously held that "[t]he notion that . . . a regulation . . . 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."[72] Writing for the Court, Justice O'Connor further asserted that "'government regulation—by definition—involves the adjustment of rights for the public good'. . . 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'"[73] The Court concluded that examination of whether a regulation "'does not substantially advance [a] legitimate state interest' . . . is not a valid takings test, and . . . has no proper place in our takings jurisprudence."[74] The Supreme Court's decision reaffirmed the vitality of an earlier,

[68] The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V
[69] Judge Roberts has written other articles, which are not summarized here.
[70] Developments in the Law – Zoning, "The Takings Clause," 91 *Harvard Law Review* 1462, 1483 (1978).
[71] *Id.* at 1494.
[72] 161 L. Ed. 2d 876, 891 (2005)
[73] *Id.* at 887 (citations omitted).
[74] *Id.* at 894 (quoting *Agins v. City of Tiburon*, 477 U.S. 255, 260 (1980) (first alteration in the original).

seminal decision, *Penn Central Transportation Corp. v. New York City,* which came down the year Judge Roberts published his article.[75]

Judge Roberts wrote his article without the benefit of *Lingle, Penn Central* or any other important, more recent takings decisions. The Judiciary Committee must therefore ask him how to square his previously-expressed views of takings with those of the Court and whether he continues to envision a greater role for the courts in reviewing takings claims.

In the second article, Judge Roberts addressed the Contracts Clause, which provides that, "No state shall ... pass any ... law impairing the obligation of contracts."[76] The Supreme Court used the Contracts Clause in the early twentieth century to strike down social and economic legislation protecting workers and others against the excesses of big business, among other things. Judge Roberts' article argued that in the late-1970s, the Supreme Court was once again considering the validity of "social and economic legislation" under the Contracts Clause.[77] He pointed out that in cases in 1977 and 1978, *Allied Steel Co. v. Spannaus* and *United States Trust Co. v. New Jersey*, the Supreme Court struck down laws under the Contracts Clause for the first time in almost 50 years.[78] He argued that "[t]he contract clause provides an ideal vehicle to begin carrying disaffection with excessively differential review into the area of social and economic regulation."[79] He went on to say that "[e]xcessive deference and speculation as to state purposes have led to some dubious results in the post-*Lochner* era, results which could be avoided by more careful judicial inquiry, but without returning to the excesses of the *Lochner* era."[80] Judge Roberts forecast that the Supreme Court would interpret the Contracts Clause to do just this: "*Allied Steel* represents an effort to delineate these limits [on states' power to regulate the economy], obscure since the demise of *Lochner*, in a manner sensitive to modern needs and conditions."[81] Since 1978, however, the Court has rarely, if ever, struck down a regulation on private contracts.

In the article, Judge Roberts criticized Justice Brennan's dissent in *Allied Steel.* Justice Brennan asserted that the Contracts Clause should be narrowly interpreted according to its plain language, the Framers' intent and precedent so as simply to protect individuals from state government laws that nullify parties' contractual obligations. Judge Roberts disagreed: "[T]here appears to be no substantive reason for applying the distinction Justice Brennan draws between relieving obligations and imposing additional

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[75] The article is dated one month before *Penn Central,* 438 U.S. 104 (1978), but the article cites the case in passing, so it must have come out soon after *Penn Central* came down.
[76] U.S. CONST. Art. 1 § 10.
[77] Comment, "Contract Clause – Legislative Alteration of Private Pension Agreements," 92 *Harvard Law Review* 86, 97 (1978).
[78] *Allied Steel Co. v. Spannaus*, 438 U.S. 234, (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).
[79] Comment, "Contract Clause – Legislative Alteration of Private Pension Agreements," *supra* note 76, at 97.
[80] *Id.* at 98.
[81] *Id.* at 99.

duties [on a contracting party]."[82] Judge Roberts argued in support of "[t]he view that all contractually based expectations merit some protection from state interference."[83] Rejecting a plain language interpretation of the Contracts Clause, Judge Roberts asserted that "Constitutional protections ... should not depend merely on a strict construction that may allow 'technicalities of form to dictate consequences of substance.'"[84]

### B. Public Statements

Recent statements by Judge Roberts prior to his nomination to the D.C. Circuit shed some light on his ideological leanings. When asked in 2000 for his opinion of the Rehnquist Supreme Court, which has been characterized by many legal scholars as the most conservative-activist Court in decades,[85] Judge Roberts stated, "I don't know how you can call [the Rehnquist] court conservative . . . ."[86] And when asked specifically about the 1999-2000 Supreme Court term, a term in which the Court rendered a number of controversial decisions, including landmark decisions striking down provisions of the Age Discrimination in Employment Act and the Violence Against Women Act as exceeding Congress' constitutional powers,[87] Roberts said that "[t]aking this term as a whole, the most important thing it did was make a compelling case that we do not have a very conservative Supreme Court . . . ."[88]

## V. CONCLUSION

Judge Roberts' record is limited. As a result, the Senate must take special care in carrying out its advise-and-consent duties. It must carefully and thoroughly question Judge Roberts, and obtain whatever documents it can, to learn more about his record and his judicial philosophy.

The record that does exist raises serious concerns. Judge Roberts has voted to curb Congress' power to pass national environmental laws more aggressively than either the current Supreme Court or any appeals court in the nation. Consistent with the positions taken by the conservative legal organizations he has supported, the view of federal authority he expressed in *Rancho Viejo* might lead him to curtail or undo federal workplace, social welfare, public safety and civil rights protections as well. Serving in political positions in the Reagan and Bush administrations, Judge Roberts also participated in efforts to weaken voting rights, equal education rights, reproductive rights,

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[82] *Id.* at 92.
[83] *Id.* at 93.
[84] *Id* at 91 & n.37 (1978) (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 181 (1958) (Harlan J., dissenting)).
[85] The *New York Times* called the Court "William Rehnquist's archconservative Supreme Court," Cohen, Adam, "Hell Hath No Fury Like a Conservative Who Is Victorious," November 24, 2002. The *National Journal* noted that, no matter whom Bush appointed to fill Rehnquist's seat, should he retire, he would be unlikely to be able to shift the court further to the right than it already is. "Bush and the Supreme Court: Place Your Bets," Taylor, Stuart, November 16, 2002.
[86] Lyle Denniston, *High court's recent rulings, future are campaign issues*, BALTIMORE SUN, July 2, 2000.
[87] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000);*United States v. Morrison*, 529 U.S. 598 (2000).
[88] David Jackson, *Power of Precedent Seen in High Court Decisions, Conservative Views Lost in Abortion, Prayer and Miranda Rulings*, DALLAS MORNING NEWS, July 2, 2000.

environmental protections and proscriptions on state-sponsored religion. Americans will be counting on the confirmation process to learn more about what this record might mean if Judge Roberts were to become a Supreme Court Justice.

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National Women's Law Center
National Youth Advocacy Coalition
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Planned Parenthood Federation of America
Public Advocates
States United to Prevent Gun Violence
The Sierra Club Foundation
Tides Center
University of Pennsylvania Law School Public Service Program
Violence Policy Center
Welfare Law Center
The Wilderness Society
Women's Law Project
Youth Law Center

September 16, 2005

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

I write on behalf of Alliance for Justice to oppose the nomination of D.C. Circuit Judge John Roberts to be Chief Justice of the United States. As detailed in the attached executive summary to our full report on the Roberts nomination, Judge Roberts has demonstrated a restrictive view of Congress's authority to correct nationwide problems, a narrow view of the federal courts' power to protect individual rights, an expansive view of executive power, and a view critical of the separation of church and state. For further information, please see Alliance for Justice's full report on Judge Roberts, which is available at http://www.supremecourtwatch.org/robertsprehearing.pdf.

Alliance for Justice is a national association of more than 70 environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. Alliance for Justice's Judicial Selection Project, founded in 1985, has taken a leading role in efforts to ensure a fair and independent federal judiciary. The Project monitors judicial nominations at all levels of the federal bench. The Project promotes support for the nomination and confirmation of highly capable and fair judges who have demonstrated a commitment to equal justice.

Sincerely,

Nan Aron
President

Attachment

## EXECUTIVE SUMMARY

President Bush has nominated D.C. Circuit Judge John G. Roberts to the most prominent judgeship in the nation – Chief Justice of the United States Supreme Court. Judge Roberts has extensive credentials. He clerked on the Court, served in high legal posts in two Republican administrations and is highly regarded as an appellate lawyer. Based on these professional qualifications, the American Bar Association has rated him "well-qualified."[4] As accomplished as Judge Roberts is, however, his professional qualifications say nothing about his views on the law. In a recent letter to Senator Leahy clarifying the ABA's review process, ABA President Michael S. Greco agreed: "The [ABA's] Standing Committee does not consider a nominee's ideology or philosophy or political positions, leaving to the U.S. Senate, the Administration and the public to evaluate those and other factors."[5]

As recognized by senators, legal scholars and the public alike, judicial philosophy matters when it comes to a lifetime appointment to the Supreme Court. Indeed, just this month Senate Judiciary Committee Chairman Arlen Specter reiterated the importance of judicial philosophy when he sent two letters directly asking Judge Roberts about his views on the Supreme Court's recent efforts to curtail Congress' ability to address national problems.[6] Judicial philosophy matters now perhaps more than at any other time in years. In the next term, the Supreme Court is scheduled to decide issues related to disability rights, assisted suicide, religious freedom, the military's policy against gays and reproductive rights. As important as these specific issues are, far more important will be the broader, potentially ground-breaking precedential rules and standards the Court establishes for interpreting the Constitution – precedent that stands to influence constitutional law on myriad issues for years to come. Several months ago, in a noteworthy letter, renowned constitutional law scholar Laurence Tribe explained that he would be holding off on producing another volume of his famed constitutional law treatise precisely because constitutional doctrine is in such a state of flux:

> [I]n area after area, we find ourselves at a fork in the road – a point at which it's fair to say things could go in any of several directions – and because conflict over basic constitutional premises is today at a fever pitch. Ascertaining the text's meaning; the proper role and likely impact of treaty, international and foreign law; the relationships among constitutional law, constitutional culture, and constitutional politics; what to make of things about which the Constitution is silent – all these, and more, are passionately contested, with little common ground from which to build agreement.[7]

If confirmed as Chief Justice, Judge Roberts would have the opportunity to shape or reshape the "basic constitutional premises" that Professor Tribe mentions – premises that help define daily life in the United States.

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[4] Stephanie Frances Ward, *ABA Gives Top Rating to Roberts*, ABA JOURNAL ONLINE, Aug. 19, 2005
[5] Letter from Michael S. Greco, to Sen. Patrick Leahy (Aug. 23, 2005) (on file with Alliance for Justice).
[6] *See* Letter from Senator Arlen Specter, to Judge John Roberts (Aug. 23, 2005); Letter from Senator Arlen Specter, to Judge John Roberts (Aug. 8, 2005).
[7] Letter from Laurence H. Tribe to Justice Stephen G. Breyer, April 29, 2005, available at 8 Green Bag 2d 291.

Having served only two years on the D.C. Circuit, Judge Roberts does not have an extensive record as a judge. It is therefore necessary to look to his service as a politically-appointed legal advisor and policy-maker in the administrations of Ronald Reagan and George H. W. Bush to gain additional insight into his legal views. Judge Roberts' 1989-1993 service as principal deputy Solicitor General – one of the most influential legal posts in the country – warrants particularly close examination. The White House, however, has refused a limited request by the Democrats on the Senate Judiciary Committee to disclose key documents from that period. The White House's refusal is depriving the Senate of the more complete picture it is entitled to have if it is to meaningfully carry out its constitutionally-prescribed, co-equal role in determining whether Judge Roberts warrants a lifetime seat on the Supreme Court.

The picture that has emerged is consistent, with little clouding it. Prominent, common threads connect and run through the legal advice Judge Roberts gave to the Reagan administration on diverse topics, the positions he advocated as a top legal official in the George H.W. Bush administration, what can be gleaned from his tenure on the D.C. Circuit, and personal views he has publicly expressed. Picking up those common threads, one can discern that Judge Roberts holds a troublingly limited view of the federal government's authority to enact key worker, civil rights and environmental safeguards and a similarly troubling, narrow view of the vital role our courts and our government play in safeguarding individual rights, especially civil and women's rights. By contrast, he holds an expansive view of presidential power and law enforcement authority. If transformed into decisional law, these views, taken together, could produce a government with less power to protect ordinary people and give ordinary people less power to protect themselves from abuse by government and other powerful interests. In other words, they could produce a national order that weakens the promises of the Constitution.

*A Restrictive View of Congress' Authority to Correct Nationwide Problems*

In his tenure on the D.C. Circuit, and in several media appearances in the late 1990s, Judge Roberts has shown an affinity for curbing federal authority to address issues of national importance. In a television appearance, for instance, Judge Roberts called a series of 5-4 Supreme Court decisions immunizing state governments from Congressionally-authorized lawsuits – including one holding that state employers are not bound by federal law requiring additional pay for overtime work – "a healthy reminder" of the space he believes the Constitution's "structure" reserves for state sovereignty. In the same vein, in his very first opinion on the bench, Judge Roberts dissented to express an exceedingly restrictive view of Congress' authority to enact important regulatory legislation. He suggested that Congress did not have the power under the Constitution's Commerce Clause to protect what he called a "hapless toad" through endangered species laws. No court has ever declared an application of the Endangered Species Act unconstitutional. Judge Roberts' apparent view of Congress' authority potentially threatens a wide swath of legislation rooted in the Commerce Clause, including civil rights safeguards, minimum wage and maximum hour laws, clean air, clean water, and workplace safety protections. In a recent opinion, a majority of the Supreme Court, including Justice Scalia, implicitly rejected Judge Roberts' view.

*A Narrow View of the Courts' Power to Protect Individual Rights*

During his years of service in the Reagan and George H. W. Bush administrations, under the banner of so-called "judicial restraint," Judge Roberts pushed legal policies that sought to weaken the vital, historic role of the federal courts as a guarantor of individual rights, including, prominently, the rights of racial minorities and women. According to conservative jurist and legal scholar Richard Posner, Judge Roberts' philosophy of "judicial restraint" actually betrays "retrenchment" rather than "restraint."[8] Or as the *Houston Chronicle* reported after reviewing Judge Roberts' Reagan-era work: "Roberts touches on many controversies, always framing conservative outcomes in the context of limiting judicial authority."[9] The *Washington Post* similarly observed:

> Roberts wrote in 1983 that in reality "the federal judiciary has been viewed by the American people with active distrust from the very beginning." Other writings by Roberts from this period suggest he might just as well have added: "particularly by me." ... Roberts was part of a cadre of young conservatives attracted to work in Washington with the ambition of righting what they considered to be a series of judicial errors under liberal governance that had helped set the country on a political course they didn't like.[10]

To advance this far-reaching "retrenchment" effort, Judge Roberts favored, as a matter of broad legal policy, narrowing the reach of federal statutes, limiting the ability of private citizens to sue under them, reducing the courts' authority to effectively remedy violations of the law, rolling back the recognition of constitutional protections, scaling back executive agency litigation aimed at enforcing the law and rejecting legislative efforts to bolster the courts' enforcement powers. According to a *Boston Globe* report, he tried to make these rights-restricting efforts more publicly palatable by "advis[ing] his conservative colleagues to cloak their views behind broadly acceptable terms such as 'judicial restraint."[11] For Judge Roberts, such "judicial restraint" translated into the following specific positions:

*On the rights of racial minorities*. Judge Roberts:

**(a)** argued for weakening proposed Voting Rights Act protections – a position from which the Reagan administration ultimately retreated because of overwhelming, bipartisan support for the legislation in both houses of Congress;

**(b)** defended legislation that would have stripped the federal courts of their authority to remedy school desegregation and legislation that would have stripped the Supreme Court of its authority to hear busing cases – a position opposed by his Justice Department superiors, including well-known conservative Ted Olson, and ultimately rejected by the Reagan White House.

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[8] LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 77 (1987).
[9] *Judicial Restraint A Theme in Roberts' Early Memos; Legal Experts Say His Model Would Yield Conservative Policy Results*, HOUSTON CHRONICLE, July 28, 2005, at A3.
[10] R. Jeffrey Smith and Jo Becker, *Sifting Old, New Writings for Roberts's Philosophy*, WASH. POST, Aug. 21, 2005, at A01.
[11] Charlie Savage, *Roberts Showed Way to Shift the Debate*, BOSTON GLOBE, July 27, 2005., at A1

(c) criticized the conservative head of the Civil Rights Division, William Bradford Reynolds, for approving proposed settlements requiring school systems with discriminatory hiring policies to grant standard remedies – offers of employment and backpay – to qualified applicants who were discriminatorily rejected and to individuals who would have applied but for the school systems' discrimination. He called such standard relief "staggering."

(d) as Acting Solicitor General, with final decision-making authority over the government's position, sought to invalidate the Federal Communication Commission's affirmative action program in broadcast licensing, an extremely rare move given that the Solicitor General's office, pursuant to its statutory mandate, almost always *defends* federal government policy;

(e) condemned a key Supreme Court decision striking down a Texas law allowing schools to deny admission to the children of undocumented aliens;

(f) viewed legislation to fortify the Fair Housing Act as "government intrusion" and advised the White House Counsel that the Reagan administration did not need to accept Congressional efforts to strengthen the law in order to "preclude political damage."

(g) as principal deputy Solicitor General, supervised and approved a brief backing away from the Justice Department's initially strong litigation position and arguing instead that after years of *de jure* segregation that produced a still almost entirely segregated university system – with large disparities in funding and academic programs between overwhelmingly white colleges and overwhelmingly African American colleges – the state of Mississippi would satisfy its constitutional duty to provide equal education simply by giving students "freedom of choice" to attend white or African American schools. The White House forced the Solicitor General to withdraw the argument in a reply brief, and the Supreme Court rejected the argument by an 8-1 vote. Judge Roberts also co-authored two friend-of-the-court briefs in school desegregation cases, arguing in one that African American parents could not keep a school district under a consent decree even though it faced imminent re-segregation and, in the other, that a school district no longer had to abide by desegregation orders even though it had not eliminated all the vestiges of past discrimination; and

(h) rejected a long-standing executive order requiring federal contractors to set flexible, reasonable goals and timetables, not "quotas," for hiring more minorities to correct unlawful workplace disparities, criticized arguments in favor of achieving racial diversity as "perfectly circular," and asserted that an affirmative action program failed because it "required the recruiting of inadequately prepared candidates."

*On the rights of women*. Judge Roberts:

(a) gave legal approval to a proposal seeking to overturn long-standing regulations that brought educational institutions with students receiving federal financial aid under federal anti-discrimination laws, including the law barring discrimination against women in education (Title IX). The Reagan Administration ultimately rejected the proposal, and the Supreme Court later agreed that there was "no hint" Title IX was limited in this way. He also argued that Title IX should cover only the specific educational programs that receive federal funds, asserting that institution-wide Title IX coverage allowed the government to "rummage wily-nily through institutions." When Congress later proposed specifically amending Title IX to provide institution-wide coverage, Judge Roberts called it an effort to "radically expand the civil rights laws." By an overwhelming margin, a subsequent Congress enacted similar legislation, the Civil Rights Restoration Act, over President Reagan's veto.

(b) disagreeing with William Bradford Reynolds, argued that the Justice Department should not get involved in a lawsuit where female prisoners were denied equal job training. His rationale for staying out of the case: he opposed the argument that the Constitution gives heightened protection to women facing government-sponsored discrimination, and he thought that the costs of requiring equal job training were too great. The Supreme Court had rejected both rationales prior to the time Judge Roberts rendered his opinion.

(c) derided state and national efforts to fix what he referred to as the "purported gender gap" in job pay, and the "canard" that there was any such gap, dismissing it as attributable to factors like seniority and women leaving the workforce for family reasons; opposed the Equal Rights Amendment because he did not want to "vest the federal judiciary with broader powers in this area;" and effectively accused then-Representative Olympia Snowe and other Republican Congresswomen of embracing Marxism because of their support for certain gender equality proposals;

(d) as principal deputy Solicitor General, co-wrote a friend-of-the-court brief arguing that employment policies prohibiting women from working in certain jobs because they could become pregnant could be valid under anti-discrimination laws if the policies were based on a "*bona fide* occupational qualification." The Supreme Court rejected the argument, with Justice O'Connor casting the deciding vote.

(e) as principal deputy Solicitor General, co-authored a friend-of-the-court brief arguing that Title IX did not permit a girl who was repeatedly sexually harassed by her teacher to sue for compensatory damages – an argument unanimously rejected by the Supreme Court as leaving the girl "remediless";

(f) as principal deputy Solicitor General, argued in a friend-of-the-court brief and on public television that a civil rights law did not protect women from harassment by violent anti-abortion demonstrators at abortion clinics; and

(g) as principal deputy Solicitor General, co-authored a brief asserting that *Roe v. Wade* "was wrongly decided and should be overruled." The case did not directly involve the continuing vitality of *Roe*.

*On other federal rights and protections*. Judge Roberts:

(a) dismissed what he called the "so-called right of privacy," upon which many important protections are based. He wrote "All of us...may heartily endorse a 'right of privacy.' That does not, however, mean that courts should discern such an abstraction in the Constitution...The broad range of rights which are now alleged to be 'fundamental' by litigants, with only the most tenuous connection to the Constitution, bears ample witness to the dangers of this doctrine."

(b) referred to litigation under 42 U.S.C. § 1983 – a key law enabling individuals to obtain relief from state and local government violations of their federal rights – as the "most serious federal court problem" and criticized "the damage" wrought by a Supreme Court decision holding that federal statutory rights were enforceable under Section 1983;

(c) as principal deputy Solicitor General, submitted friend-of-the-court briefs asserting that federal courts had no authority to use Section 1983 to enforce either the federal Medicaid law or the federal law requiring state child welfare agencies receiving federal funds to make reasonable efforts to keep or reunite foster children with their natural families; and

(d) defended the George H. W. Bush administration's position that private citizens have limited rights to enforce environmental protections, even if Congress tries to provide them broader rights.

*An Expansive View of Executive Power*

On the bench and in the Reagan and George H.W. Bush Administrations, Judge Roberts has accorded great deference to the authority of both the president and law enforcement. As to presidential power, he joined a D.C. Circuit decision adopting the Bush administration's position that detainees designated as "enemy combatants" may be tried for war crimes before military commissions lacking basic procedural safeguards, ruling that the Geneva Convention, which provides trial protections to prisoners of war, is unenforceable in U.S. courts and otherwise does not apply to the detainees. In addition, disagreeing with the other judges on a three-judge panel, Judge Roberts adopted the Bush administration's position that a presidential order validly eliminated lawsuits against Iraqi officials brought by American POWs for torture they suffered during the first Gulf War. While in the Reagan administration, Judge Roberts vigorously defended the unfettered exercise of presidential power. Among other things, he suggested considering the rather extreme position of abolishing independent regulatory agencies – like the Federal Reserve Board, the National Labor Relations Board, the Consumer Products Safety

Commission and the Occupational Safety and Health Commission – on the theory that they usurp powers reserved for the president.

Judge Roberts has also taken an extraordinarily deferential view of law enforcement authority. On the bench, he has rejected several significant claims of improper search and seizure, dissenting in one case where the majority reversed the conviction, breaking from precedent in another to justify the search, and denying relief in a third to a 12-year old girl who was arrested and detained for eating a French fry on the subway, even though an adult caught doing the same thing would have been given a citation. This limited judicial record is a natural extension of what Judge Roberts advocated in the Reagan and George H.W. Bush administrations. As principal deputy Solicitor General, according to the *Wall Street Journal*, "his office chose to get involved in dozens of state cases to limit the rights of criminal defendants."[12] For instance, the office sought to erect new procedural hurdles to federal *habeas corpus* review of state convictions and to bar certain kinds of *habeas* claims from being heard, including alleged *Miranda* violations and claims of actual innocence. As an advisor in the Reagan administration, Judge Roberts advocated overriding the strong ethical and legal prohibitions on law enforcement officials directly communicating with witnesses and suspects known to be represented by counsel, limiting *habeas* relief and curtailing the rule that requires exclusion of evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.

*A Critical View of Church-State Separation*

Judge Roberts has advocated expanding the role of religion in the public sphere. In the Reagan administration, he approved a speech by Education Secretary Bill Bennett criticizing Supreme Court decisions barring religion in schools as antithetical to "the preservation of a free society"; defended the constitutionality of legislation stripping the Supreme Court of jurisdiction to hear school prayer cases (a position the Reagan administration rejected); and called a Supreme Court decision invalidating a religiously-inspired moment of silence "indefensible," applauding then-Associate Justice Rehnquist's dissent for seeking to overturn a landmark precedent – "the *Lemon* test" – ensuring government neutrality toward religion. As principal deputy Solicitor General, Judge Roberts joined efforts to do what he had tacitly praised Justice Rehnquist for attempting, co-authoring briefs asking the Court to scrap the *Lemon* test and uphold a school district's practice of paying clergy to deliver religious prayers at graduation ceremonies. The Supreme Court struck down the practice as impermissibly advancing religion.

* * *

Senator Patrick Leahy, Ranking Member of the Senate Judiciary Committee, recently said that the historical evidence thus far shows Judge Roberts to have been "an eager and aggressive advocate of policies that are deeply tinged with the ideology of the far right wing of his party then, and now."[13] According to Senator Edward Kennedy, "[i]f Roberts continues to hold the views he appears to have expressed in the early 1980s, then his views on civil rights are

[12] Jess Bravin, *Judge Roberts's Rules of Law and Order*, WALL STREET J., Aug. 8, 2005 at A4.
[13] Statement of Sen. Patrick Leahy. Aug. 16, 2005.

out of the mainstream."[14] After reviewing recently released records from his tenure in the Reagan Administration, the *New York Times* reported:

> On almost every issue he dealt with where there were basically two sides, one more conservative than the other, the documents ... show that Judge Roberts ... advocated the more conservative course. Sometimes, he took positions even more conservative than his prominent superiors [including Ted Olson and William Bradford Reynolds]. He favored less government enforcement of civil rights laws rather than more. He criticized court decisions that required a thick wall between church and state. He took the side of prosecutors over criminal defendants. He maintained that the role of the courts should be limited and the president's powers enhanced.[15]

Ed Whelan, head of the conservative Ethics and Public Policy Center, agreed: "[T]hose who try to paint Judge Roberts as a squishy moderate will not find any supporting evidence in [the Reagan era] documents."[16] According to the *Washington Post*, conservative constitutional law expert Bruce Fein, with whom Judge Roberts served in the Reagan administration, similarly noted: "'[We were] a band of ideological brothers,' determined to make a lasting stamp on the nation."[17]

The *New York Times* concluded that "[t]he ideology [Judge Roberts] expressed as a young man helps explains why conservative activists seem pleased with him..."[18] And indeed they do. Former Attorney General Edwin Meese, former White House Counsel C. Boyden Gray, Pat Robertson, Gary Bauer, James Dobson of Focus on the Family, Tony Perkins of the Family Research Council, Jan LaRue of Concerned Women of America, Manny Miranda of the Third Branch Conference and Operation Rescue quickly and eagerly embraced Judge Roberts' nomination. Federalist Society leader Leonard Leo and American Center for Law and Justice head Jay Sekulow reportedly spent more than a year before the nomination assuring social conservatives that Judge Roberts could be trusted.[19] These supporters have confidently likened Judge Roberts to their judicial heroes, Justices Thomas and Scalia.[20]

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[14] Senator Edward Kennedy, *Why Roberts' Views Matter*, WASHINGTON POST, Aug. 19, 2005, at A21.
[15] David Rosenbaum, *An Advocate for the Right*, NEW YORK TIMES, July 28, 2005, at A16.
[16] Amy Goldstein and Jo Becker, *Memo Cited 'Abortion Tragedy;' Roberts Backed Service for Fetuses*, WASHINGTON POST, Aug. 16, 2005, at A1.
[17] R. Jeffrey Smith, Amy Goldstein and Jo Becker, *A Charter Member of the Reagan Vanguard*, WASHINGTON POST, Aug. 1, 2005, at A1.
[18] David Rosenbaum, *An Advocate for the Right*, NEW YORK TIMES, July 28, 2005, at A16.
[19] David Kirkpatrick, *A Year of Work to Sell Roberts to Conservatives*, NEW YORK TIMES, July 22, 2005, at 14.
[20] Meese asserted that "the president is convinced that [Judge Roberts] is a constitutionalist in the same way that Scalia and Thomas are." Jess Bravin, *In Re Judge Roberts: Question of Originalism Looms Large*, WALL STREET JOURNAL, July 21, 2005, at A1. Fein has compared Judge Roberts' views to the "originalist" philosophy of Robert Bork and Justice Scalia. Bruce Fein, *Squandering a Supreme Opportunity*, WASHINGTON TIMES, Aug. 23, 2005, at A1. Sekulow, Perkins and LaRue each stated that by nominating Judge Roberts, President Bush fulfilled his promise to nominate justices like Scalia and Thomas. Tom Brune and John Riley, *Bush's Nominee*, NEWSDAY, July 20, 2005, at A6; Susan Page and Kathy Kiely, *Praise on One Side, Questions on the Other*, USA TODAY, July 20, 2005, at A6; Peter Baker and Susan B. Glasser, *Activists Gear Up For Nominee Fight*, WASHINGTON POST, July 3, 2005, A1.

The evidence disclosed thus far makes it increasingly clear why the hard right has enthusiastically supported Judge Roberts' nomination. The positions he has taken as both a legal policy-maker and judge have given them reason to cheer.

A lifetime appointment to the Supreme Court is a privilege, and comes with a responsibility, that requires more than professional credentials. Every nominee bears the burden of showing that he or she appreciates the important role that an independent judiciary plays in safeguarding individual rights, enforcing legal protections and guaranteeing equal justice under law – in other words, the role ordinary people rely on it to play. The record to date raises serious questions about whether Judge Roberts sufficiently appreciates that role.

AWD Alliance of Women Democrats
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Ph. 979-277-9693 Fax 979-277-9698

September 6, 2005

Dear Senator Leahy,

AWD is a group of politically informed women who have formed a PAC.

We are extremely concerned about John Roberts, with his ultra-conservative agenda, becoming Chief Justice.

We need your assistance in Washington to convince good Democrats to persuade Justice Sandra Day O'Conner to withdraw her resignation until the end of 2006.

We are also doing our part, since the country needs her leadership and expertise on the Supreme Court.

Respectfully,
Patricia Olney
dolney@pdq.net

September 1, 2005

Senate Judiciary Committee
Dirksen Building, Room 224
Washington, D.C.
Fax: 202-224-9102

Dear Senators:

We write to you on behalf of the American Association of People with Disabilities (AAPD), National Council on Independent Living, and the Bazelon Center for Mental Health Law to urge you to give close and careful scrutiny to the views of Supreme Court nominee John Roberts concerning the rights of persons with disabilities.

Several weeks ago, we celebrated the 15th Anniversary of the bipartisan adoption of the Americans with Disabilities Act (ADA). Despite the great strides that people with disabilities have made due to the ADA, our rights hang in the balance. The Supreme Court has narrowly upheld key protections for persons with disabilities in cases such as *Olmstead v. L.C.* and *Tennessee v. Lane*. It has also, however, repeatedly second-guessed the judgment of Congress with respect to the scope of coverage of the ADA and has taken a restrictive view of Congress's power to enact parts of the ADA. Many federal courts have also relied on recent Supreme Court precedent to adopt restrictive interpretations of the ADA and other antidiscrimination laws protecting people with disabilities, and to conclude that Congress did not intend to provide enforceable rights for people with disabilities under federal fair housing laws and regulations and the Medicaid statute.

It is long past time for the rights of persons with disabilities to be treated as issues of high importance in the context of Supreme Court nominees. While we recognize that it is inappropriate to ask how a judge would rule on a specific case, Judge Roberts' statements, arguments, and rulings raise certain concerns about his commitment to protect the civil rights of persons with disabilities. Given the closely divided nature of key Supreme Court rulings in cases involving the Americans with Disabilities

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Act, we feel that it is vital to learn whether Judge Roberts shares the commitment of leaders such as President George H.W. Bush, Bob Dole and Richard Thornburgh to the rights of people with disabilities.

We have enclosed a series of questions that may be posed to Judge Roberts to help assess whether he would fairly uphold the needed protections that Congress provided for people with disabilities. These questions address many of the issues of concern to people with disabilities that may be considered at some point by the Supreme Court.

Please feel free to contact Andrew Imparato (202-457-0046 ex 29 or imparatoa@aol.com) with any questions you may have. Thank you for your attention to our concerns.

Very truly yours,

Andrew Imparato

Andrew J. Imparato
President and CEO, American Association of People with Disabilities

John Lancaster

John Lancaster
Executive Director, National Council on Independent Living

Robert Bernstein

Robert Bernstein
Executive Director, Bazelon Center for Mental Health Law

**Questions for Judge John Roberts**
**Submitted by American Association of People with Disabilities (AAPD), National Council on Independent Living (NCIL) and the Judge David L. Bazelon Center for Mental Health Law (Bazelon)**

**Congressional Power**

We think it is important to discern what Judge Roberts believes concerning the sources of Congress's power to pass important disability rights laws, including the power to legislate under Section 5 of the Fourteenth Amendment, the Commerce Clause, and the Spending Clause. We are particularly concerned about Judge Roberts' view of these sources of Congress's power given the restrictive interpretation of the Commerce Clause in his dissent from denial of rehearing en banc in *Rancho Viejo LLC v. Norton*, and his arguments about Spending Clause legislation in *Gonzaga v. Doe*.

Does Judge Roberts believe that Congress acted within its authority in passing such laws as the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act?

**Private Enforcement of Statutory Rights**

We would like to understand Judge Roberts' position on individuals' ability to go to court to enforce their statutory rights. Because of his advocacy in *Gonzaga v. Doe*, many courts have held that Medicaid recipients cannot privately enforce their rights under the Medicaid statute - for example, their right to obtain medically necessary services covered by the state's Medicaid program. Does Judge Roberts agree with these decisions?

Does Judge Roberts agree with decisions concluding that abused and neglected children have no right to go to court to enforce their rights under the Adoption Assistance and Child Welfare Act?

**Scope of the Americans with Disabilities Act**

We are concerned about the cramped view of the ADA that Judge Roberts took when he represented the defendant in *Toyota Motor Manufacturing of Kentucky v. Williams*. He argued to the Supreme Court that only the "truly disabled" had legitimate needs for protection under the ADA. Whom does Judge Roberts believe the "truly disabled" encompasses?

Does Judge Roberts believe that the ADA must be interpreted narrowly or broadly in terms of whom it protects?

Judge Roberts stated in the Toyota case that the ADA and workers' compensation laws "coexist uneasily." Why does he feel that these two schemes are incompatible?

The Supreme Court's decision in *Olmstead v. L.C.* is a landmark decision concerning the rights of individuals with disabilities. The Court held that unnecessary institutionalization of individuals with disabilities is a form of discrimination prohibited by the ADA. We think it is important to explore Judge Roberts' views on the ADA's integration mandate. For example, does he believe that the *Olmstead* decision requires states to have a plan to move individuals with disabilities who are unnecessarily institutionalized into more integrated settings? What does Judge Roberts think is a reasonable pace for moving individuals with disabilities into more integrated settings?

**Fair Housing**

In a 1983 memorandum concerning legislation that would have made the Fair Housing Act applicable to people with disabilities, Judge Roberts urged the Administration to "go slowly on housing legislation." Why? Additionally, Judge Roberts expressed concern about the government intrusion in this area. Does Judge Roberts believe that housing discrimination is an appropriate area for Congress to legislate about?

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

# Supreme Court Nominee John Roberts: An Incomplete Record that Gives Cause for Concern

President George W. Bush has nominated John G. Roberts, Jr., a judge on the U.S. Court of Appeals for the D.C. Circuit, to replace retiring U.S. Supreme Court Justice Sandra Day O'Connor.

The American Association of University Women (AAUW) has reissued its strong concerns about the judicial philosophy of Judge Roberts, which date back to his confirmation for the federal judgeship he now holds. At that time, troubling information came to light regarding his opposition to reproductive choice and family planning. Also troubling, Judge Roberts' philosophy on other issues critical to maintaining decades of progress for women and girls – such as Title IX, pay equity, and other civil rights – remain in part unclear.

Recently released documents demonstrate that, as a young lawyer, John Roberts was part of the "vanguard of a conservative political revolution in civil rights," promoting new legal theories and implementing Reagan Administration plans designed to rein in the role of government and reduce the use of the courts to remedy racial and sexual discrimination.[1] It is difficult to determine, roughly two decades later, the degree to which now-Judge Roberts still holds these views and how he might apply them if he is confirmed to the U.S. Supreme Court. From all accounts, these were deeply held convictions from Roberts' earliest days at the Department of Justice; it would be unusual for such core principles to drastically alter over the years. At the same time, Roberts appears at times to be a pragmatist in his approach to the law, and his record in private practice has been somewhat mixed – although neither conservatives nor liberals seem to "attach much importance to his diverse practice… some activists on both sides remain secure in their conviction that he is an emphatic conservative who will move the high court to the right – never mind his client list."[2]

AAUW believes the cloudiness of Judge Robert's views makes it especially important that his entire record be carefully reviewed and assessed, including a careful evaluation of his record on civil rights and liberties, disability rights, environmental protections, privacy rights, religious freedom, and worker and consumer safety.

## The Need for Additional Information

Since his nomination, some documents from Roberts' legal career have come to light which have begun to paint a picture of the nominee's judicial philosophy. Unfortunately, the Bush Administration refuses to release many documents that AAUW believes would provide additional valuable information about the nominee's record.

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Many of these documents harken back to Roberts' work as a political deputy to then-Solicitor General Ken Starr in the White House during the first Bush Administration. AAUW is concerned that the current Bush Administration's refusal to give senators a complete record of Roberts' actions as a political appointee in a senior legal position undermines the Senate's effort to carry out a comprehensive review of the nominee's record.

While more documents were released by the Reagan Presidential Library in mid-August, the critical memos Roberts wrote while in the Solicitor General's Office under the first Bush Administration, between 1989 and 1993, have been purposely withheld. AAUW urges the Bush Administration to change its position and provide these critical documents so that senators can thoroughly address any subsequent concerns and questions during Judge Roberts' confirmation hearings. While the White House has argued that the Solicitor General documents are protected by attorney-client privilege, there is strong precedent for the release of such documents to the Senate in connection with past nominations to the Supreme Court, the Attorney General's office, and the federal appellate courts.[3]

Further, while for much of Roberts' career he has been an advocate for others – both in public service and in private practice – his memos and briefs during these years still help to illuminate his judicial philosophy and patterns of legal reasoning. Roberts was a political appointee in both the Reagan and first Bush Administrations; it is therefore safe to assume that his positions were reasonably in line with those who appointed him. At the same time, he did exercise his own intellectual reasoning in the course of his work, which is what makes these documents potentially helpful in the confirmation process. Indeed, as reported in the *Washington Post*, the Justice Department memos released at the end of July "show Roberts speaking at times in his own voice. … In the rare instances revealed in the documents in which Roberts disagreed with his superiors on the proper legal course to take on major social issues of the day, he advocated the more conservative tack."[4]

A primary issue for AAUW is to what degree, if any, this past work reflects on the judicial philosophy Roberts would exercise as a Supreme Court Justice. There are many yet-to-be-determined pieces to be added to the puzzle in the vetting of Roberts' nomination, and these pieces cannot be summed up with the necessary thoroughness and accuracy without access to the entirety of John Roberts' record and the documents that illuminate it.

To date, there are certain aspects of Judge Roberts' record that have come to light that raise significant questions. Some of AAUW's most pressing concerns regarding his record include Title IX, privacy rights and reproductive choice, and other civil rights protections. These areas must be thoroughly examined before the Senate can determine his suitability for a lifetime appointment to the U.S. Supreme Court.

**A Narrow Interpretation of Title IX**

Recent documents that have been released have illuminated Roberts' participation in shaping civil rights policies during the Reagan and first Bush Administrations. AAUW is particularly

concerned about Title IX of the Education Amendments of 1972, the law that prohibits sex discrimination in education. According to reports based on documents released to date,[5] Roberts' writings reveal troubling statements about this landmark civil rights law that has opened so many doors for women and girls, both in the classroom and on the athletics field.

***Federal Funds and the Application of Civil Rights Law:*** The recently disclosed memos from the nominee's work in the Reagan Administration show that he pressed for a limited interpretation of Title IX. For example, AAUW is troubled by an instance in which Roberts urged then-Attorney General William French Smith to withdraw the Reagan Administration's support from a Department of Education investigation of alleged sex discrimination in athletics at the University of Richmond. The Carter Administration had earlier supported the Department, contending that Title IX granted the federal government broad authority over all programs at a federally-funded university, whether or not the particular program directly received federal funds.[6] Roberts wrote a 1982 memo to Attorney General Smith advising that the Reagan Administration reverse the previous administration's policy. According to research by the National Women's Law Center, Roberts believed "that the Department of Education should not appeal a district court's ruling which prevented the Department from investigating [the] alleged sex discrimination in athletics at the University of Richmond, because under the extremely narrow view of Title IX that Roberts espoused, Title IX's prohibition of sex discrimination did not apply to the athletics program since it did not *directly* receive money from the federal government."[7] [emphasis added]

During his subsequent years in the White House Counsel's office, Roberts wrote a memo stating that there was "intuitive appeal" to the argument that a university should not be covered by Title IX – even though its students paid tuition to the school with federal financial aid.[8] In the same memo, Roberts criticized the Civil Rights Restoration Bill, which clarified that Title IX and similar civil rights laws prohibiting discrimination on the basis of race, ethnicity, disability, and age apply to an entire institution – not just the specific program receiving federal funds. Roberts argued the Civil Rights Restoration Bill would "radically" expand the scope of existing civil rights laws.[9] The language of the bill, which was later passed with substantial AAUW support, was in direct contrast to Roberts' own much more narrow interpretation of Title IX.

AAUW finds Roberts' line of reasoning on this question particularly troubling, since it is through the receipt of federal funding in all its myriad forms that many civil rights laws – not just Title IX – are applied and enforced. Roberts' overly restrictive argument would have severely narrowed the reach of Title IX. Further, if his reasoning in this instance were to be applied more broadly, it could negatively impact the application and enforcement of other critical civil rights protections as well.

***Monetary Damages:*** In addition to Roberts' efforts to narrow Title IX during the Reagan years, he later advocated positions that would have seriously weakened a plaintiff's ability to seek redress under this critical civil rights law. In *Franklin v. Gwinnett County School District*, Roberts co-authored an *amicus* brief as Deputy Solicitor General in the administration of President George H. W. Bush.[10] It is important to note that participating as *amicus* is a discretionary decision on the part of the Solicitor General. Thus the decision to intervene in such

a way is in and of itself instructive – and another example of the well-documented efforts of Reagan Administration to curtail the use of federal courts to remedy sex discrimination.

In the *Franklin* brief, Roberts' argued against a high school student obtaining monetary damages for sexual harassment and sexual abuse by her teacher/coach. Roberts' overly restrictive view of appropriate remedies under Title IX was rejected unanimously by the U.S. Supreme Court, which held that victims of sexual discrimination can recover monetary damages under Title IX.

AAUW is concerned that Roberts' position in the *Franklin* case raises questions about whether he would seek to narrow long-standing interpretations of Title IX in ways that would limit the ability of women to fully assert their legal rights. AAUW finds this extremely restrictive interpretation of Title IX quite troubling for a Supreme Court nominee; critical rights for women and girls have been won and protected through the courts, but they are hollow victories if we cannot hold those in authority accountable for civil rights violations. In 1991, AAUW signed on to an *amicus* brief to the U.S. Supreme Court in the *Franklin* case espousing views opposite to those put forward by Roberts.

***Far-Reaching Civil Rights Consequences:*** Roberts's arguments for limiting Title IX are troubling not only because they would limit protections against sex discrimination for students, and their ability to seek legal recourse in the face of such behavior, but also because his arguments could apply to other analogous civil rights laws that have been so important to women and girls. These include Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in programs that receive federal funds; Section 504 of the Rehabilitation Act of 1973, which protects the recipients of federal funds from discriminating against people with disabilities; and the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age in federal programs or activities.

AAUW continues to be a strong proponent of these civil rights measures, and Roberts' record on Title IX reveals a pressing need for the Senate to ask compelling questions of the nominee regarding his judicial philosophy on these critical civil rights matters, as well as his respect for precedent and his ability to independently and impartially apply settled law. AAUW urges in particular that the Senate Judiciary Committee question Judge Roberts on his respect for precedent in the *Franklin* case, which continues to be an important benchmark for addressing sex discrimination in education.

**Privacy Rights and Reproductive Choice**

President Bush, who selected Judge Roberts after careful vetting, has made clear that his model Supreme Court Justices are Antonin Scalia and Clarence Thomas. Both of these men have stated they wish to overturn *Roe v. Wade* and have voted consistently to restrict women's reproductive rights.

During his confirmation hearings for the D.C. Circuit, AAUW was disappointed to note that John Roberts repeatedly refused to state whether he believed in a constitutional right to privacy, or whether that right includes a woman's right to have an abortion. These are some warning

signs that Judge Roberts, if confirmed, might provide an additional vote to undermine the right to choose.

***The Precedent of Roe v. Wade:*** Roberts, as a political appointee in the first Bush Administration, co-authored an *amicus* brief that argued that "*Roe* was wrongly decided and should be overruled" and that the U.S. Supreme Court's conclusions that there is a fundamental right to privacy "find no support in the text, structure, or history of the Constitution."[11] The case for which the brief was written, *Rust v. Sullivan*, did not present a legal question regarding *Roe's* validity – yet Roberts as co-author still brought up the issue of *Roe* in his brief.[12]

In his 2003 confirmation hearing for the D.C. Circuit, Roberts said his personal views should not be inferred from his participation in the *Rust* brief. But Roberts stopped short of saying the brief did not reflect his views and he repeatedly declined to answer questions asking for his views on *Roe* or even more broadly the right to privacy.[13]

AAUW believes Judge Roberts, like Supreme Court Justice Ruth Bader Ginsburg before him, should answer questions about the fundamental right to privacy – upon which the right to legal abortion rests – during his confirmation hearing. Then-Judge Ginsburg did answer senators' questions on a number of controversial issues, including abortion. Notably, at the time of her hearings, Justice Ginsburg also had a very extensive record of articles and opinions on a range of legal matters, giving senators a comprehensive record on which to determine her views on important legal questions – which is clearly not the case with Judge Roberts.[14] As a result, AAUW urges Judge Roberts to be forthcoming and forthright in his answers to all questions at his confirmation hearings. We also urge the Bush Administration to release the requested documents detailing Roberts' legal work during the Reagan and first Bush Administrations.

***Clinic Violence:*** Roberts' work on the case *Bray v. Alexandria Women's Health Clinic* raises additional questions about his judicial philosophy regarding sex discrimination. As Deputy Solicitor General, Roberts co-authored an *amicus* brief in *Bray* that argued that Operation Rescue's tactics of blocking entrances to abortion clinics did not constitute discrimination against women, and thus could not be stopped under then-existing federal anti-discrimination laws.[15] Roberts advanced this argument even though only women can exercise the right to seek an abortion.[16]

It is important to note that participating as *amicus* is a discretionary decision on the part of the Solicitor General. In *Bray*, "the government chose to involve itself in a case in support of those who sought to deprive women of the right to choose through massive, often violent, blockades. Roberts argued that the protesters' blockades merely amounted to an expression of their opposition to abortion and that a civil rights remedy was therefore inappropriate."[17] As Roberts did in the Title IX cases discussed previously, AAUW is concerned that *Bray* represents another example where Roberts again advocated an exceptionally narrow interpretation of civil rights law. In 1991, AAUW signed on to an *amicus* brief to the U.S. Supreme Court in the *Bray* case espousing a position opposite to that taken by Roberts.

**The Senate Should Not Rush to Judgment**

AAUW encourages the Senate to vigorously exercise their advise and consent responsibilities by conducting a thorough and deliberate examination of the nominee's record. This includes obtaining and carefully reviewing all relevant information about the nominee, and conducting comprehensive confirmation hearings. AAUW believes lifetime appointments should never be rushed.

AAUW continues to urge the Senate to withhold judgment on this lifetime appointment until this review is complete and the confirmation process has ensured that John Roberts is a jurist within the mainstream of legal thought. It is more important than ever to ensure the moderate balance of the court by confirming a justice who reflects mainstream America. The Senate has few constitutional duties more significant than that of advising on and consenting to U.S. Supreme Court nominations, and should confirm only those nominees that exhibit the impartiality and independence that are so critical on the nation's highest court.

No nominee is presumptively entitled to confirmation. Whether Judge John Roberts deserves that honor is still an open question, and AAUW looks forward to his honest and forthright answers regarding the civil rights concerns we have outlined here during his confirmation hearings.

For more information, call 800/608-5286 or e-mail votered@aauw.org.

**AAUW Public Policy and Government Relations Department**
**August 17, 2005**

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[1] R. Jeffrey Smith, Amy Goldstein, and Jo Becker, "A Charter Member of the Reagan Vanguard," *The Washington Post*, August 1, 2005, at A1.
[2] Jo Becker and Michael Grunwald, "In Private Practice, Roberts's Record Is Mixed," *The Washington Post*, August 5, 2005, at A2.
[3] Sen. Patrick Leahy 3/18/03 statement during Senate consideration of Miguel Estrada's nomination to the U.S. Court of Appeals for the District of Columbia, "Past administrations have provided such legal memoranda in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott and Ben Civiletti, and even this Administration did so with a nominee to the environmental Protection Agency."
[4] R. Jeffrey Smith, Jo Becker, and Amy Goldstein, "Documents Show Roberts Influence in Reagan Era," *The Washington Post*, July 27, 2005 at A1.
[5] Jo Becker and Amy Argetsinger, "The Nominee As a Young Pragmatist," *The Washington Post*, July 22, 2005, at A1; Charlie Savage, "Civil Rights Groups Cite Concerns Over Roberts," *The Boston Globe*, July 22, 2005; R. Jeffrey Smith, Jo Becker and Amy Goldstein, "Documents Show Roberts Influence In Reagan Era," *The Washington Post*, July 27, 2005 at A1.
[6] Ibid.
[7] National Women's Law Center, "Judge Roberts's Record: Incomplete But Very Troubling," August 3, 2005.
[8] Ibid.
[9] Ibid.
[10] *Franklin v. Gwinnett County School District*, 503 U.S. 60 (1992).
[11] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391 and 89-1392).

[12] In *Rust v. Sullivan,* the Supreme Court considered whether Department of Health and Human Services regulations limiting the ability of Title X recipients to engage in abortion-related activities violated various constitutional provisions. Judge Roberts, appearing on behalf of HHS as Principal Deputy Solicitor General, argued that this domestic gag rule, whereby doctors working in family planning programs receiving federal funds were barred from even discussing abortion options with patients, did not violate constitutional protections. In 1990, AAUW signed on to an amicus brief to the U.S. Supreme Court in the *Rust* case espousing a position opposite that of Judge Roberts.
[13] *U.S. Committee on the Judiciary: Nomination of John G. Roberts, Jr., of Maryland, to be Circuit Judge for the District of Columbia* (Apr. 30, 2003) (question of Senator Durbin). *See also* Responses of John G. Roberts, Jr. to Written Questions of Senators Biden, Feingold, Feinstein, and Kennedy (Feb. 5, 2003).
[14] National Women's Law Center, "The Ginsburg Standard: What Really Happened," July 2005, at pg. 1
[15] Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993) (No. 90-985).
[16] The Freedom of Access to Clinic Entrances Act (FACE), which passed in 1994 in response to the *Bray* case, provides federal protection against the unlawful and often violent tactics used by abortion opponents. Courts repeatedly have upheld the law as constitutional, and experts credit FACE as a contributing factor in reducing clinic violence.
[17] NARAL ProChoice America, "John G. Roberts, Jr."
http://www.prochoiceamerica.org/retirement/roberts_choice_highlights.pdf at pg 2.

**ABA Model Code**

# Model Code of Judicial Conduct

**CANON 5**[5,6]

**A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY**

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**A. All Judges and Candidates**

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**(3) A candidate* for a judicial office:**

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**(d) shall not:**

**(i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial* performance of the adjudicative duties of the office; or**

**(ii) knowingly* misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;**

**Commentary:**

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9) and (10), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. **This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment**. See also Rule 8.2 of the ABA Model Rules of Professional Conduct.

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[5] Introductory Note to Canon 5: There is wide variation in the methods of judicial selection used, both among jurisdictions and within the jurisdictions themselves. In a given state, judges may be selected by one method initially, retained by a different method, and selected by still another method to fill interim vacancies.

According to figures compiled in 1987 by the National Center for State Courts, 32 states and the District of Columbia use a merit selection method (in which an executive such as a governor appoints a judge from a group of nominees selected by a judicial nominating commission) to select judges in the state either initially or to fill an interim vacancy. Of those 33 jurisdictions, a merit

selection method is used in 18 jurisdictions to choose judges of courts of last resort, in 13 jurisdictions to choose judges of intermediate appellate courts, in 12 jurisdictions to choose judges of general jurisdiction courts and in 5 jurisdictions to choose judges of limited jurisdiction courts.

Methods of judicial selection other than merit selection include nonpartisan election (10 states use it for initial selection at all court levels, another 10 states use it for initial selection for at least one court level) and partisan election (8 states use it for initial selection at all court levels, another 7 states use it for initial selection for at least one level). In a small minority of the states, judicial selection methods include executive or legislative appointment (without nomination of a group of potential appointees by a judicial nominating commission) and court selection. In addition, the federal judicial system utilizes an executive appointment method. See State Court Organization 1987 (National Center for State Courts, 1988).

[6] Amended August 6, 1997, American Bar Association House of Delegates, San Francisco, California, per Report No. 112, and August 10, 1999, American Bar Association House of Delegates, Atlanta, Georgia, per Report No. 123.

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*ABC News Transcripts August 29, 1985 Thursday*

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**SHOW:** WORLD NEWS TONIGHT - ABC

**August** 29, 1985 Thursday

**LENGTH:** 117 words

**BODY:**
TED KOPPEL

And two other medical notes. The National Centers for Disease Control in Atlanta recommended today that most children infected with the AIDS virus should be allowed to attend school and officials should do their best to keep the child's name and condition secret. The CDC says again that **children with AIDS** appear to pose no risk to others through casual contact. A new home medical test went on the market today which may help some of the four and a half million couples who've had difficulty conceiving a child. The test can accurately predict when a woman will ovulate 12 to 24 hours ahead of time. That will help couples trying to judge the most likely time for conception.

**LANGUAGE:** ENGLISH

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September 15, 2005

The Honorable Arlen Specter
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The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Specter and Leahy:

We write as American citizens who feel an obligation to preserve for future generations the constitutional protections we have enjoyed, and as religious leaders with a deep and abiding concern for justice in the lives of individuals and our nation. We urge you to vote against the confirmation of John Roberts as the next Chief Justice of the United States.

Our next Chief Justice must not only be exemplary in character and intellect. That person must also be committed to upholding the principles, laws, and remedies that have allowed this nation to move closer to the ideals of equal justice for all. Unfortunately, it is increasingly evident that John Roberts has spent much of his career trying to undermine those protections, with little regard to the impact of his ideology on Americans' lives and opportunities.

Despite our country's history of egregious efforts to keep racial and ethnic minorities from voting, Judge Roberts helped orchestrate efforts to try to make it harder to challenge discriminatory voting systems and procedures. In addition, he has consistently opposed affirmative action efforts, once declaring that such programs were bound to fail because they required the "recruiting of inadequately prepared candidates." Generations of accomplished Americans who have taken advantage of educational and economic opportunities that would otherwise have been denied to them are living proof that Roberts has been wrong, as well as wrong-headed, when it comes to efforts to diminish the impact of historical and continuing discrimination.

Roberts urged his colleagues in the Reagan administration to "go slowly" on proposed fair housing legislation, claiming that such legislation represented "government intrusion." We profoundly disagree with the ideology that equates government efforts to protect individuals from discrimination in housing with "intrusion." We believe that America achieves its highest ideals when we protect the most vulnerable in our communities.

As religious leaders, we have a special respect and concern for the religious liberty that allows us to worship freely and without government coercion. We know that separation of church and state, embodied in the First Amendment to our Constitution, safeguards that liberty. We are deeply concerned about the evidence that John Roberts has, throughout his career, opposed federal court rulings that upheld the important principle of government neutrality toward religion. The Constitution demands that our government remains neutral on religion and practice so that all faith traditions may flourish.

Our sacred texts and traditions, as well as our understanding of our nation's core democratic and constitutional principles, demand that we advocate for human dignity for all people, especially for those who have been systematically marginalized and oppressed. We do not find in John Roberts' record evidence that he would uphold the constitutional and legal principles that have advanced the cause of justice in America.

We respectfully urge you to consider carefully the record of Judge John Roberts and hope that you will join us in opposing his confirmation as Chief Justice of the United States.

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Chevy Chase , MD

Rev. William Amundsen
Lansing, MI

Rev. Wendell Anthony
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August 30, 2005

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RICHARD ZACKS
*TREASURER*

Re: Nomination of John Roberts, Jr. to the United States Supreme Court

Dear Chairman Specter and Senator Leahy:

The American Civil Liberties Union would like to express its deep concern over some of the civil liberties and civil rights positions advocated by Judge John Roberts, Jr., President Bush's nominee to replace retiring Justice Sandra Day O'Connor on the Supreme Court. In addition to this letter summarizing our concerns, the ACLU has written a comprehensive report on the civil liberties and civil rights record of Roberts, which is enclosed with this letter and is also available at www.aclu.org.

We appreciate the difficulty of assessing the record of a nominee whose many years as an advocate overshadow his short tenure on the bench, but we urge the Senate, at minimum, to determine the extent to which the civil liberties positions advanced by Roberts as an advocate or lower court judge reflect the approach he would take in deciding cases if confirmed. The Senate cannot fulfill its constitutional obligation of advise and consent unless Roberts provides clear answers to specific questions on his civil liberties record, and the Executive Branch provides all documents that relate to his work on civil liberties issues. Given the importance of the nomination and the Senate's obligation of advise and consent, the President should waive any claims of privilege over these documents.

Roberts has been nominated to replace a justice who often was a moderating voice and critical swing vote on civil liberties issues. The Senate must fully consider Roberts' legal and judicial philosophy, approach to decision-making, and possible impact on the role of the Court as a protector of civil liberties in determining whether he should replace Justice O'Connor.

Overview

As a law firm attorney and as Principal Deputy Solicitor General in the first Bush Administration, Roberts argued more than thirty cases before the Supreme Court. His advocacy sometimes concerned significant civil

liberties issues including civil rights, access to the courts, reproductive rights, and government funding or endorsement of religion. The challenge in reviewing John Roberts' record is that, as with any advocate, his litigation positions may not necessarily reflect his personal views. However, several of the recently released internal memoranda from his service as an attorney in the office of the Attorney General during the Reagan Administration clearly express his personal views, and can provide the Committee with insights into his perspectives on civil liberties.

Judge Roberts' judicial opinions provide a fairly clear and very recent window into the legal positions that he might take on the Supreme Court. However, he has been a judge on the D.C. Circuit for just over two years and he has only a handful of cases that substantially implicate civil liberties.

As a judge, Roberts has decided a few cases supporting civil liberties and several cases in which his positions raise concerns. For instance, Roberts joined the D.C Circuit's recent decision holding that Guantanamo Bay detainees could be tried by military commissions. The decision rested, in part, on a holding that the Geneva Conventions are not judicially enforceable and that they do not apply in any event to the conflict in Afghanistan. He has adopted a broad view of executive power in a case involving the Foreign Sovereign Immunities Act. On the other hand, Roberts has ruled that Congress can use its Spending Clause power to authorize federal civil rights lawsuits against states. In addition, he recently joined a decision that reversed a trial court for imposing too harsh a sentence on a defendant.

Roberts' work in private practice as an associate and then as a partner at Hogan & Hartson involved primarily the representation of corporate clients, though he was active in *pro bono* litigation. Several of Roberts' cases from private practice raise civil liberties concerns, while others advanced civil liberties. Perhaps his most troubling cases from this period were his series of briefs and appearances for the Associated General Contractors in challenges to federal affirmative action programs and his successful argument before the Supreme Court that a federal statute protecting the privacy of student records was not privately enforceable. However, in two other important matters while in private practice, he co-counseled with the ACLU of the National Capital Area in its representation of individuals whose welfare benefits were terminated, and he advised the attorney representing gay men and lesbians in a critical case on protecting the rights of gay men and lesbians to lobby their state and local governments for civil rights protections.

Roberts' work as a Principal Deputy Solicitor General in the first Bush Administration – where he was a political appointee and second in command – as well as his work in the Reagan administration raise the most concerns. As Deputy Solicitor General, Roberts co-wrote a brief defending

the federal "gag rule" limiting the ability of federal grantees to provide abortion-related counseling and referral. His brief included an argument that *Roe v. Wade* was wrongly decided and should be reversed--even though *Roe* was not at issue. Roberts also successfully argued for the government that Operation Rescue could not be sued under federal civil rights laws for its organized blockades of clinics. On behalf of the government, Roberts also argued that prayer was permitted at a public school graduation ceremony as long as students were not subject to coercion, an argument the Court rejected. Roberts successfully argued to prevent individuals from bringing suit to require states to comply with certain federal child welfare requirements. Finally, documents from Roberts' tenure in the Reagan Administration indicate that Roberts sought to limit busing as a desegregation remedy, and argued against legislation that eventually passed (and that the ACLU vigorously supported) to restore a key interpretation of the Voting Rights Act after the Supreme Court's adverse decision in *City of Mobile v. Bolden,* 446 U.S. 55 (1980).

Read in its entirety, Roberts' record, as disclosed up to this point, reflects a narrow view of federal court jurisdiction and a narrow view of the judiciary's role in construing the Constitution, especially with regard to unenumerated rights. This has led Roberts to take some very troubling positions – again, more often as an advocate than as a judge – on core civil liberties such as those relating to race, government funded or endorsed religion, and reproductive rights. His actual views on those issues matter enormously because it is on precisely those issues that Justice O'Connor often provided a moderating voice and a critical swing vote on the current Supreme Court. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action in college admissions); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (overturning a state abortion ban); *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005) (finding certain Ten Commandment displays in courthouses unconstitutional).

International Law and National Security

Earlier this summer, Judge Roberts joined the troubling appellate court opinion in Hamdan v. Rumsfeld, the military commissions case. The court held that the President has the power to detain and try a captive from the war in Afghanistan in *ad hoc* military commissions that provide even less due process protections than military courts martial. Hamdan, a detainee at Guantanamo Bay, had asked the court to rule that he could not be tried in these commissions until a fair and impartial tribunal determined he should not be treated as a prisoner of war, as required under the Geneva Conventions.

The district court agreed with Hamdan, but—in what the media is calling a "significant victory" for the Bush administration—the D.C. Circuit reversed, holding that Hamdan could not use the court to enforce the Geneva Convention's protection of a fair and impartial tribunal to determine whether

he is a prisoner of war, and affirming the President's power to determine who is to be tried in a military commission. Judge Roberts did not write a separate opinion in the case. The ACLU has opposed the military commissions at Guantanamo Bay because they unconstitutionally deny due process rights to the detainees.

In addition to the military commission case, Judge Roberts also wrote a separate concurrence in another recent national security case implicating civil liberties. In Acree v. Iraq, several American troops, captured and tortured by the Iraqis in the 1991 Gulf War, brought suit in 2004 against Saddam Hussein, Iraqi intelligence and the country itself. The lawsuit, however, conflicted with a directive from President Bush granting post-Saddam Iraq immunity from legal action. The majority of the court found the main legal dilemma in the case an "exceedingly close question." Judge Roberts issued a separate concurrence, saying that the president clearly had the power to exempt Iraq from liability. The Senate must determine whether this decision is indicative of a broad view of presidential power in national security cases.

Freedom of Speech and Freedom of Religion

During his career as an advocate, Judge Roberts has taken several positions on freedom of speech and religion that raise serious civil liberties questions. For example, Roberts and the ACLU were on opposing sides when he argued as a government lawyer that a federal act prohibiting flag burning did not violate the First Amendment's free speech guarantees, even after the Supreme Court had declared a nearly identical state statute unconstitutional the previous year. While working as an attorney in the Reagan White House Counsel's office, Roberts wrote a memorandum critical of an important free speech case, *New York Times v. Sullivan,* stating that it was his "personal view" that returning to the pre-*Sullivan* standards for libel in exchange for eliminating punitive damages "would strike the balance about right." As a lawyer in private practice, however, Roberts co-authored a brief to the Supreme Court on behalf of *Time* magazine claiming that an Arkansas statute violated the First Amendment because it exempted certain magazines from sales tax based on their content, a position that the ACLU also advocated.

The record on government funded or endorsed religion is more one-sided. Representing the government in an ACLU case, Roberts unsuccessfully argued in support of the constitutionality of school prayer at graduation ceremonies, and in favor of a narrow interpretation of the Establishment Clause that emphasized the need to prove coercion. Earlier in his career, while working as a lawyer in the Reagan White House Counsel's office, Roberts wrote a memo in which he described a Supreme Court opinion that held that a one-minute period of silence in public schools,

enacted by the legislature to return prayer to the public schools, was unconstitutional—as "indefensible." Roberts further stated in the memo that he would have no objection to a White House statement of support for a constitutional amendment authorizing silent prayer in public schools.

All of these positions were taken when Roberts was a lawyer for the government or in private practice. Although he had a somewhat mixed record on speech cases, his one-sided record on government funded or endorsed religion is more troubling. The Committee needs to determine whether his representation of the government or a client reflects his own perspective on these critical issues.

Civil Rights

Roberts advised or represented the federal government or private industry in undermining school desegregation and workplace affirmative action programs, while also defending a Hawaii state program that favored native Hawaiians. While working in the solicitor general's office, Roberts co-authored briefs arguing for standards that made it easier for school systems to get out from under desegregation decrees, which were imposed based on findings of intentional race discrimination. Recently released memos also indicate that, while working in the Reagan White House Counsel's office, Roberts opposed busing as a desegregation remedy and supported the right of Congress to bar busing as a remedy in desegregation cases, even if courts thought it necessary. In private practice, Roberts repeatedly wrote briefs on behalf of a group opposed to federal affirmative action for minority contractors in transportation and defense programs. At the same time, he also wrote a brief supporting a program, which, although not strictly speaking an affirmative action program, favored native Hawaiians.

In the area of voting rights, while working as a Special Assistant to U.S. Attorney General William French Smith in the Reagan Administration, Roberts participated in the Reagan Administration's efforts to fight against improving the Voting Rights Act to help minority voters. Specifically, the Supreme Court ruled in *Mobile v. Bolden*, 446 U.S. 55 (1980), that plaintiffs bringing vote dilution claims under the Voting Rights Act must prove intentional discrimination. After the decision, Congress amended the statute to allow claims based on a "results" theory, because of this difficulty of proving intent especially against longstanding voting practices. Roberts had a role in the Reagan Administration's efforts to oppose the legislative proposal.

Applying a similar rationale in the context of fair housing protections while serving as a lawyer in Reagan's White House Counsel's office, Roberts wrote a memorandum to White House Counsel Fred Fielding in which he provided an account of the Administration's work in the area of fair housing, but also suggested that the Administration should not support an amendment

to the Fair Housing Act that would codify an "effects test. " The memorandum argues that: "[g]overnment intrusion (though (sic), e.g., an "effects test") quite literally hits much closer to home in this area than in any other civil rights area." Roberts argued that despite the fact that the Administration was "burned" the prior year by not supporting an effects test in voting rights, "I do not think there is a need to concede all or many of the controversial points (effects test, national administrative remedy) to preclude political damage." These internal efforts raise the serious question of whether Roberts would limit the scope of civil rights protections to ban only the most overt discrimination.

Roberts argued on behalf of the government or private clients, and advised the government, on important matters affecting the rights of women. While in the Attorney General's office in 1982, Roberts urged the Justice Department not to contest a court ruling that the anti-discrimination provisions of Title IX only apply to the specific university program receiving federal funds and not to the university as a whole. In response to a subsequent Supreme Court ruling, Congress ultimately made clear that Title IX in fact applied to the entire university, regardless of which program received funding. He also argued against the doctrine that pay in traditionally female jobs should be equal to those in comparable traditionally male jobs. While in the same position, he also recommended against having the Justice Department intervene to challenge a state prison's policy of excluding women from many vocational training programs. Roberts argued that intervention was against the Attorney General's positions against heightened scrutiny for gender-based discrimination and against federal court intervention in state programs. Later in his career, while at the Reagan White House Counsel's office, he outlined arguments against the proposed Equal Rights Amendment to the Constitution.

His record on disability rights is mixed. For example, while a law firm partner, Roberts successfully represented Toyota Motor Manufacturing in its claim that it had no duty to provide reasonable accommodation to an assembly line worker who was unable to perform her job because of carpal tunnel syndrome. However, as a judge, he joined a decision written by Judge Garland--over the opposition of Judge Sentelle--which held that the Washington Metropolitan Area Transit Authority was not immune from suit in federal court under section 504 of the Rehabilitation Act. The opinion upheld the right of a private person to sue a state government because Congress had properly used the Spending Clause as authority for applying the Rehabilitation Act to the states.

In his *pro bono* work as a law firm partner, he worked on cases in which he worked to protect civil rights. As a volunteer ACLU cooperating attorney, Roberts unsuccessfully challenged the denial of due process rights by the District of Columbia government to hundreds of individuals who lost their medical disability benefits without individualized notice or an opportunity for a hearing. Also, the *Los Angeles Times* recently reported that

Roberts, while a law firm partner, assisted the lawyer representing the gay men and lesbians who successfully challenged a state constitutional amendment barring all protections against sexual orientation discrimination.

Only last year, the Senate helped lead the nation in a celebration of *Brown v. Board of Education* and in an examination of the unfinished work of the civil rights movement. The Court has been too important to the elimination of unconstitutional and illegal discrimination to allow anyone to join the Court without a full examination of the nominee's commitment to protecting the civil rights of all.

Court-Stripping and Access to Federal Courts

On at least three occasions between 1982 and 1986, Roberts unsuccessfully argued within the government that Congress has the constitutional power to strip the Supreme Court of jurisdiction over issues such as busing, abortion, and school prayer. As a special assistant to Attorney General William French Smith in 1982, Roberts repeatedly argued in support of bills that would have stripped the Supreme Court of jurisdiction over abortion, busing and school prayer cases. Roberts wrote "NO!" in the margins of an April 12, 1982 memorandum then-Assistant Attorney General Theodore B. Olson sent to Smith. In the memo, Olson observed that opposing the bills would "be perceived as a courageous and highly principled position, especially in the press." Roberts underlined the words "especially in the press," and wrote in the margin: "Real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises and Brinks!" (Apparently referring to Harvard Law Professor Laurence H. Tribe, columnist Anthony Lewis and then-President of the American Bar Association David Brink, who all opposed the bills.) Roberts also added notes skeptical about Olson's position that the bills were unnecessary because the Supreme Court was now moving to the right.

In another memo-- written on the recommendation of Kenneth Starr—Roberts argued that Congress has the power to control the appellate jurisdiction of the Supreme Court. Roberts wrote that his memo was "prepared from a standpoint of advocacy of congressional power over the Supreme Court's appellate jurisdiction [and] does not purport to be an objective review of the issue, and should therefore not be viewed as such." In the context of his analysis, Roberts approvingly cited comments by then-University of Chicago law professor Antonin Scalia at a conference on court-stripping bills. At the conference, Scalia acknowledged that the bills may lead to non-uniformity in the interpretation of federal law, but, Roberts stated, "[g]iven the choice between non-uniformity and the uniform imposition of the judicial excesses embodied in *Roe v. Wade*, Scalia was prepared to choose the former alternative." Roberts also presented arguments that stripping the courts of jurisdiction in abortion and school prayer cases does not "directly burden the exercise of any fundamental

rights." The Administration, in the end, did not follow Roberts' advice and instead opposed the bills.

The *Washington Times* reported on a memo written by Roberts in his subsequent position as a lawyer in the White House Counsel's office, in which he wrote to then-White House Counsel Fred Fielding that Congress could, but should not, strip federal courts of jurisdiction in cases involving school prayer. According to the *Washington Times*, Roberts' May 6, 1986 memo indicated that he had looked into the issue while working as a special assistant for Smith, and that he had concluded "[s]uch bills were bad policy and should be opposed on policy grounds," but that they were not prohibited by the Constitution:

> After an exhaustive review at the Department of Justice, I determined that such bills were within the constitutional powers of Congress to fix the appellate jurisdiction of the Supreme Court... My views did not carry the day. . . The bills were, accordingly, opposed on constitutional grounds.

All these accounts, it should be noted, suggest that Roberts believed that jurisdiction stripping was constitutional--a position that would undermine the Constitution's protection of checks and balances. Although these writings are roughly two decades old, they are so extreme that the Senate must determine whether they still represent Roberts' views on the constitutionality of removing the Supreme Court from the Constitution's system of checks and balances.

Reproductive Rights

As Deputy Solicitor General, Roberts argued that Operation Rescue could not be sued under federal civil rights laws for its organized blockades of clinics that provide abortions. In another case while in the Solicitor General's office, Roberts co-authored the Bush administration brief in defense of the "gag" rule, which also argued that *Roe* was wrongly decided, even though *Roe* was not before the Court. As a judge, he has not had occasion to rule in a reproductive rights or privacy case.

In response to questioning at his confirmation hearing about his argument that *Roe* should be overruled, Roberts stated that he was advocating a position for his client, and that the Bush Administration had, "articulated in four different briefs filed with the Supreme Court, briefs that I hadn't worked on, that *Roe v. Wade* should be overturned." When asked his position on *Roe*, Roberts stated:

> *Roe v. Wade* is the settled law of the land. It is not – it's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision. Accordingly, it's the settled law of the land. There's nothing in

> my personal views that would prevent me from fully and faithfully applying that precedent, as well as *Casey*.

Roberts provided this answer in the context of his appointment to a lower court where he is duty bound to follow the Supreme Court's rulings. The extent to which he believes in *Roe* or *Casey* personally, or whether, as a Supreme Court Justice, he would consider the constitutionality of reproductive choice "settled" law are open questions and must be considered by the Committee.

Criminal Justice

Roberts' record on criminal justice issues has been mixed. As a judge, Roberts has consistently ruled against Fourth Amendment claims, most notably dissenting recently from a panel ruling requiring the suppression of certain evidence found by police in a car trunk, but also joined in an opinion reducing another defendant's sentence. While working for the Attorney General during the Reagan Administration, Roberts had an extraordinarily narrow view of the constitutional right to federal *habeas* corpus. Roberts argued that despite the Constitution's prohibition against suspension of *habeas corpus* except "when in cases of rebellion or invasion the public safety may require it," Congress has the power to abolish federal *habeas corpus* entirely. While in private practice, Roberts' first argument to the Supreme Court was on behalf of an individual who accused the government of violating the double jeopardy clause, a case in which he was successful. As Deputy Solicitor General, Roberts argued on the same side as the ACLU in a case involving the Eighth Amendment rights of prisoners.

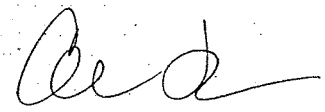
Need for Thorough Questioning

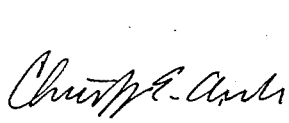
The nomination of Roberts comes at a critical moment for civil liberties and civil rights. With so much at stake, the Senate's inquiry must be deep, and the Executive Branch's disclosure of documents must be complete. Does Roberts believe that the Constitution protects a right to privacy and, if so, what are its contours? Does he believe that Congress can strip the courts of jurisdiction to resolve particular constitutional disputes? Does he believe that Congress can prevent the courts from ordering specific remedies in civil rights cases because Congress, not the courts, has found them to be ineffective? Can government endorse religion as long as it does not compel anyone to agree? What are Roberts' views on *stare decisis* – an issue on which he has said and written very little?

Given Roberts' 25-year record as a lawyer and judge, these and other questions need to be asked and answered. The Senate has both a right and a responsibility to fully consider the nominee's judicial philosophy and approach to constitutional decision-making as part of its advise-and-consent function under the Constitution.

Thank you for your attention to this matter, and please do not hesitate to call us at 202-675-2308 if you have any questions regarding this issue.

Very truly yours,





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Enclosure

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September 2, 2005

The Honorable Arlen Specter, Chairman
Senate Committee on the Judiciary
United State Senate
Washington, D.C. 20510

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

Dear Chairman Specter and Ranking Minority Member Leahy:

I am writing to express the grave concerns of the AFL CIO regarding the nomination of Judge John G. Roberts to be an Associate Justice of the United States Supreme Court. What has been revealed about Judge Roberts' judicial philosophy and his commitment to the cause of equal rights for all Americans is extremely troubling. I therefore urge members of the Judiciary Committee to engage in vigorous and extensive questioning of Judge Roberts so that the Senate and the American public can determine whether Judge Roberts will be a Supreme Court Justice in whom we can safely entrust our most fundamental rights and liberties.

As a litigator, Judge Roberts chiefly argued on behalf of clients opposed to the rights and interests of working families, but it is difficult to separate a practicing litigator's views from the interests of their clients, and his limited tenure on the federal bench does not provide the Senate with much insight into his beliefs about the law. Much of what we know of his views on vital issues comes from recently released Reagan administration documents.

In these memos, then Special Assistant to the Attorney General Roberts argued that Congress has broad power to strip federal courts of jurisdiction over key issues, and urged the Reagan administration to oppose legislation to strengthen the Voting Rights Act and Fair Housing Act. He criticized the Supreme Court decision that prohibited states from eliminating public education for the children of undocumented immigrants and argued that prohibitions against discrimination by educational institutions should apply only to those programs that receive federal funds. Roberts also argued that the 14th Amendment guarantee of equal protection under the law should not be enforced if the defendant would have to incur significant costs to do so.

Roberts ignored Supreme Court precedents regarding the need for heightened Constitutional scrutiny of state-sponsored gender discrimination. His views on precedent are further called into question by a memo in which he acknowledges that certain Justice Department views on Title VII of the 1964 Civil Rights Act had been rejected by the Supreme Court, but then suggests that the decision need not be accepted as guiding principle.

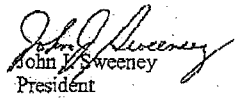
The AFL-CIO urges the Committee to conduct a full and complete airing of Judge Roberts' views on fundamental issues of Constitutional law as they pertain to workers' rights and civil rights. There have been times in our nation's history when as a result of a tortured reading of both the 14th Amendment and the Commerce Clause, the Supreme Court denied African Americans and women the protections of the 14th Amendment and stripped the federal government of its ability to protect workers through laws establishing the minimum wage and barring child labor. While this period of judicial activism is now a part of our past, we must be certain that Judge Roberts is not interested in resurrecting it. His public defense of a narrowly decided Supreme Court decision denying state employees the right to recover unpaid overtime compensation under the federal Fair Labor Standards Act also heightens concern about his views on federalism.

The AFL-CIO is troubled by what the memos reveal about his view of the extent to which the Fourteenth Amendment and the Due Process clause of the Constitution protect all of us against discrimination by federal, state and local government. We are further concerned by the positions he has expressed regarding Congressional authority to limit the jurisdiction of the federal courts, and to the limits of Congressional power under the Commerce Clause.

The Supreme Court is a uniquely historical institution—one charged with interpreting 18th century documents in the 21st century. Judge Roberts must be asked how he understands the history of our country's struggle against the profound injustices that once affected nearly every aspect of our national life. His early writings suggest a brutal indifference to the very meaning of American legal history for those most in need of the law's protection. If unmodified by subsequent experience, that mentality would render him unfit to serve on the highest court of the land.

Judge Roberts' approach to fundamental principles of Constitutional law is of critical importance to America's working families. On behalf of the AFL-CIO, I strongly urge the Senate to engage in a deliberate, methodical and complete inquiry into Justice Roberts' thinking on issues of workers' rights and civil rights as part of a larger inquiry into his legal philosophy.

Sincerely,



John J. Sweeney
President

cc: Members of Senate Committee on the Judiciary

# *Americans United for Separation of Church and State: A Report in Opposition to the Nomination of John G. Roberts Jr. to the United States Supreme Court*

## RELIGIOUS MINORITIES AT RISK: A REPORT IN OPPOSITION TO THE NOMINATION OF JOHN G. ROBERTS JR. TO THE UNITED STATES SUPREME COURT

*John G. Roberts Jr. has consistently called for dismantling the wall that separates church and state. His brand of Establishment Clause jurisprudence would bring about remarkable — indeed, radical — results, with potentially devastating consequences for religious minorities.*

### Overview

At every step of his legal career, Roberts has advanced an exceedingly narrow reading of the constitutional provision that was designed to ensure a healthy separation of church and state. He has time and again advocated a legal standard that jettisons longstanding protections against over-reaching by religious majorities. Under his view of the law, highly sectarian prayers would be permitted at public-school ceremonies, and perhaps even in public school classrooms; displays of sectarian religious symbols would be allowed to proliferate in public schools and other government buildings; public dollars could be used to subsidize religious discrimination and other religious activities; and religious minorities could be deprived of access to the federal courts to seek constitutional protections against such over-reaching.

Roberts may claim that he took some of these positions because they represented the views of his clients or employers, rather than his own. But if that were so, one would expect to find writings advancing varied positions from a range of perspectives. Instead, Roberts' writings — whether on behalf of clients, the Attorney General, the Solicitor General, or the Reagan White House — present a remarkably consistent vision: a federal court system that is wholly unreceptive to the Establishment Clause concerns of religious minorities.

### I. Roberts Supports a View of the Establishment Clause That Gives Short Shrift to the Concerns of Religious Minorities.

In an address to the Supreme Council of the Knights of Columbus on August 7, 1985, then-Secretary of Education William J. Bennett expressed the view that the United States is founded on Judeo-Christian religious principles and that these principles are, and should be, "wedded together" with "our values, our principles, the animating spirit of our institutions."[1] A more clear repudiation of the separation of

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[1] Bennett Address at 12 (on file with the Ronald Reagan Presidential Library).

church and state is difficult to fathom. Yet, rather than objecting to this statement, Roberts supported it: he approved the address, stating, "I have no quarrel" with it.[2]

Roberts recognized the controversial nature of Bennett's remarks, stating that they would "stir up the debate."[3] Indeed, the remarks were nothing short of incendiary, taking the view that "[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh, blood of the blood," and that "our history has . . . deepened the intimate relationship between the Judeo-Christian tradition and the American political order."[4] But Roberts concluded nonetheless that there was no "legal reason to object to them."[5]

In fact, there was ample legal reason to object to these remarks. Just three years before Roberts' memo, the United States Supreme Court had held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[6] As the Court recognized in *Larson*, "Madison's vision — freedom for all religion[s] being guaranteed by free competition between religions — naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference."[7] Yet, Roberts chose in his 1985 memo to turn a blind eye to this vital principle.

## II. Roberts Would Abandon the Longstanding Legal Standard That Protects Against Majoritarian Over-Reaching.

In order to ensure that government remains neutral on religious matters, the Supreme Court held over thirty years ago that governmental action will be found to violate the Establishment Clause

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[2] Memorandum from John G. Roberts, Associate Council to the President, to Fred F. Fielding, Council to the President (Aug. 6, 1985) (on file with the Ronald Reagan Presidential Library).

[3] *Id.*

[4] Bennett Address at 9, 11.

[5] Memorandum from Roberts to Fielding (Aug. 6, 1985).

[6] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[7] *Id.* at 245.

of the First Amendment if it was taken with a religious purpose, has a primarily religious effect, or excessively entangles church and state.[8]

Since that time, the "*Lemon* test" has served as a bulwark against over-reaching by religious majorities. The test has been used to strike down the indoctrination of public school students through the posting of the Ten Commandments in classrooms,[9] to prohibit the delivery of Christian prayers at high school football games,[10] and to preclude government funding of the religious activities of anti-choice organizations.[11]

Although the *Lemon* test has been the subject of some criticism, and the Court has declined to apply it in certain narrow circumstances,[12] the test remains the operative standard in Establishment Clause cases.[13] Just last term, five of the current Justices — including Justice O'Connor — made

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[8] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[9] *See Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

[10] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000).

[11] *See Bowen v. Kendrick*, 487 U.S. 589, 602 (1988).

[12] The two principal cases in which the Supreme Court has opted not to apply the *Lemon* test are *Lee v. Weisman*, 505 U.S. 577 (1992), and *Marsh v. Chambers*, 463 U.S. 783 (1983). In the former case, the Court had no need to apply the *Lemon* test because it found prayers at public school graduation ceremonies to violate even the more demanding coercion test. *Lee*, 505 U.S. at 587. In *Marsh*, the Supreme Court opted to apply a standard of original intent, rather than the *Lemon* test, to uphold legislative prayers because the First Congress had explicitly approved the practice. *Marsh*, 463 U.S. at 786-92. *Marsh* is considered a "one-of-a-kind" case in Establishment Clause jurisprudence, with little impact beyond the context of legislative prayers. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 380-82 (6th Cir. 1999); *accord Kurtz v. Baker,* 829 F.2d 1133, 1147 (D.C. Cir. 1987) (noting that *Marsh* "fits into a special nook — a narrow space tightly sealed off from otherwise applicable first amendment doctrine"); *see also Lee*, 505 U.S. at 596-97 (finding *Marsh* inapplicable to public high school graduation prayers because of the unique nature of state legislative sessions). The brief that Roberts joined in *Lee* advocated expansion of *Marsh* beyond the context of legislative prayers to all civic ceremonies in public schools and elsewhere. Brief for United States as *Amicus Curiae* in Supp. of Cert. in *Lee* at 9-10 (at http://www.usdoj.gov/osg/briefs/1990/sg900354.txt).

[13] *See Agostini v. Felton*, 521 U.S. 203, 222 (1997) (noting that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed"

(continued...)

clear that they continue to support the *Lemon* test; four Justices made plain their interest in abandoning it.[14] The continued viability of the *Lemon* test thus hangs in the balance of Justice O'Connor's impending resignation.

While at the Solicitor General's Office,[15] then-Deputy Solicitor General Roberts filed briefs asking the Supreme Court to overrule the *Lemon* test.[16] Roberts advocated replacement of the *Lemon* test with a "coercion" test, under which religious action by government would be permissible

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[13] (...continued)
and that "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . . [and] whether the aid has the 'effect' of advancing or inhibiting religion").

[14] *See McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

[15] During his confirmation hearings for his nomination to the D.C. Circuit, Roberts attempted to distance himself from some of the positions taken in briefs that he joined while at the Solicitor General's Office. *See Confirmation Hearings on Fed. Appointments: Hearing Before the Comm. on the Judiciary*, 108th Cong. 96-97 (2003) (exchange between Sen. Hatch, Chairman, Sen. Comm. on the Judiciary, and John G. Roberts, Jr., Nominee, D.C. Circuit). He will presumably seek to do so again. This effort, however, should be resisted. As Principal Deputy Solicitor General, Roberts was one of only two political appointments to the office, the other being the Solicitor General himself. As Principal Deputy Solicitor General, Roberts "participated in formulating the litigation position of the government." *See* U.S. Dept. of Justice, Office of Legal Policy, *John G. Roberts, Biography*, http://www.usdoj.gov/olp/robertsbio.htm. Roberts has himself explained that it was his responsibility to "supervise[] the preparation and filing of petitions for and briefs in opposition to certiorari." *Confirmation Hearings on Fed. Appointments: Hearing Before the Comm. on the Judiciary*, 108th Cong. 307-08 (2003) (questionnaire of John G. Roberts, Jr., Nominee, D.C. Circuit).

[16] *See* Brief for the United States as *Amicus Curiae* in Supp. of Cert. in *Lee* at 5; Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Lee* at 4, 9 (at http://www.usdoj.gov/osg/briefs/1990/sg900105.txt); *see also* Brief for the United States in *Board of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990), at 20 (at http://www.usdoj.gov/osg/briefs/1989/sg890427.txt) (claiming that "the *Lemon* test has generated results that often obfuscate as much as they illuminate" and that it improperly "sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people"). The United States was not a party to the *Lee* case; nor was a federal statute under attack in the litigation. The Solicitor General's Office was thus under no obligation to participate in the case.

provided that it does not "coerce nonadherents to participate in any religion or religious exercise against their will."[17]

Justice O'Connor has explicitly repudiated the coercion test that the government's brief proposed. As she has explained, "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy."[18] Adoption of the coercion test would amount to "abandoning our settled law,"[19] law that would undoubtedly be up for grabs if Roberts is elevated to the High Court.

## III. Roberts Would Advance a Historical Test That Would Abridge Longstanding Protections.

Roberts' briefs in *Lee* took the position that the Establishment Clause should be interpreted today in precisely the same way that it was understood at the time of its adoption in 1789 — and, according to Roberts, the Clause was understood at that time to impose a coercion standard.[20] Indeed, the briefs argued that the Court should not only approve those religious activities that existed

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[17] Brief for the United States in Supp. of Cert. in *Lee* at 4-8; *accord* Brief for the United States Supporting Petitioners in *Lee* at 4, 9-10 ("The proper approach recognizes that in this setting coercion is the touchstone of an Establishment Clause violation.").

[18] *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (O'Connor, J., concurring).

[19] *Lee*, 505 U.S. at 618 (Souter, J., concurring, joined by Stevens & O'Connor, J.J.).

[20] Brief for the United States in Supp. of Cert. at 5; Brief for the United States Supporting Petitioners in *Lee* at 9. The Solicitor General's brief was wrong not only as a matter of law, but as a matter of history. Both Jefferson and Madison believed that official prayers were unconstitutional *and* that coercion was not a necessary element of an Establishment Clause violation. Letter from Thomas Jefferson to Rev. Mr. Millar (Jan. 23, 1808), *reprinted in* THE REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS, at 136-37 (Norman Cousins ed., 1998) (refusing to set aside days of thanksgiving and prayer because the government has "no power to prescribe any religious exercise, or to assume authority in religious discipline" and noting that the Establishment Clause is not limited to "fine and imprisonment"); JAMES MADISON, DETACHED MEMORANDA, *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY, at 93-94 (Robert S. Alley ed., 1985) (regretting past presidential encouragement of prayer as unconstitutional because it "naturally terminates in a conformity to the creed of the majority" and expressing the view that the Establishment Clause protects against not only ultimate harms, but the incremental steps leading to that harm).

at the Founding and were approved by the Framers, but should also be willing to "draw inferences from long-established traditions to approve [religious] practices in contemporary settings."[21]

While the Supreme Court has found historical evidence persuasive in interpreting the Establishment Clause, a majority of the Court has declined to make such evidence dispositive, holding that not "all accepted practices 200 years old and their equivalents are constitutional today."[22] The Court has noted that a standard that makes history dispositive would result in the approval of highly sectarian actions:

> The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). . . . There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command.[23]

Indeed, the rationale espoused in the Solicitor General's briefs in *Lee* was the very same rationale used to uphold slavery in the *Dred Scott* decision.[24]

## IV. The Effect on Establishment Clause Jurisprudence Would Be Staggering.

Overruling *Lemon* and replacing it with the coercion/historical test that Roberts has advanced would throw church-state jurisprudence into disarray — and threaten a return of the "heritage of official discrimination against non-Christians" that the Court rejected in *Allegheny*. The *Lemon* test

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[21] Brief for the United States in Supp. of Cert. at 5-6; *accord* Brief for the United States Supporting Petitioners in *Lee* at 9-10.

[22] *Allegheny*, 492 U.S. at 603.

[23] *Id.* at 604-05 (citations omitted).

[24] *See Scott v. Sanford*, 60 U.S. 393, 410 (1856) (holding that Blacks are not included within the phrase "all men are created equal" because "if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted").

is the backbone of Establishment Clause law; jettisoning it is akin to the proverbial removal of the tablecloth from under the dishes: only a magician could prevent the destruction of longstanding caselaw.

As described more fully below, replacement of the *Lemon* test with the coercion standard advanced by Roberts would have the following results: government officials would be permitted to deliver prayers at all civic events, including those that take place in the public schools; legislators and other officials could choose to adorn government buildings with displays of the Ten Commandments, other biblical texts, and even religious iconography; and government dollars could be used to support religious activities, including religious discrimination.

Because the decisions about the nature of those religious messages and activities will generally result from majoritarian processes, one may assume that the prayers that get said, the displays that get erected, and the organizations that get funded will, in the vast majority of cases reflect certain Christian traditions or beliefs. These developments would marginalize religious minorities, whose voices are likely to be drowned out by the proliferation of majoritarian messages in the halls of schools, legislatures, and other government arenas.

To make matters worse, Roberts has supported legislative measures that would deprive the federal courts of jurisdiction over church-state issues, leaving state courts as the final arbiters of these controversial questions. Because state courts, which are often staffed by elected judges, are far more likely to be subject to majoritarian influences, this would only exacerbate the negative impact on religious minorities, for whom the federal court system has historically functioned as a forum of last resort.

### *A. Majoritarian Prayers at Public-School Ceremonies and Other Civic Events Would Become Commonplace.*

Consistent with his view that only coercive governmental actions should be prohibited under the Establishment Clause, Roberts joined two briefs in *Lee v. Weisman*,[25] arguing that school officials and local clergy should be allowed to deliver prayers at public-school graduation ceremonies.[26] According to one of those briefs, "an individual is not coerced by a civic

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[25] 505 U.S. 577 (1991).

[26] *See* Brief for the United States in Supp. of Cert. in *Lee, passim*; Brief for the United States Supporting Petitioners in *Lee, passim*.

acknowledgment of religion so long as that person is not *required* to witness it."[27] And because "[s]tudents were not compelled to attend the ceremony,"[28] no coercion existed.

Government-sponsored prayers are permissible, Roberts argued, because they "merely respect the religious heritage of the community"[29] and are "an expression of civic tolerance and accommodation to all citizens."[30] Apparently, only those persons reflected in the prayers are "citizens" of this "community." Buddhists, Hindus, Muslims, and members of other minority religions are not: they can simply choose "not to be present for [the] graduation."[31]

Recognizing that the government's view was inconsistent with a public school community that welcomes people of *all* religious faiths, the Supreme Court, in a 5-4 opinion written by Justice Kennedy, rejected the government's argument, finding that it "demonstrates fundamental inconsistency" and "turns conventional First Amendment analysis on its head" by allowing the wishes of the majority to trump the concerns of the adherents of minority religions.[32] As the Court explained, "[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us [by the government]."[33]

The Supreme Court found that the government's argument that attendance at graduation ceremonies is voluntary "lacks all persuasion."[34] The Court found that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme" because "in our culture high school graduation is one of life's most significant occasions."[35]

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27 Brief for the United States Supporting Petitioners in *Lee* at 11 (emphasis added).

28 *Id.* at 13.

29 Brief for the United States in Supp. of Cert. in *Lee* at 8

30 *Id.* at 7-8.

31 Brief for the United States Supporting Petitioners in *Lee* at 12.

32 *Lee,* 505 U.S. at 595-96.

33 *Id.* at 596.

34 *Id.* at 595.

35 *Id.*

Yet, under the view of the Establishment Clause advocated in the briefs joined by Roberts, school officials would be permitted to deliver prayers not only at graduation ceremonies, but at other public school events and ceremonies at which attendance is not mandatory, such as sporting events and school assemblies.[36] Under this vision of America, Jewish and Muslim children would be forced to choose between forfeiting their right to full participation in the public schools or being bombarded with sectarian prayers at school ceremonies and events.

Indeed, the briefs indicate that, if given the opportunity, Roberts would vote to allow prayers at *all* civic events, in the public schools and elsewhere. That is because the brief joined by Roberts argued that religious ceremonies should be permitted in all aspects of "our public life," in proper recognition of our "Nation's religious heritage."[37]

To make matters worse, the Solicitor General's briefs did not ascribe any importance to the fact that the School District had chosen to limit the prayers to nonsectarian messages. The briefs joined by Roberts did not advocate any limits on the content of prayers, instead advancing a standard

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[36] *See* Brief for the United States Supporting Petitioners in *Lee* at 11 (referring generally to non-coercive "civic acknowledgment[s] of religion"). Roberts has recognized that his views have not carried the day in the Supreme Court. Speaking in 2000 on "Capital Conversation," a weekly public affairs program on the ABC Dallas affiliate WFAA, Roberts conceded that "the argument about government-sponsored, government-initiated prayer in schools is over, but that's not necessarily all that we're talking about." Kathryn J. Lopez, *Roberts, on the Record: "listening to this man, that he is a conservative,"* BENCH MEMOS, http://bench.nationalreview.com/archives/072295.asp. He went on to offer an extremely narrow interpretation of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) — in which the Court struck down the delivery of prayers over the public address system at high school football games — stating as follows:

> The test, as I see it, is, if the prayer is genuinely student-initiated, student-led and does not look like something the government, the school district is sponsoring, then it's going to be all right.
>
> * * *
>
> You have a situation where it's not school-initiated, it's school-sponsored, but it's the students themselves or groups of students themselves who are engaging in prayer or religious activity. That's an entirely different question.

*Id.*

[37] Brief for the United States in Supp. of Cert. in *Lee* at 4; *accord* Brief for the United States Supporting Petitioners in *Lee* at 4 (noting that the case provides the Court the opportunity to hold "that civic acknowledgments of religion in public life do not offend the Establishment Clause").

that would permit not only the nonsectarian prayers that the School District sought in *Lee*, but even overtly proselytizing messages. Nor did the briefs proffer any limits on the nature of acceptable prayer-givers, thereby countenancing the delivery of prayers by even those at the top of the governmental hierarchy, such as a school Principal or School District Superintendent.

One of Roberts' briefs even opined, contrary to longstanding Supreme Court precedent, that "[n]o level of heightened scrutiny . . . should be triggered merely because a challenge involves a ceremony that children might attend"[38] and that "no special rule for children is justified in the setting of a public school graduation or in any other ceremonial setting where children may compose part of the audience."[39] This, too, was rejected by the Supreme Court, which explicitly reaffirmed that "there are heightened concerns with protecting freedom of conscience . . . in the elementary and secondary public schools."[40]

Allowing public school events and other civic ceremonies to be hijacked by those with a religious agenda runs counter to the mission of the public schools in particular and our constitutional ideals in general. Roberts' elevation to the high Court would pave the way for extreme marginalization of religious minorities through the introduction of majoritarian religious messages into all aspects of American civic life.

### *B. Roberts Would Permit Public School Classrooms To Be Hijacked By A Sectarian Agenda.*

Roberts appears to espouse a position even more hostile to religious minorities than that advocated in the Solicitor General's briefs in *Lee*. The Solicitor General's briefs in *Lee* recognized that the risk of coercion may be greater in the "classroom setting" than at graduation ceremonies because the latter context is "more properly understood as a civic ceremony than part of the educational mission."[41] But Roberts has expressed no such concern, with respect to silent or spoken prayer, when writing under his name alone.

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[38] Brief for the United States Supporting Petitioners in *Lee* at 5.

[39] *Id.* at 12.

[40] *Lee*, 505 U.S. at 592.

[41] Brief for the United States in Supp. of Cert. in *Lee* at 8; *accord* Brief for the United States Supporting Petitioners in *Lee* at 12.

Roberts is plainly of the view that nothing in the Constitution prohibits a daily moment of silent prayer in public school classrooms. In *Wallace v. Jaffree*,[42] the Supreme Court struck down a statute that called for a daily classroom period of silence for "meditation or voluntary prayer" because legislators had passed the statute in a backdoor effort to circumvent the prohibition on school prayer. In response to the holding, some lawmakers proposed a constitutional amendment to permit "individual or group silent prayer or reflection in public schools." Roberts expressed no objection to the administration's support of the amendment because, in his view, the conclusion "that the Constitution prohibits such a moment of silent reflection — or even silent 'prayer' — seems indefensible."[43]

Roberts has supported efforts to return even *spoken* prayer to public school classrooms. For example, he supported a constitutional amendment that authorized voluntary prayers — on both an individual and group basis — to take place in the public schools, without expressing any reservation about the application of the amendment to the classroom context.[44]

He expressed a similar view in another memo addressing a written response to a question posed by Dr. Pat Robertson. The question asked "[w]hy is Washington seemingly the last place to be receptive to issues like school prayer, when 60-80% of Americans want to allow prayer in public schools?"[45] The proposed response was to express a plan "to try again for passage of school prayer

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[42] 472 U.S. 38 (1985).

[43] Memorandum from John G. Roberts to Fred F. Fielding (Nov. 21, 1985) (on file with the Ronald Reagan Presidential Library).

[44] *See* Memorandum from Roberts to Fielding (June 11, 1985) (on file with the Ronald Reagan Presidential Library). Roberts' memo was written in support of constitutional amendments S.J. Res. 3, 99th Cong. (1985), and the identical H.R.J. Res. 279, 99th Cong. (1985). The amendment provided as follows:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.

*Id.* The amendment did not limit its reach to the non-classroom context or to silent, as opposed to audible, prayer.

[45] Memorandum from Roberts to Fielding (Apr. 23, 1985) (on file with the Ronald (continued...)

amendment," a response to which Roberts expressed "no objections," again without reservation.[46] Here, again, Roberts failed to recognize that the purpose of the Establishment Clause is to remove from those in the majority the ability to impose their religious views on others.

Roberts removed any ambiguity about his interest in returning prayer to the public schools in a 1985 memo addressing the Supreme Court's decision in *Wallace v. Jaffree*. He explained in the memo that while the Court had struck down the particular moment of silence statute at issue in *Wallace* because of its reference to "prayer," a majority of the Justices had explained that they would likely approve a simple moment-of-silence statute.[47] He expressed dissatisfaction with this result, however, because "we still have an uphill battle to return prayer to schools."[48] He lamented the fact that "there is nothing positive in the opinion for prayer, only for a moment of silence."[49]

### *C. Displays of Sectarian Religious Symbols Would Proliferate in Public Schools and Other Government Buildings.*

A slim majority of the Supreme Court has consistently held that the Establishment Clause prohibits government officials from erecting a religious monument or other religious display when they do so with a religious purpose, or when the religious item is not incorporated into a larger display that sends a secular message.

Thus, in *Stone v. Graham,*[50] the Supreme Court struck down a statute that required copies of the Ten Commandments to be posted on the walls of every public school classroom. The Court explained that the Ten Commandments can be incorporated into an appropriate study of history, civilization, comparative religion, or the like, but they cannot be posted in a manner that indicates that they are being depicted "to induce the schoolchildren to read, meditate upon, perhaps to

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[45] (...continued)
Reagan Presidential Library).

[46] *Id.*

[47] Memorandum from Roberts to Fielding (June 4, 1985) (on file with the Ronald Reagan Presidential Library).

[48] *Id.*

[49] *Id.*

[50] 449 U.S. 39 (1980).

venerate and obey, the Commandments."[51] That is because the Commandments do not confine themselves to secular matters such as killing and stealing, but also extend to plainly religious duties such as worshipping the Lord God alone and observing the Sabbath Day.[52]

Similarly, in *Allegheny v. ACLU*,[53] the Court held 5-4 that a crèche depicting Jesus' birth could not be placed, by itself, in the Grand Staircase of a County Courthouse. And just last month, again in a 5-4 decision, the Court struck down displays that paired the Ten Commandments with a variety of other secular documents because the history of the displays revealed that the Counties had added the other items in an effort to"reach[] for any way to keep a religious document on the walls of courthouses."[54]

It is clear that Roberts would support none of these decisions. Because Roberts believes that the government should be allowed to acknowledge our "Nation's religious heritage" without limit,[55] provided that it does so without requiring the active participation of viewers,[56] these decisions would most certainly be overturned on his watch.

Roberts has made his position known, explicitly opining that both *Stone* and *Allegheny* were wrongly decided. In his August 6, 1985, memo addressing Bennett's comments to the Knights of Columbus, Roberts said he was not "bothered by the criticism" of *Stone*, and has "no quarrel with Bennett on the merits," disclosing that he "worked for Justice Rehnquist when he filed the lone

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51 *Id.* at 42.

52 *Id.* at 41-42.

53 492 U.S. 573 (1989).

54 *See McCreary*, 125 S. Ct. at 2741.

55 Brief for the United States in Supp. of Cert. in *Lee* at 4.

56 *See id.* at 4, 7-8; *accord* Brief for the United States Supporting Petitioners in *Lee* at 11.

dissent in *Stone*."[57] Likewise, one of the briefs that Roberts submitted in *Lee* took the position that the decision in *Allegheny* was misguided.[58]

Thus, under Roberts' watch, government officials would have license to place religious messages and iconography in government buildings and other public spaces. Indeed, under his proposed coercion test, government officials would be permitted to erect highly sectarian displays. Displays that reflect a preference for Christianity over other faiths, such as that erected by Alabama Chief Justice Roy S. Moore in 2001, would be permitted — at the inevitable expense of the rights of religious minorities.

### *D. Public Dollars Would Be Used to Subsidize Religious Activities.*

The Supreme Court held long ago that, in order to ensure that the government remains neutral on religious matters, "[t]he State may not adopt programs or practices . . . which aid . . . any religion."[59] While, in the ensuing years, the High Court has taken exception to this general principle when the aid is "indirect" — as in voucher programs[60] — it has steadfastly maintained that public aid that is provided directly to religious institutions cannot be put to religious use.

In *Mitchell v. Helms*,[61] the Court considered a program that provided aid to public and private schools — including parochial schools — for non-religious use. Four of the Justices in the majority took the view that support for religious institutions, such as churches and parochial schools, is constitutionally permissible even when the aid is used for religious purposes.[62] This view, however, did not prevail. Justice O'Connor, who provided the fifth vote for the majority, wrote a concurring

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[57] Memorandum from Roberts to Fielding (Aug. 6, 1985). In a 1985 memo, Roberts advised President Reagan not to endorse a Kentucky resolution calling for the posting in public schools of plaques inscribed with the national motto "In God We Trust." Memorandum from Roberts to Anita Bevacqua (May 24, 1985) (on file with the Ronald Reagan Presidential Library). Roberts advice, however, was premised on the fact that the Supreme Court's decision in *Stone* suggested that the posting would be unconstitutional. That is, Roberts was informing Reagan of what the law *is*, rather than what it *should be*.

[58] *See* Brief for the United States in Supp. of Cert. in *Lee* at 8.

[59] *Epperson v. Arkansas,* 393 U.S. 97, 106 (1968).

[60] *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

[61] 530 U.S. 793 (2000).

[62] *Id.* at 807-08.

opinion that reiterated the longstanding prohibition on the diversion of public dollars to religious use.[63] Replacing Justice O'Connor with someone who shares the view of the other Justices in the majority would result in overturning this time-tested prohibition.

And that is, indeed, the kind of person Roberts appears to be. In a 1984 memo Roberts wrote while at the White House, he cautioned administration officials against language in a presidential statement saying that the Constitution's Establishment Clause prohibited government "support" of religion.[64] The advice came after Roberts reviewed a proposed statement for President Reagan on the signing of the Equal Access Act into law. Reagan's draft statement said the equal access provisions "appropriately balance [] free speech [and] 'the prohibition against government support of religion.'"[65] Roberts suggested changing the word "support"to "establishment" because, in his view, "[t]here is no such prohibition."[66]

Similarly, in his remarks to the Knights of Columbus, Bennett included the comment that the Constitution does not prohibit, and indeed authorizes, "public support of religion."[67] Again, Roberts stated that he had "no quarrel" with this assertion.[68] It is thus clear that Roberts would seek to undo the longstanding prohibition on the use of public dollars for religious purposes.

### *E. Public Dollars Would Be Used to Support Religious Discrimination.*

In *Zelman v. Simmons-Harris*,[69] the Supreme Court addressed the constitutionality of a Cleveland voucher program that made vouchers available to parochial schools but disallowed those schools from engaging in racial or religious discrimination against applicants. The Supreme Court approved the program in a 5-4 vote but did not say whether it would have reached a different conclusion had schools been allowed to engage in discrimination.

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[63] *Id.* at 837-39 (O'Connor, J., concurring).

[64] Memorandum from Roberts to Fielding (Aug. 9, 1984) (on file with the Ronald Reagan Presidential Library).

[65] *Id.*

[66] *Id.*

[67] Bennett Address at 9.

[68] Memorandum from Roberts to Fielding (Aug. 6, 1984).

[69] 536 U.S. 639 (2002).

The Court has not had occasion to address whether public subsidies — whether in the form of vouchers or direct cash grants — can be provided to private schools, social-service providers, or other organizations that engage in religious discrimination against employers, students, or beneficiaries. This civil-rights issue has been thrust to the forefront of legal debate as a result of the Faith-Based Initiative, and is likely to be decided by the Supreme Court in the coming years.

It is likely that four Justices on the Court would vote to uphold the provision of government funds to subsidize even religious discrimination.[70] It is unclear, however, what the other five Justices — including Justice O'Connor — would hold.

The High Court has held that government may, in limited circumstances, take measures to accommodate religious practices.[71] The Court has cautioned, however, that such accommodations must be carefully circumscribed to ensure that they do not "devolve into an unlawful fostering of religion."[72]

But Roberts took the position while in private practice that "efforts to accommodate religion are *invariably* constitutional when the State simply chooses to relieve religious institutions" of legal obligations.[73] Although two judges on the three-judge panel of the Fourth Circuit voted to uphold the ordinance at issue — which exempted certain parochial schools from various zoning requirements — as a permissible accommodation of religion, they recognized that "[t]he line between benevolent neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other, must be delicately drawn both to protect the free exercise

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[70] *See Mitchell*, 530 U.S. at 801, 807-08 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, J.J.) (finding that Establishment Clause places no limits on religious organizations' use of public aid, provided that aid reaches recipients through a religion-neutral process).

[71] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII's prohibition on religious discrimination, in a context that did not involve the provision of public funds).

[72] *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005) (internal quotation marks and citation omitted).

[73] Brief of Appellant in *Renzi v. Connelly School of the Holy Child Inc.*, 224 F.3d 283 (4th Cir. 2000), at 11 (emphasis added).

of religion and to prohibit its establishment."[74] But Roberts did not proffer a "delicately drawn" line, instead advocating that government be given unlimited freedom to exempt religious institutions from legal obligations.

This extremist advocacy — which was unnecessary to the disposition of the case at hand — suggests that Roberts would vote to allow publicly-funded religious organizations to be exempted from civil-rights laws and to use taxpayer dollars to finance discrimination.

### *F. The Federal Judiciary Could Be Stripped of Jurisdiction Over Church-State Issues.*

Proposals to strip the federal courts of jurisdiction over controversial matters have been commonplace in Congress for decades, but virtually none have passed. In the early 1980s, when Roberts was working at the United States Attorney General's Office, several court-stripping bills were under consideration. The bills were designed to divest the Supreme Court (and, in some instances, lower federal courts) of jurisdiction over cases raising certain issues, including school prayer, desegregation, and abortion. It was commonly understood that these bills were motivated by legislators' disagreement with the positions taken by some federal courts on these issues.

During Roberts' tenure at the Attorney General's Office, he prepared a 36-page memorandum in support of these court-stripping measures.[75] Although the memo explained that its purpose was to "marshal the arguments . . . in favor of Congress' power to control the appellate jurisdiction of the Supreme Court,"[76] the memo purported to represent a balanced view of the issue.[77]

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[74] *Renzi*, 224 F.3d at 287-88.

[75] *See* Memorandum from John G. Roberts, Special Assistant to the Attorney General, to William F. Smith, United States Attorney General (Sept. 29, 1981) (dated in handwriting in top right corner) (on file with the National Archives). This memorandum appears to be a draft of a more formal 27-page memorandum that has been quoted in the press. *See, e.g.*, Jeffrey Smith et al., *Documents Show Roberts Influence In Reagan Era*, WASHINGTON POST, July 27, 2005, at A1; Jeffrey Smith et al., *A Charter Member of Reagan Vanguard*, WASHINGTON POST, Aug. 1, 2005, at A1. The subsequent memorandum states that it does "not purport to be an objective review of the issue." *See* Memorandum from John G. Roberts to William F. Smith (Sept. 29, 1981). This language is missing from the earlier draft.

[76] *Id.* at 1.

[77] *See, e.g., id.* at 33 (claiming that "[e]qual protection challenges would seem to present (continued...)

And it was by no means an academic exercise: it was written in Roberts' own, highly personal voice.

The memo argued that the Exceptions Clause — which gives Congress the power to create "exceptions" to Supreme Court jurisdiction — "by its terms contains no limit."[78] Roberts characterized the language of the Clause as "clear and unequivocal" and as a "stumbling block for those who would read the clause in a . . . restricted fashion."[79] He reiterated this point on several occasions, noting later in the memorandum that "it is important to recognize that we are not considering a constitutional clause that is by its nature indeterminate and incapable of precise or fixed meaning."[80]

Roberts went on to interpret a Supreme Court decision as giving "broad, indeed unlimited scope" to the exceptions power.[81] He argued that the Supreme Court's decisions concerning congressional power "clearly indicate that the Court accepted the proposition that Congress could, if it desired, totally divest the Supreme Court of appellate jurisdiction in [certain categories] of cases."[82] He dismissed a contrary decision as "a red herring"[83] and concluded that there is "a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says."[84]

Roberts did not premise his support of the court-stripping bills on the continued availability to litigants of the lower federal courts. Rather, in his view, the Constitution requires only that

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[77] (...continued)
the most serious hurdle for the pending bills").

[78] *Id.* at 2.

[79] *Id.* at 2-3.

[80] *Id.* at 4.

[81] *Id.* at 13.

[82] *Id.* at 15.

[83] *Id.*

[84] *Id.* at 17.

review be available in "*some* judicial forum, either the lower federal courts or state courts."[85] In his view, "[d]ue process does not require judicial review in a federal court *or* final review by the Supreme Court."[86]

Any claim that this memo does not reflect Roberts' personal views is belied by his subsequent writings. In an April 12, 1982, memorandum that then-Assistant Attorney General Theodore B. Olson sent to then-Attorney General William French Smith, Olson advocated opposing the pending court-stripping bills, explaining that opposition would "be perceived as a courageous and highly principled position."[87] Roberts opposed Olsen's position, scrawling "NO!" in the margins and observing that"[r]eal courage would be to read the constitution as it should be read and not kowtow to [those opposing the bills]."[88]

Fortunately, Roberts' position did not prevail: the Administration ultimately elected to oppose the court-stripping measures and they were not enacted into law, leaving the federal courts available to enforce constitutional protections.

**Conclusion**

Roberts' elevation to the Supreme Court would herald a sea change in Establishment Clause jurisprudence, resulting in further erosion of the wall that separates church and state. The Supreme Court — to the extent that it retained jurisdiction — would cease to be receptive to the complaints of religious minorities, and the longstanding protections against government-sanctioned majoritarian over-reaching would be weakened, if not eliminated altogether.

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[85] *Id.* at 33.

[86] *Id.* (emphasis added).

[87] Memorandum from Theodore B. Olsen to William F. Smith (Apr. 12, 1982) (on file with the National Archives).

[88] *Id.* Roberts' advocacy of court-stripping measures likely related to his substantive disagreement with some of the Supreme Court decisions of that era. In a 1983 memo opposing the creation of a temporary court between the Courts of Appeals and the Supreme Court, Roberts stated that "[s]o long as the Court views itself as ultimately responsible for governing all aspects of our society, it will, understandably, be overworked." Memorandum from John G. Roberts to Fred F. Fielding (Feb. 10, 1983) (on file with the Ronald Reagan Presidential Library).

**Nomination of John G. Roberts to be Chief Justice of the United States**

**Hearings before the Committee on the Judiciary, United States Senate**

**Testimony of Patricia L. Bellia***

**September 15, 2005**

It is an honor to appear before you in support of the President's nomination of Judge John Roberts to be Chief Justice of the United States.

By way of background, I am a law professor at the University of Notre Dame, where I teach and research in the areas of constitutional law and law and information technology. Before joining the Notre Dame faculty, I served from 1997 to 2000 as an attorney-adviser in the Office of Legal Counsel of the United States Department of Justice, which advises the Attorney General and the President on various "structural" constitutional issues, including questions about the scope of Congress's legislative authority and separation of powers. Prior to my service in the Justice Department, I had the great privilege of clerking for two of our nation's most respected jurists: Judge José A. Cabranes of the United States Court of Appeals for the Second Circuit, whose fair-mindedness and commitment to legal principle long ago set the bar in my mind of attributes that a worthy Supreme Court nominee must possess; and Justice Sandra Day O'Connor, whom Judge Roberts was initially nominated to replace and for whom I have the deepest admiration.

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I have never worked with Judge Roberts; indeed, I have never met him. I have had the privilege, however, to know Judge Roberts' work as an advocate before the Supreme Court and, more recently, his work as a judge on the United States Court of Appeals for the D.C. Circuit. During my time in Washington, I witnessed Judge Roberts' advocacy before the Court first-hand on several occasions. As an advocate before the Supreme Court, Judge Roberts was an extraordinary legal craftsman. His arguments were brilliant, his temperament even, and his responsiveness to the concerns of each Justice genuine. No one who followed Judge Roberts' career as a Supreme Court advocate could plausibly deny that he stands among the very best lawyers of his generation.

I will not focus in this testimony, however, on the record of John Roberts as an advocate for his clients before the Supreme Court and other courts; rather, I will focus on his record as a judge, a record with which I am thoroughly familiar. In my view, the best evidence of how a nominee will perform as a judge is how he has performed as a judge. I have read all of the opinions that Judge Roberts has written in his time on the United States Court of Appeals for the D.C. Circuit. His service on that court demonstrates that he resolves cases with competence, care, impartiality, and fair-mindedness. Most importantly, his jurisprudence on the Court of Appeals demonstrates in decided fashion that Judge Roberts does not seek in his decisions to advance the platform of any current political ideology. Judge Roberts has joined and written opinions upholding claims of criminal defendants and joined and written opinions denying such claims. He has accepted challenges to Executive agency action claimed to be arbitrary and capricious, in violation of due process, lacking substantial evidence, or otherwise unreasonable; and he

has rejected such challenges when he believes that an agency has faithfully discharged its duty under the law. He has interpreted statutes with great care, with a primary focus on the text that Congress has enacted, but never categorically dismissing any evidence that is probative of congressional intent. Across the board, his opinions reveal no bias or political agenda—no desire merely to manipulate the law in the service of a politically predetermined result.

His opinions, be they for the court or himself, display no rancor; rather, they are notable for the respect and care with which they outline any disagreement he might have with the positions of litigants or his colleagues on the court. Nor do his opinions betray any impatience for the claims of any class of litigants. The occasional hints of exasperation in Judge Roberts' opinions are reserved for the district court judge or the administrative agency that has decided upon the rights and claims of individuals without providing the considered explanation to which he believes all persons who find themselves before our tribunals are entitled. It is therefore no surprise to find in Judge Roberts' opinions an extensive, careful scrutiny of the individual claims that each case squarely presents—no more and no less.

There is not the time here for me to specifically analyze each opinion that Judge Roberts has written or joined on the Court of Appeals. I therefore will focus on two substantive areas in which Judge Roberts' work on the Court of Appeals has been subject to criticism. Both areas involve structural constitutional issues. The first concerns Judge Roberts' approach to questions of congressional power under the Constitution. A claim has been made that Judge Roberts takes an unduly narrow view of Congress's power under the Commerce Clause—one that endangers a variety of civil rights statutes, labor

standards, and environmental regulations that Congress has justly designed to protect the equal rights of all Americans, the conditions under which we work, and the environment in which we live. The second issue concerns Judge Roberts' approach to questions of Executive power. The critical claim is that Judge Roberts is unduly deferential to assertions of presidential prerogative, particularly in the area of foreign affairs. In my view, these claims are unfounded, dependent as they are upon a misreading of Judge Roberts' opinions.

A fair explanation of why these claims are unfounded does not make for gripping political rhetoric. Rather, a fair explanation demands a considered analysis of the cases in light of the complexity, measure, and nuance of the governing law that the facts of these cases implicated—in other words, a legal analysis.

The concern regarding congressional power stems from Judge Roberts' dissenting opinion in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (*Rancho Viejo II*). In this case, the court was called upon to address whether the U.S. Fish and Wildlife Service could, under the Endangered Species Act, impose certain restrictions on a proposed housing development on the theory that the development would result in the so-called "taking" of the arroyo southwestern toad. The developer challenged the restrictions on the ground that application of the Endangered Species Act to protect the arroyo toad and thereby restrict the housing development exceeded the authority of the federal government under the Commerce Clause. A panel of the D.C. Circuit rejected that claim, and the developer petitioned for rehearing by the full Court of Appeals.

The active members of the D.C. Circuit declined to rehear the case en banc. Judge Roberts dissented from that denial of rehearing. Because Judge Roberts' dissent

has been characterized as evidencing a hostility to Congress's Commerce power, it is important to establish what the dissent shows, and what it does not show. Judge Roberts dissented not on grounds that the panel reached the wrong *result* in upholding congressional power, but that it employed the wrong *methodology*. Nowhere does the dissent suggest that the Endangered Species Act is unconstitutional, as applied in this case or in any other case. Rather than demonstrating a hostility to congressional power, the dissent demonstrates a concern that courts provide the right *reasons* for their decisions—even if the results remain the same. This concern is of course well founded, as the reasons that the courts provide in support of their decisions are central to the corpus of law that will guide judicial action in subsequent cases.

Specifically, what the dissent shows is a concern that the methodology the panel adopted in deciding the case is out of step with relevant Supreme Court doctrine. In evaluating the developer's claim that the federal government's action was unconstitutional, the panel examined whether the activity the federal government effectively precluded—namely, the housing development—had a substantial effect on interstate commerce. In doing so, the panel declined to consider an alternative ground in defense of the restrictions: that the loss of the toad would itself have a substantial effect on the ecosystem and likewise on interstate commerce. Nor did the panel consider similar rationales on which other circuits had relied to uphold endangered species regulations, including that protection of endangered species affects interstate commerce through tourism, trade, and scientific research. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067-68 n.2 (D.C. Cir. 2003) (*Rancho Viejo I*).

Judge Roberts' concern in dissent was that the panel opinion asked the wrong question. In particular, the panel asked not whether the *activity targeted by the statute* substantially affects interstate commerce, but rather whether the *consequences of targeting that activity* substantially affect interstate commerce. More specifically, the panel focused not on whether the taking of the arroyo toad affected interstate commerce, but rather on whether the restriction of the housing development affected interstate commerce. *See Rancho Viejo II*, 334 F.3d at 1160 (Roberts, J., dissenting). Judge Roberts perceived the panel's approach to be in tension with the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Had the Supreme Court in *Lopez* and *Morrison* taken the approach embraced by the panel majority in *Rancho Viejo I*, the Court would necessarily have had to reject facial challenges to the statutes at issue, because some applications of those statutes—i.e., those that would have resulted in some disruption of commercial activities—would have been constitutional.

What the dissent does *not* show is that Judge Roberts believes the Endangered Species Act to be unconstitutional. Indeed, in an important passage that has often been overlooked, Judge Roberts stated that en banc review would afford the court "the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent." *Rancho Viejo II*, 334 F.3d at 1160 (Roberts, J., dissenting). The "alternative grounds" to which Judge Roberts alluded were those that the panel opinion specifically declined to address, but that had formed the basis for other courts' conclusions that particular applications of the Endangered Species Act were constitutional. *See id.* (citing *Rancho Viejo I*, 323 F.3d at 1067-68 n.2).

The limited nature of Judge Roberts' opinion is perhaps best seen through comparison to Judge Sentelle's opinion also dissenting from denial of rehearing en banc. Judge Sentelle expressly concluded that application of the Endangered Species Act to restrict the housing development was unconstitutional. *Rancho Viejo II*, 334 F.3d at 1158 (Sentelle, J., dissenting). Moreover, Judge Sentelle adopted a narrow view of the Court's decision in *Lopez*: as permitting federal regulation only of activities that are themselves commercial. *See id.* at 1159 (Sentelle, J., dissenting). *Lopez*, to be sure, characterized a number of past cases sustaining Commerce Clause regulation on the ground that the regulated activity substantially affected interstate commerce as cases involving commercial activities. The *Lopez* Court, however, established no explicit rule that an activity must be commercial to have a substantial effect on interstate commerce. Importantly, Judge Roberts neither joined nor even pursued these lines of inquiry in *Ranch Viejo II.*

Other actions of Judge Roberts on the Court of Appeals confirm that he has not taken an overly narrow view of congressional power. In *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004), Judge Roberts joined the majority in an important case upholding congressional power under the Spending Clause. In *Barbour*, the court was called upon to address whether Congress could constitutionally condition federal transportation funds on a waiver of state sovereign immunity. After the Supreme Court's decision in *Lopez*, commentators, litigants, and lower courts questioned whether Congress's ability to attach conditions to the funds it disburses was in fact as broad as the Supreme Court suggested it was in its 1987 decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). Over a dissenting opinion

making precisely this point, *see* 374 F.3d at 1171 (Sentelle, J., dissenting), Judge Roberts joined Judge Merrick Garland in upholding Congress's action.

The second area in which Judge Roberts has been subject to criticism concerns his approach to questions of Executive power. This criticism stems largely from Judge Roberts' concurring opinion in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004). In *Acree*, a group of American soldiers filed suit in federal court against the Iraqi government, alleging that they had been held as prisoners of war and tortured while serving in the Gulf War. The Court of Appeals unanimously dismissed the suit, with Judge Roberts diverging from the majority on one point of law. Again, it is important to establish what Judge Roberts' opinion shows and what it does not show. Judge Roberts' opinion demonstrates a narrow disagreement with his colleagues on a question of statutory interpretation that all agreed was a "close" one. *See id.* at 51; *id.* at 62 (Roberts, J., concurring in part and concurring in the judgment). The opinion says nothing about the scope of the Executive power that the Constitution grants the President, in the foreign affairs area or in any other area.

Among the central issues in the *Acree* case was how to resolve the interplay between two federal statutes. First, the Foreign Sovereign Immunities Act (FSIA) abrogates foreign states' immunity from suit in federal court with respect to certain claims, including those involving torture or other terrorist acts. 28 U.S.C. § 1605(a)(7). Second, a 2003 appropriations measure passed to facilitate the rebuilding of Iraq contained a proviso authorizing the President to suspend a specific statute restricting aid to Iraq, as well as to "make inapplicable" to Iraq "any . . . provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-71, § 1503, 117 Stat. 559, 579

(2003). While the soldiers' suit was pending in federal court, the President issued a Presidential Determination exercising the authority that Congress had granted.

The Court of Appeals thus had to address whether the terrorism exception under the FSIA was among the provisions that could be "ma[de] inapplicable" to Iraq by the President, thereby divesting the federal courts of subject matter jurisdiction in the soldiers' case. The majority concluded that the FSIA was not among the laws that the President could suspend. In particular, the majority reasoned that, based on the placement of the appropriation act's proviso among provisions governing assistance to Iraq, and in light of a legislative history reflecting Congress's desire to eliminate restrictions on aid and exports needed for Iraq's reconstruction, the proviso should be read narrowly: as permitting suspension only of those statutes creating obstacles to granting aid to Iraq, not of a statute conferring federal court jurisdiction over civil claims against Iraq.

What Judge Roberts' dissent shows is a disagreement with the majority on this rather technical question of statutory interpretation. Judge Roberts favored giving effect to the statute's broad language—allowing suspension of "any provision of law." While conceding that the statute was not entirely unambiguous, he believed that the majority's other evidence of Congress's intent, including a legislative history that did not squarely address the interplay between the two statutes, was insufficient to overcome the broad statutory language.

What Judge Roberts' concurrence does *not* say is anything about the scope of the President's powers under the Constitution with respect to foreign affairs. Judge Roberts' opinion alludes to the possibility that the President's interpretation of the scope of his

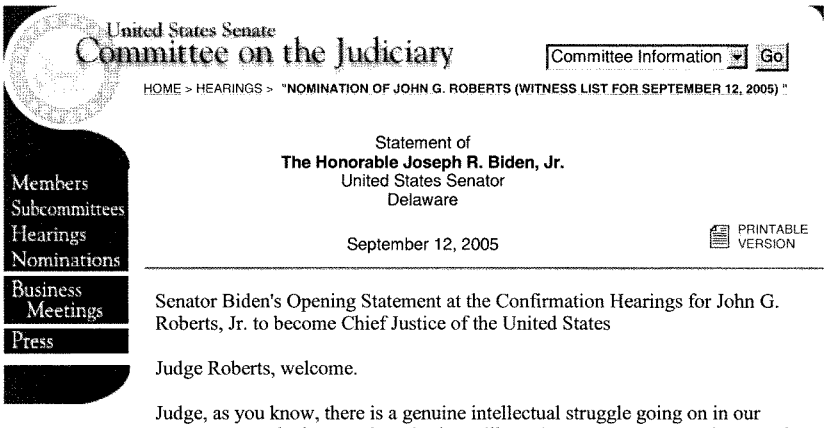
authority under an ambiguous *statute* may be entitled to deference under the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Acree*, 370 F.3d at 62 n.2. Although raising the issue, the opinion notes the debate surrounding it and does not purport to resolve it.

Judge Roberts also was a member of a panel that addressed the slightly different question of what deference a court owes to the President's interpretation of an international treaty. In *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), an enemy combatant claimed that he could not be tried by a military commission. Among a number of issues Judge Randolph's opinion for the court addressed was whether the 1949 Geneva Convention, under which Hamdan sought protection, applied to the United States' conflict with al Qaeda. *Id.* at 41. All members of the panel agreed that the only circumstance under which the Convention could arguably apply to Hamdan would be if the United States' conflict with al Qaeda were deemed, by terms of the Convention, an "armed conflict *not of an international character* occurring in the territory of one of the High Contracting Parties." Because Afghanistan was a "High Contracting Party," the question was whether the conflict with al Qaeda could be considered "not of an international character." Judge Randolph's majority opinion, which Judge Roberts joined, found that the President's determination that the conflict was international in scope was a reasonable one. *Id.* at 41-42. Judge Williams diverged from the majority on this point, concluding that, in the context of the treaty, "not of an international character" simply meant "not between nations," and that the treaty therefore could cover a conflict between a signatory and a non-state actor. Importantly, Judge Williams' dispute with the majority was a narrow one: all members of the panel fully agreed with the proposition

that the President's construction of a treaty is entitled to great weight. *Id.* at 44 (Williams, J., concurring).

In short, with respect to structural constitutional issues, the criticisms leveled against Judge Roberts' work on the Court of Appeals are unfounded. In addressing these two areas of controversy, I do not intend to detract from the remainder of Judge Roberts' judicial work, which consists of uniformly careful, evenhanded, and principled decisions.

In sum, I believe that Judge Roberts' jurisprudence on the Court of Appeals reflects the best of what we should expect of a nominee to the Supreme Court of the United States. His decisions defy categorization as conservative or liberal, Republican or Democrat. Indeed, Judge Roberts has refused to characterize himself as subscribing to any particular judicial philosophy, be it originalism or living constitutionalism, textualism or statutory dynamicism. He says that he simply decides every case as it comes before him according to the law, as best as he can discern it. What he has accomplished on the Court of Appeals thus far demonstrates that he has truthfully represented himself to the American public. Simply put, he has demonstrated that he possesses one of our Nation's foremost legal minds, that he employs that mind with full fairness and integrity, and, in all of this, that he well deserves our trust to lead our Nation's judiciary. It is an honor and privilege to testify today in support of his nomination to serve as Chief Justice of the United States.






Statement of
**The Honorable Joseph R. Biden, Jr.**
United States Senator
Delaware

September 12, 2005

PRINTABLE VERSION

Senator Biden's Opening Statement at the Confirmation Hearings for John G. Roberts, Jr. to become Chief Justice of the United States

Judge Roberts, welcome.

Judge, as you know, there is a genuine intellectual struggle going on in our country over whether our Constitution will continue to protect our privacy and continue to empower the federal government to protect the powerless.

For 70 years, there has been a consensus in our Supreme Court on these issues. And this consensus has been fully embraced by the American people.

But there are those who strongly disagree with this consensus – and they seek to unravel it. And, Judge, you have the unenviable position of being right in the middle of this fundamentally important debate.

And, quite frankly, we need to know on which side you stand. For whoever replaces Chief Justice Rehnquist, as well as Justice O'Connor, will play pivotal roles in this debate.

But for tens of millions of our people this is more than an academic debate.

For the position you take in this debate will affect their lives in very real and personal ways – for the next three decades. There is nothing they can do about it after this moment.

I believe in a Constitution – as our Supreme Court's first great Chief Justice, John Marshall, said in 1819 – and I quote "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."

At its core, the Constitution envisions ever increasing protections of human liberty and dignity for its citizens and a national government empowered to face unanticipated "crises."

Judge, herein lies the crux of the intellectual debate I referenced at the outset – whether we will have ever increasing protections for human liberty and dignity or whether those protections will be diminished.

In 1925, the Constitution preserved the rights of parents to determine how to educate their kids, striking down a law that required children to attend public schools. In 1965, the Constitution told the state to get out of a married couple's bedroom, by striking down a state law prohibiting married couples from using contraceptives. In 1967, the Constitution defended the right of a black woman to marry a white man. And in 1977, the Constitution stopped a city from making it a crime for a grandmother to live with her grandchildren.

And, fortunately, even when the Supreme Court, at first, took our Constitution away from the promise and hope of our Constitution's ennobling phrases; in the end, we have kept the faith.

In 1873, for example, the Court said states could forbid women from being lawyers. It took a hundred years to undo this terrible mistake. But the Court eventually got it right.

In 1896, the Supreme Court said "separate but equal" was lawful. It took 58 years for the Supreme Court to outlaw racial segregation, throwing that doctrine in the dustbin of history. But the Court ultimately got it right.

In the early 1900s, the Court rendered the federal government powerless to outlaw child labor and to protect workers. It took until 1937 for the Supreme Court to see the error in its ways. But the Court finally got it right.

At every step, we've had to struggle against those who saw the Constitution as frozen in time. But time and again, we have overcome, and the Constitution has remained relevant and dynamic thanks to a proper interpretation of the ennobling phrases purposefully placed in our great "civic Bible."

And once again – when it should be even more obvious we need increased protections for liberty – as we look around the world and see thousands persecuted for their faith, women unable to show their faces in public, and children maimed and killed for no other reason than which tribe they were born into.

And once again – when it should be obvious we need a more energetic national government to deal with the challenges of a new millennium – terrorism, the spread of weapons of mass destruction, pandemic disease, and religious intolerance.

Once again, our journey of progress is under attack from the Right.

There are judges, scholars, and opinion leaders – good and honorable people – who believe the Constitution provides no protection against government intrusions into our highly personal decisions – decisions about birth, marriage, family, death, and religion. There are those who would slash the power of our national government, fragmenting it among the states. Incredibly, some have even argued that the Constitution eliminates the federal government's ability to respond to disasters like Katrina.

Judge, I don't believe the Constitution these individuals long for could have led to the America our Founders envisioned. Like the Founders, I believe our Constitution is as big and as grand as this great nation.

Our constitutional journey did not stop with women barred from being lawyers, with 10-year-olds working in coal mines, or with black kids forced into different schools than white kids just because the Constitution nowhere mentions "sex discrimination," "child labor," or "segregated education."

Our constitutional journey did not stop then, and it must not stop now. For we will be faced with equally consequential decisions in the 21st Century: can microscopic tags be implanted in a person's body to track his every movement; can patents be issued for the creation of human life; can brain scans be used to determine whether a person is inclined toward criminal or violent behavior?

Judge, I need to know whether you will be a Justice who believes that the constitutional journey must continue to speak to these consequential decisions – or that we've gone far enough in protecting against government intrusion into the most personal decisions we make.

Judge, that's why this is a critical moment. Those elected officials on the Far Right, such as Mr. DeLay and others, have been unsuccessful at implementing their radical agenda in the elected branches – so they pour their energy and resources into trying to change the Court's view of the Constitution.

And now they have a once-in-a-lifetime opportunity – the filling of two Supreme Court vacancies, one of which is the Chief Justice's – the first time that's happened in 75 years.

Judge, I believe with every fiber of my being that their view of the Constitution and where the Country should be taken would be a disaster for our people.

Like most Americans, I believe the Constitution recognizes a general right to privacy.

I believe the rights of women must be nationally and vigorously protected.

I believe the federal government must act as a shield to protect the powerless against major economic interests.

I believe the federal government should stamp out discrimination – wherever it occurs.

And I believe the Constitution inspires and empowers us to achieve these goals.

Judge, if I looked only at what you've said and written in the past, I'd feel compelled to vote NO. You dismissed the Constitution's protection of privacy as a "so-called right," you derided agencies like the Securities and Exchange Commission that combat corporate misconduct as "constitutional anomalies," and you dismissed "gender discrimination" as merely a quote, "perceived

problem."

This is your chance to explain what you meant by what you have said and what you have written.

The Constitution provides for one democratic moment before a lifetime of judicial independence, when we the people of the United States are entitled to know as much as we can about the person we are entrusting with safeguarding our future and the future of our children and grandchildren.

This is that moment. That's what these hearings are about.

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## 1993 ANSWERS BY JUDGE GINSBURG

Below are some of the questions asked to Judge Ginsburg during her 1993 hearings. The question is shown in **bold text** and quotations. The answers provided by Judge Ginsburg follow each question in *italics*.

Questions from Republicans

1. In 1993, **Senator Hatch** asked Judge Ginsburg whether she agreed with the following: **"[I]n my view it is impossible, as a matter of principle, to distinguish *Dred Scott* v. *Sanford* and the *Lochner* cases from the Court's substantive due process/privacy cases like *Roe* v. *Wade.* The methodology is the same; the difference is only in the results, which hinge on the personal subjective values of the judge deciding the case."**

This is what Judge Ginsburg told Senator Hatch: *"In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines."* (Ginsburg Hrg. at 271)

2. In 1993 **Senator Hatch** told Judge Ginsburg that he regarded the establishment of a right to privacy by the Supreme Court as a **"recent"** development.

Here's how Judge Ginsburg responded to Senator Hatch: *"I don't think [the right to privacy] is a recent development. I think it started decades ago. . . . It started in the 19th century. The Court then said no right is held more sacred or is more carefully guarded by the common law. It grew from our tradition, and the right of every individual to the control of his person. The line of decisions continued through* Skinner v. Oklahoma *(1942), which recognized the right to have offspring as a basic human right. I have said to this committee that the finest expression of that idea of individual autonomy and*

*personhood, and of the obligation of the State to leave people alone to make basic decisions about their personal life, Justice Harlan's dissenting opinion in Poe v. Ullman. . . . After Poe v. Ullman, I think the most eloquent statement of it, recognizing that it has difficulties—and it certainly does—is by Justice Powell in Moore v. City of East Cleveland (1977), the case concerning the grandmother who wanted to live with her grandson. Those two cases more than any others—Poe v. Ullman, which was the forerunner of the Griswold (1965) case, and Moore v. City of East Cleveland—explain the concept far better than I can."* (Ginsburg Hrg. at 269)

3. In 1993 **Senator Hatch** asked Judge Ginsburg if she agreed that "**one can favor various privacy interests as a matter of policy and support legislation to protect them and still recognize the illegitimacy of judges making up rights that aren't found in the Constitution**."

Here's how Judge Ginsburg answered: "*Senator Hatch, I agree with the Moore v. City of East Cleveland statement of Justice Powell. He repeats the history [of ] the Lochner era, and says that history 'demonstrates there is reason for concern lest judicial intervention become the predilections of those who happen at the moment to be members of the Court.' He goes on to say that history 'counsels caution and restraint,' and I agree with that. He then says, 'but it does not counsel abandonment,' abandonment of the notion that people have a right to make certain fundamental decisions about their lives without interference from the State. And what he next says is, history 'doesn't counsel abandonment, nor does it require what the city is urging here'—cutting off the family right at the first boundary, which is the nuclear family. He rejects that. In taking the position I have in all of my writings on this subject, I must associate myself with Justice Powell's statements."* (Ginsburg Hrg. at 271)

4. In 1993 **Senator Hatch** asked Judge Ginsburg whether she agreed with the following statement: **"The only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended."**

Here's how Judge Ginsburg answered: *"I think all people could agree with that. But as I tried to say in response to the chairman's question, trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. . . . So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time."* [ p. 127]

5. In 1993 **Senator Specter** asked Judge Ginsburg whether she had **"any concern about an issue of legitimacy for the Supreme Court to identify new rights in the equal protection clause, in light of the failure of the passage of ERA."**

Here's how Judge Ginsburg answered: *"Senator Specter, I tried to answer that question before. I will try once more. The 14th amendment says that no State shall deny, neither the United States nor any State shall deny to any person within its jurisdiction the equal protection of its laws. Before women were full citizens, before they could vote, maybe one could justify the lack of equal treatment. Ever since the 19th amendment, women are citizens of equal stature with men. The Equal Rights Amendment is a very important symbol, in my judgment, because it would explicitly correct the unfortunate history of the treatment of women as something less than full persons. However, the Constitution has been corrected by the 19th amendment to make women full citizens. I can't imagine anyone not reading the equal protection clause today to mean that women and men are persons of equal stature and dignity before the law. I don't think that is at all an activist position with regard to the proper interpretation of the equal protection clause of the 14th amendment."* (Ginsburg Hrg. at 193)

6. In 1993 **Senator Brown** from Colorado asked Judge Ginsburg whether she agreed that **"the equal protection clause suggests a sex-blind standard with regard to legislation and programs?"**

Here's how Judge Ginsburg answered: *"In most instances, that is correct. [The equal protection clause states:] 'Nor shall any person be denied the equal protection of the laws.' It is my firm belief that for purposes of being whatever a person wishes and is able to be, sex is not a relevant criterion."* (Ginsburg Hrg. at 338-339)

7. In 1993 **Senator Brown** asked Judge Ginsburg **whether a father might have a competing interest in the termination of a pregnancy under the equal protection clause. He asked her: "since [the equal protection clause] may well confer a right to choose on the woman, it [could] also follow that the father would be entitled to a right to choose in this regard or some rights in this regard."**

Here's how Judge Ginsburg answered: *"That was an issue left open in Roe v. Wade (1973). But if I recall correctly, it was put to rest in Casey (1992). . . . The Casey majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. . . . I will rest my answer on the Casey decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child. . . . It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex."* (Ginsburg Hrg. at 207)

8. In 1993, **Senator Simpson** asked Judge Ginsburg: "**under the ninth amendment, rights left unnamed in the Constitution are retained by the people. When considering that designation of the right retained by the people, how would you reason the grant or denial of a new right not enumerated in the Constitution?"**

Here's her response: *"[T]he primary guardian of the 9th and 10th amendments has really got to be the Congress itself. The national government is one of enumerated powers. To create a conflict, an arguable conflict with the 10th amendment, Congress would have to take action vis-a-vis the States. So I think these amendments, first about not restricting people's rights and then about the reserved rights of the States, these amendments are peculiarly directed to Congress. A question about the 10th amendment would never come to Court apart from some action Congress has taken.*

*So I think these two amendments are instructions first and foremost to Congress itself. Congress is not to limit people's freedom and not to encroach upon the States. And it is only when Congress takes an action with regard to the States that the States consider intrusive, that a 10th amendment issue would come to the Court. So I think that these amendments are directed to the Congress. I think you suggested that in the way you put the question".* (Ginsburg Hrg. at 188)

Questions from Democrats

9. **Senator Biden** asked Judge Ginsburg the following question at her 1993 hearings: **"what is it that allows the Court to recognize such rights that the drafters of the Constitution or specific amendments did not mention or even contemplate at the time the amendment, in the case of the 14th amendment, or the Constitution and the Bill of Rights were drafted?"**

Here's how Judge Ginsburg answered: *"I think the Framers are shortchanged if we view them as having a limited view of rights, because they wrote, Thomas Jefferson wrote, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these"—among these—"are life, liberty, and the pursuit of happiness," and that government is formed to protect and secure those rights.*

*Now, when the Constitution was written, as you know, there was much concern over a Bill of Rights. There were some who thought a Bill of Rights dangerous because one couldn't enumerate all the rights of the people; one couldn't compose a complete catalog. The thing to do was to limit the powers of government, and that would keep government from trampling on people's rights.*

*But there was a sufficient call for a Bill of Rights, and so the Framers put down what was in the front of their minds in the Bill of Rights. Let's look at the way rights are stated in the Bill of Rights in contrast to the Declaration of Independence, let's take liberty as it appears in the fifth amendment.*

*The statement in the fifth amendment—"nor shall any person be deprived of life, liberty, or property, without due process of law"—is written as a restriction on the government. The Founders had already declared in the Declaration that liberty is an unalienable right, and the government is accordingly warned to keep off, both in the structure of the Constitution, which limits the powers of government, and in the Bill of Rights. And, as you also know, Mr. Chairman, the Framers were fearful that this limited catalog might be perceived—even though written as a restriction on government rather than as a grant of rights to people—as skimpy, as not stating everything that is. And so we have the ninth amendment, which states that the Constitution shall not be construed to deny or disparage other rights.*

*Now, it is true that the immediate implementation in the days of the Founding Fathers in many respects was limited. "We the People" was not then what it is today. The most eloquent speaker on that subject was Justice Thurgood Marshall [who] reminded us that the Constitution's immediate implementation, even its text, had certain limitations, blind spots, blots on our record. But he said that the beauty of this Constitution is that, through a combination of judicial interpretation, constitutional amendment, laws passed by Congress, "We the People" has grown ever larger. So now it includes people who were once held in bondage. It includes women who were left out of the political community at the start…. The view of the Framers, their large view, I think was expansive."* (Ginsburg Hrg. at 118-19)

10. **Senator Biden** asked Judge Ginsburg the following question at her 1993 hearings: "**in thinking about how the Constitution protects unenumerated rights, including rights of privacy, will**

**you use the methodology that looks to going back to a specific right being sought, guaranteed, or will you use the more traditional method of more broadly looking at the right that is attempting, seeking constitutional protection before the Court? What methodology will you use? What role will history and tradition play for you in determining whether or not a right exists that is not enumerated?**

Here's how Judge Ginsburg answered: *"Senator Biden, I have stated that I associate myself with the dissenting opinion in Poe v. Ullman (1961), the method revealed most completely by Justice Harlan in that opinion. The next best statement of it appears in Justice Powell's opinion in Moore v. City of East Cleveland (1977). My understanding of the O'Connor/Kennedy position in the Michael H. case is that they, too, associate themselves with that position. Justice O'Connor cited the dissenting opinion in Poe v. Ullman as the methodology she employs. She cited Loving as her reason for not associating herself with the footnote, the famous footnote 6 in Justice Scalia's Michael H. opinion, a footnote in which two Justices concurred."* (Ginsburg Hrg. at 281-82)

11. In 1993 **Senator Simon** posed the following question to Judge Ginsburg: **"we had a nominee before us who said, when the ninth amendment says certain rights shall not be construed to deny or disparage others retained by the people, that they probably meant by the States, rather than the people. Now, that's a very, very important distinction. That nominee was not approved by this committee, I might add. But when the ninth amendment says 'by the people,' do you believe it means by the people?"**

Here was Judge Ginsburg's reply: *"The 10th amendment addresses the powers not delegated to the United States and says they are reserved to the States. The 10th amendment deals with the rights reserved to the States. The ninth amendment—and you have recited the history—speaks of the people. There was a concern, as you said, that if we had a Bill of Rights, some rights would surely be left out. Therefore, it was better, some thought, just to rely on the fact that the Federal Government was to be a government of enumerated, delegated powers, and leave it at that. The ninth amendment is part*

*of the idea that people have rights. The Bill of Rights keeps the Government from intruding on those rights. We don't have a complete enumeration in the first 10 amendments, and the ninth amendment so confirms."* (Ginsburg Hrg. at 209)

12. In 1993, **Senator Heflin** asked, **"the Court reversed a 5-year-old precedent in *Payne* v. *Tennessee,* and in its opinion, the majority reasoned that <u>stare decisis</u> is less vital in cases that don't involve property or contract rights because litigants have not built up reliance on the current state of the law. In your judgment, is this a sound theory of stare decisis? Would you prefer some other version such as the test . . . which would inquire into the soundness of the reasoning in a prior opinion without regard to the substantive area of the law?"**

Here's how she answered: *"The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough. . . . But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution. . . . So how has a precedent worked in practice? What about reliance interests? Those things count, as well as the soundness of the decision. Stare decisis is also important because it keeps judges from infusing their own value judgments into the law."* [p. 197-98]

13. In 1993, **Senator Biden** asked Judge Ginsburg, **"do you agree that the right of privacy is fundamental, meaning that it is so important —I am not asking about any specific rights of privacy—meaning that it is so important, that the Government may interfere with it only for compelling reasons, when it finds that such a right exists, the right of privacy?"**

Here's how she responded: *"The line of cases that you just outlined, the right to marry, the right to procreate or not, the right to raise one's children, the degree of justification the State must have to interfere with those rights is large. . . . You mentioned Meyer v. Nebraska (1923) and Pierce v. Society of Sisters (1925). Although pigeonholed in the free exercise of religion area, I would put the Yoder (1972) case in that same line."* (Ginsburg Hrg. at 279)

**Chairman Biden's Statements on Proper Scope of Questioning during Ginsburg Hearing**

Chairman Joseph R. Biden. Jr. made the following statements during 1993 concerning the proper scope of questioning.

- "*A Senator has not only the right, but the duty to weigh carefully a nominee's judicial philosophy and, even more importantly, the consequences of that philosophy for the country. And as I have stated in past confirmation hearings, my questions about a nominee's judicial philosophy are not aimed at getting answers about specific cases.*" (Ginsburg Transcript at 114)

- *"I have said many times and I want you to know that I believe my duty obliges me to learn how nominees will decide, not what they will decide, but how they will decide."* (Ginsburg Transcript at 114)

- *"In my view, the public is best served by questions that initiate a dialogue with the nominee, not about how she will decide any specific case that may come before her, but about the spirit and method she will bring to the task of judging. There is a real difference, between questions that focus on specific results or outcomes, the answers to which would risk compromising a nominee's independence and impartiality, and questions on judicial methods and philosophy. The former can undermine the dispassionate and unprejudiced judgment we expect the nominee to exercise as a Justice. But the latter are essential and contribute critically to our public dialogue." (Floor Debate, July 15, 1993).*

- *"Now, I would hope, as I said to you very briefly, that the way in which you outlined the circumstances under which you would reply and not reply, that you will not make a blanket refusal to comment on things because obviously everything we could ask you is bound to come before the Court. There is not a controversial issue in this country that does not have a prospect of coming before the Court someday.*" (Ginsburg Transcript at

114)

- *"If a nominee, although it is their right, does not answer questions that don't go to what they would decide, but how they would decide, I will vote against that nominee regardless of who it is. And you can thank Justice Scalia for that."* (Ginsburg Transcript at 114-115)

- *"I would also point out that my concerns about your not answering questions have been met. You have answered my questions the second day and third day. At least from my perspective, you have been as forthcoming as any recent witness we have had."* (Ginsburg Transcript at 367)

*Black Women's Health Imperative; Feminist Majority;*
*NARAL Pro-Choice America; National Abortion Federation;*
*National Family Planning & Reproductive Health Assn.; National Partnership for Women & Families; National Women's Law Center;*
*Planned Parenthood Federation of America, Inc.*

Dear Senator,

We are writing about the nomination of Judge Roberts to be Chief Justice of the United States Supreme Court. We represent a broad coalition united by our fundamental belief that the U.S. Constitution guarantees the fundamental rights to equality and privacy, including reproductive privacy and the right to choose. We do not believe that these rights should be endangered by an ideological appointment to the U.S. Supreme Court.

It is clear from what we know of Judge Roberts' stated beliefs and his writings that he does not share a commitment to these fundamental rights. And we look to the hearings for Judge Roberts to demonstrate to the Senate and the American public that in light of this record, if confirmed, he would not overturn these rights.

It is unacceptable for Senators to put a generation of hard won rights that expand freedoms and opportunities at risk by supporting a nominee who refuses to affirm these rights. This is particularly true in light of Judge Roberts' disturbing record. These hearings represent for Judge Roberts an opportunity to clarify his views. For the U.S. Senate they are an opportunity to affirm these fundamental rights.

Our belief that Judge Roberts will not uphold these fundamental rights is based on what we have learned about his views on a range of issues important to women and families across our nation.

We have learned to date that Judge Roberts:

- Referred to the constitutional right to privacy as a "so-called" right;
- Co-authored a brief that called for the complete overturning of *Roe v. Wade;*
- Argued against using a federal civil rights law to protect women whose access to health clinics was being impeded by massive "Operation Rescue" blockades using violence and intimidation;
- Wrote of "perceived gender discrimination" implying that there is no actual gender discrimination;
- Argued for weaker prohibitions against existing constitutional protections for official government sponsored sex discrimination;
- Argued for a narrow interpretation of Title IX and against remedies for Title IX discrimination;
- Belittled and opposed measures to ensure that women's work would be valued and paid fairly.

John Roberts' record shows a contemptuous attitude toward laws and constitutional rights protecting women's equality, and a lack of understanding of the continuing impact of discrimination in our society and how the law affects us in our everyday lives. We urge you, as elected representatives of millions of Americans, to take seriously your

responsibility to ensure that the next Chief Justice of the Supreme Court will respect and uphold the fundamental rights and liberties that all Americans hold dear.

The Administration's unwillingness to allow the Senate access to critical documents from Judge Roberts' past reinforces the concern that his positions on issues like privacy and women's rights are so out of step with American values and beliefs that they must be concealed. The Senate has a right to know what the Administration knows about this nominee and so do the American people.

Those of us who deeply believe in the Constitutional guarantees of privacy, reproductive freedom, and equal rights for women will be listening carefully to the questions posed and the answers given by this nominee. If John Roberts is not clear and forthcoming in his response to your questions, we will be forced to assume the worst.

The stakes are extraordinarily high for women and families. The direction of our courts, the impact of our laws, and the nature of our society for decades to come will be largely shaped by the way in which the Senate now exercises its responsibility. No nominee, regardless of legal qualifications, is presumptively entitled to a seat on the U.S. Supreme Court. We urge you now to put principle before politics and to act in the best interests of your constituents. We urge you to protect the fundamental values, rights and liberties which define who we are as a nation and enable all Americans to realize this country's promise of equality, opportunity and liberty for all.

Signed,

**Black Women's Health Imperative**
Lorraine Cole, *President*

**Feminist Majority**
Ellie Smeal, *President*

**NARAL Pro-Choice America**
Nancy Keenan, *President*

**National Abortion Federation**
Vicki Saporta, *President*

**National Family Planning & Reproductive Health Assn.**
Judith DeSarno, *President*

**National Partnership for Women & Families**
Debra Ness, *President*

**National Women's Law Center**
Marcia Greenberger, *Co-President*

**Planned Parenthood Federation of America, Inc.**
Karen Pearl, *Interim President*

TESTIMONY OF BRUCE M. BOTELHO
September 15, 2005

Submitted to the United States Senate Committee on the Judiciary
On the Nomination of John G. Roberts, Jr. to be Chief Justice of the
Supreme Court of the United States

I urge you to support the nomination of Judge John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States. I offer this testimony from the perspective of a client – in my case, a state client. As Attorney General of the State of Alaska for Governor Tony Knowles (D) from 1994 to 2002, I retained John Roberts to represent or advise Alaska in numerous matters before the United States Supreme Court. Although I am a life-long Democrat with liberal views on social issues, I support this nomination based on my first-hand experience with Judge Roberts. I believe that he possesses the integrity, intellectual capacity, compassion, and courage to undertake the momentous job of Chief Justice of the Supreme Court.

I first retained Judge Roberts in January 1997 to represent Alaska in an Indian law case that we had lost in the United States Court of Appeals for the Ninth Circuit. The case had been in the federal courts for nearly 18 years and was complex and convoluted. The issue was whether land that Congress had conveyed to a Native corporation under the Alaska Native Claims Settlement Act, later conveyed to a tribe, was Indian country. The case was immensely important to Alaskans, at once divisive and highly-charged politically. As attorney general, I felt it was critical that the Supreme Court review and decide the case. Because the

case facially involved only Alaska, however, we were concerned that the Court would not grant certiorari. Thus, we set out to secure the services of the most qualified and talented Supreme Court practitioner we could find. I chose John Roberts following a thorough review of possible candidates and a careful selection process. That decision was probably one of my best as attorney general.

From the beginning Judge Roberts wanted to learn everything there was to know about the case. He met with us and studied the maps and pictures of Alaska we spread across the table. He engaged my assistant attorneys general as equals, picking their brains for ideas, facts, and background information. He wanted to learn every detail, including the correct pronunciation of the village names, the structure and role of Native organizations in Alaska, and the geography of our vast state. Meanwhile, he studied the relevant law and began testing with us his analysis and theories of the case. His goal was always to best prepare himself to represent the interests of the State of Alaska.

Judge Roberts tackled the subject in short order, prepared a successful petition for certiorari, and briefed and argued the case, which resulted in a unanimous reversal by the Supreme Court. *Alaska v. Native Village of Venetie Tribal Governmen*t, 522 U.S. 520 (1998).

I retained Judge Roberts on a number of other matters over the next six years. Among these were the defense of Alaska's Sex Offender Registration Act, the state's claim of ownership of submerged lands in the Tongass National Forest,

the issue of federal pre-emption of state environmental laws, fundamental issues involving the Alaska Statehood Act, and issues concerning the balance of federal and state authority over land and resource management under the Alaska National Interest Lands Conservation Act. Working with Judge Roberts on these cases, I got to know the most remarkable and inspiring lawyer I have ever met.

I have several general observations about John Roberts that I believe are important for your consideration of his nomination to be Chief Justice.

First, he unfailingly developed a complete comprehension of each case. Judge Roberts has an astounding capacity to absorb and understand the relevant universe of law. Of course, he has a deep foundation of knowledge upon which to build, but he readily expanded this to encompass the particular law applicable to each case. Further, he took the time to understand completely the factual background of each case. For example, to prepare for the *Venetie* case, he flew to Alaska to observe life in the rural areas of our state. He wanted to be able to personally represent the facts to the Court rather than rely upon a second-hand impression acquired from reading about another person's experience. He also traveled with my staff and me throughout Southeast Alaska to obtain first-hand knowledge of the geography of the region, knowledge that was critical to effectively presenting our legal positions to the Supreme Court in the submerged lands case.

Second, Judge Roberts's legal skills are truly extraordinary. His briefs were not only technically perfect; they also had clarity, persuasiveness, and spark. His scholarly yet practical approach to the law and issues, and his attention to detail and presentation, made his briefs a pleasure to read. His oral argument style was similarly skillful, with the added element of his remarkably gracious personality.

Third, John Roberts was retained to represent Alaska by a Democratic Governor and a Democratic Attorney General, and he approached each matter without regard to politics. Nothing he said or did ever suggested his personal views on an issue, and I honestly cannot tell you how he would have ruled on our cases if he had faced them as a judge. He clearly considered his job to be to represent Alaska's interests and position to the Supreme Court based on solid legal principles and precedent, not to promote any personal views.

Fourth, Judge Roberts's character is impeccable. It is impossible for me to separate his character from his legal work. He is modest, respectful, polite, and eminently approachable. He has a remarkable ability to engage people, and seeks to learn from them even as they learn from him. He did not simply take a case and a couple months later send us a product. Rather, he collaborated with us and sought our views and critique at all levels of the project. My staff and I always felt comfortable calling him on his direct line or even at his home, e-mailing, and

visiting with him. He challenged us, worked with us, and made us laugh. In the process he made hard work fun and rewarding.

But perhaps Judge Roberts's most striking feature was his deep respect for the law. He was always faithful to the text and context of the law; he demonstrated an astute awareness of his role as an advocate within the limits of the law; his judgment and common sense were exquisite; he knew where to draw the lines and gave his advice and guidance accordingly. But while he was a perfectionist in his own work, he was not rigid in his approach as a lawyer. He followed a natural, collegial process, seeking out and considering a variety of viewpoints and arguments. He did not enter the debate opinionated, but rather maintained a thoughtful and flexible stance. He was always willing to make adjustments as he gained knowledge. He subjected ideas to rigorous examination to reach logical, sound conclusions based on the facts and law. Ultimately his command of the case – the facts, the law, and the arguments on all sides – was nothing short of stunning.

All of these characteristics – his judgment, skill, intellect, integrity, character, common sense, and respect for the law and its role in our society – are key elements of John Roberts's success as a lawyer and judge. Knowing how John Roberts draws on these attributes in his legal work, I trust him, despite our political differences, to make decisions that are based on a deep understanding of the factual background, the law, and the historical context of each case. I urge

you to support his nomination as Chief Justice of the United States Supreme Court. America deserves the best and you have the opportunity to make that happen. Thank you.

**Statement of Jennifer Cabranes Braceras**

**Visiting Fellow, Independent Women's Forum and Commissioner, U.S. Commission on Civil Rights**

**before the Senate Judiciary Committee in support of the nomination of Judge John G. Roberts to serve as Chief Justice of the United States**

Chairman Specter, Senator Leahy, Members of the Committee:

My name is Jennifer Braceras. I am a resident of Massachusetts and a member of the Massachusetts Bar and the Hispanic National Bar Association. I am a Visiting Fellow with the Independent Women's Forum, and I am privileged to serve, by appointment of the President, as a Commissioner on the United States Commission on Civil Rights.

Since my graduation from Harvard Law School in 1994, I have served as a law clerk to two federal judges, practiced employment law at a major Boston law firm, and taught and conducted research on education law and federal anti-discrimination law.

I am pleased to be here today to support the nomination of Judge John Roberts to be Chief Justice of the United States.

Although I do not know Judge Roberts personally, I am generally familiar with his professional background and public record. His distinguished career and his testimony before this Committee make clear to even the most casual observer that Judge Roberts is eminently well qualified for the post.

Despite his obvious qualifications, however, opponents of Judge Roberts criticize his record on a variety of matters that loosely fall under the umbrella of civil rights. These critics allege that Judge Roberts's confirmation to be Chief Justice will somehow

be harmful to women or minorities. These charges are, at best, misplaced and, at worst, deliberately misleading attacks that would have been leveled against *anyone* nominated to the High Court by this President. There are at least five reasons why such criticisms should not shake our confidence in Judge Roberts.

**First,** many of the criticisms of Judge Roberts involve positions he advocated as a lawyer in the administrations of Presidents Ronald Reagan and George H.W. Bush. Some of the subjects that have elicited adverse comment by interest groups purporting to represent various segments of American society include: (1) school busing, (2) the theory of comparable worth (which is often mischievously conflated with the very different concept of equal pay for men and women), (3) racial quotas, and (4) the expansion of voting rights legislation to seek equal electoral *results* as opposed to equal *access*. In all of these maters, published reports indicate that the positions taken by John Roberts as a lawyer for the Reagan and Bush administrations are entirely consistent with the views of the American people and fully within the political mainstream.

In any event, the arguments expressed by Judge Roberts as a young man, decades ago, were the policy judgments of an executive branch lawyer on behalf of the administrations for which he worked -- not the views of a neutral umpire asked to rule on the constitutionality of particular legislation. Judge Roberts understands that the role of a judge is fundamentally different from that of an advocate or legal adviser, and he has proven that he can exercise the judicial power with restraint. His view of the judicial function does not contemplate the imposition of his own policy preferences from the bench. This proven commitment to judicial restraint should give Americans of all political viewpoints great comfort.

**Second,** it is clear from the public record that Judge Roberts supports the vigorous enforcement of our Nation's anti-discrimination laws. In his executive branch memos, Judge Roberts repeatedly defended the "bedrock principle of treating people on the basis of merit without regard to race or sex" and argued numerous times for the executive branch to prosecute fully claims of unequal treatment.

**Third,** as an advocate, Judge Roberts has been on both sides of controversial civil rights questions, representing both plaintiffs and defendants. This broad experience should give the American people faith in Judge Roberts's ability to understand all sides of complex issues, his willingness to listen to all arguments, and his ability to judge each case fairly and according to the law.

**Fourth,** Judge Roberts has a strong commitment to equal opportunity and the anti-discrimination principle embodied in the Fourteenth Amendment and codified in the Civil Rights Act of 1964. There can be no doubt that Judge Roberts is committed to the idea that people should be treated as individuals not as members of perceived social or ethnic enclaves with group grievances. He has written that "before the law we do not stand as black or white, Gentile or Jew, Hispanic or Anglo, but only as Americans entitled to equal justice." Certainly, there is nothing "extreme" or "unusual" about this view. To the contrary, it embodies the American ideal. It reflects the aspirations of the Fourteenth, which were given life by the Court in *Brown v. Board of Education* and by the framers of the 1964 Act. And it embodies the credo of Dr. Martin Luther King when he eloquently proclaimed that people should be judged "not by the color of their skin, but by the content of their character."

**Finally,** irresponsible rhetoric that a Court led by Judge Roberts would "turn back the clock" on civil rights misinterprets the role of the Court in our democracy. Our Constitution guarantees certain basic rights, which the courts must, of course, enforce. But it is not for the courts to expand upon constitutional rights or to create new rights out of whole cloth. That is the job of legislatures (both state and federal). The legislative branches, acting within the scope of their constitutional authority, can create additional rights or expand upon the rights guaranteed by the Constitution. If citizens are in any way dissatisfied with the scope or reach of the Constitution or current statutes, it is to their democratically elected representatives that they should turn. The record makes clear that Judge Roberts respects this separation of powers and that he has faith in our democracy and in you, our elected representatives.

On occasion, we have seen the Court reject an expansive reading of civil rights statutes only to have Congress clarify the law and explicitly broaden civil rights protections. And that is as it should be. Congress has an obligation to be clear about the protections it bestows. It is not the role of the Court to expand upon the work of our democratically elected representatives. The Supreme Court, therefore, is not the last word on civil rights – or any other issue for that matter. Each of the three branches of government has a role to play, and Judge Roberts respects and understands these distinct roles.

On other rare occasions, we have seen the Court strike down laws broadly aimed at civil rights on the ground that the statute conflicts with the Constitution. But even in these circumstances it is improper to say that the Court has taken away anyone's rights. Courts can neither create nor take away rights. Rather, their role, as Judge Roberts

clearly understands, is to determine the constitutional authority of government, both state and federal. When government exceeds its constitutional authority or tramples on rights protected by the Constitution, the Court is correct to invalidate that action.

It is judges, like John Roberts, who take seriously the Constitution's restrictions on government power that are the true guardians of our civil rights and civil liberties. Those who are concerned with the rights of the minority surely should prefer a Court that faithfully and properly polices the boundaries of government over a Court that would abdicate the power of judicial review in blind deference to the political branches.

Judge Roberts has demonstrated a strong commitment to the vigorous enforcement of our Nation's civil rights laws and to the bedrock principles of judicial restraint, judicial review, and equal opportunity. I am, therefore, honored to testify in favor of Judge Roberts's nomination. He will be a Justice of whom all Americans will be proud, and I respectfully urge the Senate to confirm him as the next Chief Justice of the United States.

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**Senate Judiciary Committee**
**Confirmation Hearings for John G. Roberts, Jr.**
**Testimony of Kathryn W. Bradley**
**September 15, 2005**

Mr. Chairman, Mr. Leahy, Members of the Committee, and Judge Roberts:

My name is Kathryn Webb Bradley. I am a Senior Lecturing Fellow at Duke Law School and a former partner, and now of counsel, at Hogan & Hartson, L.L.P. I have been a Democrat since I became old enough to vote. But while the President has not personally won my support in either of the last two presidential elections, his nominee has my full and enthusiastic support today. Everything I know about John Roberts assures me that he is exactly the right person to become the next Chief Justice of the United States Supreme Court.

I have known John Roberts since 1990, when I was privileged to serve as law clerk to Justice Byron White. From the law clerk chairs between the columns along the side of the courtroom, I watched then-Deputy Solicitor General Roberts argue several cases before the Court. While I was fortunate to see a number of highly skilled advocates that Term, John Roberts stood out in my mind as simply the best.

What made him so effective was his gift for being able to take extraordinarily complex concepts and then explain them in a way that seemed straightforward, even simple, yet never simplistic. His demeanor in Court was always respectful and professional, confident yet never cocky. His complete command of the facts and law of each case was impressive, not just because of the level of preparation it revealed, but because it enabled him to anticipate and respond to the concerns of members of the Court about whatever position he was advocating. Inevitably, his colloquy with the Court left the impression that he had blazed for the Court a clear trail that it could comfortably follow to reach the result he sought. This is not to say that his

position prevailed in every case that he argued that Term. But I do believe that in each case the quality of his advocacy aided the Court in its decision-making process as it sought to reach the right result, which is precisely what good advocacy should do.

My admiration for John's advocacy skills deepened into a profound respect for his intellect and his integrity during the time we were colleagues at Hogan & Hartson. I joined the firm following my clerkship; he returned there following his departure from the Solicitor General's office. I was fortunate to work closely with several groups within Hogan's large litigation practice, including the appellate practice group that John headed. Although John and I did not work together on a day-to-day basis, I did assist him on a number of appellate and administrative matters. The recollections that stand out most clearly in my mind, though, are not about those cases, but about times when John's guidance proved invaluable. I would like to share several of those recollections today.

The first concerns a death penalty case in which the firm was acting as pro bono counsel. A team of partners and associates had been laboring on the case for years, and I had joined that effort right after I came to the firm. We had just lost a significant petition for relief in the state court, and thus had reached a point in the proceedings where we were permitted, if we so chose, to file a petition for writ of certiorari with the Supreme Court. As any litigator knows, the temptation to take such a step is great in any case, but particularly in a death penalty case where every legitimate opportunity for delay is important, because the end of the case may signal the end of the client's life.

But as another associate and I considered the possible conclusions that the Court could reach, were it to take the case, we determined that, because of the issues we would necessarily be asking the Court to consider, there was a serious risk that the Court could render a decision that

would not only harm our client, but hurt other death row inmates as well. We explained our conclusions to the partners on the team. They were understandably reluctant to forsake Supreme Court review too lightly, and they wondered whether there might be some clever way to tailor the issues so as to allow the Court to reach the result we wanted, without putting our client at risk. So they sent us to talk to John, believing – rightly – that if anyone could figure a way through this maze, it would be he. And that was John's initial reaction, too, as he listened to what we had to say and promised to think about the dilemma. When I spoke with him several days later, though, he confessed that he had found no legitimate way within the bounds of the law to narrow the issues in a way that was safe for our client. This stuck with me, not only because my fellow associate and I felt vindicated, but because I realized how committed John was to adhering to the law and doing what was in the best interest of the client, even if it deprived him of the opportunity to advance a novel legal theory or argue another case.

My second story comes from several years later, when I was a senior associate working in the firm's Denver office. I was involved in the representation of a state institution in a suit brought by an employee under the Fair Labor Standards Act. The plaintiff initially had brought the action in federal court, but voluntarily dismissed the complaint and filed suit in state court, after the Supreme Court issued its decision in Seminole Tribe v. Florida, 517 U.S. 44 (1996). In Seminole Tribe, the Court held that Congress lacked the authority under the Commerce Clause to abrogate a state's Eleventh Amendment sovereign immunity from suit in federal court. The firm had been retained to defend the state court case as it proceeded through discovery toward trial, but as I began to look at the issues, I started to wonder whether we might move to dismiss the state suit on constitutional sovereign immunity grounds similar to those that had mandated the dismissal of the federal action. The only helpful legal authority at that point consisted of several

state trial court opinions, including one from Maine, and a handful of articles speculating that such a theory might succeed, based on an extension of Seminole Tribe to the state court setting. Supreme Court guidance on the issue was scant. So I called John, ran the argument by him, and asked what he thought. His response was that while I had a colorable argument, the theory I was suggesting certainly did not fit within his understanding of the Court's interpretation of the Eleventh Amendment.

We proceeded to file the motion, and after losing that motion, an appeal. At each stage John was supportive and responsive to my questions, even though he was not officially working on the case. When the appeal in the case was stayed pending the Supreme Court's consideration of Alden v. Maine, 527 U.S. 706 (1999), John volunteered his time, at my request, to conduct a moot court for counsel for Maine, since a favorable result for Maine in that case would be favorable for our client's pending appeal. The Supreme Court's decision in Alden extending a state's constitutional sovereign immunity beyond the federal court setting focused new attention on federalism, and received kudos from many conservatives intent on furthering states' rights. Yet at no point during the years I worked with John on this issue did I ever hear him voice anything other than his understanding of the governing precedent and his thoughtful and considered views about what arguments appropriately could be made within the existing legal framework. I certainly never saw any signs that he viewed the case as an opportunity to promote a personal conservative ideology or advance a particular political agenda.

The third recollection I want to share is not a story, but a set of impressions about John based on our years as colleagues. Although his intellect puts him head and shoulders above most lawyers, I never saw John flaunt his brilliance. Although the practice of law can be incredibly stressful, I never heard John speak impatiently with anyone with whom he was working, even

when criticism might have been deserved. Although law firm life can be very hierarchical, I always saw John treat every individual with whom he worked as a respected and valued colleague, without regard to seniority, status, or personal belief.

I believe that the qualities I have admired in John Roberts for the last fifteen years are precisely those that qualify him to become the next Chief Justice. The mastery of the law he exhibited in oral arguments leaves little doubt that he will be able to find a principled way through the murkiest of constitutional waters. His focus on the facts of the cases and the circumstances of his clients suggests that as Chief Justice he will approach each case on its individual merits. His respect for precedent, with his cautious approach to moving beyond its established bounds, offers reassurance that he will respect the role of stare decisis. And his collegiality and congeniality will enable him to lead the Court as Chief Justice with grace and style.

I would like to make two final points in closing. First, in part because of my experience as a Supreme Court clerk, I have developed tremendous respect and appreciation for the role of the Court and the rule of law in safeguarding our democracy. As a professor of law, I make it my business now to try and instill that respect in the students I teach. I could not in good conscience come before you today were I not convinced that John Roberts shares that respect and will demonstrate it every day he serves the Court and this Nation as Chief Justice.

Second, as both a Democrat and a woman, it is fundamentally important to me that the individual liberties of every citizen – including those relating to the right to privacy and the right to be free from discrimination – be fully protected. I could not be here today if I did not feel confident entrusting my own rights and those of my children and their generation to John Roberts for safekeeping.

For all of these reasons, I respectfully urge this Committee to recommend that the full Senate swiftly confirm the nomination of John Roberts as Chief Justice of the Supreme Court. Thank you for affording me the opportunity to speak on his behalf today.

**Testimony of**

**The Honorable Carol M. Browner**

**U.S. Environmental Protection Agency Administrator, 1993-2001**

**Hearing before the Senate Committee on the Judiciary**

**On the Nomination of John G. Roberts, Jr.**

**To be Chief Justice of the Supreme Court of the United States**

**September 15, 2005**

Mr. Chairman, Senator Leahy, Members of the Committee:

Thank you for the opportunity to appear here today. The Supreme Court has had in the past, and will have in the future, a profound impact on how our country goes about the work of protecting human health and the environment.

Before I begin, I would like to recognize those in the environmental community whose great efforts have informed the public of the import of these hearings. In particular, both a letter sent to Senators Specter and Leahy signed by ten of the country's leading environmental organizations, and a 2001 report entitled "Hostile Environment," were helpful in preparing my testimony.

Like many Americans, I am still reflecting on Judge Roberts' testimony from earlier this week, as well as his responses to your questions. My purpose for being here today is not to take a position on whether Judge Roberts should be confirmed, but to discuss the fundamental importance of the Supreme Court with respect to our nation's ongoing efforts to ensure clean, safe, and healthy communities for this and future generations.

I have been involved in our system of human health and environmental protection for most of my professional life: as the head of the Environmental Protection Agency, as the head of the Florida Department of Environmental Protection, and as a young lawyer in the U.S. Senate. The laws and regulations that we have crafted have allowed us to make steady progress toward clean air, clean water, and a healthy environment, while growing our economy and engaging the public in this effort. Though not a perfect system, a dismantling of these laws and regulations could leave our country without a sensible way to address ongoing environmental problems such as the presence of mercury, the disappearance of our wetlands, and the reality of global warming.

As you might suspect, during my eight years as Administrator of the EPA we were sued by environmental groups, by polluters, and by states—some saying that we had not done enough and others that we had done too much. We also filed our own lawsuits against polluters and states. The statutory bases for several of the decisions I made at EPA were argued in the Supreme Court, including the constitutionality of provisions of the Clean

Air Act, which we had relied on to set tough public health ozone and fine particle standards.

The Supreme Court has historically been clear in its recognition of the responsibility of federal regulatory agencies to set standards to protect individuals and communities, to enforce these standards and laws, and, when the government fails to do its job, to allow private citizens to use the courts to ensure the enforcement of our laws. Increasingly, however, lower court judges have been open to the arguments made by opponents of federal environmental protections.

More than fifty years ago, Congress realized that individual states often lacked the power, or were unwilling, to address problems of pollution. Congress also realized that pollution does not recognize the political boundaries of states. Dirty air blows across the country without regard for where it originated, and polluted water inevitably flows downstream. A federal solution is often the only solution.

In response, Congress utilized its Commerce Clause authority to pass environmental legislation designed to protect the quality of the air we breathe, the safety of the water we drink, and the health of our communities and our children.

Nonetheless, the Supreme Court's decisions in *United States v. Lopez* and *United States v. Morrison,* limiting the scope of Congress' Commerce Clause authority, have triggered an effort to undermine a number of environmental laws, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act. In *SWANCC v. U.S. Army Corps of Engineers*, the petitioners argued that Congress lacked the authority under the Commerce Clause to protect "isolated wetlands." As we all know, wetlands are an important part of the ecosystem on which we depend: they not only provide valuable habitat, but also perform a crucial function in minimizing the impact of flooding and naturally cleansing waters. While the Court avoided the Commerce Clause challenge by holding, instead, that the Corps had exceeded its statutory authority, the majority did note "significant constitutional questions" regarding the authority of Congress to protect certain types of wetlands even though used by migratory birds.

Maintaining Congress' Commerce Clause authority is essential to our ongoing progress to protect our air and water, our communities, and the environment.

Justice Kennedy, while joining with the majority in *Lopez*, noted the importance of the Commerce Clause when he wrote, "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."

While Judge Roberts' dissenting opinion from denial of rehearing in *Rancho Viejo v. Norton*—the case now referred to as the "hapless toad" case—is not definitive as to his position on the Commerce Clause power or on the Endangered Species Act, it is certainly worth noting that he rejected the three judge panel's unanimous opinion which

specifically rejected a claim that Congress lacked the Commerce Clause authority to protect the "hapless toad."

Lower court judges have also attempted to restrict the authority of Congress to delegate certain powers to the Executive Branch. In *Browner v. American Trucking Associations,* a case regarding the ozone and fine particle standards set by EPA, the D.C. Circuit struck down a key section of the Clean Air Act as unconstitutional, citing the non-delegation doctrine which had been rejected by the courts for more than 50 years.

For decades Congress has required EPA to set public health air pollution standards for the most commonly found air pollutants based on the best available science. Congress understood that the work of setting these types of standards was best done by a federal agency that could fully vet the science behind the standards, as well as take comments from all members of the public, both ordinary citizens and industry. Ultimately, the Supreme Court unanimously reversed the lower court's finding in *Browner* that Congress had improperly delegated authority to EPA. However, should a future Court embrace the non-delegation doctrine, the work of setting specific pollution levels could well fall to Congress. As I said at the time, such a result could "throw into complete turmoil the underpinnings of almost every single environmental and public health statute in the country."

Finally, Congress has frequently recognized the right of individual citizens to seek enforcement of our country's environmental laws in the courts. These citizen-suits are an important check and balance in the system—a recognition that, at times, the Executive Branch may fail to do what Congress has directed it to do and, as the Supreme Court itself recognized in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, such suits "also deter future violations."

In an earlier case, *Lujan v. Defenders of Wildlife*, while a majority on the Court denied standing to citizens concerned about the destruction of endangered species, Justice O'Connor dissented along with Justice Blackmun who wrote, "I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."

Judge Roberts, commenting on the *Lujan* opinion in a law journal article, wrote that the majority's ruling was "hardly a surprising result" and that Congress may not ask the courts to exercise "oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue."

A rejection of citizens' rights to ensure the enforcement of our nation's environmental laws would be a devastating change to the current system of safeguards.

A key role and responsibility of the government is to protect those things which are held in common: our air, our water, the public health of our communities. The nation's environmental laws are based on a set of shared values, and they rest on principles embraced by Congress over many years. The High Court should respect both the broad authority of Congress under the Constitution and well-established precedents that allow

for a robust federal role in protecting our environment. The Court should also continue to recognize the right of Congress to delegate to the Executive Branch the day-to-day work of setting standards and providing protections. And the Court must protect the opportunity for individual citizens to step in when the Executive Branch fails to do what Congress has directed.

**Justice Stephen Breyer**
**Cases involving the United States**

**March 19, 1993:** Justice White retires

**June 1993:** The White House interviews Justice Breyer for the Supreme Court. He does not receive the nomination but is widely reported as the President's second choice.

Justice Breyer decides four cases for the United States and Executive Branch agencies prior to the announcement of Ruth Bader` Ginsburg's nomination.

US v. Tajeddini, 996 F.2d 1278 (June 3, 1993)
US v. Flowers, 995 F.2d 315 (June 4, 1993)
US v. Rivera, 994 F.2d 942 (June 4, 1993)
Heno v. FDIC, 996 F.2d 429 (June 10, 1993)

**June 14, 1993:** Ruth Bader Ginsburg is announced

**Apr. 6, 1994:** Supreme Court vacancy created when Justice Blackmun resigns.

**Justice Breyer decides 5 cases for the United States and Executive Branch agencies.**

*U.S. v. Ghaffar,* 1994 WL 118141 (Apr. 7, 1994)
*U.S. v. Certain Real Property*, 21 F.3d 420 (Apr. 8, 1994)
*U.S. v. Mitchell*, 23 F.3d 1 (Apr. 13, 1994)
*U.S. v. Tirado-Torres*, 21 F.3d 420 (Apr. 12, 1994)
*Patilla v. Sec. of Health and Human Services*, 1994 WL 140416 (Apr. 15, 1994)

**Apr. 15, 1994:** The White House contacts Justice Breyer about a possible nomination to the Supreme Court.

**Justice Breyer decides 7 cases for the United States and Executive Branch agencies.**

*Cornejo v. U.S.*, 1994 WL 140412 (Apr. 19, 1994)
*Baez v. Sec. Health and Human Services*, 1994 WL 144489 (Apr. 21, 1994)
*Jiminez-Isale v. U.S.*, 1994 WL 159422 (Apr. 26, 1994)
*Lauvera v. INS*, 1994 WL 159446 (Apr. 29, 1994)
*U.S. v. Chapdelaine*, 23 F.3d 11 (May 2, 1994)
Cruz-Gonzalez v. Sec. Health and Human Services, 1994 WL 179927 (May 12, 1994)
*Swedebank v. FDIC*, 1994 WL 183542 (May 13, 1994)

**May 13, 1994:** Announcement of Justice Breyer's nomination.

**Justice Breyer decides 3 cases for the government.**

*U.S. v. Kimball*, 25 F.3d 1 (May 23, 1994)
*Camilo-Montoya v. U.S.*, 1994 WL 198173 (May 20, 1994)
*Pagan v. Secretary of Health and Human Services*, 1994 WL 191906 (May 17, 1994)

**July 29, 1994** Justice Breyer confirmed.

**Justice Ruth Bader Ginsburg**
**Cases involving the United States**

**Apr. 6, 1993:** Supreme Court vacancy created when Justice White resigns.

**Justice Ginsburg decides 17 cases for the United States and Executive Branch agencies.**

- U.S. v. Dale, 991 F.2d 819 (D.C. Cir. April 6, 1993)
- Bailey v. Secretary of Health and Human Services, 1993 WL 118100 (D.C. Cir. April 7, 1993)
- Lavado v. Dept. of Justice, 1993 WL 118092 (D.C. Cir. April 7, 1993)
- Consumer Federation of America v. Consumer Product Safety Commission, 990 F.2d 1298 (D.C. Cir. April 9, 1993).
- U.S. v. Thomas, 989 F.2d 1252 (D.C. Cir. April 16, 1993)
- Spannaus v. F.E.C., 990 F.2d 643 (D.C. Cir. April 20, 1993)
- Bunch v. Commodity Futures Trading Commission, 1993 WL 437037 (D.C. Cir. April 28, 1993)
- U.S. v. McDonald, 991 F.2d 866 (D.C. Cir. April 30, 1993)
- U.S. v. Atkins, 1993 WL 157360 (D.C. Cir. May 3, 1993)
- Williams v. F.B.I., 1993 WL 157679 (D.C. Cir. May 7, 1993)
- North American Fund Management Corp. v. F.D.I.C., 991 F.2d 873 (D.C. Cir. May 7, 1993)
- Beran v. U.S., 1993 WL 185254 (D.C. Cir. May 20, 1993)
- Moore v. Reno (Attorney General), 1993 WL 190978 (D.C. Cir. May 24, 1993)
- Sidram v. U.S., 1993 WL 191794 (D.C. Cir. May 25, 1993
- Kooritzky v. Reich (Secretary of Labor), 1993 WL 191787 (D.C. Cir. May 25, 1993)
- Alexander v. Runyon (Postmaster General), 1993 WL 190958 (D.C. Cir. May 25, 1993)
- National Trust for Historic Preservation v. F.D.I.C., 995 F.2d 238 (D.C. Cir. May 28, 1993)

**Justice Ginsburg decides 3 cases against the U.S. and Executive Branch agencies.**

- LaRouche v. F.E.C., 990 F.2d 641 (D.C. Cir. April 20, 1993)
- U.S. v. Simpson, 992 F.2d 1224 (D.C. Cir. May 21, 1993)
- U.S. v. Ford, 993 F.2d 249 (D.C. Cir. May 25 1993)

**June 11, 1993:** The White House contacts Justice Ginsburg about a possible nomination to the Supreme Court.

**June 14, 1993**: Announcement of Justice Ginsburg's nomination.

**Justice Ginsburg decides 3 cases for the government.**

- U.S. v. Spriggs, 996 F.2d 320 (D.C. Cir. June 18, 1993)
- U.S. v. Jones, 997 F.2d 1475 (D.C. Cir. July 2, 1993)
- Environmental Action v. FERC, 996 F.2d 401 (D.C. Cir. July 2, 1993)

**Justice Ginsburg decides 2 cases against the government.**

- Overland Express Inv. v. ICC, 996 F.2d 356 (D.C. Cir. June 22, 1993)
- Gas Appliance Manufactures v. Dept. of Energy, 998 F.2d 1041 (D.C. Cir. July 27, 1993)

**August 3, 1993** Justice Ginsburg confirmed.

Center for Constitutional Rights
666 Broadway, 7th Floor
New York City, NY 10012

Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

September 6, 2005

Dear Honorable Members of the Senate Committee on the Judiciary:

The Center for Constitutional Rights has a special relationship to the detentions at Guantánamo, having brought the *Rasul* case before the United States Supreme Court and currently coordinating the representation of many Guantánamo detainees. We are concerned about Judge Roberts' nomination because his most recent opinion demonstrates his disregard for international law and United States treaty obligations according fundamental protections to these detainees. Further, his role in this decision is disconcerting in its rejection of his legal and ethical obligations as a federal judge.

The application and enforceability of the Geneva Convention is of critical importance at this moment in history because it limits a nation's ability to flout human rights norms and laws. The Convention provides basic protections to those captured by the United States and preserves the United States position as a country founded on the rule of law. The Geneva Convention also protects United States military personnel and cannot be lightly or easily shorn.

On May 15, 2005, four days before his official nomination to be a Supreme Court Justice and on a day in which he met with President Bush to discuss the position, Judge Roberts decided a case that dramatically expanded the President's authority and curtailed the minimal rights accorded by international law to detainees held for over three years by the United States military. Judge Roberts' role in this case was both unethical and illegal under 28 U.S.C. §455 and the Judicial Code of Conduct. Moreover, his opinion in the case demonstrates his readiness to undermine United States treaty obligations and international law in favor of the expansion of executive authority. For these reasons, the Center for Constitutional Rights expresses our concern that Judge Roberts is an inappropriate choice to be Chief Justice on the nation's highest court.

1. **IN HIS DECISION IN *HAMDAN V. RUMSFELD*, JUDGE ROBERTS DENIED GUANTÁNAMO DETAINEES THE MINIMAL FUNDAMENTAL RIGHTS RECOGNIZED BY THE INTERNATIONAL COMMUNITY, AND REQUIRED BY UNITED STATES TREATY OBLIGATIONS. HE EXPANDED EXECUTIVE AUTHORITY AT THE EXPENSE OF LONG-RECOGNIZED LAW.**

The central question in *Hamdan v. Rumsfeld* was the constitutionality of a Presidential order.[1] In sanctioning the President's military commissions for Guantánamo detainees, Judge

[1] *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

Roberts supported the expansion of the President's authority to act outside of recognized international law and treaty obligations.

The 1949 Geneva Convention to the Treatment of Prisoners of War applies to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *dehors* the combat by sickness, wounds, detention or any cause ..." Article III of the Convention guarantees basic protections against violence, mutilation, murder, cruel treatment, torture, outrages upon personal dignity, and hostage taking. Article III further protects against the "passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the guarantees which are recognized as indispensable by civilized peoples."

The *Hamdan* court unanimously denied the right of individuals to present claims founded on the Geneva Convention in United States courts. Judge Roberts went even further. He was part of the 2-1 majority that held that even the most basic Geneva Convention protections did not apply to Al Qaeda. In a concurring opinion, Judge Williams countered this view and asserted that the "modest requirements of 'humane[]' treatment and 'the judicial guarantees which are recognized as indispensable by civilized peoples'" apply in this context to the United States as a signatory to the Geneva Convention.[2]

In the majority opinion, Judge Roberts affirmed President Bush's much-criticized decision to declare al-Qaeda detainees beyond the scope of the Geneva Convention. During the development of this controversial policy, Colin Powell, then Secretary of State, asserted that not applying the Geneva Convention in this case would "reverse over a century of United States policy and practice."[3] President Bush chose instead to embrace the advice of then White House Counsel Alberto Gonzales, who characterized some of the Geneva protections as "obsolete" and "quaint" in this context.[4] The decision reached in *Hamdan* was thus central to the administration's claims of executive power and its entire structure of capturing, detaining, interrogating and trying so-called enemy combatants.

In a period in which it is important to consistently recognize national and international norms and laws, Judge Roberts has weakened them. His analysis of the President's order to create military commissions supported an executive decision that has increasingly exposed the United States as a country where ideology reigns above the law. The *Hamdan* opinion justified

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[2] *Hamdan* at 44.

[3] A January 26, 2002 memo from Secretary of State Colin Powell stated that the position proposed by the White House Counsel would "reverse over a century of U.S. policy and practice."

[4] In this January 25, 2002 memo from Alberto Gonzales to President Bush, Gonzales recognized that significant negative ramifications that would arise from this position, including "widespread condemnation" internationally; diminished protections for captured United States troops; the introduction of "an element of uncertainty" in the status of opponents; and the bestowal of legitimacy on other countries to create "'loopholes' in future conflicts" to renege on their international obligations. Despite these recognized ramifications, the memo rejected the application of the Geneva Convention protections in order to preserve "flexibility" and minimize the likelihood of future prosecution for detainee treatment. Draft Memorandum to the President January 25, 2002, p. 2. February 7, 2002, President George W. Bush stated that the Geneva Conventions do not apply to the United States conflict with al-Qaeda. Bush claimed that the United States would treat detainees "in a manner appropriate with the Geneva Conventions" where "appropriate and consistent with military necessity."

the President's creation of loopholes in a rare legal document that has been widely agreed upon by international actors and reliably upheld by the United States in all past conflicts. In a system of checks and balances, the judiciary needs to be relied on to curb executive authority when it acts outside of the law. Judge Roberts has instead shown his willingness to bestow excessive authority on an executive consciously acting to undercut recognized law.

**2. JUDGE ROBERTS VIOLATED 28 USC §455 AND THE JUDICIAL CODE OF CONDUCT BY CHOOSING NOT TO RECUSE HIMSELF FROM THE *HAMDAN* OPINION DESPITE HIS ONGOING COMMUNICATION WITH MEMBERS OF THE BUSH ADMINISTRATION ABOUT HIS POTENTIAL NOMINATION TO THE SUPREME COURT.**

Judge Roberts heard and decided *Hamdan* at the same time as he had a series of conversations with high-ranking officials of the Bush administration regarding his potential nomination to be a Supreme Court Justice. This was neither an ordinary case nor an ordinary appointment. The question in *Hamdan* was squarely about the President's authority. Because of this clear conflict of interest, Judge Roberts was obligated by law to recuse himself in order to maintain the integrity of the opinion and, more importantly, of the judiciary. 28 U.S.C. §455 and the Judicial Code of Conduct prohibits a judge from sitting in a case in which his or her "impartiality might reasonably be questioned." In not recusing himself from *Hamdan*, Judge Roberts acted outside of his legal and ethical obligations.

The basic rule governing the recusal of appellate judges is 28 U.S.C. §455. The standard is deliberately generous in order to "promote public confidence in the integrity of the judicial process."[5] A judge should "disqualify himself in any proceeding in which his impartiality might reasonably be questioned,"[6] or where "he has a personal bias or prejudice concerning a party..."[7] This provision is almost identical to Canon 3(C) of the Code of Conduct for United States Judges. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."[8] Even if "no *actual* partiality exists" in this case, "the close coupling" of his decision to the President's nomination of him to the position "does create the appearance that he may have been pursuing employment...while he was presiding over the case."[9] It is this appearance of partiality, and not actual partiality, which 28 U.S.C. §455 and the Judicial Code of Conduct prohibits.

The *Hamdan* case had been assigned to Judge Roberts some time prior to April 2004; it was to be argued on April 7. On April 1, six days before argument, Judge Roberts met with Attorney General Alberto Gonzales to discuss his possible nomination to the Supreme Court—one of the most important and prestigious legal jobs in the country. Judge Roberts continued

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[5] *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 858 (1988).
[6] 28 U.S.C. §455(a).
[7] 28 U.S.C. §455(b)(1).
[8] *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., in chambers), *cited in Liljeberg* at 869-70, *supra*.
[9] *See Continental Airlines*, 901 F.2d 1259 (5th Cir. 1990). "The goal of section 455(a) is to avoid even the appearance of partiality...Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Liljeberg* at 860-61, *supra*, *citing Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986).

meeting with administration officials after the oral argument in *Hamdan*, and while the case was under submission. He met again with Gonzales, the Vice President, Chief of Staff Andrew Card, Counsel to the President Harriet Miers, Deputy Chief of Staff Karl Rove and the Vice-President's Deputy Chief of Staff, Lewis Libby; he had telephone conversations with Deputy Counsel to the President, William K. Kelly; and he met with the President on the day the decision was announced. Although the *Hamden* case concerned the legality of policies authored by some of these very officials, and the President who nominated him for the Supreme Court was a defendant in the case, Roberts did not recuse himself. Nor did he ever inform Mr. Hamdan's lawyers of the meetings so they could argue that it was improper for him to continue on the case.

The law is clear as it applies to this case. 28 U.S.C. §455 and the ABA's Judicial Code of Conduct Canon 3(C) compelled Judge Roberts to recuse himself from the *Hamdan* case either before or after the decision was reached. A reasonable person might question his impartiality when he sat on an appellate panel that directly and widely expanded the President's powers while he was simultaneously being seriously considered by the President to fill a prestigious Supreme Court vacancy. If he did not realize at the time that his recusal was necessary, or if he was sworn to secrecy about the negotiations, he should have recused himself after the judgment was reached and his nomination was announced.

In related cases, courts found glaring judicial error when judges chose not to recuse themselves from cases in which the judge was in communication with one of the sides of the case about potential future job offers.

- In *Pepsico v. McMillen*, Judge Posner directed a federal judge to recuse himself after a headhunter he hired to approach law firms as he planned for his post-retirement employment mistakenly contacted two opposing firms in a case pending before him.[10] "All concerned were aware that it would be unethical for a law firm that had a case pending before a judge to be at the same time negotiating with him over possible future employment at the firm."[11] Neither firm agreed to employ him, but an "asymmetrical" relationship existed in the responses of the firms; one rejected him outright and the other was less definitive in its rejection.[12] While Judge Posner insisted that the judge in question was "a judge of unblemished honor and sterling character" and that "the motion to recuse him did not and could not have alleged any actual impropriety [because both firms rejected him and conditions were attached to his searching for post-judicial employment]," the Fifth Circuit nevertheless concluded that §455(a) "required" his recusal "because of the appearance of partiality that would be created by [his] continuing to preside in this case."[13] Judge Posner wrote that "the dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under

[10] *Pepsico v. McMillen*, 764 F.2d 458 (7th Cir. 1985).
[11] *Pepsico* at 460.
[12] *Pepsico* at 461.
[13] *Pepsico* at 460. The Fifth Circuit standard for a violation of §455(a), when a judge's "impartiality might reasonably be questioned", is when "there is a 'reasonable basis' for a finding of an 'appearance of partiality under the facts and circumstances' of the case." *Pepsico* at 460, *citing SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977).

such conditions will be decided in accordance with the highest traditions of the judiciary."[14]

- Similarly, in *In re Continental Airlines*, the Fifth Circuit found a violation of §455(a) when a bankruptcy judge took a position with a law firm representing the debtor soon after entering judgment in a bankruptcy case.[15] Even if "no *actual* partiality exists" in this case, "the close coupling" of the judge's decision with the party's employment offer and the judge's acceptance of the offer "does create the appearance that he may have been pursuing employment...while he was presiding over the case."[16]

- The D.C. Circuit relied on Canon 3(C) of the ABA Code of Judicial Conduct to find that a judge should have recused himself after he failed to disclose employment negotiations with the Executive Office for United States Attorneys in the Department of Justice contemporaneous with ruling on an intent-to-kill case prosecuted by the United States Attorney for the District of Columbia, part of the Department of Justice.[17] During the trial, the judge was engaged in employment discussions with the Department of Justice that included two meetings and a conditional job offer.[18] The defendant only learned of the employment negotiations after he was sentenced.[19] As with a violation of §455(a), "neither bias in fact nor actual impropriety is required to violate the Canon."[20] The court found that "the circumstance presents the specter of partiality that the Canon and the Supreme Court entreat all judges scrupulously to avoid."[21]

Some have argued that Judge Roberts could not have excused himself from every government case pending before the circuit court while he was in the midst of discussions with the executive about a potential Supreme Court nomination, and that he was thus not required to recuse himself from this one. However, this appeal was not ordinary government litigation or agency review. At issue were sweeping and temporally undefined powers claimed by the executive. The government requested expedited consideration of this appeal asserting that the ruling below "...had dangerous ramifications," contradicted "important military determinations

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[14] *Pepsico* at 461.
[15] *In re Continental Airlines*, 901 F.2d 1259 (5th Cir. 1990).
[16] *In re Continental Airlines* at 1262. "[T]o hold that § 455(a) was violated in the present case does not mean that Judge Roberts was required to stand recused before discovering that he was being considered for employment. Rather, when an offer of employment was received the day after his approval of $700,000 in legal fees to the firm making the offer, Judge Roberts was 'required to take the steps necessary to maintain public confidence in the judiciary.' In the circumstances of this case Judge Roberts should either have rejected the offer outright, or, if he seriously desired to consider accepting the offer, stood recused and vacated the rulings made shortly before the offer was made. Although we are confident that Judge Roberts committed no substantive impropriety in his handling of the motions in this case, we nevertheless conclude that recusal was mandated by the appearances of the situation which we have described." *In re Continental Airlines* at 1262-63.
[17] *Scott v. U.S.*, 559 A.2d 745 (D.C. Cir. 1989) (*en banc*).
[18] *Scott* at 747.
[19] *Scott* at 748.
[20] *Scott* at 749.
[21] *Scott* at 750. The court emphasized that the governmental nature of the judge's prospective employer does not alter the Code's requirement that the judge disqualify himself from a case in which employment negotiations might cause his impartiality to be questioned: "the negotiations at issue for employment with a unit directly linked to the prosecutor's office are ethically analogous to negotiations for employment with a large private law firm." *Scott* at 750.

of the Commander-in-Chief during a time of active armed conflict...," and further represented an "unprecedented judicial intrusion into the prerogatives of the President."[22] It was argued by the Assistant Attorney General for the United States and the court expedited consideration. And in sanctioning the President's military commissions for Guantánamo detainees, the *Hamdan* court held that the President had absolute authority to find that Mr. Hamdan was not a prisoner of war, and that "[the President's] construction and application of treaty provisions [was] entitled to 'great weight.'"[23] While Judge Roberts may not have been required to recuse himself from every government case that appeared before his court in the preceding months, he was certainly required to recuse himself from this extraordinary one.

Even if Judge Roberts did not realize his obligation to recuse himself during the appeal and decision, he should have realized his obligation, and remedied his nondisclosure and nonrecusal, by disclosing the conflict of interest and recusing himself from the opinion after the announcement of his Supreme Court nomination.[24] A post-judgment review would have been particularly necessary given that Judge Roberts did not disclose the conflict of interest that would have allowed Mr. Hamdan to challenge Judge Roberts' role in this case prior to the decision and the announcement of his Supreme Court nomination. In not recusing himself either before or after the announcement of his nomination to the Supreme Court, Judge Roberts showed he lacks the highest respect for the law and judicial ethics necessary for a Justice.

**CONCLUSION**

The Center for Constitutional Rights expresses our deep concern about the nomination of Judge Roberts to the Supreme Court. Within the limited collection of court opinions which bear his name, the recent *Hamdan* opinion should present a strong warning to the Judiciary Committee and the nation. While in the midst of discussions with the executive, when he knew that his Supreme Court nomination was potentially at stake, Judge Roberts decided to undermine recognized international law and treaty obligations; deny even minimal protections to detainees held incommunicado for three years; and not acknowledge a glaring conflict of interest that was both illegal and unethical. Judge Roberts should not be confirmed to the Supreme Court; the risk is too great.

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[22] Motion for Expedition of Appeal, at 4.
[23] *Hamdan* at 41, 43.
[24] "[T]o the extent [28 U.S.C. §455(a)] can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary." *Liljeberg* at 861.

**CENTER FOR INDIVIDUAL FREEDOM**

August 22, 2005

Dear Senator:

I am writing to express the Center for Individual Freedom's strong support for the confirmation of Judge John G. Roberts to be an Associate Justice of the Supreme Court of the United States.

Judge Roberts is eminently qualified. His educational achievements illustrate that he possesses a superb intellect. His record as an appellate lawyer, which includes 39 appearances before the High Court, demonstrates that he is among the best legal practitioners of his generation. His performance as a member of the U.S. Court of Appeals for the D.C. Circuit establishes that he is an outstanding jurist. His character is unblemished and his integrity is unquestioned.

Judge Roberts will be an exceptional member of the Supreme Court of the United States. The Center for Individual Freedom is confident that Judge Roberts will be a faithful interpreter of the Constitution and that he will objectively apply the relevant law to the case at hand without passion or prejudice. In addition, based on his lengthy record of public and private service, it is clear that Judge Roberts exhibits the appropriate temperament to sit on the nation's Highest Court.

In short, if the Supreme Court is to be composed of the best and brightest legal minds, there is no question that Judge Roberts is an extraordinary choice.

The Center for Individual Freedom urges the Committee and the Senate to swiftly consider and confirm Judge Roberts so that he may take his seat before the Supreme Court opens its October Term in less than two months.

Sincerely,

Jeffrey Mazzella
President

cc: Majority Leader Bill Frist
Minority Leader Harry Reid
Senator Arlen Specter
Senator Patrick Leahy
Senator Mitch McConnell
Senator Richard Durbin
The White House

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For Immediate Release

Contact: Phyllis Berry Myers
Phone: (202) 544-9555

**Centre for New Black Leadership's Statement in Support of Judge John Roberts**

WASHINGTON, D.C. (August 1, 2005) "We are shocked, just shocked," says Phyllis Berry Myers, President, Centre for New Black Leadership (CNBL), "to learn that Judge John Roberts as a young conservative lawyer serving in a conservative Reagan Administration, would express countervailing opinions to liberal approaches to civil rights issues and enforcement."

"Why wouldn't he then and why shouldn't he now?

"In fact, CNBL shares many of Judge Roberts' opinions and was founded ten years ago to bring such vision and impetus to the national discourse on race.

"Ideas, as the pundits say, have consequences, and polls taken over the last ten years demonstrate a majority of Americans believes the wholesale adoption of racial preferences in hiring, university admissions and government procurement has been a wrong-headed policy for this country. Millions of black Americans believe government policy should not be developed on the premise of 'black victimization,' rather public policy should reaffirm the equal standing of every American before the law; that school choice should be promoted as a means of providing a sound education to low income students and improving urban schools; faith-based institutions have a role in combating the social ills plaguing low-income, low-resources communities; healthy, married, two-parent families should be encouraged and that tax and regulatory barriers, that needlessly hamper the economic development of our communities, need to be eliminated.

"African-Americans should celebrate black achievement as evidence of our dignity, humanity, intelligence and our ability to do for ourselves; not for power to leverage special benefits from the state. That's what a 21st Century civil rights agenda would advocate.

"So, if the traditional civil rights organizations want to use the Roberts' confirmation hearings as a battle over a 1960s – or even a 1980s – civil rights agenda versus a 21st Century Citizens Responsibility agenda, 'bring it on.'"

*The Centre for New Black Leadership is a Washington, DC-based research and education organization promoting a market-oriented, community-based vision of public leadership for black communities in America.*

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**COMMUNITY RIGHTS COUNSEL**
**DEFENDERS OF WILDLIFE**
**EARTHJUSTICE**
**ENDANGERED SPECIES COALTION**
**FRIENDS OF THE EARTH**
**NATIONAL ENVIRONMENTAL TRUST**
**SIERRA CLUB**

September 2, 2005

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC

RE: Environmental Concerns with Supreme Court Nomination of Judge John G. Roberts, Jr.

Dear Senators Specter and Leahy:

Judge John G. Roberts, Jr. has been nominated to fill the Supreme Court seat being vacated by Justice Sandra Day O'Connor, who has frequently been a swing vote in important environmental cases. The Supreme Court has become an increasingly hostile forum for pro-environmental litigants in recent years, issuing rulings that have limited many of the nation's most important environmental safeguards. In other cases, environmental protections have withstood critical challenges by one or two votes, with one of those votes usually being cast by Justice O'Connor. The stakes for the environment in the Roberts' nomination could hardly be higher.

Having conducted a thorough review of Judge Roberts' record on environmental issues, we are writing to highlight two aspects of his record that give us reason for serious concern about his nomination. First, his well-publicized "hapless toad" opinion in *Rancho Viejo v. Norton*,[1] coupled with comments Roberts has made to the press in his capacity as a Supreme Court commentator, suggest that he might join a block of Supreme Court justices that in recent years have sought to significantly reduce the Constitutional authority of Congress to enact environmental safeguards. Second, throughout his career, Judge Roberts has expressed a limited view of the role of the judicial branch that could lead him to unduly restrict the right of citizens

[1] *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J. dissenting) (denying rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (2004).

to access federal courts -- rights secured for citizens by environmental statutes. Particularly at risk is the critical role assigned citizens by Congress to act as "private attorneys general" where the federal government is unwilling or lacks the resources to enforce federal law against polluters.[2]

The undersigned groups are reserving judgment until the conclusion of the confirmation hearings on whether the Senate should confirm Judge Roberts to a lifetime seat on the Supreme Court. Judge Roberts has impressive credentials, but his record on environmental issues raises some troubling concerns. We strongly believe that, as a nominee to the nation's highest court, Judge Roberts bears the burden of proving that he can be fair and impartial in deciding environmental cases that would come before him. We therefore urge the Committee to fully explore Judge Roberts' judicial views and philosophy during the confirmation process, particularly with respect to the issues raised in this letter. We appreciate the leadership Chairman Specter, Ranking Member Leahy and other members of the Committee have shown in informing Judge Roberts of the areas that will be explored at his hearing and the types of questions he will be expected to answer.

## I. Brief Overview of Judge Roberts' Environmental Record

Throughout John Roberts' career, he has been involved in environmental cases and disputes. As Special Assistant to Attorney General William French Smith, for example, Roberts wrote a speech for the Attorney General announcing the Reagan administration's states'-rights position on Western water rights. As Principal Deputy Solicitor General, Roberts briefed and argued *Lujan v. National Wildlife Federation*,[3] a critical case narrowing environmentalists' ability to challenge agency actions. In private practice at Hogan & Hartson, Roberts argued a number of important environmental cases.[4] During his brief tenure on the D.C. Circuit, Judge Roberts has written opinions on several environmental and access-to-courts issues.[5]

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[2] Examples of "private attorneys general" statutes include the Toxic Substances Control Act, 15 U.S.C. § 2619 (1994), the Clean Water Act, 33 U.S.C. § 1365 (1994), and the Clean Air Act, 42 U.S.C. § 7604 (1994).

[3] 497 U.S. 871 (1990) (successfully arguing that no one could bring an overall challenge to the Interior Department's Land Withdrawal Review Program, which reversed thousands of actions that had "withdrawn" (protected) millions of acres of federal land from mining and other development, even though, as four Justices explained in dissent, the Department had "attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals.").

[4] *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (unsuccessfully arguing that the EPA usurped state authority under the Clean Air Act when prohibiting a state PSD permit) (Another attorney argued the case before the Supreme Court, but Roberts was counsel of record on the petitioner's brief.); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (successfully arguing that a temporary moratorium does not constitute a per se taking); *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) (successfully arguing that the Clean Water Act does not authorize citizen suits seeking penalties for wholly past violations) (E. Barrett Prettyman, Jr., was counsel of record, though Roberts lists the case in his Senate Questionnaire); *Bragg v. Robertson*, 248 F.3d 275 (4th Cir. 2001) (in a mountaintop removal amicus brief for the National Mining Association, Roberts argued that the federal Surface Mining and Reclamation Act's (SMCRA's) citizen suit provision does not allow citizens to challenge the permitting decisions of state agency officials in federal court and that SMCRA's stream protection regulation, known as the buffer zone rule, does not prohibit the dumping

## II. Judge Roberts and the Scope of Congressional Authority

The most far-reaching environmental question raised by Judge Roberts' record concerns his views on the power of Congress to enact environmental safeguards, including its authority to pass laws under the Constitution's Commerce Clause. Chairman Specter recently called the Supreme Court's cases eroding Congressional power "the hallmark agenda of the judicial activism of the Rehnquist Court."[6] Meanwhile, scholars and activists on the libertarian right have been urging the Court to expand these rulings into a full-blown restoration of what D.C. Circuit Judge Douglas Ginsburg called the "Constitution in Exile," with the result that environmental laws, and wide variety of other protections passed since the New Deal, would be rendered unconstitutional.[7] In our opinion, no nominee who supports a radical restriction of Congress' Commerce Clause authority or a restoration of the so-called "Constitution in Exile" should be confirmed to the Supreme Court.

Because almost every major federal environmental statute relies on Congress' Commerce Clause authority, the Supreme Court's rulings limiting the scope of that authority in *United States v. Lopez*[8] and *United States v. Morrison*[9] have triggered a flood of challenges to environmental laws, including the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act. For example, in *SWANCC v. Army Corps of Engineers*,[10] the petitioners argued that Congress lacked authority under the Commerce Clause to protect so-called "isolated" waters under the Clean Water Act. While the Court limited its ruling to an interpretation of the statute, the 5-4 opinion narrowly avoided what the majority termed "significant constitutional

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of mining waste in Appalachian streams.), *cert. denied*, 534 U.S. 1113 (2002); *United States v. Smithfield Foods*, 191 F.3d 516 (4th Cir. 1999) (Roberts represented Smithfield Foods in a case in which the appeals court affirmed that the company was liable for Clean Water Act effluent limit violations, submission of false and late reports, and destruction of records).

[5] *Sierra Club v. EPA*, 353 F.3d 976 (D.C. Cir. 2004) (Roberts authored a decision upholding the EPA's refusal to adopt toxic air pollution emissions standards at the maximum degree achievable.); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (Roberts dissented from a denial of rehearing *en banc* in a case that held that the Endangered Species Act was applicable to a commercial development harmful to the endangered species.); *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005) (reversing, over a strong dissent, a district court's award of attorney's fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm).

[6] Letter from Senator Specter to Judge John G. Roberts, Jr. August 8, 2005.

[7] See Jeffrey Rosen, *The Unregulated Offensive*, The New York Times, April 17, 2005 (chronicling the "Constitution in Exile" movement); Douglas Ginsburg, Book Review, *Delegation Running Riot*, 18 Regulation (1996) *available at* https://www.cato.org/pubs/regulation/regv18n1/reg18n1-readings.html ("So for 60 years the non-delegation doctrine has existed only as part of the Constitution in Exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty-even if perhaps not in their own lifetimes.")

[8] 514 U.S. 549 (1995).

[9] 529 U.S. 598 (2000).

[10] 531 U.S. 159 (2001).

questions," about Congress' authority under the Commerce Clause to protect certain waters and wetlands that were used by migratory birds.

It is not clear how Judge Roberts would rule on environmental Commerce Clause challenges if confirmed to the Supreme Court, but his one opinion on the issue as a D.C. Circuit judge – indeed the first opinion he wrote as a member of the bench – warrants close examination by the Committee and gives us serious concern. The opinion is *Rancho Viejo v. Norton,*[11] the now famous "hapless toad" case. In *Rancho Viejo,* a three-judge panel of the D.C. Circuit unanimously rejected a claim that Congress lacked the Commerce Clause authority to protect the toad, holding that the Endangered Species Act (ESA) was applicable to commercial development that threatened an endangered species.[12] A petition for rehearing by the entire court was denied 7-2, with Judges Roberts and Sentelle dissenting.

In his dissent, Judge Roberts wrote that: "the panel's opinion in effect asks whether the challenged regulation substantially affects interstate commerce, rather than whether the *activity* being regulated does so;" and concluded that "[s]uch an approach seems inconsistent with the Supreme Court's holdings . . ."[13] Judge Roberts' analysis is troubling because the panel's reasoning is arguably the strongest basis for distinguishing the Endangered Species Act from the Guns Free School Zone Act at issue in *Lopez* and the Violence Against Women Act at issue in *Morrison.* As the panel explains, the Endangered Species Act regulates the "taking" of species and such takings are almost always the result of commercial development activities. The Act thus regulates economic activity much more directly than did the laws in *Lopez* and *Morrison,* which regulated gun possession and domestic violence, activities the Court in *Morrison* deemed "non-economic" and "criminal."

Judge Roberts' opinion leaves open the possibility that he would uphold the Endangered Species Act protection of the arroyo toad on an alternative ground,[14] but it is still more than a little disconcerting that he would so publicly disagree with his colleagues on the court about a very solid basis -- probably the strongest basis -- for upholding ESA safeguards against constitutional challenges.[15] In addition, even if Roberts would ultimately rely on an alternative ground on the *Rancho Viejo* facts, it is essential to determine if the potential alternative grounds would be narrower in other contexts. In other words, Roberts should explain whether there are current (or reasonably foreseeable future) applications of environmental or other laws that might

[11] 334 F.3d 1158 (D.C. Cir. 2003).
[12] *Id.*
[13] *Id.* at 1160.
[14] Judge Roberts' reference to "alternative grounds for sustaining application of the Act" is accompanied by a citation to a footnote in the panel's decision, *Rancho Viejo,* 323 F.3d at 1067-68 n.2, which discusses other rationales.
[15] It is significant to note that dissents from denial of *en banc* review are extremely rare in the D.C. Circuit; since Roberts joined the court, judges have dissented in only three cases (including two cases in which Roberts dissented). On the other hand, it also should be noted that Judge Roberts wrote separately and did not join a more strident and more definitive dissent from *en banc* review written by Judge Sentelle.

be constitutional under the panel's reasoning, but might not be constitutional under one or more possible alternative grounds.

Roberts' brief opinion also appears to question whether Congress can protect endangered species found in only one state, stating that "[t]he panel's approach . . . leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes 'Commerce . . . among the several States.'"[16] This passage contrasts markedly with the recognition of the value of species that is reflected in the consistent rulings by every majority opinion to consider the issue, including decisions by conservative Republican-appointed judges that have upheld ESA safeguards against similar claims.

As Paul Clement, President Bush's Solicitor General, explained in successfully urging the Supreme Court to deny review of the case, no court "has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures."[17] The Supreme Court has repeatedly rejected, without recorded dissent, petitions to review appeals court decisions that have rejected Commerce Clause challenges to ESA safeguards.

Roberts sharply criticized an argument for congressional authority under the Commerce Clause that was signed onto by Judge Douglas Ginsburg, who, as noted above, coined the term "Constitution in Exile." His opinion in *Rancho Viejo* warrants careful examination at his upcoming hearing.

Another set of comments by Roberts also suggests he may have an unduly limited view of congressional power and, perhaps, some sympathy for the theory of a so-called Constitution in Exile. Roberts' comments came in the context of the Supreme Court's decision to review *Browner v. American Trucking Associations,*[18] a stunning decision by Judges Douglas Ginsburg and Stephen Williams of the D.C. Circuit to strike down a central provision of the Clean Air Act as an unconstitutional violation of what is known as the non-delegation doctrine.[19] EPA Administrator Carol Browner called the ruling "bizarre and extreme" and warned that, if upheld, it could "throw into complete turmoil the underpinnings of almost every single environmental and public health statute in the country."[20] The Supreme Court agreed with Browner and her

[16] 334 F.3d at 1160.
[17] See Brief of Respondents in Opposition, *Rancho Viejo LLC v. Norton, No. 03-761, available at* http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0761.resp.html; See also *Gibbs v. Babbitt*, 214 F.3d 483, 501 (4th Cir. 2000) (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment"), *cert. denied*, 531 U.S. 1145 (2001);
[18] 175 F.3d 1027 (D.C. Cir. 1999).
[19] 531 U.S. 942 (2000).
[20] Margaret Kriz, *Why the EPA's Wheezing a Bit*, National Journal, June 24, 1999, at 2166.

Bush Administration successor, reversing the D.C. Circuit unanimously in a sharply worded opinion by Justice Scalia.[21]

Yet before the case was argued before the Supreme Court, Roberts expressed what a reporter called a "more positive view" of the D.C. Circuit's ruling, stating that a "revitalized non-delegation doctrine might force Congress to be more specific."[22] In words eerily similar to those of Judge Douglas Ginsburg, Roberts told another reporter: "[t]his case involves the moribund delegation doctrine, which has been as much of a dead letter as the Commerce Clause, until lately, or the 11th Amendment, a ghost from the past that might be revived."[23] It is possible that Roberts' remarks were mischaracterized, and these comments are far from conclusive concerning Roberts' views, but they warrant further exploration.

## III. John Roberts and Access to Courts

A powerful innovation of modern environmental law is the authority Congress grants citizens to ensure that environmental statutes are implemented by regulatory agencies and obeyed by polluters. Congress has repeatedly included "citizen suit" provisions in numerous environmental, civil rights, and other laws in order to ensure that essential legal safeguards are upheld and enforced. For example, in upholding the ability of individuals and organizations to sue polluters, the Supreme Court recognized that: "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."[24]

There are significant reasons to believe that a Justice Roberts would write or join Supreme Court opinions that limit the ability of citizens to enforce environmental laws. A core aspect of Judge Roberts' self-described judicial philosophy is his view that judges must narrowly define their constitutional role in deciding "cases and controversies" in order to avoid any infringement of the powers assigned to other branches of government. Early in his career, for example, Roberts wrote a memo to then-Attorney General William French Smith in which he criticized the Carter administration's policy of "not raising standing challenges in the most vigorous fashion . . . particularly . . . in the environmental area."[25] Roberts urged Smith to inform reporters that "it will be our policy to raise standing and other justiciability challenges to the fullest extent possible."[26]

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[21] *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).
[22] Jonathan Ringel, *High Court to tackle Wide-Ranging Docket*, Fulton County Daily Report, September 25, 2000.
[23] Marcia Coyle, *Playing Variations on Legal Themes, federalism, First and Fourth Amendment Cases Dominate Those to be Heard This Term*, The National Law Journal, Volume 23, Number 6, October 2, 2000.
[24] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).
[25] Memorandum from John G. Roberts to William French Smith dated Nov. 21, 1981.
[26] *Id.* Roberts' proposed policy statement was sweeping and unqualified—it was not limited to cases in which the Justice Department believed there was no standing or even to cases where there was a serious question. Challenging standing "in the most vigorous fashion" and "to the fullest extent possible" delays decisions that block illegal pollution and other conduct and chills access to courts by individuals and small non-profit groups who have standing

Roberts' views on environmental standing are most fully explained in his 1993 Duke Law Journal comment on the *Lujan v. Defenders of Wildlife* (hereinafter *Defenders*) decision.[27] In *Defenders*, Justice Scalia's majority opinion denied standing to citizens concerned about the destruction of endangered species stemming from U.S. activities abroad. In his article, Roberts provided a robust defense of the opinion, stating that the ruling in *Defenders* was "hardly a surprising result under the Court's standing precedents, given the vague and amorphous nature of the plaintiff's claims of injury."[28]

But the ruling in *Defenders* was a bitter surprise for citizens seeking to enforce environmental laws and the ruling has raised the burden and costs of demonstrating standing in every subsequent citizen suit. It was also a surprise to Justice O'Connor, who joined a dissent by Justice Blackmun that ends as follows: "I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."[29] Roberts' comment that Congress may not ask the Courts to exercise "oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue,"[30] similarly suggests he may not fully appreciate the critical role citizen suits have played in the success of environmental law. It is also interesting to note that Justice Scalia appears to have picked up on Roberts' "John Q. Public" reference in a recent dissent in an environmental standing case.[31]

More broadly, Roberts' article on *Defenders* asserts that standing is "properly regarded as a doctrine of judicial self-restraint" and "(s)eparation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches."[32] Roberts specifically agreed with Scalia's argument in *Defenders* that courts should rigorously enforce Article III case or controversy limitations to avoid infringement upon the executive's authority under Article II.[33] In 1990, Roberts made a nearly identical argument on behalf of the United States in *Lujan v. National Wildlife Federation*.[34]

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but cannot afford to respond to the Justice Department's aggressive discovery requests and lengthy briefs. A few years later, as an Associate Counsel in the Reagan White House, Roberts continued his focus on restricting access to courts rather than ensuring or expanding it. In an April 28, 1983 memorandum, Roberts declared that 42 USC § 1983 "abuse really has become the most serious federal court problem" and only suggested delaying attempts to restrict it for political reasons: "the general sense is that it would be impolitic to touch the provision, which authorizes most actions for civil rights violations, until after 1984" [a presidential election year].

[27] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 (1993).

[28] *Id.* at 1221.

[29] 504 U.S. 555, 606 (1992) (Blackmun, J. dissenting).

[30] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 (1993).

[31] See *Friends of the Earth v. Laidlaw* (2000) 528 U.S. 167, 209 & n.2 (Scalia, J. dissenting) ("[b]y permitting citizens to pursue civil penalties payable to the Federal Treasury, the [Clean Water] Act ... turns over to private citizens the function of enforcing the law.... [A]ccording the Chief Executive of the United States the ability to intervene does no more than place him on a par with **John Q. Public** who can intervene -- whether the government likes it or not -- when the United States files suit.")

[32] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 (1993).

[33] Id. at 1230. ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. Dean Nichol loses sight of this reality in criticizing Justice Scalia's

These views strongly suggest that Roberts would agree with Justice Scalia and decide that private attorney general suits, which allow citizens to sue polluters to win compliance with federal environmental safeguards, are an unconstitutional infringement on the executive's power under Article II to prosecute federal laws.

In a 2000 case called *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,[35] a majority of the Supreme Court (including Justice O'Connor) rejected a challenge to Congress's ability to deputize citizens to help enforce environmental laws. In a key portion of her opinion for the Court, Justice Ginsburg rejected *Laidlaw's* challenge to private-attorneys-general suits, finding that, because of the deterrent effect, a fine paid to the federal treasury provides sufficient "redress" for environmental plaintiffs to meet the redressability element of Article III standing.[36] *Laidlaw* thus appears to have put to rest the notion that the "cases" or "controversies" requirement of Article III of the Constitution blocks Congress' ability to empower citizens to sue to enforce environmental laws.

A concurrence by Justice Kennedy[37] and a dissent by Justices Scalia and Thomas[38] express a willingness to consider the same constitutional question under a different constitutional lens: Article II of the Constitution.[39] While not explained in detail in *Laidlaw*, this Article II "unitary executive" theory is fleshed out in Justice Scalia's opinion for the Court in *Printz v. United States*,[40] and in Scalia's dissent in *Morrison v. Olson*.[41] Applied in the citizen suit

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invocation of the "take Care" clause of Article II. * * * The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed.").

[34] See Brief for Petitioners, *Lujan v. National Wildlife Federation*, 1989 U.S. Briefs 640 (1990)(arguing that if NWF was permitted to bring a suit on vague standing allegations resulting in a nationwide preliminary injunction, federal courts would "inevitably assume managerial responsibilities for wide ranging federal activities – activities whose administration properly belongs in the Executive Branch.") ("Managing a litigation of such dimension *aggregates expansive powers in the court, and withdraws them, correspondingly, from the executive officials* charged by law with the day-to-day responsibility for administering the public lands. Standing doctrines are designed to avoid such clashes between judicial and executive authority. Under our constitutional system, the judicial power may be invoked to resolve controversies between persons adversely affected by a particular governmental action and the officials who took that action, not to supervise public officials' general conduct of their duties.") (Emphasis added.).

[35] 528 U.S. 167 (2000).

[36] Id. at 185.

[37] Kennedy's short concurrence in *Laidlaw* states "Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court." 528 U.S. at 197.

[38] *Id.* at 209-11.

[39] *Id.* at 197-215 (Kennedy, J. concurring, Scalia, J. and Thomas, J. dissenting).

[40] 521 U.S. 898, 921 (1997).

context, the argument would go as follows: Article II of the Constitution gives the President the power to "take care" that U.S. laws are faithfully executed. This gives the power to enforce the laws solely to the executive branch. Laws that deputize private attorneys general to petition courts for enforcement infringe on that exclusive executive power, turning it over to private citizens and the courts that hear their cases.

It is impossible to firmly predict how a Justice Roberts would decide an Article II challenge to a private-attorney-general action. But Judge Roberts has argued that separation of powers is a "zero sum game" and that Article II should inform Article III and should mandate a narrow interpretation of standing principles to avoid encroachment on executive authority. It is not too great of a leap to presume that he would decide that separation-of-powers concerns prohibit Congress from deputizing citizens to help enforce environmental safeguards.[42]

Citizen-suit provisions are among the most important and successful innovations of modern environmental law. These suits have ensured that environmental laws are enforced even where there is no will in Washington to take on corporate polluters. But these suits and the future of our environmental safeguards hang in the balance. As in many areas of the law, Justice O'Connor was a critical swing vote in environmental standing cases.[43] Most importantly, she (like Chief Justice Rehnquist, who may also retire in the near future) was a member of the *Laidlaw* majority, meaning the addition of Judge Roberts to the Court could alter the direction of the Court's environmental standing case law. The Senate needs to know if Roberts' views on standing and separation of powers are so rigid that he would be likely to undermine the enforcement of our most important and successful environmental statutes.

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[41] 487 U.S 654, 697 (1985) (Scalia J., dissenting).

[42] Judge Roberts' majority opinion in *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005), also raises concerns about how he will rule on access to courts. In *Taucher*, Judge Roberts reversed a district court's award of attorney's fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm that had successfully represented a publisher *pro bono* against the Commodities Futures Trading Commission (CFTC). EAJA provides for the award of attorneys' fees to a party in a lawsuit who prevails against the U.S. government, unless the government's legal position in the case was "substantially justified." Although he rejected CFTC's arguments against paying plaintiff's fees, Judge Roberts found that CFTC's position in the underlying case was substantially justified on other grounds. In a sharp dissent, Judge Harry Edwards argued that the court had exceeded its proper scope of review and had not given proper deference to the lower court, under an abuse-of-discretion standard.

[43] O'Connor voted with the majority in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) and in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); she dissented, along with Justice Blackmun in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); she voted with the majority in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

We appreciate your consideration of our views and stand ready to work with you and your staffs to ensure that Judge Roberts' confirmation process is fair and complete. Moreover, we believe that the burden is on Judge Roberts to demonstrate to the Senate during the confirmation process that he is committed to being a fair and neutral arbiter of the environmental cases that come before the Supreme Court.

Sincerely,

**Doug Kendall**
**Executive Director**
**Community Rights Counsel**

**Robert Dewey**
**Vice President**
**Government Relations and External Affairs**
**Defenders of Wildlife**

**Vawter Parker**
**Executive Director**
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**William Snape, Esq**
**Board Chairman**
**Endangered Species Coalition**

**Brent Blackwelder**
**President**
**Friends of the Earth**

**Karen Steuer**
**Vice President**
**National Environmental Trust**

**Carl Pope**
**Executive Director**
**Sierra Club**

cc: Members, Senate Committee on the Judiciary

Janet M. LaRue, Esq.
Chief Legal Counsel
Concerned Women for America

STATEMENT IN SUPPORT OF THE CONFIRMATION OF THE HONORABLE JOHN G. ROBERTS, JR. AS CHIEF JUSTICE OF THE U.S. SUPREME COURT
COMMITTEE ON THE JUDICIARY
of the U.S. SENATE

September 12, 2005

If it can be said that justices of the United States Supreme Court are born and not made, then it must be said of the Honorable Judge John G. Roberts, Jr. Rarely is a person as qualified for the position to which he has been nominated, as is Judge Roberts.

Judge Roberts possesses the intellect, temperament, integrity, impartiality, legal knowledge and judgment necessary to serve on the Court. Additionally, his leadership, kindness, humility and conciliatory manner make him exceptionally qualified to serve as Chief Justice. Throughout his legal career, he has demonstrated a thorough knowledge of and respect for the U.S. Constitution and the role of a judge.

For the third time, the American Bar Association has given Judge Roberts a unanimous well-qualified rating. His brilliance as a writer and oral advocate before the Court is well deserved and widely acclaimed. His legal resumé is the envy of any lawyer.

Judge Roberts' experience in the executive and judicial branches of our government, as Clerk to then Associate Justice William H. Rehnquist, as Associate White House Counsel to President Ronald Reagan, in the Department of Justice as Principal Deputy Solicitor General, as

Judge on the D.C. Circuit Court, and in private practice, is the exception rather than the norm when compared to most Supreme Court nominees.

While in private practice, Judge Roberts was undoubtedly the first choice of most appellate litigants with the financial resources to afford his services. Even so, Judge Roberts lent his skills and service to those who could not afford them. Judge Roberts argued *pro bono* before the D.C. Court of Appeals in the case of *Barry v. Little* on behalf of a class of the neediest welfare recipients, challenging a termination of benefits under the District's Public Assistance Act of 1982.

Judge Roberts' advocacy before the Supreme Court both as a private litigator and as Deputy Solicitor General covers a broad range of legal issues, including admiralty, antitrust, arbitration, environmental law, free speech/religion, health care law, Indian law, bankruptcy, tax, regulation of financial institutions, administrative law, labor law, federal jurisdiction and procedure, interstate commerce, civil rights, and criminal law.

When nominated to the D.C. Circuit Court, 152 fellow members of the D.C. Bar wrote to this Committee in support of Judge Roberts as "one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate." This Committee by a vote of 16-3, favorably reported out his nomination and the Senate confirmed him by unanimous consent for the D.C. Circuit.

Judge Roberts' decisions on the U.S. Court of Appeals for the D.C. Circuit illustrate that his rulings are based on the application of existing laws and specific facts of the cases before him, rather than writing new laws or creating new policies based on personal opinion. Judge



CONCERNED WOMEN FOR AMERICA

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Roberts has authored about 40 opinions thus far on the D.C. Circuit but only three have included a dissenting opinion. While participating in numerous panels, he has dissented in only two cases. This speaks well of a judge who practices restraint and is clearly within the mainstream of judicial thought.

Concerned Women for America has one litmus test for Judge Roberts as the nominee: What is his judicial philosophy with respect to Constitutional interpretation? Does he exemplify judicial restraint and reject judicial activism? As the late Sen. Sam Ervin (D-North Carolina) said, "A judicial activist is a judge who interprets the Constitution to mean what it would have said if he instead of the Founding Fathers had written it."

We firmly believe that Judge Roberts' statements and opinions demonstrate his unequivocal belief in and deference to the text of the Constitution and the intent of the Founders. As the nation's largest public policy women's organization, we believe that Judge Roberts' expressed positions on gender equity, comparable worth and other so-called women's issues are entirely consistent with the Constitution's equal protection guarantees.

Typically, leftist special interest groups have expressed unwarranted criticism and opposition to Judge Roberts' nomination. It is important to remember that very similar attacks were directed at past Supreme Court nominees who are now heroes of their critics:

- Lewis Powell was accused of demonstrating "continued hostility to the law" and waging a "continual war on the Constitution." Senate witnesses warned that his confirmation would mean, "justice for women will be ignored."



CONCERNED WOMEN FOR AMERICA

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- John Paul Stevens was charged with "blatant insensitivity to discrimination against women."
- Anthony Kennedy was scrutinized for his "history of *pro bono* work for the Catholic Church" and declared "a deeply disturbing candidate" for the United States Supreme Court. "Deeply disturbing."
- David Souter was described as "almost Neanderthal," "biased," and "inflammatory." His civil rights record was called "particularly troubling" and "raised troubling questions about the depth of his commitment to the role of the Supreme Court and Congress in protecting individual rights and liberties under the Constitution." At this Committee's hearings, witnesses cried, "I tremble for this country if you confirm David Souter," warning that "women's lives are at stake" and even predicting that "women will die."

Judge Roberts has also received praise from those on the left of the political spectrum, including Leon Panetta, former chief of staff to President Bill Clinton and Harvard law professor and liberal legal scholar Lawrence Tribe. Justice Sandra Day O'Connor responded to Roberts' nomination to replace her on the Court by calling him "first-rate." She added that he is "well-qualified" and "confirmable."

Judge Roberts is the quintessential fulfillment of what President Bush promised the American people he would seek in a Supreme Court Justice. They expect this Committee to provide a fair hearing and the full Senate to engage in a full and fair debate with a timely vote so that a full Supreme Court can convene for its Fall term with its Chief Justice at the helm.



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The confirmation process of a judicial nominee should not devolve into a partisan political contest that loses sight of the Constitutional importance. Judge Roberts should not be asked for advance commitments to rule certain ways in unresolved cases or cases that may come before him in the future. As President Lincoln said: "We cannot ask a man what he will do (on the court), and if we should, and he should answer us, we should despise him for it."

Neither should Judge Roberts be asked to commit an unqualified adherence to *stare decisis* as if it is on par with the text of the Constitution. As Justice O'Connor expressed in her majority opinion in *Aderand Constructors v. Pena*, 515 U.S. 200, 231 (1995), *stare decisis* is not a hard and fast rule:

"'*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'"

As Alexander Hamilton wrote in the *Federalist Papers* 76, "The person ultimately appointed must be the object of [the President's] preference," and the Senate should refuse to confirm a nominee only for "special and strong reasons," such as "unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity," or "possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." Hamilton states that the Senate's involvement is meant to "have a powerful, though, in general, a *silent* operation."



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If Judge Roberts is not confirmable, as Justice O'Connor opined, one is left with the question, who then is? Judge Roberts deserves the unequivocal support of every Member of the Committee. There is no legitimate reason to do otherwise.



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# Congressional Black Caucus

*of the United States Congress*

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www.congressionalblackcaucus.net

September 12, 2005

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Ranking Member Leahy:

The Congressional Black Caucus is taking the unprecedented step of submitting for your consideration during the Roberts Supreme Court nomination several questions concerning racial discrimination, in the hope that you will include them among your own questions or that they will stimulate similar questions by you. Although you may well have similar questions of your own on this subject, we submit questions concerning racial discrimination because we are both astonished and troubled by what the papers of Judge John Roberts, Jr., that have been released reveal about his views on civil rights matters in virtually all the areas of concern to African Americans. Civil rights, in our view, has emerged as the most controversial subject of the Supreme Court nomination hearings. African Americans and their representatives will be watching the hearings perhaps more closely than most Americans because they are all too aware that their rights and remedies, many of them won through Supreme Court decisions, could be retracted by changes in the Court.

As a result of our research, we have deep and expansive concerns about the Roberts nomination, covering many areas of the law, but we are submitting only eight questions – all stimulated by troubling concerns that arise directly from Judge Roberts' documented record on matters of racial discrimination. These issues particularly concern us as well, because of the CBC's agenda to concentrate on the correction of racial disparities in American life and law. We ask you to press Judge Roberts on his views on racial discrimination, considering that the White House has refused to respond to Senators' requests for Judge Roberts' papers, particularly on a number of controversial civil rights matters.

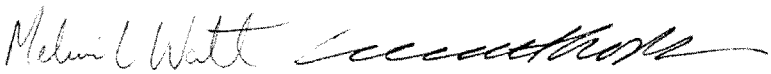
The Court was the first branch of government to assure equal opportunity to African Americans and has been a central actor in

protecting the rights of minorities ever since. However, application of equal protection of the laws to people of color and remedies to enforce the 14th and 15th Amendments are barely 50 years-old. Our country's transformation on race could not have been achieved lawfully and nonviolently without the decisions of the Supreme Court. We hope that you agree that this achievement at a minimum deserves a central place in your examination of the nominee.

The CBC previously had not been aware of the hostility to civil rights remedies and court decisions Judge Roberts' papers appear to reveal. However, in fairness, the Caucus has delayed taking a position on the Roberts nomination in order to give him the opportunity to explain his views, many of which go back a quarter of a century when he was a young man. We believe that the pride the country now takes in the racial progress of the last 50 years and the pain it took to achieve this progress demands forthright answers on this subject from any nominee, especially one whose early record as an influential official was at odds with this progress.

We would very much appreciate your consideration of the attached questions.

Sincerely,



Melvin L. Watt
Chair, CBC

Eleanor Holmes Norton
Judicial Nominations Chair

**Questions Submitted by the Congressional Black Caucus to Members of the Senate Judiciary Committee with a Request that Judge John G. Roberts, Jr., be asked to Respond:**

1. ORIGIN AND OPERATION OF DISCRIMINATION IN THE UNITED STATES

A 1981 government report described discrimination as follows:

Today's discriminatory processes originated in our history of inequality.... These processes became self-sustaining as the prejudiced attitudes and behaviors of individuals were built into the operations of organizations and their supporting social structures (such as education, employment, housing, and government). These built-in mechanisms reinforce existing discrimination and breed new unfair practices and damaging stereotypes. (U.S. Civil Rights Commission Affirmative Action in the 1980s, p. 2 (1982)).

***Question:*** **Do you believe this is an accurate or an inaccurate description of how discrimination has operated historically in our country?**

2. AFFIRMATIVE ACTION REMEDIES

While working in key positions in the government, you strongly opposed affirmative action of all kinds, advising the Attorney General "that race and gender should never be factors in employment decisions" (Roberts Memorandum, August 9, 1982), even in the early 1980s when such remedies were barely a decade old. As you are aware, the Supreme Court has allowed the use of race and gender in some narrowly tailored circumstances in some areas with considerable results, particularly in employment where these remedies were deemed necessary to break patterns the employer could not show were free of discrimination.

***Question:*** **Considering that engrained patterns of employment discrimination were deeply rooted through hundreds of years of our history, do you believe that these patterns could have been removed, as many have, short of the remedies that have been in place since the 1960s, sanctioned by the Court and by Republican and Democratic administrations alike?**

3. REAUTHORIZATION OF THE 1965 VOTING RIGHTS ACT

The Congress is considering the reauthorization of the Voting Rights Act for the first time since 1982, when you were perhaps the most energetic opponent of a key section of the Act. In more than 25 memoranda, among other actions, you led an unsuccessful attempt by the Reagan administration to narrow Section 2 by requiring proof of intent in order to find a violation by state or local actions of the right to vote. The Congress instead adopted the effects test, finding that an intent test "places an unacceptable burden

upon plaintiffs" and cited as an example of a Georgia case that had not survived the intents test "even though the evidence showed pervasive discrimination in the political process." (S.Rep. No. 97-417, 97th Cong., 2d Sess. at 16, 39). You continued to oppose the effects test even following the compromise fashioned by Sen. Robert Dole making more explicit that proportional representation was disallowed (Roberts Memorandum to the Attorney General 2/16/82), although it had not been claimed or found by any Court.

***Question:*** **Now, after 25 years of court enforcement of the effects test, is there any evidence that the effects test has established "essentially a quota system for electoral politics" or even a "drastic alteration of local governmental affairs" as you feared? In light of 25 years of litigation under the effects test, do you still oppose this test?**

4. DESEGREGATION OF HIGHER EDUCATION

In a rare retraction, Solicitor General Kenneth Starr withdrew the position taken in a case you supervised, U.S. v. Fordice, 505 U.S. 717 (1992), endorsing "freedom of choice" as a means of removing unconstitutionally segregated higher education in the state of Mississippi that would have left in place most of the vestiges of segregation, including discriminatory testing and starkly unequal programs, facilities, and teacher salaries. Solicitor General Starr's reply brief flatly stated that the positions taken in the brief you co-signed "no longer reflect the position of the United States..." and that "it is incumbent on the state... to eradicate discrimination from its system of higher education" (Reply Brief for the United States, U.S. v. Fordice, 505 U.S. 717 (1992) (No. 90-1205)). The Supreme Court, 8-1, agreed, rejected the freedom of choice position, and required the dismantlement by the state of policies and practices traceable to segregation.

***Question:*** **Because the White House has not provided your memoranda from this period, we must ask you whether you agreed with the position taken in the brief you originally supervised or with Solicitor General Starr's reply brief retracting the freedom of choice position in the earlier brief?**

5. THE SUPREME COURT'S ROLE IN CRIMINAL JUSTICE

The Supreme Court agreed with the position in an amicus brief, signed by you, in Herrera v. Collins (No. 91-7328, 1991 U.S. Briefs 7328 (July 10, 1992)) that newly discovered evidence proving the actual innocence of a condemned prisoner did not require court consideration under the Due Process Clause, but the Court said it assumed an execution in such a case would be unconstitutional if there were no state avenue for correcting "a truly persuasive demonstration of 'actual innocence.'" However, in your brief, you disagreed and said, "There is no reason to fear that there is a significant risk that an innocent person will be executed under the procedures that the States have in place" (Herrera Brief at p. 9, n.18).

***Question:*** **With the emergence of DNA and other evidence that have resulted in the release of a significant number of people held on death row in states such as Illinois, do you believe that a revision of this view is justified that would require the Court to act in a case involving "a truly persuasive demonstration of 'actual innocence'" if a governor refused to stop the execution?**

6. STRIPPING THE SUPREME COURT AND OTHER FEDERAL COURTS OF JURISDICTION TO HEAR CIVIL RIGHTS AND OTHER CASES

Throughout your career in government you were at odds with the administrations in which you served on the constitutionality of proposals to strip the federal courts, including the Supreme Court, of jurisdiction over controversial issues. For example, you argued in a 25-page memorandum that the federal courts, including the Supreme Court, could be stripped of jurisdiction to hear school desegregation cases, among other issues (Roberts Memo on Proposals to Divest the Supreme Court of Appellate Jurisdiction, attached to an October 30, 1981 note from Kenneth Starr to Theodore Olson). You later indicated some opposition to court stripping as a policy matter, but continued to hold to the view that court stripping was constitutional (Roberts Memo to Fred Fielding re: S. 47, 6/21/95).

***Question:*** **In hindsight, would you now agree with Ted Olson, who as Assistant Attorney General along with others in the Justice Department, opposed your view and advised the Attorney General that Congress may not "make 'exceptions' which would negate the power of the Supreme Court to decide cases arising under the Constitution and laws of the United States" because only the Court has the power to provide "an authoritative and final expression of the meaning of the Constitution"?**

7. EFFECT OF LIFE TENURE ON JUDICIAL INDEPENDENCE TO RENDER UNPOPULAR DECISIONS

In a 1983 memorandum opposing the Justice Department's position supporting life tenure for federal judges, you favored a limited term of years today when judges live longer and argued that "the case for insolating the judges from political accountability" is outweighed by judges' longevity, allowing them to live "decades of ivory tower existence."

***Question:*** **In responding to whether this is still your view, please say whether you would agree that life tenure has the benefit of protecting judges to render highly unpopular decisions affecting, for example, racial minorities or unpopular forms of speech?**

8. THE AIDS CRISIS AND THE LAW

This is a question about evidence that must guide a judge, regardless of the nature or controversy surrounding the issue. President Reagan was late and hesitant in offering leadership on the AIDS crisis, but by 1985, the White House believed it had to confront the shunning of children with AIDS that had resulted in discrimination against them in public schools for fear of contracting the disease. You recommended that the President avoid the position that had been recommended to the President by the Centers for Disease Control (CDC) that "as far as our best scientists have been able to determine, (the) AIDS virus is not transmitted through casual or routine contact," (Roberts Memo to Fred Fielding, p. 1, 9/13/85) the very reassurance that needed presidential leadership.

***Question:*** **On the basis of what evidence did you believe that, notwithstanding the CDC's expert opinion, President Reagan should omit this statement of reassurance and should "assume AIDS can be transmitted through casual or routine contact" because of "disputed" scientific evidence (Roberts Memo, p. 1)?**

**TESTIMONY OF JOHN W. DEAN BEFORE THE SENATE JUDICARY COMMITTEE HEARINGS ON THE NOMINATION OF JUDGE JOHN ROBERTS TO BE CHIEF JUSTICE OF THE UNITED STATES**

Mr. Chairman, and members of the committee, thank you for the invitation to appear. I have accepted the invitation for several reasons.

First, I am not here as a partisan on whether Judge Roberts should or should not be confirmed. My partisan days are behind me. I represent no organization or group or cause. Rather than persona or philosophy, I'd like to focus on process. My only interest is in good government, and process is often overlooked.

After forty years of observing the workings of the federal government, as both an insider and outsider, I am startled by the remarkable shift from open government to secret government during the past five years, a shift that has little to do with national security but everything to do with a White House that insists on secrecy. That secrecy is playing out in these hearings.

The Senate is being stonewalled. In fact, the refusal to provide materials from Judge Roberts's days in the office of the Solicitor General is not unlike what occurred during the nomination of the late Chief Justice, William Rehnquist, when he was nominated as an associate justice in 1971.

At that time I thought I knew Bill Rehnquist rather well. I had worked with him for several years. First, as a colleague at the Department of Justice. Then again when I was White House Counsel and he was the Assistant Attorney General in charge of the Office of Legal Counsel, which is sometimes known as "the President's law firm."

Bill Rehnquist had a wonderful droll sense of humor, a powerful work ethic and a remarkable intellect. So at a critical point in the selection process, when President Nixon was searching for a "strict constructionist" to place on the Supreme Court, I recommended Bill Rehnquist. To make that story very short, much to his surprise, Bill Rehnquist learned that he would be appointed to the Supreme Court only hours before the announcement was made.

At that time, in 1971, two people were responsible for vetting Supreme Court nominees: Bill Rehnquist and myself. Bill Rehnquist, however, was never vetted by anyone before his nomination was sent to the Senate in 1971. Nor, it appears, was he vetted when nominated to become Chief Justice in 1986.

Attorney General John Mitchell invoked attorney-client privilege on Rehnquist's work of as an Assistant Attorney General during his 1971 confirmation hearing, and President Reagan invoked executive privilege -- with limited exceptions -- on the same information during the 1986 confirmation. Thus, the Senate twice confirmed a nominee

they knew little about, and who was not merely less than candid with the committee, but sadly he dissembled.

Please understand that I have not come forward at this time to raise issues when the late Chief Justice cannot defend himself. To the contrary, I first raised these matters while he was very much alive, when I wrote about them in 2001. Because I happened to publish in the immediate aftermath of 9/11, only a few became aware of these charges. To be certain Bill Rehnquist was aware of them, however, I arranged for a copy of my book to be sent to him directly (by my editor). It was my sincere hope that either he, or one of his many able law clerks, would for the sake of history correct or enlighten what I knew about him. Unfortunately, that never happened. While the late Chief Justice's public service was long and distinguished, suffice it to say that for many Americans -- women, Black Americans, and other minorities -- his conservatism was often without conscience.

Why is this relevant to these proceedings?

Regrettably, the judicial confirmation process has increasingly become a "hide and seek" game, particularly when the nominee's public service record is found in government files and archives of the Executive Branch, thus controlled by the president.

Two questions serve as examples to make my point: Would Miguel Estrada be on the D.C. Circuit Court of Appeals today if his records had been made available? Probably. Would Judge Jay Bybee be sitting on the 9th Circuit today if his legal opinion authorizing the use of torture had been available to the Senate? Probably not.

In raising process problems, I would like to suggest a potential solution. A recommendation that I informally conveyed earlier to the committee's counsel. I have never understood why the Senate does not thoroughly cross-examine nominees about what they know of their vetting, particularly any interviews they have given. Occasionally a confirmation hearing can touch on vetting, but to my knowledge the subject does not receive serious attention.

If a nominee has not been properly vetted, then the president does not really know the nominee either, and the Senate should proceed accordingly. And if the nominee has been properly vetted (as should be the case), the Senate is entitled to know everything that nominee has told those in the Executive Branch about his or her thinking and work. A nominee enjoys no privilege in what they have told others involved in their selection process. Based on my experience, I believe questions about vetting could be very revelatory to the Senate.

Thank you.

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
**September 12, 2005**

**The Honorable Mike DeWine**
United States Senator , Ohio

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OPENING STATEMENT
CONFIRMATION HEARING OF JOHN G. ROBERTS, JR.
U.S. SENATOR MIKE DEWINE
SEPTEMBER 12, 2005

Thank you, Mr. Chairman. Judge Roberts, I congratulate you on your nomination, applaud you on your extraordinary legal career, and welcome you, your wife Jane, and your children Jack and Josie.

Over the next several days, we will be spending a lot of time together: you, the 18 members of this Committee, and the American people. This is the time for a national conversation -- a conversation about the document that binds us as a nation and a people. That document, of course, is the Constitution.

For more than 215 years, we have been having an extended conversation about the meaning of our Constitution.

Sometimes, the conversation has been civil. Sometimes, it has been passionate. And, sometimes, it has been violent.

The New Deal -- and the court battles that were fought about the scope of the federal government's power to combat the Great Depression -- was a debate about the meaning of the Constitution.

The civil rights movement -- and the vigorous, often violent, resistance to efforts to desegregate all America -- was a debate about the meaning of our Constitution.

And, the Civil War -- the most violent and bloodiest time in American history -- was a war about the meaning of our Constitution.

We have seen a President resign, elections decided, and popular laws overturned all because of our Constitution. But, our Constitution is more than just a symbol of our Nation's history. It is also a light for the world. As a nation, we were among the first to sit down and draft a document that, quite literally, "constitutes" our government.

But, we were not the last. Since our Founders embraced the idea of a written Constitution, others have followed suit. After the fall of the Soviet regime, we witnessed an explosion of Constitution-writing in Eastern Europe. There are now more than 170 written constitutions in the world, more than half of which have been drafted in the last 30 years. To paraphrase Thomas Paine, "the cause of America" is indeed, "the cause of all mankind."

That's why our gathering today is so significant. We are charged with providing our "advice and consent" on the President's nominee to the Supreme Court. Our job is important. But, if confirmed, Judge Roberts, your job will be even more important. It will be your job, as the 17th Chief Justice of

the United States, to correctly construe our Constitution, to preserve the balance of power sewn into it, and to protect those rights and values that are a part of our history and tradition.

Former Chief Justice John Marshall once warned that "people made the Constitution, and people can unmake it." It will be your job, in other words, to ensure that our Constitution is never unmade.

As of late, however, many Americans believe that the Supreme Court is "unmaking" the very Constitution that our Founders drafted. Many are concerned when they see the Court strike down laws protecting the aged, the disabled, and women who are the victims of violence. Many worry when they see the Court permit the taking of private property for "economic development." Many are troubled when they see the Court cite international law in its decisions. Many fear that our Court is making policy, when it repeatedly strikes down laws passed by Congress and the State legislatures.

I, too, am concerned. Judges are not Members of Congress. They are not State Legislators. They are not Governors. And, they are not Presidents. Their job is not to pass laws, implement regulations, or make policy.

Perhaps no one said this better than Justice Byron White. During his confirmation hearing in 1962, White was asked to explain "the role of the Supreme Court in our constitutional form of government." Nowadays, in response to this question, we often hear grand theories about the meaning of the Constitution and its history. Justice White, however, said nothing of the kind.

When he was asked about the role of the Supreme Court in our system of government, White gave a simple answer: "to decide cases."

It sounds almost too obvious to be true, but that is the right answer. Judges need to restrict themselves to the proper resolution of the case before them. They need to avoid the temptation to set broad policy. And, they need to pay proper deference to the role of the Executive, the Congress, and the States -- while closely guarding the language of the Constitution.

We would do well to keep this example in mind. The Constitution does not give us all the answers. It does, however, create the perfect process for solving our problems. The Congress and the President have a role in this process. The States have theirs. And, when there are disputes, the Courts are there to "decide cases."

There is a reason that Judges need to take on this limited role. As my esteemed colleague from Iowa, Senator Grassley, explained during Justice Souter's confirmation hearing, a Judge should not be "pro-this and anti-that. He should rather be a judge of cases, not causes."

Causes come and go, but cases do not. In years or decades, one cause may fade and another will emerge. But, Judges will remain, deciding cases and interpreting our Constitution.

Our next Chief Justice is not merely for today. He is a Chief Justice for the future -- a future that will present Constitutional issues that are now unknown.

The career of Chief Justice Rehnquist proves the point. When he joined the Court in 1972, there was no Internet, and no need to protect our children from the proliferation of on-line pornography. And, at the time, there was no War on Terror, no Presidential order to detain terrorists as "enemy combatants," and no terrorist prison at Guantanamo Bay. But, Chief Justice Rehnquist dealt with all of these issues while on the Court.

When faced with new and unexpected issues, a Justice is left only with the tools that every good Judge must use: the facts of the case, the language of the Constitution, and the weight of precedent. This is a simple and limited approach to deciding cases -- the kind of approach that Justice White would have understood and our Founders would have admired.

While preparing for this hearing, I came across a statement from a sitting federal judge that neatly sums up this philosophy. Deciding cases, this Judge said, "requires an essential humility grounded in the properly limited role of an undemocratic judiciary in a democratic republic, a humility reflected in doctrines of deference to legislative policy judgments and embodied in the often misunderstood term 'judicial restraint.'"

Judge Roberts, those words are yours. And, in my opinion, they are very wise words indeed. You have the talent, experience, and humility to be an outstanding member of the Supreme Court. And, I expect that these hearings will show that you have the appropriate philosophy to lead our Nation into the future as the 17th Chief Justice of the United States.

Thank you, Mr. Chairman.

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
**September 12, 2005**

**The Honorable Richard J. Durbin**
United States Senator , Illinois

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Sen. Richard J. Durbin
Opening Statement
Senate Judiciary Committee
September 12, 2005

Nomination Hearings of John G. Roberts, Jr. to be
Chief Justice of the United States

Judge Roberts, I welcome you and your family to the Judiciary Committee, and I congratulate you on your nomination to be the 17th Chief Justice of the United States.

Twelve years ago, at the nomination hearings of Justice Ruth Bader Ginsburg, my friend, Illinois Senator Paul Simon, made a comment worth repeating. He said to the nominee: "You face a much harsher judge . . . than this committee, and that is the judgment of history. And that judgment is likely to revolve around one question: Did you restrict freedom or did you expand it?"

Senator Simon put his finger on how the United States Senate should evaluate a nominee for a lifetime appointment to the federal bench.

Judge Roberts, if you are confirmed as the first Supreme Court Justice of the 21st century, will you restrict the personal freedoms we enjoy as Americans or will you expand them?

Civil Rights

When we met together in my office, I gave you a biography of a judge whom I admire greatly. His name was Frank Johnson. He was a federal judge in Alabama, and a lifelong Republican.

Fifty years ago, following the arrest of Rosa Parks, Judge Johnson ruled that African Americans in Montgomery, Alabama were acting within their constitutional rights when they organized a boycott of the city's segregated bus system and that Martin Luther King, Jr. and others could march from Selma to Montgomery.

As result of those decisions, the Ku Klux Klan branded him the "most hated man in America." Wooden crosses were burned on his lawn. He received so many death threats that he and his family were under constant federal protection from 1961 to 1975. He was denounced as a "judicial activist" and threatened with impeachment.

Judge Frank Johnson had the courage to expand freedom in America.

Judge Roberts, I hope you agree America must never return to those days of discrimination and limitations on our freedom.

Some of the memos that you wrote while serving in the Reagan Administration, however, raise

concerns about your views on civil rights and women's rights, concerns that led many of our nation's leading civil rights groups to openly oppose your nomination.

So it is important that you give complete answers to questions about your views on civil rights, equality, and the role of the courts in ensuring those protections. This hearing is your opportunity to clarify the record and to explain your views on these issues today. We cannot assume that the time or maturity has changed the thinking in those Reagan-era memos. The refusal of the White House to disclose documents about 16 specific cases which you wrote as Deputy Solicitor General deny this committee more contemporary expressions of your values. Only your testimony before this committee can convince us that the John Roberts of 2005 will be a truly impartial, open-minded Chief Justice.

Privacy Rights

Concerns have also been raised about your views on another issue critical to the American people: the right to privacy — a right which you disparaged as a young lawyer.

Just forty years ago, married couples in Connecticut and other states could be convicted of a crime, fined, and sentenced to up to a year in prison for using birth control.

But in 1965, the Supreme Court struck down the Connecticut law in the landmark case Griswold v. Connecticut. The Court held that some decisions were so intensely personal, and their consequences so profound, that the government could not intrude or impose its will upon individuals. That right to privacy was again acknowledged in 1973 in Roe v. Wade.

You can search every sentence of the Constitution and never find the word "privacy." Yet the Supreme Court has said the concept of privacy was inseparable from our other individual rights and liberties. It is the foundation of many of our other rights.

But the right to privacy is far from settled law in the minds of many. Today, forty years after the Griswold decision, you can see new efforts to restrict the right to privacy. You can see it in attempts to impose gag rules on doctors and other measures that make it harder for women to obtain information related to family planning. You can see it in the sad debate over the tragedy of Terri Schiavo — a debate which led some members of Congress to threaten judges who disagreed with their point of view with impeachment. And you can find it in the eagerness to authorize the government to pry into our financial records, our medical records and our library records.

Whether the Supreme Court continues to recognize and protect Americans' right to privacy will have profound consequences for every person in this nation, from the moment of birth to the moment of death. In your early writings you referred to this right of privacy as "an abstraction." We need to know if that is what you sincerely believe.

Congressional Power

We also need to hear your views on another fundamental issue: the power of Congress to pass laws that address our nation's most important challenges.

In a series of rulings over the past decade, the Supreme Court has struck down an unprecedented number of federal laws including those that bar guns from our nation's schools and protect women from gender-based violence — all of which were based on the authority granted to Congress under Article I, Section 8 of the Constitution — the Commerce Clause. In addition, the Supreme Court has

adopted a narrow reading of the 14th Amendment which prevented state employees who are victims of discrimination a day in court.

If the next Supreme Court takes a narrow view of the Commerce Clause, then the ability of Congress to pass laws on issues of national importance — environmental laws, laws protecting women from violence, even civil rights, workers rights and disability legislation — will be greatly diminished. Many of the most significant legal decisions of the last century could be in jeopardy. That would represent a radical shift in American law.

It is important to learn your view of the Commerce Clause and the 14th Amendment. Do you believe that Congress has the power to pass laws that protect the most vulnerable, no matter where they live? Or do you believe the Supreme Court should remove the federal government from its historic role in setting national standards that protect basic rights?

Executive Power

And we need to ask your views on executive power. This is not a subject taught in most law schools. It is not tested on any bar exam. It has not been a major focus in past Supreme Court nomination hearings. Yet it is a subject of great importance to our country today as we fight the war on terrorism.

Judge Roberts, some aspects of your early record suggest that you might be overly deferential to the President. It is essential that we know where you stand.

If confirmed, you will help determine what role, if any, the judicial branch will play in deciding whether the President or the Executive Branch has exceeded its authority under our Constitution.

Throughout history, during times of war, Presidents have tried to restrict liberty in the name of security. At these times, the Supreme Court was the last guardian of the Constitution. The Court has usually been up to the task, but sometimes it has failed. That's why it's crucial that we ensure that nominees to the Court have the courage to say 'no' to a President who violates the Constitution.

We need Justices like those who stood up to President Abraham Lincoln during the Civil War when he authorized the trial of American citizens by military commission rather than a jury of their peers. The words of those Justices still ring true: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Now, we are being tested again. Will we stand by our Constitution in the age of terrorism? That challenge falls especially on our Supreme Court, and on you Judge Roberts, if you are confirmed.

Church and State

We must also learn your views on the First Amendment, particularly the rights relating to religious liberties. Over the past few decades, the Supreme Court has maintained a delicate — yet what I believe to be a proper — balance between the church and the state.

In a recent case involving the Ten Commandments, Justice Sandra Day O'Connor issued the following challenge: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate. Our regard for constitutional boundaries has protected us from similar travails, while allowing private

religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

If confirmed, I hope you would not seek to renegotiate time-honored church-state boundaries but, rather, would maintain our proud tradition of religious freedom protected by the Establishment Clause.

Burden of Proof

The burden of proof for a Supreme Court Justice nominee is on the nominee. This burden is greatest when a person is nominated to be the Chief Justice.

If you are confirmed as Chief Justice, you would be the most powerful judge in America. You would have the power to write or assign any decision in which you are in the majority. You would have the power to appoint the 11 judges on the FISA Court, the Foreign Intelligence Surveillance Act Court, which has authority to issue warrants for secret searches and wiretaps of American citizens. You would appoint the committees that determine the rules for civil and criminal procedures. And you would be the president and CEO of a 30,000-person bureaucracy with an annual budget of nearly $6 billion.

No one has a right to sit on the Supreme Court, and no one has the right to be the Chief Justice. It is not enough for a nominee to be found well qualified by the American Bar Association — the ABA only looks at judicial temperament and professional competence. The Senate — and the American people — have a right to know whether a nominee has other critical qualities, such as an open mind and a measure of compassion.

To meet this burden of proof, a nominee must answer our questions and give the American people insight into his core values and judicial philosophy.

We certainly want Supreme Court Justices who are smart and capable. But it's not enough to have a Justice with a prestigious law school degree. Each justice must also have a degree of compassion.

If a person who is close-minded to the pleas of those who are disadvantaged on the basis of economic status, race, gender, sexual orientation or any other characteristic, that person does not belong on the Supreme Court. Our Justices must be fair and open-minded. You will have an opportunity to address this issue directly: not as a lawyer speaking for any President, not as a lawyer speaking for his client — but rather as a person who if confirmed will speak for himself on the Court for decades.

Conclusion

I spoke earlier about the courage of Judge Frank Johnson. A few months ago, another judge of rare courage testified before this committee. Her name is Joan Lefkow, and she is a federal judge in Chicago. Last February, her husband and mother were murdered in her home by a deranged man who was angry that Judge Lefkow had dismissed his lawsuit.

In her remarks to this committee, Judge Lefkow said that the murders of her family members were "a direct result of a decision made in the course of fulfilling our duty to do justice without fear or favor."

In my view, that is the only proper test for a Supreme Court Justice. Will he "do justice without fear or favor?" Will he expand freedom for all Americans, as Judge Frank Johnson did?

Again, I congratulate you, Judge Roberts, on your nomination and your accomplished career, and I look forward to these hearings and to hearing your answers to these important questions.

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

# Beyond the Toad:

## Judge Roberts Needs To Explain His Views On Congressional Authority To Protect The Environment, And On Citizens' Access To Courts

### I. Judge Roberts and the Scope of Congressional Authority

Senators' statements and media coverage and commentary, including editorials in *The Washington Post* and *The New York Times,* on President Bush's Supreme Court nomination of D.C. Circuit Judge John Roberts, Jr. has focused on an opinion he wrote that questioned, but did not decide, the constitutionality of key Endangered Species Act (ESA) safeguards.[1] Judge Roberts' opinion raises serious questions about his views on the scope of the Commerce Clause, which is the basis for a wide range of laws that protect the environment, civil rights, workers, consumers, and public health and safety. These questions must be asked and fully answered during the Senate hearings on whether to confirm Judge Roberts to a lifetime seat on our nation's highest court.

In this case,[2] a three judge D.C. Circuit panel, including a conservative Republican-appointed judge (Douglas Ginsburg, who initiated the right–wing praise for "the Constitution in exile") rejected a claim that Congress lacked the constitutional authority to protect the endangered arroyo southwestern toad from a housing development. Judge Roberts' opinion dissented from the court's denial of a request that all D.C. Circuit judges review the decision, and questioned the panel's approach and the reasons it relied upon.

The Senate hearing on Judge Roberts' Supreme Court nomination is important because his opinion raises serious questions without deciding them—he concluded by stating that review by the full D.C. Circuit court would "afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

Judge Roberts' opinion in this key environmental case is troubling in several respects:

- Judge Roberts was one of only two judges who dissented from the court's denial of a request that all D.C. Circuit judges review a decision that upheld the constitutionality of Endangered Species Act safeguards. The seven judges who declined to join him include three conservative Republican-appointed judges (Ginsburg, Henderson, and Randolph). Such dissents are very rare; since Roberts joined the D.C. Circuit, judges have dissented in only three cases (including two cases in which Roberts dissented).

- While his dissent did not say how he would decide the issue, Roberts suggested that he might have an unjustifiably narrow view of the Commerce Clause. First, his dissent states that the D.C. Circuit panel "sustains the application of the Act in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce," and argues that the panel's approach "seems inconsistent with" the Supreme Court's *Lopez* and *Morrison* decisions. Judge Roberts' analysis has implications beyond the ESA. For example, in the *SWANNC* case,[3] the Supreme Court interpreted the Clean Water Act narrowly but did not decide a constitutional Commerce Clause challenge to protections for waters and wetlands against commercial nature of the activity.

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[1] See http://www.earthjustice.org/policy/judicial/whats_new/index.html#roberts

[2] *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J. dissenting) (denying rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (2004).

[3] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

- Second, Roberts seemed to question whether the ESA can protect species found in only one state, stating that "The panel's approach . . .leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes 'Commerce among the several States.'" This latter passage from Roberts' dissent displays a flippant attitude towards preventing the extinction of a species. Judge Roberts' language contrasts with the recognition of the value of species that is reflected in the consistent rulings by every majority opinion to consider the issue, including decisions by conservative Republican-appointed judges that rejected similar claims.[4] Indeed, the U.S. Fish and Wildlife Service website explains how another endangered toad (the Houston Toad) produces chemicals that "are used as medicines to treat heart and nervous disorders in humans."[5]

- As the Bush Administration's own Solicitor General explained in successfully urging the Supreme Court to deny review of the case, no court "has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures. See [*Rancho Viejo*, 323 F.3d at 1079]; *Gibbs*, 214 F.3d at 501 (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment")."[6]

- The Supreme Court has repeatedly rejected, without recorded dissent, petitions to review appeals court decisions that rejected Commerce Clause challenges to ESA safeguards.[7]

- As the *Wall St. Journal*'s July 21st editorial stated:

  > "The hapless toad," he wrote, " for reasons of its own, lives its entire life in California" and thus could not affect interstate commerce. This implies a less expansive view of the Commerce Clause than the current Supreme Court majority, and suggests he would have joined the four dissenters in *Raich,* the Supreme Court's recent decision to let the federal government overrule state laws on regulating medical marijuana.

## II. John Roberts and Access to Courts

Congress has enacted numerous environmental, civil rights and other citizen suit provisions that recognize that access to courts is necessary to ensure that laws are upheld against constitutional challenges, and carried out when administrative agencies fail to do so. For example, in upholding the ability of individuals and organizations to sue polluters, the Supreme Court recognized that: "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."[8]

Questions about Roberts's views on access to courts need to be asked and answered in light of his record. This includes his role in, and law review comment about, two major Supreme Court decisions that took a very narrow view, over vigorous dissents, of access to courts, including the constitutional doctrine of 'standing'—which is the basis for giving plaintiffs access to the courts. Roberts has written that he:

> served as Principal Deputy Solicitor General, United States Department of Justice, 1989- 1993. The Office of the Solicitor General represented Secretary of the Interior Manuel Lujan before the U.S. Supreme Court

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[4] *See Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (Wilkinson, J.), *cert. denied*, 531 U.S. 1145 (2001); *National Ass'n of Home Builders (NAHB) v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Henderson, J., concurring), *cert. denied*, 524 U.S. 937 (1998).

[5] http://ifw2es.fws.gov/HoustonToad/

[6] U.S. Brief, *available at* http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0761.resp.html

[7] See footnotes 2, 4 and *GDF Realty, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *rehearing and rehearing en banc denied*, 362 F.3d 286 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2898 (2005).

[8] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

> in *Lujan v. Defenders of Wildlife*, [504 U.S. 555] 112 S. Ct. 2130 (1992), and ... argued *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), on his behalf.[9]

In the 1990 case, the Court voted 5-4 to reverse a D.C. Circuit ruling and to dismiss a National Wildlife Federation (NWF) challenge to the Interior Department's decision to reverse thousands of actions that had "withdrawn" (protected) millions of acres of federal land from mining and other development. The Court held that NWF had not demonstrated that it had standing to challenge a particular decision. The Court also held that no one could bring an overall challenge to the Land Withdrawal Review Program, even though, as the dissent explained, the Department had "attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals."

In *Lujan v. Defenders*, the Court ruled that the plaintiffs lacked standing to challenge a national rule that consultation with federal wildlife agencies under the ESA would no longer be required for U.S. agency actions in foreign nations that may threaten endangered species. Defenders submitted affidavits of individuals who had visited the habitats of the endangered Nile Crocodile—a species threatened by American oversight of the Aswan High Dam project—and the Asian elephant and leopard, whose habitats are threatened by the Mahaweli project, which was funded by the federal Agency for International Development (AID).

Justice O'Connor joined in a dissenting opinion that concluded: "I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."[10] In contrast, in his law review comment, John Roberts argued that the ruling in *Defenders* was "hardly a surprising result under the Court's standing precedents, ***given the vague and amorphous nature of the plaintiff's claims of injury***."[11]

At one point, Roberts described Congress' attempt to extend the right of individuals to sue to enforce ESA safeguards with a note of sarcasm:

> Congress is perfectly free to cut off funding for the Aswan Dam or Mahaweli River projects if it concludes those projects threaten endangered species. It also can exercise its oversight power if it believes agencies are not consulting adequately about such effects. ***The one thing it may not do is ask the courts in effect to exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue.***[12]

Other language in Roberts' law review comment suggests that he has an extraordinarily narrow view of the constitutional doctrine of standing. Specifically, according to Roberts:

> A dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant. Standing is thus properly regarded as a doctrine of judicial self-restraint. . . . If a court errs in its standing dismissal and should have reached the merits, that court is wrong—not activist.[13]

Roberts' analysis is very disturbing. He suggests that decisions denying access to court are even-handed because "dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant." This ignores the fact that dismissals favor corporate and government defendants, by avoiding the risk losing on the merits. His unqualified characterization of decisions denying citizens access to court on the basis of standing as exercises of "judicial self-restraint," and his apparent belief that it is impossible for an "activist" court to summarily throw deserving litigants out of court, are wrong. A judge with an agenda to unreasonably restrict access to the courts across the board beyond what the law permits can be just as "activist" and

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[9] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1219 n. (1993).
[10] 504 U.S. at 606 (Blackmun, J. joined by O'Connor , J. dissenting).
[11] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 (1993) (emphasis added).
[12] *Id.* at 1229 (emphasis added).
[13] *Id.* at 1221 & n.14.

unrestrained as one who unreasonably expands such access. Moreover, a judge may be an 'activist' if he or she applies the law of standing unfairly, as by unreasonably restricting court access as to one class of plaintiff—e.g., private individuals—while not restricting access for another type of plaintiff—e.g., industry.

In his law review comment, Roberts also specifically agreed with Justice Scalia's argument in *Lujan v. Defenders of Wildlife* that courts should rigorously enforce the Constitution's Article III case or controversy limitations to avoid infringing on the executive branch's constitutional authority under Article II.[14] This view calls into question the constitutionality of private attorneys general laws that authorize citizens to enforce environmental and other safeguards.

As a Reagan Administration Justice Department attorney, Roberts wrote to Attorney General Smith on Nov. 25, 1981, urging Smith to tell reporters that although "certain parts of the Justice Department previously followed a policy of not raising standing challenges in the most vigorous fashion. This was particularly true in the environmental area. It will be our policy to raise standing and other justiciability challenges to the fullest extent possible."

Roberts' new policy statement was sweeping and unqualified—it was not limited to cases where the Justice Department believes there is no standing or to even cases where there is a serious question (it likely would require raising any challenge that would not violate rules against frivolous arguments). Challenging standing "in the most vigorous fashion" and "to the fullest extent possible" needlessly delays decisions that redress injuries from violations of environmental and other laws, and chills access to courts by individuals and non-profit groups that have standing but cannot afford to respond to the Justice Department's aggressive discovery requests and lengthy briefs on this issue.

A few months later, in a March 5, 1982 memorandum to the Attorney General entitled "Areas in Which Various Conservative Groups Have Suggested That the Department Take Action," Roberts and Carolyn B. Kuhl listed one of the few "issues on which the Department already has taken action" as "Reverse Carter Administration position not to regularly contest standing. (action taken)."

Further, Judge Roberts' majority opinion in *Taucher v. Brown-Hruska*,[15] raises additional concerns about how he will rule on access to courts. In *Taucher*, Judge Roberts reversed a district court's award of attorney's fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm that had successfully represented a publisher *pro bono* against the Commodities Futures Trading Commission (CFTC). EAJA provides for the award of attorneys' fees to a party in a lawsuit who prevails against the U.S. government, unless the government's legal position in the case was "substantially justified."[16] Although he rejected CFTC's arguments against paying plaintiff's fees, Judge Roberts' found that CFTC's position in the underlying case was substantially justified on other grounds. In a sharp dissent, Judge Harry Edwards argued that the court had exceeded its proper scope of review and had not given proper deference to the lower court, under an abuse-of-discretion standard.

Senators should question Judge Roberts closely on whether his actions, arguments, and language reflect an understanding and acceptance of, and appreciation for, the importance of access to courts and a proper deference to congressional statutes and findings that grant such access.

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[14] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. Dean Nichol loses sight of this reality in criticizing Justice Scalia's invocation of the "take Care" clause of Article II. * * * The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed.").

[15] 396 F.3d 1168 (D.C. Cir. 2005).

[16] See 28 U.S.C. § 2412 (d)(1)(A).

### III. Judge Roberts' Opinion in *Sierra Club v. EPA*

In the case of *Sierra Club v. EPA*,[17] Judge Roberts authored a decision rejecting a Sierra Club suit that sought stronger limits on arsenic—a known human carcinogen—and other toxic pollutants emitted into the air by copper smelters. EPA had adopted a rule that purported to require adequate controls for these pollutants. Under the Clean Air Act, sources of toxic air pollution must reduce their emissions by the maximum degree that is achievable.[18] Nevertheless, Judge Roberts' opinion in *Sierra Club* upheld EPA's refusal to adopt stronger standards than those required by EPA's rule, despite evidence that limits more than twice as protective were already being achieved.

Judge Roberts' toxic air pollution decision ignores settled principles of administrative law. For example:

- The opinion upheld EPA's refusal to set a stronger control standard that had been in place since 1986 based solely on an argument advanced for the first time by EPA's lawyers, and never articulated by the agency itself.

- The opinion acknowledges that, to conclude that particulate matter (PM) was a valid surrogate for all the metals that smelters emit, EPA must find that controlling PM is the "only" means by which smelters control metal emissions.[19] In *Sierra Club*, record evidence showed that PM is not the only means by which smelters achieve metals control. Further, EPA never even claimed that PM was the only means by which smelters achieve metals control, far less provided a rational explanation for such a claim.

- The opinion acknowledges that EPA previously has used lead compounds instead of PM as a surrogate for metals, but holds that the agency did not have to: (1) explain why it failed to do so in the smelters rule; (2) consider comment urging the use of lead compounds as an alternative surrogate; or (3), respond to such comment.

Judge Roberts' opinion also appears to take a 'cheap shot' at Sierra Club's basis for appealing EPA's rule when he states that "Sierra Club did not comment on the proposed emission standards, and none of the entities that did have challenged the Final Rule."[20] He added that Sierra Club "nonetheless" had challenged the rule.[21] The Clean Air Act provides that a party in court can raise any objection that was raised by someone during the administrative process. The issues raised in the case had been addressed extensively in comments submitted by other organizations. Thus, Judge Roberts' observations about Sierra Club's failure to comment were both factually and legally irrelevant. Moreover, Sierra Club submitted declarations showing that its members are affected by toxic emissions from smelters—a point that was never questioned by the court or any party.

Columnist David Broder has concluded that although Roberts has decried any suggestion that he has a doctrinaire approach to the law, "you can search his record in vain for examples of his sensitivity to the impact of the law on people's lives."[22] Judge Roberts' opinion in *Sierra Club* suggests a disturbing lack of sensitivity to the impact of toxic air pollution on the health and safety of ordinary Americans.

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[17] 353 F.3d 976 (D.C. Cir. 2004).
[18] 42 U.S.C. § 7412.
[19] *Sierra Club*, 353 F.3d at 984.
[20] *Sierra Club*, 353 F.3d at 982.
[21] *Id.*
[22] Column, The Nominee's Sheltered World, *The Washington Post* (July 24, 2005) at B7.

**Testimony of Peter B. Edelman**

**Professor of Law, Georgetown University Law Center**

**United States Senate Committee on the Judiciary**

**On the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States**

**July 15, 2005**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear today. I have taught constitutional law at the Georgetown University Law Center since 1982, and I am here to urge that the nomination of Judge Roberts be rejected. On the basis of the record – and it is an extensive record with particulars that extend over a long period of time – Judge Roberts is among the most conservative nominees in modern history. I do not believe Judge Roberts has said anything before this committee over the past few days that alters this conclusion.

The history of how "we the people" have interpreted our beloved Constitution is one on the whole of increasing protection for the rights and liberties of people. From the time of the Sedition Act, through the infamous Dred Scott and Plessy decisions, through the New Deal and on up to the present, we have seen a pattern of change and development in the meaning of its open-ended language that has meant both more respect for individual rights and liberties against governmental overreaching and, at the same time, more power for Congress to act to protect people against exploitation and injury by special interests. We are better off as a nation as a consequence of this process of development. What our Supreme Court has decided in hundreds, perhaps thousands, of cases has made an enormous difference in the lives of millions of Americans. Who sits on the Court matters crucially to all of us.

Judge Roberts' record on a long list of issues marks him as determined to turn the clock back on this deeply ingrained pattern of protection. This inquiry is not about whether one particular case will be overruled. It is about Judge Roberts' judicial philosophy across the board, in dozens of areas. It is not about what he thinks on one issue. It is about how he views the Constitution as a whole, and where that will take him in particular cases on many different kinds of questions. He has dismissed some of what he said as the work of a young staff lawyer done at

the behest of his superiors. He is too modest. Over and over, he wrote memoranda on his own initiative, or with recommendations for action – not carrying out a decision already made – that were at the right fringe of even his conservative colleagues in the Reagan Administration.

The issues in these hearings allow for exactly the kind of debate we need to have about a nominee. There are no extraneous issues about Judge Roberts' personal life. No one challenges this nomination on questions of character. No one disputes his intelligence. The issue is one of a conservatism that radically threatens the meaning of the Constitution as we have come to know it. That is exactly what we should be discussing with regard to a judicial nomination, provided the nominee is otherwise competent. Ultimately, it is the reason why this nominee should not be confirmed.

Judge Roberts said the other day that judging is like being an umpire – just calling balls and strikes as the ball comes over the plate. But if the umpire stands two steps to the right behind the catcher, strikes will look like balls and many balls will look like strikes. In any case, the analogy is remarkably disingenuous. Constitutional interpretation is not like calling balls and strikes. Constitutional and other issues that come before the Supreme Court concern issues that have not been previously adjudicated, and the process of deciding them is far more complicated than calling balls and strikes (as much as I respect umpires). Some cases are decided unanimously, to be sure, and always will be, but many involve 5 to 4 splits – based on strong differences of view about the meaning of the text, the intention of the framers, and other relevant history and societal values. Two hundred-plus years of constitutional history demonstrate that the process of constitutional decision-making is subtle and complex, and subject to deep division and debate on the Court and in the country. That is why this nomination and the one to come are

so exceptionally important. Whether this nominee is confirmed will be critical to direction of constitutional interpretation for years to come, and this will make a major difference for all of us in our daily lives.

This is a teachable moment. We are not here to debate the future of some one particular case. The question is, what is our Constitution about? Is it about fundamental principles of protection of individual rights and liberties, and assuring that government has the power it needs to act for the people, or is it about a cramped and crabbed view of protection for individuals and a view that government is to have vast power to invade our lives but little power to protect us? There is what some people call a "Constitution in exile." It involves a growing body of theory that seeks to justify and establish the latter view, which was the reigning approach a century ago, and which, until recently, many of us thought had been rejected for all time..

My conclusion from studying Judge Roberts' long record over the past quarter century is that he will exert every bit of influence he can to take America back 50 to 100 years or more on a wide variety of issues about the meaning of our basic charter. That is why I believe this nomination should be rejected.

Many here remember the hearings on the nomination of Judge Robert Bork to be an Associate Justice of the Court. That was another time when Americans paused to consider the content of the Constitution. Judge Bork had made things easy for this committee. He put nearly all of his views about the Constitution into one article in the Indiana Law Journal, and he said that nearly every important rights-protecting decision of the Supreme Court in the 20th century was wrong – except Brown v. Board of Education. Basically, all one needed to do was read that article, and it was plain that Judge Bork was not suitable to sit on our Supreme Court.

Judge Roberts is what I call Bork by accretion, Bork by dribs and drabs. He never put it all in one article or document. He said it bit by bit, memo by memo, speech by speech, and now opinion by opinion. But what it adds up to is far more radically conservative than Judge Bork. The list of issues is far longer and the views are every bit as conservative and then some. As one reporter wrote recently, every time Judge Roberts had the choice of being conservative or ultra-conservative, he chose the latter. He was overruled in positions he urged by impeccable conservatives like Ted Olson and Bradford Reynolds.

Judge Roberts didn't just oppose restoring the full reach of section 2 of the Voting Rights Act after a Supreme Court decision had watered it down. He called the pre-existing section 2 a "radical experiment" and was overruled by a wide bipartisan majority in Congress. He called legislation to strengthen the Fair Housing Act "government intrusion." He described the remedies of employment offers and back pay under Title VII of the Civil Rights Act as "staggering." Discussing women's pay equity, he referred to the "purported gender gap," and called it a "canard." He questioned the constitutionality of independent regulatory agencies like the Federal Reserve, the NLRB, the Consumer Product Safety Commission, and OSHA. He attacked Plyler v. Doe, which held that children brought to this country illegally have a right to public education. He criticized the "damage" done by a Supreme Court decision broadening the reach of section 1983, the statutory right of people to sue the government for violations of their rights. He pressed for measures to deprive the Supreme Court and the lower federal courts of jurisdiction over desegregation, school prayer, and abortion cases – proposals that were vehemently rejected by then-Assistant Attorney General Ted Olson.

Judge Roberts' recent record as a sitting judge is also deeply troubling.

I am especially concerned about his vote in the recent Hamdan case. I admire our current Supreme Court's responses thus far when questions have arisen about the breadth of governmental power to curtail civil liberties in this awful time of terror. We have a sorry history of craven Supreme Court decision-making in times of threats to national security – decisions which in hindsight are widely agreed to have been wrong, from Schenck to Korematsu to Dennis. The current Court – obviously not a consistently liberal institution as things are – has stood up to invasive claims of executive power based on incantations of national security need. Judge Roberts' vote that the Geneva Convention does not apply to enemy combatants tried before military commissions says to me that he will bring a discordant view to the Court, and this worries me greatly.

Judge Roberts' vote in Rancho Viejo, the so-called hapless toad case, also raises serious concerns. He dissented along with Judge Sentelle from a decision not to grant a motion to hear the case *en banc*. His unprecedented position – that the full D.C. Circuit should consider whether a section of the Endangered Species Act is unconstitutional – was one which conservative Judges Ginsburg, Henderson, and Randolph did not join. Judge Roberts' vote has far-reaching implications, because his analysis implies fundamental questions about Congress' power to enact laws protecting civil rights, the minimum wage, clean air and water, and workplace safety. There is implied here a basic challenge to national power to protect our people that would take us back nearly 70 years, to a time when the "nine old men" of that period thwarted basic building blocks of the New Deal that were key initiatives toward reversing the national economic catastrophe of the time.

As Senators know, all of this is just a short list. The list of ultra-conservative statements

and actions includes many more examples in the areas I have mentioned, and similarly constrictive views in a other areas. What is especially important is that each item is part of a pattern – these are not isolated positions on individual issues.

For example, Judge Roberts' views and actions on court-stripping, section 1983, standing, attorneys' fees in civil rights cases, and habeas corpus add up to a frontal attack on access to the courts for individual Americans who would consequently lack access to justice with regard to urgent matters including the violation of their fundamental constitutional rights. His advocacy of court-stripping legislation contrasts quite dramatically with Chief Justice Rehnquist's strong and repeated defense of the independence of the courts.

His views and actions on voting rights, sex discrimination, employment discrimination, and school desegregation add up to a hostility to civil rights that we have not seen on the Supreme Court since President Roosevelt ushered in the modern era with his appointments in the late 1930s.

His views and actions on civil and religious liberties and liberty rights of autonomy and personal choice add up to a broad-ranging hostility to individual liberties. His views and actions on Presidential and Executive power, and Congressional power, in areas of national security also present serious dangers to individual liberties, while his views and actions on the limits of Congressional authority vis a vis the states take the opposite tack for the same purpose – to limit protection for the rights and liberties of ordinary Americans.

The pattern in each area adds up to a meta-pattern: denial of government power – be it legislative, executive, or judicial – when the exertion of that power would be for the purpose of protecting the most vulnerable and those most victimized by discrimination throughout our

history, and affirmation of government power to invade individual liberties in circumstances where that fits his view of the way the world should work.

With all respect, this is a dangerous recipe for our nation, one that may result in injury and renewed vulnerability for literally millions of Americans who have fought for decades and even centuries to be included in our constitutional promises.

I urge the committee and the Senate to reject this nomination. I believe we as a nation will rue the day that John Roberts became Chief Justice of the United States.

8605 Explorer Drive, Colorado Springs, CO 80920 E.U.A. • (719) 531-3400

31 de agosto del 2005

Honorable Arlen Specter
Chairman
Committee on the Judiciary
Dirksen Senate Office Building, SD-224
Washington, DC 20510-6275

Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
Dirksen Senate Office Building, SD-152
Washington, DC 20510-6275

Asunto: Nombramiento de John G. Roberts para el cargo de juez del Tribunal Supremo

Estimados senadores Specter y Leahy:

El presidente Bush es digno de elogio por cumplir su promesa al pueblo estadounidense, al escoger a un magistrado tan imparcial para llenar este cargo crucial en el Tribunal Supremo. El juez Roberts es un abogado incuestionablemente calificado y un juez con una experiencia impresionante en el gobierno y el sector privado. Él ha demostrado en cada punto de su carrera, la perspicacia legal, el temperamento judicial y la integridad personal necesarios para ser un magistrado del Tribunal Supremo.

El juez Roberts ha trabajado para el actual presidente del Tribunal Supremo, ha servido como procurador general adjunto de Estados Unidos y ha debatido más de tres docenas de casos ante el Tribunal Supremo. En su cargo actual como juez del Tribunal Federal de Apelaciones del Distrito de Columbia en Washington, él se ha desempeñado muy bien y ha dado evidencias de la moderación judicial necesaria para ser juez del Tribunal Supremo.

Históricamente, la cultura hispana adopta un punto de vista de tipo constitucionalista de la ley que por su parte protege y fortalece al núcleo familiar que es tan central en nuestra cultura. Nuestro respeto de la ley y de las familias tradicionales exige jueces que harían lo mismo. Creo que el juez Roberts es esa clase de hombre y sin ninguna reserva respaldo su nombramiento.

Distinguidos senadores, les pido encarecidamente que le permitan al juez Roberts tener una audiencia del comité justa e imparcial, y que voten para confirmarlo con un voto a su favor o en contra en el Senado, a tiempo para que pueda ocupar el cargo al principio del siguiente período del Tribunal.

Respetuosamente,

Yuri Mantilla
Director de Relaciones Gubernamentales Internacionales
Enfoque a la Familia

Copias a: Presidente George W. Bush; líder de la mayoría del Senado Bill Frist

John Engler
President
National Association of Manufacturers
Senate Judiciary Committee
September 15, 2005

Mr. Chairman, Senator Leahy and distinguished members of the committee.

My name is John Engler, President of the National Association of Manufacturers (NAM), the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states.

I am pleased to be here today to testify in support of the nomination of Judge John Roberts to be the next Chief Justice of the United States.

This is an important moment for the NAM, because it is the first time that we have participated in a proceeding of this type. I would like to take a minute to explain why we have taken this historic step.

When I joined the NAM on October 1st of last year, I brought with me 20 years of experience in the Michigan legislature, and 12 years as Governor, from 1991 to 2003.

As Governor, I found that Michigan businesses were facing crushing legal costs and barriers.

I also learned that laws I helped write in the State Senate or signed as Governor were in many instances ignored, rewritten or set aside by judges unclear about or dismissive of their sworn duties.

In part because of this, the legal environment for doing business in Michigan had become unpredictable, unfavorable and unacceptable.

As Governor, I set out to change this by recruiting to the bench individuals who were committed to uphold the law and not legislate in the courtroom.

During my 12 years as Governor, I appointed more than 200 judges. That includes three State Supreme Court justices, who had a record of faithfully interpreting and applying the law.

As a result of these appointments, coupled with equally needed tort reform legislation, cases filed in the Michigan Circuit Courts dropped by 17% percent between 1997 and 2004. The legal cost of doing business in Michigan declined.

When the time came for the justices I had appointed to run for reelection, despite significant opposition from certain personal injury lawyers, who were the one group that profited from the prior unpredictable and unstable legal climate, my appointees to the Supreme Court were reelected.

Their reelection happened in significant part because the people of Michigan came to understand that the certainty and predictability that

judges help foster when they follow the law not only lead to a better business climate, but are key to jobs and prosperity.

The same is true at the national level. Nationally, our legal system consumes 2.3% of GDP, and its cost is 7 and one-half times as high as that of any of our trading partners.

The high cost of lawsuit abuse continues to be an impediment to our ability to compete in the global economy.

Of course, much of the solution to this does not lie in the federal courts, but in the Congress and the State legislatures, which must write clear laws that recognize these realities. That is why the NAM continues to advocate asbestos reform and continued tort reform, such as product liability.

That said, to achieve a business environment that is fair and predictable, and where the rules are clearly spelled out and adhered to, it is essential to have judges who will apply the rules the legislature establishes in a fair and predictable manner, and the United States Supreme Court must set the example.

The need for fairness and predictability is why the NAM decided that the time had come to take positions on judicial nominations.

After reviewing Judge John Roberts' record, the NAM is convinced that he is eminently qualified to lead the Court.

Judge Roberts has the intellect and experience needed to understand and address complicated transactions and difficult legal problems. At the

same time, he is committed to applying the law rather than applying his own personal views.

This philosophy is essential if we are to remain a nation guided by the rule of law.

Finally, he understands the importance of clarity when deciding cases and the practical consequences of decisions for business.

I should add that none of the current members of the Court comes from a recent private sector background. Judge Roberts does. Accordingly, if he is confirmed, Justice Roberts will add an important voice to the Court's deliberations because of his strong experience of how litigation affects major commercial transactions.

This background will allow Judge Roberts to assist the Court both in identifying cases that present business issues of national importance for its review and in understanding the practical ramifications of rules set out through its decisions.

As I close, let me make clear that the NAM did not seek to determine if Judge Roberts will reach or is likely to reach particular outcomes "favorable to business."

The principal difficulty with an outcome-based approach is that the outcomes a Justice should reach depend on what the duly-enacted law is.

In many areas, different companies and businesses will disagree on what the "pro-business" result actually is.

Therefore, the NAM is not looking for a Justice who is biased in favor of or against business or whose decisions reflect or are likely to reflect a "pro-business" outlook, but rather for a Justice who will properly and impartially apply the law. We are convinced Judge Roberts will be such a Justice.

For all these reasons, Judge Roberts should be confirmed as the 17th Chief Justice of the United States.

I respectfully urge this committee to act in a timely manner and report Judge John Roberts' nomination to the full Senate with a recommendation that he be confirmed as Chief Justice of the United States.

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
**September 12, 2005**

**The Honorable Russ Feingold**
United States Senator , Wisconsin

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Statement of U.S. Senator Russ Feingold At the Nomination Hearing of John G. Roberts, Jr., to be Chief Justice
As Prepared

September 12, 2005

Mr. Chairman, thank you, and Judge Roberts, welcome. First, I want to say Mr. Chairman how much I appreciate the evenhanded way that you and Senator Leahy have approached preparations for this hearing.

To our nominee, I want to thank you in advance for the long hours you will put in with us this week. I wish you well, and I admire your record and your impressive career. This is a confirmation proceeding, however, not a coronation. It is the Senate Judiciary Committee's job to ask tough questions. We are tasked by the Senate with getting a complete picture of your qualifications, your temperament, and how you will carry out your duties. Obviously, nominees to the Supreme Court must be subject to the highest level of scrutiny. As the nominee to be Chief Justice of the United States, you will be subject to the ultimate level of scrutiny. Our colleagues in the Senate, and the citizens of this country, are entitled to a hearing that will actually help them decide whether you should be confirmed. I'm sure you understand that. This is a lifetime appointment to preside over the Supreme Court, and to lead the entire federal judiciary. So I'm sure you appreciate the importance of this hearing for the future of our country.

Some have called for a "dignified process." So have I. But at times it sounds like what some really want for the nominee is an easy process. That is not what the Constitution or the traditions of the Senate call for. If by "dignified" they mean that tough and probing questions are out of bounds, I must strongly disagree. It is not undignified to ask questions that press the nominee for his views on the important areas of the law that the Supreme Court confronts. It is not undignified to review and explore the nominee's writings, his past statements, the briefs he has filed, the memos he has written. It is not undignified to ask the nominee questions he would rather not answer should he prefer to remain inscrutable, or, worse yet, all things to all people.

This process is not a game. It is not a political contest. It is one of the most important things that the Senate does -- confirm or reject nominees to the highest court in the land. And we as Senators must take that responsibility very seriously.

The most recent nine Justices of the Supreme Court served together almost as long as any other Court in history -- more than 11 years. Because the Court has been so stable for so long, and Chief Justice Rehnquist presided over it for 19 years, Members of Congress, lawyers, and the public have come to know the views of the Justices pretty well. Many Court-watchers have become pretty good at predicting the outcome of cases. That predictability is about to be tested because we will now have a new Chief Justice, and because a member of the Court who was the deciding vote in many cases has also announced her retirement.

I don't think, however, that the public is required to wait until a new Chief Justice is seated on the Court to get some idea of how that new Chief Justice thinks, how that new Chief Justice will approach controversial issues that might come before the Court, and how that new Chief Justice might run the Court. This hearing is our only opportunity to hear from this nominee how he would approach the important issues facing the Court.

I was struck as I was preparing for this hearing by remarks written years ago by Senator Grassley, my colleague from Iowa and a senior member of the Committee, in the Committee Report on the nomination of Justice O'Connor. The current nomination to the position of Chief Justice makes his remarks even more apt. Senator Grassley said the following:

I do not agree … that commenting on past Supreme Court decisions is a commitment to hold a certain way on future cases and I feel that in order that we, as Senators, fulfill our duty it is incumbent upon us to discover a nominee's judicial philosophy.

In that we had a very limited number of judicial opinions rendered by Judge O'Connor on constitutional questions it was my hope, by asking specific questions regarding past Supreme Court decisions, that the committee might obtain a clearer understanding of her philosophy. … My purpose was to satisfy my questions regarding Judge O'Connor's record in that I felt it was less complete than many other Supreme Court nominees who have had extensive experience either on the Federal bench or in leadership positions in the profession of law.

In some ways, the record of our current nominee to the Court raises similar concerns. He has a long record as a lawyer, but he has been on the federal bench for only two years, and we have little in the way of his own writings on the issues before the Court to evaluate. So like Senator Grassley, I am interested in this nominee's views on a number of cases. I don't think that getting his reaction to those decisions will commit him to vote a certain way in a future case. After all, it is not that past case he will be deciding, but a different one. Even the current Justices, whose views on specific cases are well known since they either wrote or joined one opinion or another, do not have to recuse themselves from a future case just because we know what they think of a crucial precedent in that case.

So I am looking for Judge Roberts to be forthcoming with this Committee about his views. To show the Senate's role in this process the respect it deserves, he should make every effort to be responsive.

Chief Justice Rehnquist himself acknowledged the importance of the Senate's role when he wrote the following in his last annual report on the federal judiciary: "Our Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the federal judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials."

That suggests to me that it is not only permissible, but critical, that the Senate seek to learn as much as it can about the views of nominees and that nominees be as forthcoming as they possibly can without compromising their independence.

We do have a mountain of material from the nominee's early years as a lawyer in the Justice Department and White House counsel's office of the Reagan Administration. In memo after memo, his writing was highly ideological and sometimes dismissive of the views of others. I do, however, recognize that this is a different time, and he has been nominated to play a different kind of role than he played in those early Reagan years. So, I will be looking for a somewhat different John Roberts

than the John Roberts of 1985. As I have a chance to ask questions about topics such as executive power, civil liberties, voting rights, the death penalty and other important issues, I hope to see how his views have developed and changed over the years.

Of course, the best evidence of this would be some more recent writings of the nominee. But the Administration has steadfastly refused a reasonable request for documents pertaining to a small fraction of the cases in which he participated as Deputy Solicitor General during the Administration of President George H.W. Bush. I find this refusal very troubling in light of the ample precedent for releasing such documents in this kind of proceeding, and the weakness of any claim that the release would damage the litigating position of the United States, over 12 years later. And I also must say, candidly, the refusal gives rise to a reasonable inference that the Administration has something to hide here. The Administration has done this nominee no service by maintaining its intransigent position.

Mr. Chairman, it goes without saying that the Supreme Court is one of the most important institutions in our constitutional system and that the position of Chief Justice of the United States is one of the most important positions in our government. The impact of this nominee on our country, should he be confirmed, will be enormous. That means our scrutiny of this nominee must be intense and thorough. In my view, we must evaluate not only his qualifications, but also his ability to keep an open mind, his sensitivity to the concerns of all Americans and their right to equal protection under the laws; not only his intellectual capacity, but his judgment and wisdom; not only his achievements, but his fairness, and his courage to stand up to the other branches of government when they infringe on the rights and liberties of our citizens.

I look forward to the opportunity to question the nominee about his views later in the hearing, and I thank you, Mr. Chairman, again, for the opportunity to speak today.

Statement of Senator Dianne Feinstein

Thank you very much, Mr. Chairman.

Good afternoon, Judge Roberts and Mrs. Roberts and the Roberts family.

This must be a moment of enormous pride for you. And I hope that despite the toughness of this hearing, you really realize that this family member of yours is taking over not just the position of an associate justice, but the Chief Justice of the United States at a time of unique division and polarization in this country.

And so many of us are going to be pressing him to see if he has got what we think it takes to do this.

Fred Thompson, welcome back. I hope you miss us just a little bit from time to time. Somehow I'm not quite sure that's the case.

Judge Roberts, thank you very much.

We spent a very interesting hour together. I came away from it feeling that you're certainly brilliant, talented and well qualified, and I don't think there's a question about that.

But as we take a look at you, 50-years old, to be Chief Justice of the United States, I think it's really essential for us to try to determine whether you can be the kind of leader that can generate consensus, find compromise and, above all, really embody the mainstream of American legal thinking.

For me, the most important thing is to see that the Chief Justice really cares about the fact that justice is provided to all Americans. It's been said here before, but it's really important -- young and old, rich and poor, weak and powerful, all races, creeds, colors, et cetera.

This is going to be a big session.

The Court's going to consider some very critical cases, among many others, the Court will hear cases concerning:

- the standard of review for abortion cases, and the health of the mother;
- the constitutionality of an Oregon law which permits physician-assisted suicide for terminally ill but legally competent individuals; and
- whether two oil industry leaders and competitors can be allowed to work together to fix the price of gas once they've entered into a joint venture;
- the rights of enemy combatants;
- the so-called partial birth abortion law; and
- whether Congress has the authority to protect our nation's environment through legislation.

In addition, many other important issues are just over the horizon, including the rights of enemy combatants; and the so-called federal "partial birth" abortion ban. The Endangered Species Act is winding its way through the appellate courts. It looks like they differ. And if the courts keep going the way they're going, many of us feel that they will take away from the Congress the grounds on which we base legislation on the environment.

This is an enormous macro-question that you're going to be right in the middle of as a pivotal force.

Chief Justice Rehnquist, I believe, will be remembered not only for his distinguished tenure, but also for applying a much more restrictive interpretation of the Constitution which has limited the role of Congress.

In recent years, the court has adopted a politically conservative states' rights view of several constitutional provisions.

As a result, congressional authority to enact important legislation has been significantly curtailed.

This has occurred through its restrictive interpretation of the Spending Clause, the Commerce Clause, the Fourteenth Amendment, the Eleventh Amendment -- all of which Congress uses to enact certain laws.

Based on these federalism grounds, the court has wiped out all or key parts of legislation addressing issues such as gun-free schools -- should schools be allowed to prohibit guns within 1,000 feet; religious freedom; overtime protection; age discrimination; violence against women; and discrimination against people with disabilities.

In fact, over the past decade, the Rehnquist Court has weakened or invalidated more than three dozen federal statutes. Almost a third of these decisions were based on the Commerce Clause and the Fourteenth Amendment.

If you, Judge Roberts, subscribe the Rehnquist Court's restrictive interpretation of Congress' ability to legislate, the impact could be enormous. It would severely restrict the ability of Congress to tackle nationwide issues that the American people have actually elected us to address.

As the only woman on this committee, I believe I have an additional role in evaluating nominees for the Supreme Court, and that is to see if the hard-earned autonomy of women is protected.

Like any population, women enjoy diverse opinions, beliefs, political affiliations, priorities and values. And we share a history of having to fight for many of the rights and opportunities that young American women now take so much for granted. I think they don't really recall that during the early years of the United States, women actually had very few rights and privileges. In most states, women were not allowed to enter into contracts, to act as executor of an estate. They had limited inheritance and child custody rights.

It actually wasn't until 1839 that a woman could own property separate from her husband, when Mississippi passed the Married Woman's Property Act.

It wasn't until the 19th Century that women began working outside their homes in large numbers. Most often, women were employed as teachers or nurses, and in textile mills and garment shops.

As women entered into the workforce, we had to fight our way into nontraditional fields: medicine, law, business, and yes, even politics.

The American Medical Association was founded in 1846. But it barred women for 69 years from membership, until 1915.

The American Bar Association was founded in 1876, but it barred women and did not admit them until 1918. That's 42 years later. And it wasn't until 1920 when, after a very hard fight, women won the right to vote -- not even 100 years ago.

By virtue of our accomplishments and our history, women have a perspective that's been recognized as unique and valuable. With the retirement of Justice Sandra Day O'Connor, the Court loses the important perspective she brought as a woman and the deciding vote in a number of critical cases.

For me -- and I said this to you privately, and I'll say more about it in my time on questions -- one of the most important issues that needs to be addressed by you is the constitutional right to privacy.

I'm concerned by a trend on the Court to limit this right and thereby to curtail the autonomy that we have fought for and achieved; in this case, over just simply controlling our own reproductive system rather than having some politicians do it for us.

It would be very difficult -- and I said this to you privately and I said it publicly -- for me to vote to confirm someone whom I knew would overturn *Roe v. Wade*, because I remember -- and many of the young women here don't -- what it was like when abortion was illegal in America.

As a college student at Stanford, I watched the passing of the plate to collect money so a young woman could go to Tijuana for a back-alley abortion. I knew a young woman who killed herself because she was pregnant.

And in the 1960s, as a member of the California Women's Board of Terms and Parole, when California had what was called the Indeterminate Sentencing Law, I actually sentenced women who committed abortions to prison terms.

I saw the morbidity. I saw the injuries they caused. And I don't want to go back to those days.

How the Court decides future cases could determine whether both the beginning of life and the end of life decisions remain private, or whether individuals could be subject to government intrusion or perhaps the risk of prison.

And I will be looking to understand your views on the constitutional provision for providing for the separation of church and state.

Once again, history!

For centuries, individuals have been persecuted for their religious beliefs.

During the Roman Empire, the Middle Ages, the Reformation, and even today, millions of innocent people have been killed or tortured because of their religion.

A week ago, I was walking up the Danube River in Budapest when I saw on the shore 60 pairs of shoes covered in copper -- women's shoes, men's shoes, small tiny children's shoes. They lined the bank of the river.

During World War II, Hungarian fascists and Nazi soldiers forced thousands of Jews, including men, women and children, to remove their shoes before shooting them and letting their bodies float down the Danube.

These shoes represent a powerful symbol of how religion has been used in catastrophic ways historically.

And we cannot forget that in American history, Puritans, Baptists, and Catholics came to America looking for a society where they could be free from the persecution they faced in Europe and England.

In response, the Founding Fathers created a balance in the Constitution that provided for freedom of worship as well as for separation of church and state. In their efforts to protect against religious persecution, the Framers established a secular government that would remain separate from religion.

However, these basic principles could be severely weakened or unraveled depending on the Court's allowing government funding of religious education, prayer in school, and the display of religious symbols on public property and land.

These issues are not easy and the legal theories that govern them are complex. But the basic question we are faced with boils down to this: will you, Judge Roberts as Chief Justice protect the rights of the people of this great nation – our civil and human rights, our rights as women to be treated as equals under the law.

These are the standards a Chief Justice must hold high.

Feminist Majority Foundation
working for women's equality

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Feminist Daily News Wire
July 1, 2005

## Statement of Eleanor Smeal on the Resignation of Justice O'Connor

Statement of Eleanor Smeal
President, Feminist Majority

July 1, 2005

With Sandra Day O'Connor's resignation, President Bush could reverse 32 years of freedom and progress for women. Women who have the most to lose will be the strongest voice in the debate over this Supreme Court fight. This time, for once, we will not be ignored.

Let there be no mistake about it, the feminist movement today is declaring a state of emergency to save the court for women's rights. Twenty four years ago, as president of the National Organization for Women I testified for Sandra Day O'Connor before the Senate Judiciary Committee. I knew then that O'Connor, although a conservative voice, would be one who would not permit the elimination of women's fundamental rights, including the right to privacy.

Indeed the National Organization for Women played a pivotal role in the nomination of Sandra Day O'Connor – she was nominated in 1981 at the height of the Equal Rights Amendment campaign. One of the reasons she was nominated is that NOW stood outside the White House with thousands of people demanding that President Reagan nominate a woman, and a woman who would not turn her back on the women of the nation. Even a very conservative President heard our voices. And we must make our voices so loud today another ultra conservative President will hear our voices.

We had then, and we have now, the power of the gender gap to save women's lives ... and we intend to use it. We will begin from this conference by a march Saturday, July 2nd to the Tennessee legislative capital so that Senate Majority Leader Bill Frist (R-TN) will hear our voices.

Also In the News

8/31/2005 **BREAKING NEWS: Top Woman at FDA Resigns over EC Delay** - Susan Wood, PhD, the top woman at the Food and Drug Administration (FDA), announced her resignation today because of the continued FDA delay on over-the-counter status for emergency contraception (EC). . . .

8/31/2005 **Task Force Faults Military Academies Response to Sexual Assault, Harassment** - The Department of Defense Task Force on Sexual Harassment and Violence at the Military Service Academies released its report Thursday on the policies of the US Military Academy at West Point, and the US Naval Academy at Andover. . . .

8/29/2005 **Iraq Constitution 'Big Disappointment' for Women** - Iraq's draft constitution was finalized on Sunday and will be sent to voters for a nationwide referendum to be held in six weeks. . . .

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Press Release
July 20, 2005

**Contact:** Erin Carmany
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## Feminist Majority Opposes John Roberts for the Supreme Court

Arlington, VA – The Feminist Majority today announced its opposition to John Roberts, President Bush's nominee for the United States Supreme Court.

"Everything we know about Judge Roberts' record indicates that he will be a solid vote against women's rights and *Roe v. Wade*," said Eleanor Smeal, president of the Feminist Majority. "If he is to be confirmed by senators who support women's rights, he must say where he stands on *Roe* and the right to privacy. The burden is on him."

Moreover, the Feminist Majority is dismayed that President Bush chose to nominate a man to fill the Supreme Court vacancy. "I am extremely disappointed that the President did not appoint a centrist woman to fill Sandra Day O'Connor's seat on the Supreme Court," Smeal continued. "We are now going back to tokenism for women on the highest court in the land."

Judge Roberts, as Deputy Solicitor General, argued against *Roe v. Wade*, and also argued on behalf of Operation Rescue, an extreme anti-abortion group, in *Bray v. Alexandria*. The pro-choice loss in *Bray v. Alexandria* increased violence at clinics. In private practice, Roberts argued against affirmative action for minorities.

The Feminist Majority will continue to examine Roberts' record, and it will demand that Senators not confirm Roberts unless he makes clear that he will not reverse *Roe*, civil rights, women's rights, and the rights of the disabled. If Judge Roberts will not reveal his views on these fundamental women's and civil rights and the separation of church and state, Senators must vote against his confirmation.

For more information, visit Feminist Court Watch.

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June 24, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

We write to express our concern about your recent request that the Department of Justice turn over "appeal recommendations, certiorari recommendations, and amicus recommendations" that Miguel Estrada worked on while in the Office of the Solicitor General.

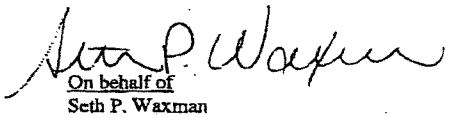
As former heads of the Office of the Solicitor General -- under Presidents of both parties -- we can attest to the vital importance of candor and confidentiality in the Solicitor General's decisionmaking process. The Solicitor General is charged with the weighty responsibility of deciding whether to appeal adverse decisions in cases where the United States is a party, whether to seek Supreme Court review of adverse appellate decisions, and whether to participate as *amicus curiae* in other high-profile cases that implicate an important federal interest. The Solicitor General has the responsibility of representing the interests not just of the Justice Department, nor just of the Executive Branch, but of the entire federal government, including Congress.

It goes without saying that, when we made these and other critical decisions, we relied on frank, honest, and thorough advice from our staff attorneys, like Mr. Estrada. Our decisionmaking process required the unbridled, open exchange of ideas -- an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking requires candor, and candor in turn requires confidentiality.

Any attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests -- a cost that also would be borne by Congress itself.

Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process.

Sincerely,



On behalf of
Seth P. Waxman
Walter Dellinger
Drew S. Days, III
Kenneth W. Starr
Charles Fried
Robert H. Bork
Archibald Cox

cc: The Honorable Orrin G. Hatch
The Honorable Alberto R. Gonzales
The Honorable John D. Ashcroft

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CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

12 August 2005

The Honorable Arlen Specter
Chairman,
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

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

Dear Mr. Chairman & Senator Leahy:

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Judge John G. Roberts, Jr. to be the next Associate Justice of the Supreme Court of the United States.

Judge Roberts has had a distinguished career as both a public servant and a practicing attorney, and he currently serves on the U.S. Court of Appeals for the D.C. Circuit. His nomination to that court was favorably reported by the Committee on a 16-3 vote, and he was confirmed by the full Senate by Unanimous Consent in May 2003. Before his confirmation to the D.C. Circuit, Judge Roberts served as Special Assistant to the Attorney General, Associate White House Counsel, and as Principal Deputy Solicitor General. In addition to his superb service as a member of the Federal judiciary, Judge Roberts graduated *summa cum laude* from Harvard College and *magna cum laude* from Harvard Law School, where he was also managing editor of the *Harvard Law Review*. He began his career as a clerk for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and then-Associate Justice of the Supreme Court William H. Rehnquist.

Two necessary qualifications for any judicial nominee—not to mention one for the highest court in the land—should be a proven record of success as a practicing attorney, and to have the respect of the law enforcement community of which they will be an important part. John Roberts meets both of these important criteria. He has argued 39 cases before the Supreme Court, and his arguments span a wide range of issues, including criminal law, civil rights, administrative law, and the regulation of financial institutions. Judge Roberts has demonstrated that he will be an outstanding addition to the Supreme Court, and that he has rightfully earned his place beside the finest legal minds in the nation.

On behalf of the more than 321,000 members of the Fraternal Order of Police, I again offer our strong support for John Roberts, and urge the Judiciary Committee to expeditiously approve his nomination. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we may be of any further assistance.

Sincerely,

Chuck Canterbury

Chuck Canterbury
National President

820 Mabry Road
Atlanta, GA 30328
July 30, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
Dirksen Senate Office Building, SD-224
Washington D.C. 20510-6275

Dear Senator Specter:

We urge you to support President Bush's nominee for the Supreme Court vacancy, Judge John Roberts. This nation deserves a judge with his qualifications. His ability and willingness to interpret the Constitution of the United States is the only relevant question.

Your support would be greatly appreciated.

Sincerely,

Roland H. Fredette Flore L. Fredette Henry P. Fredette Rosilene R. Fredette

cc: President George W. Bush
Majority Leader Bill Frist

Testimony of Charles Fried*
Senate Judiciary Committee, September 9, 2005

It is a great privilege to have been asked to testify in these hearings on a nomination that I believe will do enduring honor to the President who made it and the Senators who give their advice and consent to it. I am only slightly acquainted with Judge Roberts personally, although I have long known of his reputation. In 2002, before Judge Roberts moved to the bench, he and I represented separate but similarly aligned parties in an appeal to Second Circuit in a commercial case.(*World Trade Center Properties, Inc. v. Hartford Insurance Co., et al.*) In that connection I had one or two conversations with Judge Roberts and reviewed drafts of his briefs in the appeal. This summer I served as Chair of the practitioners' reading committee asked to give our evaluation of Judge Roberts's judicial writings to the Standing Committee on the Judiciary of the American Bar Association. In that capacity I have read almost all of Judge Roberts's opinions, including all his dissenting and concurring opinions and any opinion he wrote for the court, in which another judge wrote a concurring or dissenting opinion. (The judgment I express today on those opinions is my own. The unanimous conclusion of our committee is referred to in the Report of the Standing Committee.) I have also read press accounts and press excerpts of the memoranda he wrote while he served in the office of the Attorney General and the office of the White House Counsel. I do not recall reading any of his memoranda written while he was in the latter office and I was Solicitor General.

* Charles Fried is the Beneficial Professor of Law at the Harvard Law School, where he has taught since 1961. He was Solicitor General of the United States, 1985-1989 and an Associate Justice of the Supreme Judicial Court of Massachusetts, 1995-1999. He was a law clerk to Justice John Marshall Harlan of the Supreme Court of the United States during the October Term, 1960. His most recent book is SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (Harvard University Press, 2004).

My strongest impression of Judge Roberts is that he is a superb lawyer, perhaps one of the finest of his generation. No one has raised any objection to John Roberts's ability, learning, experience or integrity, but debate has arisen about his "judicial philosophy"—that is, his theory of judging, of the constitution, of individual rights, of federalism. Such an inquiry profoundly misconceives how many good judges—even great judges—decide cases. If questioned about their philosophies on these matters prior to becoming judges how would the all-time greats like Earl Warren, John Harlan, Henry Friendly (for whom Roberts clerked) or indeed John Marshall have answered? These men came to the bench without a worked-out philosophy of the job they were about to undertake. Rather they had dispositions and character. There are counter-examples—Oliver Wendell Holmes, Jr., Felix Frankfurter, Richard Posner, Antonin Scalia, Robert Bork had he been confirmed--but they prove my point. These are all legal scholars whose profession it was to have a philosophy about their subject. That is why Robert Bork could hardly have avoided questions about his philosophy of law—it's what he had been writing about and lecturing on for years.

Come back to Earl Warren or Henry Friendly: it is only after they had been on the bench for some time that a philosophy could be attributed to them, and even then it is those who observe them not the men themselves who could best articulate their philosophies. Benjamin Nathan Cardozo, who wrote some of the most illuminating essays on the art of judging, only wrote after he had been a judge on New York's highest court for several years. Stephen Breyer—a fine and learned Justice—has recently written and lectured extensively about his philosophy of the constitution. But though he had been a professor of administrative and antitrust law and a lower court judge for many years, he

did not articulate a constitutional theory until after several years on the Supreme Court. Henry Friendly, the consummate judges' judge—only wrote some of his great articles after many years on the bench. Before that he had been too busy as a corporate lawyer—his principal client had been Pan-Am—for such speculation. The philosophy of these great judges only emerged by reflecting on what they had been doing, not as an agenda or a mindset with which they came to the Supreme Court.

This is such an outstanding nomination, therefore, not because of some distinctive, worked-out "philosophy" with which Judge Roberts would comes to the Court, but just because he is first and foremost a superb lawyer. Indeed Judge Roberts has told us that he does not come to cases with any single approach, method or theory. He may not have a philosophy, but Judge Roberts does show a disposition, and his judicial writings show the kind of person and judge he is. The forty-nine opinions he wrote in over two years as a judge show him to be careful, modest in the face of the law, unlikely to embark on constitutional adventures, respectful of institutions, not a reformer, not a slayer of dragons, not a man on a mission, and someone too smart, too skeptical to be taken in by extravagant, novel theories. His judicial writings, though lightened by touches of gentle humor—"the hapless toad"—do not scorn those who disagree with him. Unlike some of his more strident opponents, he is evidently not a hater.

Let me give some examples. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), is particularly noteworthy. Judge Merrick Garland, another exceptionally fine judge (and former Friendly clerk) disagreed with Judge Roberts on the application of the Federal False Claims Act to false claims alleged to have been submitted to the grantee (here Amtrak) of federal funds. Judge Roberts ruled that

the statute did not apply to such claims unless they were submitted to or forwarded to the federal government for payment, and that claims that would be paid under previously made grants to a grantee were not covered. Judge Roberts, citing Judge Friendly, concluded that the language of the statute was plain enough to resolve the issue without recourse to legislative history. Judge Garland dissented in an equally careful and measured opinion that made considerable use of legislative history and the structure of the statute. What is noteworthy in this disagreement is the care, detail and professionalism shown in both opinions as they respectfully took issue with each other. It is striking that Judge Roberts did not dogmatically deny the appropriateness of referring to legislative history, and Judge Garland did not argue that history and structure overwhelmed an argument from the text of the statute.

This same meticulous, courteous and professional approach was demonstrated in Judge Roberts's partial dissent in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), a suit against the Republic of Iraq—and eventually against the United States as holder of funds seized from the Republic of Iraq—by U.S. military personnel captured and mistreated during the first Gulf War.

*Hedgepath v. Washington Metropolitan Area Transit Authority*, 386 F.3d 1148 (D.C. Cir. 2004), has attracted some attention. A good description of the case as well as a sense of Judge Roberts's style and approach may be gathered from the opening paragraph of his opinion:

> No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and

> detained until released to her mother some three hours later – all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as "foolish," and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not, and accordingly we affirm.

Finally, a great deal has been made of Judge Roberts's dissent from a denial of rehearing *en banc* in *Rancho Viejo, LLC v. Norton*, 334 Fd.3d 1158 (2003), *cert. denied*, 540 U.S. 1218 (2004). In that case a panel of the District of Columbia Circuit, following circuit precedent, had ruled that the Endangered Species Act, as applied to forbid a developer from putting up a fence that would disturb the movements of the arroyo toad—an animal that is neither migratory nor an item of commerce—was not beyond the power of Congress under the Commerce Clause. Judges Sentelle and Roberts dissented from the denial of the petition for rehearing *en banc*. Judge Sentelle concluded that the statute as applied was unconstitutional under the Supreme Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995). Judge Roberts did not join Judge Sentelle's opinion. Judge Roberts stated that the panel's "approach seems inconsistent with the Supreme Court's holdings in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000)." Judge Roberts wrote: "To be fair, the [D.C. Circuit] panel faithfully applied *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C.Cir.1997)." Moreover, both Judges Sentelle and Roberts noted that rehearing *en banc* was appropriate because

the panel's decision was in conflict with a recent decision of the Fifth Circuit, *GDF Realty Investment, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*,125 S. Ct. 2898 (2005). Such a circuit conflict is, of course, a standard reason for granting rehearing *en banc*. It is particularly noteworthy that Judge Roberts concluded his opinion by that en banc "review would also afford the opportunity to consider alternative grounds for sustaining application of the [Endangered Species] Act that may be more consistent with Supreme Court precedent."

What then of the thousands of pages of memoranda Judge Roberts wrote while working for Attorney General Smith and as a staffer in the White House during the two Reagan Administrations? They certainly do show a political disposition by a man who worked in trusted political positions. It was a disposition that accorded with the one project we in the Reagan Administrations all shared: to discipline the free-form inclination of some judges and justices to make the law up as they went along because they had enthusiastically embraced the philosophy of the legal realists and critical legal studies that law was just the continuations of politics by other means and that the best judges use their power to help remake society when legislators would not or could not. As their dissenting opinions in the Supreme Court and in opinions in lower federal courts since the 'sixties and and through the 'seventies suggest or even explicitly proclaim these judges would have: eliminated the death penalty, made uncounselled police questioning and warrantless searches virtually impossible, given lower federal courts general authority to supervise state criminal judgments, opened our borders by making deportations so cumbersome as to be not worth bothering with, and in the name of equal protection mandated minimum levels of welfare, medical care, housing and education.

And all of this would be facilitated by relaxed rules of standing that would have allowed any organization with an ideological project to urge its cause in the federal courts. In short our democracy—state and federal—would have been placed in the receivership of federal judges.

To be sure some of these memoranda also addressed potential legislation and therefore some may disagree with his conclusions. But there is ample evidence that Judge Roberts understands the difference between political convictions and the discipline of the law, the discipline that should constrain the judge. It is passion for that discipline that I see as the principal energy behind his work as an administration official. The slogan that the constitution must be interpreted according to the original intent of the framers was in my view an understandable but over-simplified and sometimes meaningless attempt to impose such discipline on this looming judicial coup d'etat. The real cure is judges who actually believe that law, doctrine, precedent and tradition have meaning, that they can and therefore should discipline the work of judges. No formula or pledge of allegiance to original intent can guarantee such judging. That is a matter of character, competence, and temperament. And that is where we began. John Roberts promises to be a justice who will neither be a rigid ideologue in the grips of a theory as some fear he might, nor will he be a Justice Brennan of the right as some hope. The best hope for the law and for all of us is that he will be the Henry Friendly of his generation. If he tells of his judicial philosophy it will only be ten or more years from now, during which time he would have brought judgment, balance and a towering intellect to the decision of particular cases.

# STATEMENT OF HON. WILLIAM H. FRIST, M.D., A U.S. SENATOR FROM THE STATE OF TENNESSEE AND MAJORITY LEADER OF THE UNITED STATES SENATE, ON THE OPENING DAY OF THE CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR. TO BE CHIEF JUSTICE OF THE UNITED STATES

WASHINGTON, D.C. - U.S. Senate Majority Leader Bill Frist, M.D. (R-TN) submitted the following statement for inclusion in the committee record today regarding the Senate Judiciary Committee hearing of John Roberts to be Chief Justice of the Supreme Court of the United States. The public hearing began today with opening statements given by committee members and Judge Roberts:

"Mr. Chairman and members of the Committee, I would like to take this opportunity to express my sincere gratitude to you and to your staffs for your hard work in preparing for this hearing on the nomination of John Roberts as Chief Justice of the United States. I applaud all the members of the Committee for committing significant time and staff resources to this process. I also appreciate the Committee's cooperation and flexibility as we rescheduled the hearings to accommodate the funeral arrangements for the late Chief Justice William Rehnquist.

"Despite the postponement of the hearings, our ultimate goal in the Senate remains unchanged: to vote up or down on Judge Roberts' nomination before the Supreme Court begins its new term on October 3rd. With the passing of Chief Justice Rehnquist last week, accomplishing this goal takes on even greater importance. The Chief Justice plays an enormous and vital role in the management and administration of the Court. I'm grateful that the revised hearing schedule will keep the Senate on track to have the Court at full strength when it reconvenes.

"Today truly marks an historic day in the United States Senate, as it has been over 11 years since this body has exercised its constitutional responsibility to provide advice and consent to the President on a Supreme Court nominee. And it has been even longer - 19 nineteen years -- since we have considered a nominee for Chief Justice of the United States. Confirming a Chief Justice to sit on the highest court in the land is among the most consequential of our tasks as Senators. The American people have entrusted us to undertake this monumental task, and it's my hope that we will perform it well. Our fellow citizens expect us to conduct a respectful and expeditious confirmation process, including a thorough hearing and floor debate and then a fair up or down confirmation vote.

"As the Majority Leader of the Senate, I would like to add my voice to the chorus of endorsements for John Roberts to serve as the Chief Justice of the United States. While Judge Roberts has big shoes to fill, I am confident that he will serve with honor and distinction -- as his mentor, friend, and predecessor, William Rehnquist, did throughout his three decades of service on the high Court. I understand that Judge Roberts was extremely close to the Chief, and I want to extend my heartfelt sympathy to him for this great loss. I know that Judge Roberts is honored to receive the nomination to replace such a distinguished American.

"I've had the privilege of meeting Judge Roberts personally, and I have studied his academic and professional record. In every aspect, I have been impressed. He is honest, thoughtful, and intelligent. Judge Roberts' credentials prove beyond a doubt his fitness to serve on the Supreme Court. He has an impressive academic background. He graduated at the top of his class from both Harvard College and Harvard Law School, and earned the coveted position as editor of one of the most well-respected law journals in the country. His legal career has been equally as impressive. Having argued 39 cases before the Supreme Court, he has earned bipartisan respect as one of the finest appellate advocates in the nation. And, he has been given the highest rating possible - "well-qualified" -- from the American Bar Association on three occasions - twice for his nomination to the D.C. Circuit Court of Appeals and most recently to serve on the Supreme Court.

"After getting to know Judge Roberts and studying his record, it's crystal clear to me that the President made an excellent choice when he selected John Roberts to replace William Rehnquist as the Chief Justice of the United States. Just two years ago, this body unanimously confirmed Judge Roberts' nomination to serve on the D.C. Circuit, and I am hopeful that later this month we will once again confirm his nomination with such overwhelming bipartisan support - this time to lead the Supreme Court. As Chief Justice on our highest Court, I'm confident that John Roberts will serve with distinction, as he has on the appellate bench.

"During the past few months in the Senate, we have talked extensively about the judicial confirmation process and the qualities that make an individual a good judge. I think all of my colleagues would agree that a judge should be fair, open-minded, unbiased, and committed to faithfully interpreting the Constitution. I believe that Judge Roberts embodies each of these qualities. Judge Roberts appreciates the role of a judge is to interpret the law and not to legislate from the bench, and he decides each case based on the facts, the law and the Constitution - not any personal political views.

"John Roberts' extensive legal experience, outstanding record of public service and his distinguished tenure on the D.C. Circuit make him an ideal candidate to serve on the highest Court in the land. Above all, he's a good and honest person—a man of principle, integrity, and character, a devoted husband, and a loving father.

"John Roberts is the type of Supreme Court nominee that America needs, and he deserves the courtesy of a fair confirmation process. As the committee proceeds with questioning over the next few days, I urge my colleagues to treat Judge Roberts with the dignity and respect that he deserves. I am hopeful that the hearings will be fair and thoughtful, and that Members will not ask Judge Roberts to compromise his judicial independence by requiring him to pre-judge cases and issues that may come before the high Court.

"Mr. Chairman, again, thank you for your leadership. I commend the Committee for your commitment to conducting a fair and respectful confirmation process. I urge my

colleagues on this Committee to support John Roberts' nomination to serve as Chief Justice of the United States, to favorably report his nomination to the full Senate and to vote up or down to confirm him on the floor. And to you, Judge Roberts, I look forward to reading the opinions of the "Roberts Court" for years to come."

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Testimony
*United States Senate Committee on the Judiciary*
**Nomination of John G Roberts (Witness List for September 15)**
**September 15, 2005**

**Diana Furchtgott-Roth**
Senior Fellow , Hudson Institute

Testimony on Behalf of Judge John Roberts
To Be Chief Justice of the Supreme Court

Diana Furchtgott-Roth
Senior Fellow, Hudson Institute

Senate Committee on the Judiciary
September 15, 2005

Testimony on Behalf of Judge John Roberts
To Be Chief Justice of the Supreme Court

Mr. Chairman, members of the Committee, I am honored to be invited to testify before your Committee today on the subject of Judge John Roberts and his record on women's economic issues. I have followed and written about these issues for many years.

Currently I am a senior fellow at Hudson Institute, where I direct the Center for Economic Policy. From February 2003 until April 2005 I was chief economist at the U.S. Department of Labor. From 2001 until 2003 I served at the Council of Economic Advisers as chief of staff and special adviser. Previously, I was a resident fellow at the American Enterprise Institute.

Among the thousands of pages of Reagan-era documents released by the White House on Judge Roberts, one issue that has some observers concerned is his attitudes towards women. I believe that Judge Roberts's record is supportive of women, and that the policies he advocated are in women's best interests.

Women made extraordinary progress during President Reagan's presidency. President Reagan's goals of spurring economic growth by lowering taxes and reducing regulation were extremely popular, and he was reelected with over 60 percent of the vote in 1984. He received a mandate to lower individual taxes even further, and with the Tax Reform Act of 1986 the top rate fell to 28 percent. This caused the marginal income tax rate for the median family to fall from 24 percent in 1980 to 15 percent at the end of his presidency. For those at twice the median income, the marginal tax rate fell from 43 to 28 percent.

As taxes were reduced and regulations were made more efficient, the economy expanded. Women were some of the main beneficiaries of that economic growth. In the 1980s women moved into the workforce in increasing numbers, with the percent of adult women participating in the labor force rising from 51 to 58 percent. At the same time, unemployment rates for women fell from 6.4 to 4.9 percent. Women's salaries relative to men's grew faster than in any decade in U.S. history.

In education, women made vast strides. By 1990 women were earning over half of all BA and MA degrees. The percent of MBAs awarded to women grew from 22 to 34 percent. More women became doctors, and the percent of medical degrees awarded to women increased by over 10 percentage points, from 23 to 34 percent. The percentage of female dentistry graduates increased even faster, by almost 20 percentage points, from 13 to 31 percent. By 1990 women were earning 42 percent of law degrees, up from 30 percent in 1980.

Now, in 2005, the United States leads the industrialized world in job creation, and unemployment rates for both adult men and women, at 4.9 percent in August, are among the lowest. In contrast,

unemployment rates for women in most other countries are far higher. Last July, the latest month for which comparable data are available, while American women had an unemployment rate of 5.2 percent, unemployment rates for women in the Eurozone were 10.1 percent; in France, 10.7 percent; in Germany, 10.2 percent; and in Spain, 12.4 percent. Only Japan and the UK had lower rates than the United States, and their economies are characterized by slower rates of GDP growth.

Even though women were so successful in the 1980s, some are concerned about Judge Roberts's views on comparable worth. Some believe, with the best of intentions, that if comparable worth had been implemented women would have made even more progress. That concern is misplaced: comparable worth is a thoroughly discredited economic concept.

Comparable worth does not mean equal pay for equal work, which is already law, and which is the principle that President Reagan and Judge Roberts supported. Instead, comparable worth signifies equal pay for entirely different jobs based on categories of employees determined by government officials. Comparable worth's supporters claim that it is unfair that some predominantly male occupations—such as sewer workers—are paid more than some predominantly female ones—such as clerical specialists.

As Judge Roberts correctly wrote, this amounts to "nothing less than central planning of the economy." For better or for worse, our economic system rewards American workers on the basis of how much the public values their service and is actually willing to pay for their service, not based on how much officials say it is worth.

Some support comparable worth because, 40 years after the Equal Pay Act, average full-time female workers' wages are about 80 percent of men's. However, this so-called wage gap is not necessarily due to discrimination. Within each job category, men and women with the same skills and experience are paid about the same for equal work, as required by law. Individuals who believe that they are being paid less than colleagues for the same work can and do sue.

Decisions about field of study, occupation, and time in the workforce can lead to lower compensation, both for men and women. Those who choose college majors in the humanities rather than in the sciences tend to earn less. Many women choose humanities majors, and will for that reason make less than both me and women who choose to major in computer science. On the other hand, those women who choose computer science and engineering have higher incomes than both men and women who major in the humanities.

Men and women who take time out of the workforce to look after children, and in order to do so choose jobs with fewer hours or more flexible schedules, frequently have lower incomes than those who stay in the workforce continuously and work longer hours. Some choose not to return to paid work, preferring to be homemakers. Employers naturally compensate workers who have taken time out of the work force less than workers who remain constantly in the work force, increasing their skills and their value to the employer. A choice of more time out of the workforce with less money rather than more time in the workforce with more income is not a social problem. A society that provides women with these choices, as does ours, is something to applaud.

One way to reduce the so-called wage gap further would be adopt comparable worth--mandate that occupations employing primarily men are paid the same as those with a majority of female workers. Some jobs command more than others because people are willing to pay more for them.

Many jobs are dirty and dangerous, such as oil drilling, construction work, mining, and roofing. Other highly paid occupations have long inflexible hours, such as truckers, plumbers, and electricians. According to data from the Bureau of Labor Statistics, these jobs are primarily performed by men. Women are not excluded from these or other jobs, but often select professions with a more pleasant environment and potentially more flexible schedules, such as teaching and office work. Many of these jobs pay less.

Proponents of wage guidelines, such as the National Committee on Pay Equity, cite approvingly on their websites examples of where comparable worth has been used. One example cited was in Hawaii in 1995, where nurses, mostly female, were given $11,500 annual raises to bring their salaries in line

with those of adult corrections workers, mostly male. But working conditions in prisons are far more dangerous and unpleasant than the atmosphere in hospitals. Another example cited was in Oregon, where female clerical specialists were given raises of over $7,000 a year to bring them in line with male senior sewer workers. Everyone, given a choice of working in an office or a sewer at the same salary, would choose the office. You have to pay people more to work with and in sewers.
Comparable worth has never been imposed on the private sector in the United States. The Sixth, Seventh, Ninth, and Tenth Circuits have all rejected comparable worth. Regardless of which party controlled Congress or the White House, Congress has never passed comparable worth legislation. Only a few state and local governments have chosen to implement wage guidelines on their public-sector workers. Most state and local governments have not adopted wage guidelines because they make no economic sense. Moreover, those governments that have adopted it incur additional costs. The extra funding for increased women's salaries comes from taxpayers and does not cause the governmental entity to go out of business. Requiring private businesses to adopt comparable worth would be far more detrimental in terms of firms either going out of business or relocating overseas. Women's progress in the 1980s would have been hampered by comparable worth. Comparable worth would have worked against women, because artificially high wages would have prevented them from being hired. When wages get too high, employers cut back on numbers of workers. Comparable worth assumes that workers cannot ever succeed in certain fields on their own.
Some observers have criticized Judge Roberts because they disagree with memoranda he wrote on Title IX and college athletics in the early 1980s. In particular, Judge Roberts wrote in 1982 that Title IX only applied to specific programs receiving Federal aid within an educational institution, and not to all the programs in that educational institution.
However, this was what Title IX required at the time, as corroborated by the Supreme Court in 1984 in Grove City College v Bell. The Supreme Court ruled that, under Title IX, only the program that actually received Federal funds, rather than the entire college or university, need comply with Title IX. As I describe in my book, The Feminist Dilemma: When Success Is Not Enough,
"The six to three opinion effectively prevented the Office of Civil Rights of the Department of Education from investigating a college athletic department for Title IX violations unless that department was the direct recipient of Federal funds, which most were not."

In writing about Title IX, Judge Roberts argued persuasively that the executive branch and regulatory agencies should comply with Congress's direction. He correctly wrote in a 1982 memo that "Congress elected to make the anti-discrimination provisions of Title IX program-specific, and the arguments properly rejected by the district court - - which we would repeat if we appealed - -would essentially nullify this limitation. The women's groups pressuring us to appeal would have regulatory agencies usurp power denied them by Congress to achieve an anti-discrimination goal."

A few years later Congress changed this law by passing the Civil Rights Restoration Act of 1987. The new law required that all programs had to comply with Title IX if the institution received any Federal money. Had this law been in place in 1982, Judge Roberts's memo would have been different. Judge Roberts was in a position where he was required to report on jurisprudence at the time, not in the future.
Wage guidelines and the wording of anti-discrimination laws are not a decision for judges, but for members of the Congress of the United States. It is members of Congress who decide on the laws and give the executive branch the authority to design and implement regulations. Therefore it would be up to you, Senators, to evaluate the costs and benefits of the issues discussed above. Should he be confirmed as Chief Justice, Judge Roberts's role would be to interpret laws and adjudicate disputes concerning laws you were to pass. Hence, his views on a wide range of issues have no effect on whether these ever become the law of the land.
All Americans, men and women, have made enormous progress because our country is governed by

the rule of law—laws that this august body writes. Fifty years ago, it was lawful to pay men and women different salaries for identical work. Today it is not lawful because of anti-discrimination laws, laws that Judge Roberts supported. Fifty years ago, it was lawful to have different job categories and different promotion criteria for men and women. Jobs were actually advertised in the newspaper with one salary for men and another for women. Today, such discrimination is rightfully unlawful. Laws were changed to protect women, not because individuals in the executive branch or the judiciary rewrote the laws, but because Congress rewrote the laws. In turn, the executive branch and judiciary implemented and interpreted the laws as written by Congress.

I have seen nothing in Judge Roberts's writings with respect to issues affecting women other than reverence and fealty for the law. That fealty to the law gives all Americans, including women, confidence that America will be governed by the rule of law. That is how we progressed in the past, and how we will continue to progress in the future.

Thank you for giving me the opportunity to appear before you today. I would be glad to answer any questions.

**jurisprudence**

# Improper Advances

Talking dream jobs with the judge out of court.

By Stephen Gillers, David J. Luban, and Steven Lubet

Posted Wednesday, Aug. 17, 2005, at 11:50 AM PT

Four days before President Bush nominated John G. Roberts to the Supreme Court on July 19, an appeals court panel of three judges, including Judge Roberts, handed the Bush administration a big victory in a hotly contested challenge to the president's military commissions. The challenge was brought by Salim Ahmed Hamdan, a Guantanamo detainee. President Bush was a defendant in the case because he had personally, in writing, found "reason to believe" that Hamdan was a terrorist subject to military tribunals. The appeals court upheld the rules the president had authorized for these military commissions, and it rejected Hamdan's human rights claims—including claims for protection under the Geneva Conventions.

At the time, the close proximity of the court's decision and the Roberts nomination suggested no appearance of impropriety. Roberts had been assigned to hear the appeal back in December, and it was argued on April 7. Surely he had decided the case long before the administration first approached him about replacing Supreme Court Justice Sandra Day O'Connor, who had announced her retirement on July 1. As it turns out, however, the timing was not so simple.

The nominee's Aug. 2 answers to a Senate questionnaire reveal that Roberts had several interviews with administration officials contemporaneous with the progress of the *Hamdan* appeal. One occurred even before the appeal was argued. Attorney General Alberto Gonzales interviewed the judge on April 1. Back then, it was an ailing Chief Justice William H. Rehnquist, not Justice O'Connor, who was expected to retire. The attorney general, of course, heads the Justice Department, which represents the defendants in Hamdan's case. And as White House counsel, Gonzales had advised the president on the requirements of the Geneva Conventions, which were an issue in the case.

The April interview must have gone quite well because Roberts next enjoyed what can only be labeled callback heaven. On May 3, he met with Vice President Dick Cheney; Andrew H. Card Jr., the White House chief of staff; Karl Rove, Bush's chief political strategist; Harriet Miers, the White House legal counsel; Gonzales; and I. Lewis Libby, the vice president's chief of staff. On May 23, Miers interviewed Judge Roberts again.

Hamdan's lawyer was completely in the dark about these interviews until Roberts revealed them to the Senate. (Full disclosure: Professor Luban is a faculty colleague of Hamdan's principal lawyer.) Did administration officials or Roberts ask whether it was proper to conduct interviews for a possible Supreme Court nomination while the judge was adjudicating the government's much-disputed claims of expansive presidential powers? Did they ask whether it was appropriate to do so without informing opposing counsel?

If they had asked, they would have discovered that the interviews violated federal law on the disqualification of judges. Federal law deems public trust in the courts so critical that

it requires judges to step aside if their "impartiality might reasonably be questioned," even if the judge is completely impartial as a matter of fact. As Justice John Paul Stevens wrote in a 1988 Supreme Court opinion, "the very purpose of [this law] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." The requirement of an appearance of impartiality has been cited in situations like the one here, leading to the disqualification of a judge or the reversal of a verdict.

In 1985, a federal appeals court in Chicago cited the requirement of the appearance of impartiality when it ordered the recusal of a federal judge who, planning to leave the bench, had hired a "headhunter" to approach law firms in the city. By mistake—and, in fact, contrary to the judge's instructions—the headhunter contacted two opposing firms in a case then pending before the judge. One firm rejected the overture outright. The other was negative but not quite as definitive. Writing for the Court of Appeals, Judge Richard A. Posner emphasized that the trial judge "is a judge of unblemished honor and sterling character," and that he "is accused of, and has committed, no impropriety." Nevertheless, the court ordered the judge to recuse himself because of the appearance of partiality. "The dignity and independence of the judiciary are diminished when the judge comes before lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary." Although both law firms had refused to offer him employment, the court held that "an objective observer might wonder whether [the judge] might not at some unconscious level favor the firm … that had not as definitively rejected him."

In the fall and winter of 1984, a criminal-trial judge in the District of Columbia was discussing a managerial position with the Department of Justice while the local U.S. attorney's office—which is part of the department—was prosecuting an intent-to-kill case before him. Following the conviction and sentence, the judge was offered the department job and accepted. On appeal, the United States conceded that the judge had acted improperly by presiding at the trial during the employment negotiations. It argued, however, that the conviction should not be overturned. The appeals court disagreed. Relying on Judge Posner's opinion in the Chicago case, as well as the rules of judicial ethics, the court vacated the conviction even though the defendant did not "claim that his trial was unfair or that the [the judge] was actually biased against him." The court was "persuaded that an objective observer might have difficulty understanding that [the judge] did not … realize … that others might question his impartiality."

So, the problem in *Hamdan* is not that Roberts may have cast his vote to improve his chances of promotion. We believe he is a man of integrity who voted as he thought the law required. The problem is that if one side that very much wants to win a certain case can secretly approach the judge about a dream job while the case is still under active consideration, and especially if the judge shows interest in the job, the public's trust in the judiciary (not to mention the opposing party's) suffers because the public can never know how the approach may have affected the judge's thinking. Perhaps, as Judge Posner wrote, the judge may have been influenced even in ways that he may not consciously recognize.

A further complication here is that Roberts' vote was not a mere add-on. His vote was decisive on a key question of presidential power that now confronts the nation. Although all three judges reached the same bottom line in the case, they were divided on whether the Geneva Conventions grant basic human rights to prisoners like Hamdan who don't qualify for other Geneva protections. The lower court had held that some provisions do. Judge Roberts and a second judge rejected that view. The third judge said Geneva did apply, but found it premature to resolve the issues it raised. Hamdan has since asked the Supreme Court to hear the case.

Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position. The government litigates too many cases for that to make any sense. But Hamdan was not merely suing the government. He was suing the president, who had authorized the military commissions and who had personally designated Hamdan for a commission trial, explaining that "there is reason to believe that [Hamdan] was ... involved in terrorism."

Moreover, the *Hamdan* appeal is the polar opposite of routine for at least two reasons. First, its issues are central to the much-disputed claims of broad presidential power in the war on terror. Second, the court's decision on the Geneva Conventions has a spillover effect on the legality of controversial interrogation techniques used by the government at Guantanamo and elsewhere. That is because the same provision of the Geneva Conventions that would protect Hamdan from unfair trials also protects detainees from cruel, humiliating, or degrading treatment. The D.C. Circuit's decision rejecting the Geneva Conventions' trial protections—a decision that hinged on Roberts' vote—also strips away an important legal safeguard against cruel and humiliating treatment that may fall just short of torture.

Given the case's importance, then, when Gonzales interviewed Roberts for a possible Supreme Court seat on April 1, the judge should have withdrawn from the *Hamdan* appeal. Or he and Gonzales, as the opposing lawyer, should have revealed the interview to Hamdan's lawyer, who could then have decided whether to make a formal recusal motion. The need to do one or the other became acute—indeed incontrovertible—when arrangements were made for the May 3 interview with six high government officials. (We don't know how long before May 3 the arrangements were made.)

We do not cite these events to raise questions about Roberts' fitness for the Supreme Court. In the rush of business, his oversight may be understandable. What is immediately at stake, however, is the appearance of justice in the *Hamdan* case and the proper resolution of an important legal question about the limits on presidential power. Although the procedural rules are murky, it may yet be possible for Judge Roberts to withdraw his vote retroactively. That would at least eliminate the precedential effect of the opinion on whether the Geneva Conventions grant minimum human rights to Hamdan and others in his position. Better yet, the Supreme Court can remove the opinion's precedential effect by taking the *Hamdan* case and reversing it.

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September 6, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

We are writing in response to letters sent to you by Professors Thomas Morgan and Ronald Rotunda. In these letters, the professors disagree with our view (offered in a Slate magazine article) that Judge John Roberts should have recused himself in *Hamdan v. Rumsfeld*. We have great respect for Professors Morgan and Rotunda and recognize their eminence and expertise in legal ethics. But after carefully studying their arguments, we conclude that they fail to deal accurately with the precedents we cited in our Slate article. In addition, other authorities, which space constraints did not allow us to discuss in Slate, further support the conclusion we reached there. We have seen no authority that contradicts that conclusion.

We believe that the Senate should have a complete and accurate understanding of these issues, and for that reason we explain why the contrary views of Professors Morgan and Rotunda are wrong. In short, Judge Roberts should have recused himself in Hamdan without being asked to do so; failing which, he should have given Mr. Hamdan's lawyers the opportunity formally to seek his recusal if so advised or to waive their right to do so. We are *not* commenting on Judge Roberts's fitness to be Chief Justice of the Supreme Court. As we said in Slate, we do not doubt Judge Roberts's integrity.[1] Nor do we question his judicial temperament or legal abilities.

Our concern may be stated quite simply. Judge Roberts was interviewing for a Supreme Court seat with top White House officials, including Attorney General Alberto

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[1] The article is Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs With the Judge Out of Court*, Slate.com, August 17, 2005, available at http://www.slate.com/id/2124603/. We wrote: "We believe he [Judge Roberts] is a man of integrity who voted as he thought the law required." We also wrote: "We do not cite these events to raise questions about Roberts' fitness for the Supreme Court."

Gonzales, during the pendency of a case in which President Bush is a defendant. The Attorney General's Department is representing him and the other government defendants. Judge Roberts did not disclose these interviews until after *Hamdan* was decided and he had been nominated to the Court. This unusual state of affairs means that his impartiality in *Hamdan* might reasonably be questioned. When a judge's impartiality might reasonably be questioned, federal law requires the judge to recuse himself – even if *in fact* the judge is completely impartial. As the Supreme Court and lower federal courts have repeatedly said, this law, 28 U.S.C. § 455(a), serves the important purpose of maintaining public confidence in the fairness of our courts. As we will show, case law and judicial ethics opinions uniformly support our analysis.

Professors Morgan and Rotunda offer three main objections to our reasoning. First, they object that a rule requiring judges being considered for promotion to recuse themselves from important cases involving the government would disqualify far too many judges in far too many cases. Second, they disagree that legal authority supports our position. Third, they believe that we have substituted a vague charge of "appearance of impropriety" for the actual standard in the law. As we now explain, none of their objections correctly represents what the law requires.

Section 455(a) reads: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This broadly-worded standard does not spell out when a judge's impartiality might reasonably be questioned. Like all "reasonableness" standards in the law, it requires a fact-specific, case by case inquiry. This is the law Congress passed long ago. It applies to all federal judges. It has been construed in hundreds of cases in light of the facts of those cases, sometimes resulting in recusal. Those cases give content to the congressional standard.

Instead of addressing this statute directly, Professor Rotunda recharacterizes its test. He finds fault with something he labels the "Gillers Rule," which he describes this way: "a judge who learns that he is being considered for an appointment to the U.S. Supreme Court [must] recuse himself from cases where the Government represents one side, and that case is, in Gillers' words, 'hotly contested'" (Rotunda letter, p. 7). But nothing resembling this rule, or any other proposed rule, appears in our article. For good reason: the task is not to concoct rules but to apply Section 455(a) as Congress wrote it. It is, after all, the standard that Congress adopted and the President signed into law. Rather than reading some hypothetical "rule" into the standard, we far prefer the traditional, fact-specific approach of the common law. This has been the approach of the federal courts. Our conclusion, drawing on cases interpreting this standard, discussed below, was that Judge Roberts's impartiality might reasonably be questioned because of specific and highly unusual facts:

(1) Judge Roberts's first interviewer was Attorney General Gonzales, who had personally drafted a widely-publicized memo to the President advising him of the

inapplicability of the Geneva Conventions to suspected Al Qaeda members.[2] As it happens, the inapplicability of the Geneva Conventions to suspected Al Qaeda members is one of the issues *Hamdan* decided – with Judge Roberts casting a deciding vote for the position that Mr. Gonzales recommended to the President. Judge Roberts met with Mr. Gonzales just six days before the oral argument in *Hamdan*. When he heard the arguments, therefore, Judge Roberts had just been reminded that a possible Supreme Court appointment might hinge on Mr. Gonzales's assessment of him. The likelihood of a vacancy on the Court was widely regarded as great at that time because of the late Chief Justice Rehnquist's ultimately fatal illness. We reiterate that we are not accusing Judge Roberts of bias. Our point is only that, in the words of the law, "his impartiality might reasonably be questioned."

(2) As Attorney General, Mr. Gonzales heads the Department of Justice, and it was Department of Justice lawyers who defended the *Hamdan* case. This places Judge Roberts in the posture of discussing a possible Supreme Court appointment with the head lawyer of the "firm" (the Department of Justice) litigating a case before him – a head lawyer who previously gave his legal opinion to the president on a central issue in the case.

(3) Contrary to Professors Morgan and Rotunda, *Hamdan* was not merely a case that was "'important' to the Administration" or "hotly contested" (Morgan letter, p. 2; Rotunda letter, p. 7). President Bush was a named defendant in *Hamdan*. Nor was the President a named defendant only as a formality. President Bush created the military commissions at issue in *Hamdan* by executive order. On February 7, 2002 he personally declared in writing that the Geneva Conventions do not apply to alleged Al Qaeda members. And President Bush declared in writing that there is reason to believe that Mr. Hamdan is an Al Qaeda member engaged in terrorism, who therefore qualifies for trial before a military tribunal. In other words, the President is a defendant in the case because of official actions that he himself took – not because of mere formalities.

(4) Although President Bush did not interview Judge Roberts for the Supreme Court vacancy until some hours after the *Hamdan* decision came down, the numerous interviews prior to the decision were with the President's top aides and advisors, including Vice President Cheney, Chief of Staff Andrew H. Card, Jr., Vice President Cheney's Chief of Staff I. Lewis Libby, White House Counsel Harriet Miers, and Deputy Chief of Staff Karl Rove.

Taken together, these facts show that Judge Roberts was interviewing with top aides of a defendant in a case before his court, including the chief lawyer responsible for

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[2] Memorandum for the President (Draft), from Alberto Gonzales, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban, January 25, 2002.

defending that case, when the defendant had the sole power to nominate him to the Supreme Court. Furthermore, in this situation both the defendant and the lawyer have a real involvement in the issues of the case, not merely a nominal involvement; and the defendant is focused on the appointment to a greater extent than other judicial appointments. Even if every White House official who interviewed Judge Roberts carefully avoided the topics in the *Hamdan* case, with no hint of an improper suggestion to the judge about how the case should come out, the pressure on the judge not to disappoint or frustrate the President and his advisors is inherent in the situation itself. Any reasonable person would question whether a judge, even with the best will in the world, can impartially consider arguments that, if accepted, would frustrate and disappoint the person who holds the judge's promotion to the Supreme Court in his hands. The law requires recusal because the public does not expect judges to have superhuman abilities to ignore their own aspirations.

Contrary to Professor Rotunda, recusal is the result uniformly endorsed by the legal authorities. In our article, we described two leading cases in which judges were forced to recuse themselves because they had discussed possible future employment with the parties or lawyers while cases were pending. These decisions (which we did not identify by name in the article) are *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) and *Scott v. United States*, 559 A.2d 745 (D.C. 1989). In the first, Judge Richard A. Posner held that a judge who wished to leave the bench and return to private practice was forced to recuse himself from a case after his headhunter, contrary to the judge's instructions, contacted law firms litigating the case. In the second, a criminal conviction was thrown out because during the trial the judge was discussing a job with the Department of Justice, which was prosecuting the case. The Department of Justice conceded that these negotiations violated judicial ethics rules. According to Professor Morgan, these cases "break no new ground and provide no new insights relevant to this discussion." (Morgan letter, p. 2.) However, that is precisely the point: far from breaking new ground, these cases squarely represent the state of the law.

Professor Rotunda points to language in *Scott* that says, "By December 23, 1984, *when he had decided to accept the position* in the Executive Office for United States Attorneys, the judge had a duty to recuse himself...." *Scott*, 559 A.2d at 755 (Professor Rotunda's emphasis). Professor Rotunda believes that this means the judge had no duty to recuse himself until he had decided to accept the job – and, by analogy, Judge Roberts had no duty to recuse himself until he had been offered, and decided to accept, the Supreme Court nomination. However, this is a badly mistaken reading of *Scott*, which explicitly says that the violation of the recusal standard occurred "when the trial judge who is presiding at the prosecution by the United States Department of Justice through the United States Attorney's Office is actively negotiating for employment with the Department's Executive Office for United States Attorneys." *Scott*, 559 A.2d at 750. Indeed, the court's holding in *Scott* reiterates this conclusion: "we hold that Judge Murphy violated Canon 3(C)(1) when he presided at Scott's trial *while he was actively seeking employment* with the Executive Office for United States Attorneys." *Scott*, 559

A.2d at 750 (our emphasis).[3]

Additional authorities reach the same conclusions. In *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262-63 (5th Cir. 1990), the Fifth Circuit Court of Appeals found that a judge should have retroactively recused himself and vacated two rulings when he thereafter accepted a job with a law firm representing one party in the case – even though he had no knowledge of the job prospect when he issued the rulings. A second panel reconsidering the case reached the identical conclusion. *In re Continental Airlines Corp.*, 981 F.2d 1450, 1462 (5th Cir. 1993). And Advisory Opinion 84 of the U.S. Judicial Conference's Committee on Codes of Conduct (1990; reviewed 1998) states that whenever a judge discusses future employment with a law firm, "no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned." The Opinion adds: "The principles discussed would apply by analogy to other potential employers."[4]

Professor Morgan responds that "[a] judge's promotion within the federal system has not been – and should not be – seen as analogous to exploration of job prospects outside of the judiciary" (Morgan letter, p. 2). But the Committee on Codes of Conduct disagrees. The Committee's Advisory Opinion 97 (1999) discusses the reappointment of magistrate judges. Magistrates are reviewed for reappointment by a selection panel. The Committee writes:

> "An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1) the magistrate judge is required to recuse in such a case."

Clearly, a circuit judge being considered for a Supreme Court appointment is equally "aware that his or her past service as a judge is being carefully reviewed and scrutinized."

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[3] Canon 3(C)(1) is the recusal rule in the ABA's Code of Judicial Conduct, which the court notes is substantially similar to Section 455(a). *Scott*, 559 A.2d at 749, note 8. It was subsequently adopted in the official Code of Conduct for United States Judges. See http://www.uscourts.gov/guide/vol2/ch1.html#3

[4] The Committee's Advisory Opinions are available at http://www.uscourts.gov/guide/advisoryopinions.htm

And so, by the reasoning of this opinion, the circuit judge is required to recuse in any case involving an attorney or party who is directly involved in the process of selecting the Supreme Court nominee. The Committee reached the same result in an informal Advisory Opinion issued in 1992. It concerns a judge on the U.S. Military Court of Appeals, nearing the end of her 15-year-term, who sought recommendation by the Department of Defense for reappointment. The Committee on Codes of Conduct found that the judge was required to recuse herself from a high-profile case in which the Defense Department was a party.[5] If mere reappointment to the judiciary raises reasonable questions about impartiality, promotion to the Supreme Court obviously does as well.

Against the unanimous weight of these opinions and decisions, Professor Rotunda cites "[t]he case that seems most on point" in his view, *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich. 1978), in which a judge declined to recuse himself from a case. However, *Baker* concerns an entirely different issue: personal friendship between a judge and a litigant. In the words of the judge in *Baker*, "The crux of plaintiffs' claim is that this Court...should recuse itself from presiding at the trial of this case because of the friendship between myself and Coleman A. Young, Mayor of the City of Detroit and a nominal party to this action." 458 F.Supp. at 375. One basis of the friendship (not the only one he mentions) is that Mayor Young had been a member of a panel that recommended Judge Keith for promotion to circuit judge. But at the time of the recusal ruling, that recommendation had already been made, and indeed Judge Keith had already been appointed Circuit Judge. Thus, in the relevant time period, Mayor Young no longer had any role to play in Judge Keith's promotion. *Baker* therefore has nothing at all to do with the question of whether a judge must recuse himself when a litigant is in a position to appoint him to a job he very much wants.

Finally, we wish to comment briefly on Professors Morgan and Rotunda's objection to the "appearance of impropriety" standard, which they believe adds nothing, is too vague and misstates Section 455(a). We find this criticism puzzling, because our article never used the phrase "appearance of impropriety," except once in a direct quote from a Supreme Court opinion. We did use the phrase "appearance of impartiality," which is far less vague than the all-purpose word "impropriety," and which has appeared in scores of federal court cases discussing Section 455(a). Section 455(a) speaks of proceedings in which a judge's "impartiality might reasonably be questioned" – in other words, proceedings that might *appear* to a reasonable person to violate impartiality, whether or not they actually do. As one distinguished court writes, "we join our sister circuits in concluding that an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be

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[5] The opinion is published in 5 Military Justice Gazette (January 1993), in MILITARY JUSTICE GAZETTE: THE FIRST TEN YEARS 1-2 (National Institute of Military Justice 2001).

demonstrated to compel recusal under section 455." *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981). With all due respect, Professors Morgan and Rotunda are engaged in semantic quibbling over the word "appearance." Nothing in our reasoning depends on the phraseology. Our conclusions depend only on Section 455(a), the facts of the case, and the authorities we cite. Professor Rotunda argues at great length that the ABA and other rule-writers have rejected "appearance of impropriety" standards. But Professor Rotunda's scholarly demonstration is entirely beside the point, because it pertains only to rules governing practicing lawyers, not judges. Canon 2 of the ABA's Code of Judicial Conduct, like the Code of Conduct for United States Judges, continues to state that "A judge shall avoid impropriety *and the appearance of impropriety* in all of the judge's activities" (emphasis added).

In conclusion, we find that Professors Morgan and Rotunda have not adequately conveyed the remarkable consensus among distinguished authorities that a judge being interviewed for a desirable job must recuse himself from cases involving the interviewers, whether they are parties or lawyers (or, as specified in Canon 3D of the Code of Conduct for United States Judges, obtain written permission to remain in the case from all parties, after disclosure on the record of the basis for disqualification). Nor have they focused on the specific facts that place Judge Roberts's situation, from April through mid-July, squarely within the ambit of the federal law requiring him to disqualify himself. We hope this letter is of use to you and your Committee.

Yours very truly,

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cc: Senator Patrick Leahy

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HEADLINE: Roberts' bad decision

BYLINE: Stephen Gillers, David Luban and Steven Lubet, STEPHEN GILLERS is a professor of law at New York University; DAVID J. LUBAN is a professor of law and philosophy at Georgetown University (and a faculty colleague of Hamdan's attorney) and STEVEN LUBET is a professor of law at Northwestern University.

BODY:

JUST FOUR DAYS before the Bush administration named John G. Roberts Jr. to fill retiring Justice Sandra Day O'Connor's seat on the Supreme Court, the District of Columbia federal appeals court decided a case called Hamdan vs. Rumsfeld. In a crucial victory for the administration, the court upheld President Bush's creation of special military tribunals for trials of alleged terrorists and denied them the protection of the Geneva Convention. Roberts was one of the judges who decided that case, but he should have recused himself.

While the case was pending in his court, Roberts was interviewing with high White House officials -- including Atty. Gen. Alberto R. Gonzales, Vice President Dick Cheney and Deputy Chief of Staff Karl Rove -- for a seat on the Supreme Court. In the words of the federal law on judicial disqualification, this placed the judge in a situation where "his impartiality might reasonably be questioned."

It is not too late to correct this error, and with Roberts slated to become the next chief justice, it is especially important that he do so.

In Hamdan vs. Rumsfeld, a three-judge panel upheld the use of military tribunals to try detainees held at the U.S. base in Guantanamo Bay, Cuba. But the decision didn't stop there. Roberts and a second judge also ruled that the Geneva Convention -- which guarantees basic human rights -- does not protect alleged Al Qaeda members. The third judge disagreed on the question of the Geneva Convention. Thus, Roberts cast a deciding vote on an issue of central importance to the president, just as administration aides were holding out the possibility that the president might choose him for a place on the highest court in the American legal system.

Previous federal cases, as well as advisory opinions of the Judicial Conference of the United States (the official policymaking body for the federal judiciary), have uniformly held that a judge must recuse himself when a lawyer in a case or a party to it is in a position to influence the judge's job prospects. In some instances, the judge was considering leaving the bench to work as a lawyer. In others, the judge was seeking reappointment within the judiciary.

Some legal scholars have defended Roberts' participation in the Hamdan case, arguing that it would be impractical and unnecessary to require Supreme Court hopefuls to recuse themselves in any case in which the federal government is party. That makes sense as a general proposition -- after all, administrations usually cast a wide net for potential nominees, and the process may take months. But the Hamdan case was no ordinary appeal.

First, Bush was a defendant in the case, because he had signed orders setting up the military commissions and removing them from the coverage of the Geneva Convention (following the advice of Gonzales, then the White House counsel). The president had also personally determined that there was reason to believe that Hamdan was an Al Qaeda member engaged in terrorism, and thus was outside the Geneva Convention's protection. Secondly, the Hamdan case set a precedent for interrogations and trials of other Guantanamo detainees. By rejecting the Geneva Convention's protections, the case eliminates an important legal safeguard against humiliating or degrading treatment of prisoners.

No doubt during his interviews for the Supreme Court, Roberts avoided all discussion of pending cases. But conflict of interest can be about appearance as much as reality. A reasonable person may wonder whether a judge, even with the best of intentions, could remain impartial in those circumstances.

Let us be clear that we do not question Roberts' integrity, or his qualifications to serve on the Supreme Court. We believe that he decided the Hamdan case as he thought the law required. We do think, however, that he erred by continuing to sit in the case. Even if he considered disqualifying himself but decided against it, he should at least have notified Hamdan's attorneys once the administration showed serious interest in promoting him to the Supreme Court. That would have given them an opportunity to file a formal recusal motion and argue the point.

As chief justice of the United States, Roberts will set the standard for recusal throughout the federal judiciary. It is regrettable that he failed to disqualify himself in the Hamdan case (or notify counsel), but that need not diminish his distinguished record.

Roberts can now demonstrate his leadership by retroactively withdrawing his vote in the case -- the procedural rules are arcane, but other judges have recalled or vacated their opinions on the basis of new information or arguments. That would leave the crucial issue -- whether the president must honor the Geneva Convention in the treatment of detainees -- for decision on another day.

UNITED STATES SENATOR • IOWA
CHUCK GRASSLEY

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Prepared Statement of Senator Chuck Grassley of Iowa
Senate Committee on the Judiciary
The Nomination Hearing of John G. Roberts, Jr. to be Chief Justice
of the United States Supreme Court
Monday, Sept. 12, 2005

Judge Roberts, welcome to the Judiciary Committee and congratulations on your nomination. With the passing of Chief Justice William Rehnquist, President Bush has sent your name up to replace him on the Court. I think it is fitting that you've been nominated to replace your mentor. Judge Roberts, you have a tough act to follow. Chief Justice Rehnquist was a great Supreme Court Justice. He believed in the strict application of the law and the Constitution, and was a consistent voice for judicial restraint. We will all miss his leadership on the Court.

Judge Roberts, we had a good personal meeting in my office a little over a month ago. Based on our discussions and what I've reviewed, you appear to be extremely well qualified. At our meeting, I was encouraged by your respect for the limited role of the courts as an institution in our democratic society. I look forward to asking you more about your record and qualifications, as well as your judicial approach. I also look forward to asking you about what you think are priorities for the federal judiciary, as you will be the head of that branch of government.

Of course, as we reflect on the enormous build up to this day and the packed hearing room filled with media lights and cameras, it's worth recalling the fact that judicial nominees never appeared before the Senate until 1925. Even since then, for the most part, the hearings weren't public spectacles. In 1962, for example, when Byron White was nominated to the Supreme Court by President Kennedy, the hearing before the Judiciary Committee lasted all of 15 minutes and eight questions. And Justice White served for 30 years.

During the Ginsburg nomination, Senator Biden - then the Chairman of the Judiciary Committee - urged that we not treat these hearings as "make or break trials" of "dramatic importance". I agree.

Rather, the hearing provides a unique opportunity for us to ensure that each person appointed to the federal bench will be a true judge, and not a "super-legislator". The courts should not be made up of seats designated for conservative, liberal or moderate judges. Rather, we have a responsibility to fill the federal bench with individuals who will faithfully interpret the

laws and Constitution - individuals who will withhold any personal, political or ideological tendencies from their decision-making process. And this is even more important when we are confirming nominees to the Supreme Court.

There are a number of qualities that I've looked for in a Supreme Court nominee. I believe that the nominee should be someone who knows he or she is not appointed to impose his or her views of right and wrong. As Chief Justice Marshall said over 200 years ago, the duty of the judge is to say what the law "is", not what it "ought to be". Moreover, the nominee should be someone who not only understands, but truly respects the equal roles and responsibilities of the different branches of government and the States. If we confirm a nominee who is all this, none of us - on the political right or left - will be disappointed, because it will mean that the people, through their elected representatives, will be in charge. On the other hand, if we confirm individuals who are bent on assigning to themselves the power to "fix society's problems" as they see fit - a bare majority of these nine unelected and unaccountable men and women will usurp the power of the people - hijacking democracy to serve their own personal prejudices. We do not want to go down that road. We should not go down that road.

Why is it so important to have Supreme Court Justices practice judicial restraint? Because that means the policy choices of the democratic-elected branches of government will only be overturned if and when there is clear warrant to do so in the Constitution itself. We want Supreme Court Justices to exercise judicial restraint so that cases will be decided solely on the law and the principles set forth in the Constitution, and not upon an individual Justice's personal philosophical views or preferences. Felix Frankfurter identified this as the highest example of judicial duty. A fundamental principle of our country is that the majority has a legitimate right to govern. This approach hardly means that courts are less energetic in protecting individual rights. But the words of the Constitution constrain judges every bit as much as they control legislators, executives, and citizens. Otherwise, we are no longer a nation of laws, but a nation of politicians dressed in judges' robes.

During my tenure here in the Senate, I've participated in a number of these Supreme Court nomination hearings - nine to be exact. I'm hopeful that we will see a dignified confirmation process that will not degenerate into what we saw during the Bork and Thomas hearings. Rather, we need to see the same level of civility as during the O'Connor, Ginsburg and Breyer hearings.

Moreover, I'm hoping that we won't see a badgering of the nominee about how he'll rule on specific cases and possible issues that will or may come before the Supreme Court. That has not been the practice in the past - let me remind my colleagues that Justices Ginsburg and Breyer refused to answer questions on how they would rule on cases during their confirmation hearings. The fact is that no Senator has a right to insist on his or her own issue-by-issue philosophy, or to seek commitments from the nominee on specific litmus-test questions likely to come before the Court. To do so is to give in to the liberal interest groups that only want judges who will do their political bidding on the bench, regardless of what is required by the law and the Constitution. The result is a loss of independence for the Supreme Court, and a lessening of our government's checks and balances.

Some have suggested that since you've now been nominated to be Chief Justice of the Supreme Court, you deserve even more scrutiny than before when you were just nominated to be an Associate Justice. Some are saying that we should prolong the hearings, and turn over even more stones than we've already turned so far. Well, the Chief Justice has been described as "first among equals" - the plain truth is that there really isn't anything substantively different in your role and your vote will count just the same as any other Justice on the Court. So my own questioning and analysis of your qualifications will not really be that much different now.

But it is true that the Chief Justice has additional duties as the head of the federal judiciary. The Chief Justice has to be someone who has a good management style, who can run the trains on time, and who can foster collegiality on the Court. Judge Roberts, I think that the fact that you've appeared 39 times to argue cases on appeal before this Court, and that the current Justices know and respect you - that bodes very well in terms of you smoothly transitioning into the Court in the role of Chief Justice.

So, Judge Roberts, again I congratulate you on your nomination, and I look forward to your testimony.

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**TESTIMONY OF MARCIA D. GREENBERGER**
**CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER**

**BEFORE THE COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**

**ON THE NOMINATION OF JOHN ROBERTS TO**
**CHIEF JUSTICE OF THE UNITED STATES**

**September 15, 2005**

My name is Marcia Greenberger and I am Co-President of the National Women's Law Center, which since 1972 has involved in virtually every major effort to secure and defend women's legal rights. I appreciate your invitation to testify before the Committee on behalf of the Center on such a profoundly important issue – the nomination of John Roberts to serve as the next Chief Justice of the United States.

From all accounts, John Roberts is a person of enormous professional accomplishment, who has many admirable personal qualities. But his distinguished credentials are only a part of the inquiry. It is also essential that a nominee have a judicial philosophy that supports the most basic principles of fairness and justice embodied in our Constitution, and key laws and Court precedents in place for decades. In the weeks since President Bush first nominated John Roberts to the U.S. Supreme Court, originally to the seat being vacated by Justice Sandra Day O'Connor, thousands of pages of documents have been made public shedding light on Judge Roberts's judicial philosophy and approach to fundamental legal rights. While there are important parts of his record that the administration has refused to release, the publicly-available information demonstrates that on a breadth of issues John Roberts followed an unmistakable pattern of developing,

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advancing and embracing legal arguments and positions that would undermine women's most basic legal rights. Based on the available record, the Center concluded that Judge Roberts should not be confirmed to the U.S. Supreme Court. The Center's analysis of the record, which provides the basis for that conclusion, is set forth in an extensive report, *The Record of John Roberts on Critical Legal Rights for Women,* which was released on August 31. The report is attached hereto, and I would like to submit it for the record of this hearing. (It is also available at http://www.nwlc.org/details.cfm?id=2376&section=JCWR.)

I will briefly summarize the central findings of our report in my testimony today. But first, it is important to underscore that the concerns raised by our review of Judge Roberts's record are heightened now that the nomination is to the position of Chief Justice, rather than Associate Justice.

The position of Chief Justice of the United States is uniquely powerful and important. Although the Chief Justice casts just one vote, like the other eight Justices on the high court, the Chief Justice has significant additional powers and functions. The Chief Justice wields added influence over the Court's jurisprudence in several ways: by circulating a list of cases he proposes the Court agree to hear; by presiding over the conferences at which the Justices discuss and vote on cases after oral arguments have been heard; and by assigning the writing of the Court's opinion (when the Chief Justice is in the majority), which enables him to affect on what grounds, and how broadly or narrowly, an opinion is written. These procedural powers allow the Chief Justice to influence the Court's agenda and shape the law itself.

The Chief Justice also serves as Chairman of the Judicial Conference of the United States, and in that capacity functions as head of the judicial branch of the government. As such, he selects the judges who sit on judicial committees on various issues, and he influences positions the judiciary takes on legislation relating to the courts. For example, the Judicial Conference, under Justice Rehnquist's leadership, opposed a portion of a bill (later enacted as the Violence Against Women Act) that allowed victims of gender-motivated violence to sue their attackers in federal court.[1] The Chief Justice also selects judges to sit on special federal tribunals, like the Foreign Intelligence Surveillance Act (FISA) Court, which approves government requests for warrants for secret surveillance, searches and wiretaps.

Finally, the position of Chief Justice carries crucial symbolic importance. The Chief Justice defines and represents the Court, embodying the prestige of the Court and the legitimacy of its decisions. As one scholar put it, the Chief Justice must lead in such a way as to "convince not only the litigants but the American people that what the Court collectively decides is ethically and morally sound and legally correct, that the Court is not only conforming to the Constitution but is in tune with transcendent justice."[2]

For all these reasons, a nomination to the position of Chief Justice of the United States requires an even higher level of scrutiny than that applied to any other nomination to the Supreme Court.

The Center's review of John Roberts's record leads us to conclude that he should not be confirmed as Chief Justice. Although Judge Roberts's writings sometimes couch

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[1] Judith Resnik & Theodore Ruger, Editorial, *One Robe, Two Hats*, N.Y. TIMES, July 17, 2005, § 4, at 13. Although the Judicial Conference later backed away from its initial position, see id., the Supreme Court in 2000, in an opinion written by Chief Justice Rehnquist, ruled that Congress had exceeded its power in giving women that new right to sue as part of the Violence Against Women Act. United States v. Morrison, 529 U.S. 598 (2000).

[2] ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 24 (1986).

his philosophy in terms of support for "judicial restraint," his record shows that, in reality, the common thread is not restraint but sharp curtailment of federal rights and remedies.

Judge Roberts has argued that courts should not recognize established fundamental rights, like the constitutional right to privacy, or apply heightened review of government policies and practices that discriminate on the basis of sex; that courts should interpret federal statutory protections for women's rights and other civil rights narrowly despite congressional intent to the contrary; that federal remedies are unavailable even where state remedies are inadequate; that Congress's power to protect the public welfare should be interpreted narrowly; and that the ability of citizens to sue in federal court to enforce federal rights should be severely restricted.

Indeed, John Roberts supported the constitutionality of proposals to completely strip federal appellate courts of jurisdiction over cases involving the constitutionality of laws on abortion and certain anti-discrimination issues – an extreme position that the Reagan Administration, in which Roberts then served, did not adopt.

On too many occasions and in too many ways, John Roberts has closed his eyes to the devastating consequences to women of his legal arguments, and has simply disregarded contrary judicial precedents.

He repeatedly ignored the facts. He wrote of "perceived problems of gender discrimination" as if there were no *actual* gender discrimination.[3] He wrote of "the canard that women are discriminated against because they receive $0.59 to every $1.00 earned by men," despite ample evidence that the pay gap for women was, and is, based in part on

[3] Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Draft 'Status of the States' 1982 Year End Report" 1 (Jan. 17, 1983).

discrimination.[4] Twenty years ago, he endorsed the statement that "Today, women and men are freed of former stereotypes and may enter any field of work they choose."[5] In recommending against Justice Department involvement in a case challenging sex discrimination in a state prison system, he wrote that equal treatment for women in training and pay would cost the state too much money.[6] This assertion was without basis, as shown by the government's intervention despite his recommendation to the contrary, and the state's decision not even to appeal the lower court's eventual finding of discrimination in these programs.[7]

He repeatedly failed to acknowledge the harmful impact on women of his arguments for limited remedies against sex discrimination. In a case involving a teacher's sexual abuse of a 10th grade student, he argued that Title IX, the landmark law prohibiting sex discrimination by educational institutions that receive federal financial assistance, did not allow for recovery of damages under any circumstances, although this position would have left girls like that student with no Title IX remedies whatsoever.[8] He argued for an interpretation of Title IX that would have exempted intercollegiate athletics programs from its non-discrimination requirement and produced other indefensible results, such as no Title IX protection against sexual harassment that took place in a campus building not constructed with federal funds despite the university's receipt of millions of dollars of

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[4] Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Clearance for Publication of Remarks Made by Eliza Paschall Before Board Meeting of National Federation of Republican Women" 1 (Oct. 4, 1984).
[5] Draft Responses at 2, attached to Memorandum from John G. Roberts, Associate Counsel to the President, and Deborah K. Owen, to Fred F. Fielding, Counsel to the President, re "Domestic Briefing Materials for Press Conference" 1 (Sept. 13, 1985).
[6] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Proposed Intervention in Canterino v. Wilson" 1 (Feb. 12, 1982).
[7] *Canterino v. Wilson,* 538 F.Supp. 62 (W.D. Ky. 1982). The state did not appeal the district court's core order requiring it to provide equal vocational programs for men and women prisoners. *See Canterino v. Wilson*, 875 F.2d 862 (6th Cir. 1989).
[8] Brief for the United States as Amicus Curiae Supporting Respondents, Franklin v. Gwinnett County Sch. Dist., 503 U.S. 60 (1992) (No. 90-918).

federal money.[9] Arguing against a federal remedy for women who were barred from access to health clinics by massive Operation Rescue blockades, he said such women could simply "repair to state court"[10] – even though state laws and remedies had proven seriously inadequate and the presiding federal judge had warned that eliminating the protection of federal marshals could lead to mayhem and bloodshed.[11]

He flouted judicial precedents. Roberts repeatedly wrote in 1981 and 1982 that sex discrimination does not call for "heightened scrutiny" under the Equal Protection Clause,[12] even though heightened scrutiny of government policies that discriminate on the basis of sex had been explicitly adopted by the Supreme Court in 1976 as the standard required by the Constitution.[13] He dismissed a Supreme Court precedent upholding affirmative action, decided only two years earlier, asserting that only four members of the majority in that case remained on the Court and therefore it was not necessary to "accept it as the guiding principle in this area."[14] He questioned whether the Constitution contains a fundamental

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[9] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance'" 1 (Dec. 8, 1981); Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General re "University of Richmond v. Bell" 1 (Aug. 31, 1982); Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Correspondence from T.H. Bell on Grove City Legislation" 1 (July 24, 1985). See also MARCIA D. GREENBERGER & C.A. BEIER, FEDERAL FUNDING OF DISCRIMINATION: THE IMPACT OF GROVE CITY COLLEGE V. BELL," REPORT BY THE NATIONAL WOMEN'S LAW CENTER 17, *reprinted in Civil Rights Restoration Act of 1987: Hearing on S. 557 Before the Senate Comm. On Labor and Human Resources*, 100th Cong. 258, 277 (1987).

[10] *The MacNeil/Lehrer NewsHour: Abortion Protest; Divided Nation; Makeover with a Mission* (PBS television broadcast, Aug. 7, 1991).

[11] *Id.*

[12] *See* Memorandum from John Roberts, Special Assistant to the Attorney General, to Kenneth W. Starr, Counselor to the Attorney General, re "Judicial Restraint Drafts," attaching short and long draft articles on judicial restraint (Nov. 24, 1981); Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Proposed Intevention [sic] in Canterino v. Wilson" 1 (Feb. 12, 1982); Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General and others, re "Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments" 23-24 (undated).

[13] Craig v. Boren, 429 U.S. 190, 197 (1976).

[14] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General re "Meeting with Secretary Donovan on Affirmative Action" 1 (Dec. 2, 1981).

right to privacy at all, referring to "the so-called 'right to privacy.'"[15] And as Deputy Solicitor General, he asked the Supreme Court to overturn *Roe v. Wade* altogether.[16]

Had John Roberts's views prevailed on issues like Title IX and other broad protections against sex discrimination and guarantees of women's legal rights, aspiring Mia Hamms, Olympic gold medal champions and WNBA players would not have had the opportunities that have enabled them to shine. Women would be facing an even greater pay gap today and their progress would be slowed in entering fields of study and careers that were simply off limits in the past. Protections would not be in place to secure essential reproductive health care without massive blockades and physical intimidation; indeed, laws would be upheld making reproductive health care illegal altogether.

Women's livelihoods and their very lives would be placed at risk if their legal rights were limited and weakened in the ways John Roberts advocated throughout his career. The Senate should not confirm John Roberts on this record.

Thank you again for this opportunity to testify before the Committee.

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[15] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Erwin Griswold Correspondence" 1 (Dec. 11, 1981).
[16] Brief for the Respondent at 13, Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391 and 89-1392).

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
**September 12, 2005**

**The Honorable Orrin Hatch**
United States Senator , Utah

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Statement of Senator Orrin G. Hatch
before the United States Senate Committee on the Judiciary
on the Nomination of John G. Roberts, Jr.
to be Chief Justice of the Supreme Court of United States
September 12, 2005

Thank you Mr. Chairman.
I want to begin by saying that my thoughts and prayers are with the family of Chief Justice William Rehnquist. He concluded his life on earth the same way he lived it, independently and with dignity.
I am glad that his children were with him when he passed away. He was a good man and a good judge.
Judge Roberts, I know that you and Chief Justice Rehnquist remained close friends. He would have been proud to have a former clerk join him as a colleague, and now you have been nominated to succeed him as Chief Justice.
When President Bush nominated you two years ago to your current post on the U.S. Court of Appeals, you had two hearings before this committee and answered approximately 100 written questions from various Senators.
The American Bar Association twice unanimously gave you its highest well qualified rating.
That process covered a lot of ground, including many of the same issues which are sure to be raised here. You acquitted yourself so well that the Senate confirmed you without dissent.
Do not be surprised now, however, if it seems like none of that scrutiny and evaluation ever happened.
Let me mention one example relating to my home state of Utah to show how the confirmation process has changed.
President Warren G. Harding nominated former Utah Senator George Sutherland to the Supreme Court on September 5, 1922. That same day, the Judiciary Committee Chairman went straight to the Senate floor and, after a few remarks, made a motion to confirm the nomination.
The Senate promptly and unanimously agreed.
There was no inquisition, no fishing expedition, no scurrilous and false attack ads.
The judicial selection process has changed because what some political forces want judges to do has changed from what America's founders established.
America's founders believed that separating the branches of government, with the legislature making the law and the judiciary interpreting and applying that law, is the lynchpin of limited government and liberty.
James Madison said that no political truth has greater intrinsic value.
Quoting the philosopher Montesquieu, Alexander Hamilton wrote in The Federalist no.78 that "there is no liberty if the power of judging be not separated from the legislative and executive powers."
Times have changed.
Today, some see the separation of powers not as a condition for liberty but an obstacle to their political agenda.
When they lose in the legislature, they want the judiciary to give them another bite at the political apple.
Politicizing the judiciary leads to politicizing judicial selection.

Former New York Governor Mario Cuomo recently said that someone's personal opinions on issues are as relevant when they are a judicial nominee as when they are a political candidate.
The confirmation process has sometimes been unbecoming of the Senate and disrespectful of nominees.
I applaud President Bush for resisting this trend, and for nominating qualified men and women who, as judges, will not legislate from the bench.
The conviction that judges interpret and apply but do not make the law helps us sort out the information we need, the questions we ask, the standards we apply, and the decisions we make.
With that in mind, I believe three facts should guide us in this hearing.
First, what judges do limits what judicial nominees may discuss.
Judges must be impartial and independent.
Their very oath of office requires impartiality and the Canons of Judicial Ethics prohibit judges and judicial nominees from making commitments regarding issues that may come before them.
I will be the first to admit that Senators want answers to a great many questions.
But I also have to admit that a Senator's desire to know something is not the only consideration on the table.
Some have said that nominees who do not spill their guts about whatever a Senator wants to know are hiding something from the American people.
Some compare a nominee's refusal to violate his judicial oath or abandon judicial ethics to taking the Fifth Amendment.
These might be catchy sound bites, but they are patently false.
That notion misleads the American people about what judges do and slanders good and honorable nominees who want to be both responsive to Senators and protect their impartiality and independence.

Nominees may not be able to answer questions that seek hints, forecasts, or previews about how they would rule on particular issues.
Senators consult with law professors to ask these questions a dozen different ways, but we all know that is what they seek.
In 1993, President Clinton's Supreme Court nominee, Judge Ruth Bader Ginsburg, explained better than I can why nominees cannot answer such questions, no matter how they are framed.
She said: "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."
Nominees may not be able to answer questions asking them to opine or speculate about hypotheticals, outside of an actual case with concrete issues and real facts.
Since 1792, as long as the judiciary itself has existed, the Supreme Court has held that judges do not have the authority to render such advisory opinions.
We should not be surprised when nominees decline to provide what judges themselves may not provide.
So the first fact that should guide us here is that, no matter how badly Senators want to know things, judicial nominees are limited in what they may discuss.
That limitation is real, and it comes from the very nature of what judges do.
The second fact is that nominees themselves must determine where to draw the line.
Judges, not Senators, take the oath of judicial office.
Judges, not Senators, are bound by the Canons of Judicial Ethics.
Judge Roberts will be a federal judge for many years to come; this process will only determine which courtroom he will occupy.
He must determine how best to honor his judicial obligations.
Different nominees may draw this line a little differently, but they draw the same kind of line protecting their judicial impartiality and independence.

Justice Stephen Breyer drew that line in 1994. As he put it, clients and lawyers must understand that judges are really open-minded.
Justice Anthony Kennedy drew that line in 1987. He said that the public expects that a judge will be confirmed because of his temperament and character, not his positions on the issues.
Recently one of our colleagues on this committee dismissed as a myth the idea that Justice Ginsburg refused to discuss things related to how she would rule.
Anyone watching C-SPAN's recent replays of Justice Ginsburg's hearing knows that this is not a myth, it is reality.
I was on this committee in 1993. Justice Ginsburg was not telling mythological tales when she refused nearly 60 times to answer questions, including mine, that she believed would violate what she said was her rule of "no hints, no forecasts, no previews."
Those were her words, not mine.
Justice Ginsburg did what every Supreme Court nominee has done. She drew the line she believed was necessary to protect her impartiality and independence.
Finally, the third fact that should guide us is that the Senate traditionally has respected nominees' judgment about where to draw the line.
In response to some of my questions, Justice Ginsburg said: "I must draw the line at that point and hope you will respect what I have tried to tell you."
Did I wish she had drawn the line differently?
Of course, but I respected her decision.
This is the historical standard.
In 1967, our colleague Senator Kennedy made the same point at a press conference supporting the Supreme Court nomination of Thurgood Marshall.
He said: "We have to respect that any nominee to the Supreme Court would have to defer any comments on any matters which are either before the Court or very likely to appear before the Court. This has been a procedure which has been followed in the past and is one which I think is based upon sound legal precedent."
Justice Marshall drew his line, yet we confirmed him by a vote of 69-11.
Justice Sandra Day O'Connor drew her line, yet we confirmed her by a vote of 99-0.
Justice Kennedy drew his line, yet we confirmed him by a vote of 97-0.
Justice Ginsburg drew her line, yet we confirmed her by a vote of 96-3.
Justice Breyer drew his line, yet we confirmed him by a vote of 87-9.
Let me finish up so we can hear from other members of the committee.
We must use a judicial, rather than a political, standard to evaluate Judge Roberts' fitness for the Supreme Court. That standard must be based on the fundamental principle that judges interpret and apply but do not make law.
Judge Roberts, as every Supreme Court nominee has done in the past, you must decide how best to honor your commitment to judicial impartiality and independence.
You must decide when that obligation is more important than what Senators, including this one, might want to know.
As the Senate has done in the past, I believe we should honor your decision, and then make our own.
Thank you, Mr. Chairman.

**Statement by Professor Geoffrey C. Hazard, Jr.,**
**University of Pennsylvania Law School**

In my opinion Judge Roberts could have decided to recuse himself in the Hamdan case but was not obliged to. Hence, it was a matter of professional judgment. These situations, where a judge is being considered for some other or additional possibility, are fairly common these days, hence part of the environment. Also, recusing would require some kind of explanation, which could lead to leaks, which could embarrass other government procedures, such as background checks. I believe that it is reasonable to say that he should have recused himself, but also reasonable for him to have concluded that it was not obligatory.

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Testimony of

**Wade Henderson**
**Executive Director**
**Leadership Conference on Civil Rights**

Before the
United States Senate
Committee on the Judiciary

on the

***Nomination of Judge John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States***

September 15, 2005

Mr. Chairman and members of the Committee: I am Wade Henderson, Executive Director of the Leadership Conference on Civil Rights (LCCR). I am also the Joseph L. Rauh Professor of Public Interest Law at the University of the District of Columbia. I am honored to appear before you today on behalf of the Leadership Conference to discuss the nomination of Judge John G. Roberts, Jr., to be Chief Justice of the United States, and to explain why we, regrettably, must oppose his confirmation.*

The Leadership Conference on Civil Rights is the nation's oldest, largest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Phillip Randolph, and Roy Wilkins, LCCR works in support of policies that further the goal of equality under law. To that end, we promote the enactment, and monitor the enforcement, of our nation's landmark civil rights laws. Today the LCCR consists of more than 190 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. It is a privilege to represent the civil and human rights community in addressing the Committee today.

In America, the Supreme Court of the United States is the ultimate arbiter of what our laws mean and how they can be applied. The decisions that the Court makes are vital to all of us, and they

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* *Not all organizations in the Leadership Conference on Civil Rights take positions on Supreme Court nominations or have opposed Judge John Roberts' confirmation to the U.S. Supreme Court.*

shape the kind of country in which we live. The selection of the Chief Justice, the leader of the Court, is therefore of utmost importance to all Americans.

In the last several days of testimony, Judge Roberts has failed to demonstrate an adequate commitment to protecting the civil and human rights that are so important to all Americans. In fact, all evidence suggests that Judge Roberts would use his undeniably impressive legal skills to bring us back to a country most of us would not recognize: where states' rights trump civil rights and where the federal courts or Congress can see race or gender discrimination, but are powerless to remedy it. This is not the America in which most Americans want to live. And as we have seen over the past two weeks in the wake of Hurricane Katrina, when the federal government's role is diminished, the least among us suffer the most.

Based on reasons outlined in more detail below, after a careful review of John Roberts' record, including his testimony before this committee, the Leadership Conference on Civil Rights is compelled to oppose the confirmation of John Roberts to the position of Chief Justice of the United States.

Our nation fought a civil war over the meaning of equality guaranteed by our Constitution and over the role of the federal government in ensuring that equality. In the years immediately following, there was a great debate in our country about the power of the federal government to enforce the 14th and 15th Amendments. Reconstruction failed, and African Americans were returned to a position of near servitude, because those who advocated for weak federal power prevailed. It was not until decades later, when the Court outlawed state-sponsored segregation in *Brown v. Board of Education*, followed by the enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the 1968 Fair Housing Act, and many other key statutes that are now the bedrock of our national commitment to equality of opportunity, that the federal government was finally empowered to play a role in improving the lives of ordinary Americans.

However, in recent years, we have seen the rise of a political movement that is an eerie parallel to the post-Reconstruction period. Today there are those who, in the name of "judicial restraint," advocate a federal retreat in the area of civil and human rights. While our Constitution speaks of fundamental rights, "judicial restraint" advocates oppose allowing the federal courts or Congress to use the Constitution in order to protect individuals against violations of those rights.

Here is one example. The Voting Rights Act is often described as the most effective civil rights statute ever enacted by Congress. Part of its power over the last 25 years is due to amendments made to the statute by Congress is 1982 to make clear that an election practice or procedure that resulted in discrimination violated the Act..

During the 1982 debate over the Voting Rights Act amendments, John Roberts was an aggressive enemy of the "results" standard. According to memos written by Roberts during his time as an advisor to Attorney General William French Smith, Roberts' opposition to the "results" test for voting discrimination was based in part on the view that "widely accepted practices" used by states in their election systems should not be subject to attack in the federal

courts,[1] even if it could be demonstrated that such practices prevented blacks from having equal opportunity in voting. This assertion is astonishing. If the federal courts had not been empowered to invalidate "widely accepted" state and local practices, our country's voting rights revolution would never have happened. Would Roberts have approved of the poll tax or literacy tests because those were "widely accepted practices?"

John Roberts' record also reveals a history of demeaning or belittling the existence of gender discrimination. According to memos from Roberts' time as a legal advisor in the Reagan administration, the basic protection of equal treatment under the law for women can be trumped by assertions by the state that compliance would be too expensive. Despite the strong recommendation from a very conservative member of the Reagan administration's civil rights team, Judge Roberts urged the administration not to intervene in a sex discrimination case against the Kentucky prison system, contending that discriminatory treatment of men and women in the prison's vocational programs was "reasonable" in light of "tight prison budgets."[2] Would Judge Roberts then apply the same argument to equal educational opportunities for women generally? Could states, in the name of saving money, refuse to provide equal health services to men and women?

Judge Roberts also has a limited view of the federal government's role in addressing discrimination in education. Roberts has argued that Congress can exclude all school desegregation cases from the federal courts,[3] thus empowering states to be the arbiters of when they have met their obligations under the school desegregation requirements of the federal Constitution. This is, in effect, a pre-*Brown* vision that fits squarely into Roberts' objective of preventing the federal courts from fulfilling the promise of the 14th Amendment.

As many commentators have made clear, Judge Roberts is a gifted and intelligent lawyer and advocate. But that is not the test for determining whether he is fit to lead the highest court in the land. Rather, the test is whether Judge Roberts has demonstrated he is committed to the fundamental principles on which our country was founded, and whether his vision of America matches the expectations of mainstream Americans.

Judge Roberts has failed this test. Therefore, the Leadership Conference on Civil Rights has no choice but to oppose his confirmation. America can and should do better.

LCCR made an effort to gain a fuller view of Judge Roberts' record, by filing a Freedom of Information Act request for some of the documents that have not been produced. We do not believe that the American people are well served by the administration selectively withholding memoranda from Roberts' time as a political appointee in the Solicitor General's office. The Administration has access to these documents, and so should the Senate and the American people. Unfortunately, our expedited request has been denied, and the relevant documents still

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[1] Memorandum to the Attorney General from John Roberts, re "Section 2 of the Voting Rights Act and *Mobile v. Bolden*," November 6, 1981.
[2] Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re "Proposed Intervention in *Canterino v. Wilson*," February 12, 1982.
[3] Memorandum to the Attorney General from John Roberts, re "Meeting with Clarence Pendleton, Chairman, U.S. Civil Rights Commission," September 15, 1982.

have not been produced. The absence of those documents only deepens the concerns that we have about his record.

Unlike some of our member organizations and other allies in the fight for civil and human rights, LCCR did not take a position on this nomination until today. Given the size and diversity of the LCCR coalition, unanimity among our members is rare, and does not exist today with regard to our position on Judge Roberts' nomination. However, our conclusion today reflects the consensus of our more than 190 member organizations.

Our reasons for opposing Judge Roberts' confirmation as Chief Justice of the United States include troubling aspects of his record in the following areas:

**CIVIL RIGHTS ENFORCEMENT**

**Judge Roberts' effort to limit the scope of the Voting Rights Act of 1965.** Judge Roberts' record to date fails to demonstrate that he is committed to upholding the constitutional and statutory foundations that protect the right to vote. During the 1981-82 reauthorization of the Voting Rights Act of 1965,[4] Roberts aggressively promoted – in more than 25 memoranda and other written materials – the Reagan administration's unsuccessful efforts to strike language, included by the House in a bill that was passed by an overwhelming 389-24 margin, which allowed plaintiffs in discrimination cases to establish a violation of Section 2 of the Voting Rights Act if they could show that the voting practice or procedure in question had a discriminatory effect. This effort by Roberts to weaken the reauthorization bill, if successful, would have brought most voting rights litigation to a grinding halt.

Roberts argued against the "effects" test for Voting Rights Act cases even though he understood that it was aimed at eliminating discriminatory practices. What is especially disconcerting is he based his position in part on the view that "widely accepted practices"[5] used by states in their election systems should somehow be protected from judicial scrutiny, even when such practices have been shown to prevent African Americans from fully participating in the voting process. This appeal to "widely accepted practices" speaks volumes and carries with it dangerous implications. After all, if federal courts had not been empowered to invalidate "widely accepted" state and local practices, our nation's civil rights revolution would never have happened.

In other memoranda, Roberts argued that the "effects" test would "establish a quota system" and "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[6] He urged the Attorney General to "not be fooled by the House vote or the 61 Senate co-sponsors of the House bill into believing that the President cannot win on this issue," alleging that "many members of the House did not know" what they were doing when they overwhelmingly approved the effects test.[7] Roberts urged the Attorney General to use the materials and analysis he had written, which he thought could help Senators become more

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[4] Voting Rights Act Amendments of 1982, P.L. 97-205 (96 Stat. 131), approved January 12, 1983.
[5] Memorandum re *Mobile v. Bolden*, *supra* note 1.
[6] Memorandum to the Attorney General from John Roberts, re "Voting Rights Act: Section 2," December 22, 1981.
[7] Memorandum to the Attorney General from John Roberts, re "Talking Points For White House Meeting on Voting Rights Act," January 26, 1982.

"educated" on the differences between the President's position and the "serious dangers" in the House-passed version.[8] Instead of the "effects" test, Roberts argued in favor of requiring plaintiffs to prove that election officials acted with the intent to discriminate – a much higher burden that would have allowed many discriminatory voting schemes to go unchallenged.

The bill to reauthorize the Voting Rights Act that was eventually passed by Congress and signed into law by President Reagan included the "effects" language, despite Roberts' objections. Roberts' opposition to the use of an "effects" test to prove racial discrimination with regard to what the NAACP Legal Defense and Educational Fund describes as "the nation's most effective civil rights statute"[9] suggests a cramped and unrealistic view of civil rights law, and raises serious questions about his commitment to equal opportunity and the protection of civil and human rights for all Americans.

**Judge Roberts' hostile attitude toward affirmative action.** Throughout his career, Roberts has strongly attacked affirmative action policies. When the U.S. Commission on Civil Rights issued a report in 1981 that said affirmative action programs needed to be expanded, he wrote a memo arguing that it relied on "circular logic" and that it was pushing "racial quotas."[10] Roberts in 1981 also tried to undermine a long-standing policy in the executive branch that encouraged affirmative action by government contractors. When Reagan administration officials indicated their intent to continue the policy, Roberts complained in a memorandum to the Attorney General that it advanced "offensive preferences" based on race and gender.[11] Even though the Supreme Court had ruled voluntary affirmation action programs were legal in *United Steelworkers v. Weber*, Roberts argued that the ruling "has only four supporters on the current Supreme Court" and that "[we] do not accept it as the guiding principle in this area."[12]

In a 1990 *amicus curiae* brief in the case of *Metro Broadcasting Inc. v. Federal Communications Commission*,[13] Roberts took the unusual step of taking the opposite side of another federal agency in an effort to fight its affirmative action policy – and referred to the FCC's program as "a policy in search of a purpose."[14] More recently, in his private capacity, Roberts characterized affirmative action as "racism" in a 1995 television interview.[15] If confirmed to the Supreme Court, the evidence strongly suggests that Roberts would use his position to abolish policies that have long been used to remedy past discrimination and advance racial, ethnic and gender diversity.

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[8] *Id.*

[9] NAACP Legal Defense and Educational Fund, Inc., *Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States*, August 31, 2005 at 18.

[10] Charlie Savage, *Roberts Vote Seen as Critical in Racial Issues: Earlier Writings Opposed Affirmative Action Plans*, THE BOSTON GLOBE, August 7, 2005 at A1.

[11] Memorandum to the Attorney General from John Roberts, re "Meeting with Secretary Donovan on Affirmative Action," December 2, 1981.

[12] *Id.*

[13] 497 U.S. 547 (1990).

[14] *Metro Broadcasting, Inc. v. Federal Communications Commission*, No. 89-453, Brief of Amicus Curiae United States in Support of Petitioners, 1989 U.S. Briefs 453, February 9, 1990.

[15] Interview, MacNeil/Lehrer News Hour, June 12, 1995 (While discussing the recent Supreme Court ruling in *Adarand Constructors v. Pena*, Roberts stated that "what the Supreme Court said today is that you don't overcome racism by engaging in it yourself").

**Judge Roberts' aggressive approach to narrowing Congressional authority under the Commerce Clause, which serves as the basis for many critical federal laws.** John Roberts' record demonstrates a disturbing pattern of action to restrict legal protections of average citizens. Too often his efforts have resulted in overturning safety protections for workers, consumers and public health. In his dissent to the D.C. Circuit's denial of a rehearing *en banc* of *Rancho Viejo, LLC v. Norton*,[16] Judge Roberts questioned whether the Endangered Species Act[17] could be applied, under the Commerce Clause, to prohibit real estate developers – plainly operating in interstate commerce – from endangering a particular species whose habitat lies entirely within the boundaries of a single state. Roberts' extraordinarily narrow perspective of Congressional power expressed in his *Rancho Viejo* dissent raises serious concerns about his views on the legitimacy of such major and historically effective pieces of civil rights infrastructure as the ban on discrimination in places of public accommodation in the Civil Rights Act of 1964 and, equally, on Congress' authority to move the country forward with additional civil rights laws such as hate crime and non-discrimination legislation to better protect the lesbian, gay, bisexual and transgender community.

**Judge Roberts' troubling views on immigrants' rights.** In a 1982 decision, the U.S. Supreme Court[18] struck down, on Equal Protection grounds, a Texas law that prevented undocumented immigrant children from attending public schools. The 5-4 decision guaranteed the right of undocumented children to attend public schools and recognized that undocumented immigrants could claim protection under the Fourteenth Amendment. Justice Brennan, writing for the majority, pointed out that it was "difficult to conceive of a rational justification for penalizing these children"[19] for being in the U.S. based on the actions of their parents. Justice Brennan also pointed out that the denial of a basic education and the stigma of illiteracy would impose "a lifetime of hardship on a discrete class of children not accountable for their disabling status."[20] In a memorandum to then-Attorney General William French Smith,[21] Roberts criticized the ruling as a decision by the product of the "activist duo," Justices Brennan and Marshall. Roberts advised the Attorney General that the Reagan administration should have filed an *amicus curiae* brief in favor of upholding the Texas law because the weight of brief from the U.S. Solicitor General on the "values of judicial restraint could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case."[22] Roberts also endorsed the idea of a national I.D. card,[23] and in another instance he pointed out that President Reagan should mention his support for a legalization proposal in an upcoming interview with a Latino publication because he thought readers would be pleased that Reagan wanted to grant legal status to their "illegal amigos."[24]

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[16] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).
[17] P.L. 93-205 (87 Stat. 884), approved December 28, 1973.
[18] Plyler v. Doe, 457 U.S. 202 (1982)
[19] *Id.* at 220.
[20] *Id.* at 223.
[21] Memorandum to the Attorney General from Carolyn B. Kuhl and John Roberts, re "*Plyler v. Doe* - The Texas Illegal Aliens Case," June 15, 1982.
[22] *Id.*
[23] Memorandum to Fred F. Fielding from John G. Roberts, re "National I.D. Comments," October 21, 1983.
[24] Memorandum to Fred F. Fielding from John G. Roberts, re "Presidential Interview with *Spanish Today*," September 30, 1983.

**Judge Roberts' attempt to undermine the wall of separation between church and state.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Lee v. Weisman*.[25] He not only argued that it was constitutional for a public school to sponsor prayers at graduation ceremonies, but also urged the Court to scrap the long-standing test that federal courts have used to decide whether laws and practices violate the Establishment Clause. The test Roberts urged on the Court would have allowed highly sectarian prayers in public schools and would threaten the longstanding rights of religious minorities. His argument was not only rejected by the Court but criticized by the majority for its erroneous First Amendment analysis. Earlier in his career, Roberts repeatedly endorsed legislation that would strip the federal courts of the ability to even hear cases dealing with school prayer.[26]

**Judge Roberts' narrow views on disability law.** Following the Supreme Court decision in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*,[27] Roberts authored a memorandum that endorsed troubling views on the ability of the federal government to assist people with disabilities. *Rowley* involved Amy Rowley, an eight-year-old deaf student who sought to have a sign language interpreter provided to assist her in school. Lower federal courts ruled that Rowley was qualified under the Education for All Handicapped Children Act of 1975[28] to receive a state-sponsored sign language interpreter. The Solicitor General's office supported her claim when the case reached the Supreme Court on appeal, but in a majority opinion written by Justice Rehnquist, the Supreme Court reversed, stating that Rowley was entitled only to an adequate education and that states were not required to "maximize the potential of handicapped children commensurate with the opportunity provided to other children."[29] A week after the ruling, Roberts wrote a memorandum that attacked the lower court rulings in Rowley's favor as "an effort by activist lower court judges to impose potentially huge burdens on the states," and faulted the Justice Department for weighing in on Amy Rowley's side of the case.[30]

**Judge Roberts' leadership in "anti-busing initiatives."** While in the Reagan Justice Department, Roberts strongly supported, in his words, "our anti-busing initiatives"[31] and referred to busing as a "failed experiment."[32] In advising the Attorney General, Roberts dismissed recommendations by Arthur Flemming, former chairperson of the U.S. Commission on Civil Rights as stressing the "purported need for race-conscious remedies such as busing." In a 1981 memo, Roberts characterized Flemming's arguments as not compelling because they relied on "long quotes from old Supreme Court cases."[33] The case Roberts referred to was *Swann v. Charlotte-Mecklenburg Board of Education*,[34] which was decided only 10 years earlier and

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[25] 505 U.S. 577 (1992).
[26] *See, e.g.* Memorandum to Fred F. Fielding from John G. Roberts, re "S. 47, "Voluntary School Prayer Act of 1985," May 6, 1985.
[27] 458 U.S. 176 (1982)
[28] Public Law 94-142 (89 Stat. 773), approved November 29, 1975; now codified as the Individuals with Disabilities Education Act, 20 U.S.C. Chapter 33.
[29] *Rowley*, 458 U.S. at 189.
[30] Memorandum to the Attorney General from John Roberts, re "Government Participation and Supreme Court Decision in *Board of Education v. Rowley*," July 7, 1982.
[31] Memorandum to William French Smith from John Roberts, re "Summary of Flemming Correspondence," October 5, 1981.
[32] Memorandum re Meeting with Clarence Pendleton, *supra* note 3.
[33] Memorandum re Flemming, *supra* note 31.
[34] 402 U.S. 1 (1971).

clearly upheld the use of court ordered busing to remedy school desegregation. Roberts did not recognize the seminal Supreme Court case as controlling.

**Judge Roberts' support for "court stripping" legislation, which undermines the ability of the federal courts to enforce constitutional protections.** Roberts waged a campaign inside the Reagan administration to support a bill introduced by Senator Helms and others to strip the federal courts of authority to require busing as remedy for illegal segregation. Both Robert Bork and Ted Olson thought the bill would was unconstitutional. Roberts had no such reservations. His memoranda heaped scorn on critics of the legislation, and claimed that Congress had power to eradicate busing as a "failed experiment."[35] Judge Roberts' writings from his tenure in the Reagan Justice Department indicate that he believes that so-called "court stripping" statutes, which withdraw constitutional claims from judicial scrutiny, are constitutional. In commenting on an analysis by then-Assistant Attorney General Theodore Olson, who wrote that opposing a bill to strip the courts of jurisdiction in school desegregation cases would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read."[36] He has also claimed that Congress has the power to strip courts of the ability to hear cases involving matters such as public school prayer and abortion.[37]

Apparently, Roberts believes that the Constitution *should be read* to permit Congress to limit or even eliminate the constitutional role of the federal judiciary in providing relief from unconstitutional legislation. LCCR finds this extremely troubling because the judicial branch has often been the sole protector of the rights of minority groups against the will of the popular majority, and our concerns are particularly relevant to the present day because Congress has voted on a number of court-stripping bills in recent years, including the so-called "Marriage Protection Act."[38] To use another example, if Congress had passed a statute stripping the federal courts of jurisdiction to hear cases raising claims of lesbian, gay, bisexual and transgender rights, the federal constitutional issue presented and vindicated in *Romer v. Evans*[39] would never have reached the Supreme Court. No candidate for the federal judiciary, especially for the Supreme Court, should advocate closing the courthouse doors to any group of Americans.

**Judge Roberts' narrow interpretation of relief under Section 1983.** While in the Reagan Justice Department and again as Deputy Solicitor General, Roberts sought to narrow the definition of "rights" under Section 1983,[40] originally enacted as part of the Civil Rights Act of 1871. In a 1982 memorandum, he made clear his strong disagreement with the Supreme Court's ruling in *Maine v. Thiboutot*,[41] which held that Section 1983 provides a remedy for violations of statutory rights as well as constitutional ones, and discussed ways to "undo the damage created

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[35] Memorandum re Meeting with Clarence Pendleton, *supra* note 3.
[36] Handwritten comments by John Roberts on memorandum to the Attorney General from Ted Olson, re "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases," April 12, 1982.
[37] Jo Becker, R. Jeffrey Smith and Sonya Geis, *In 1980s, Roberts Criticized the Court He Hopes to Join*, THE WASHINGTON POST, August 20, 2005 at A04.
[38] Marriage Protection Act of 2003 (H.R. 3313, 108th Cong., passed by U.S. House of Representatives on July 22, 2004).
[39] 517 U.S. 620 (1996).
[40] 42 U.S.C. § 1983.
[41] 448 U.S. 1 (1980).

by *Thiboutot*."[42] In *Wilder v. Virginia Hospital Association*,[43] Roberts argued before the Supreme Court that Medicaid rights were not privately enforceable under Section 1983. And in *Suter v. Artist M.*,[44] he took the position that children could not utilize Section 1983 to enforce provisions of the Adoption Assistance and Child Welfare Act, which required states to make reasonable efforts to reunite children with their families. Section 1983 is a critical federal provision that ensures that individuals can obtain relief when their federal rights have been violated by state or local officials, and has long been a primary tool for holding states accountable. Any efforts to limit its scope should be viewed as extremely troubling.

**WOMEN'S RIGHTS**

**Judge Roberts' troubling, dismissive attitude toward gender discrimination and his efforts to undermine a key law preventing it.** Throughout his government service, Roberts advocated positions on gender discrimination that are well outside of the mainstream. Indeed, Roberts' writings often seem to reflect outright denial that gender-based discrimination even exists, with memoranda authored by him even referring to "perceived problems of gender discrimination."[45] In one memorandum, he ridiculed the concept of equal pay for comparable work as a "radical redistributive concept" and mocked several female Republican members of Congress who had asked the administration not to oppose it in a pending court case.[46]

During Roberts' tenure in the Reagan Justice Department, he argued that there should be no "heightened judicial review" of laws and policies that discriminate against women. In the gender discrimination case *Canterino v. Wilson*, in which state prison officials discriminated against women by providing dramatically fewer vocational training and work opportunities than were available to men, Roberts urged his superiors to not intervene in the case because they would be forced to argue in favor of a higher standard of scrutiny.[47] This is disturbing because the Supreme Court had already ruled – definitively – that laws or policies that discriminated on the basis of gender were required to meet a higher burden under the Equal Protection Clause.[48] Equally troubling is the fact that Roberts also argued against government intervention on the ground that discriminatory treatment of men and women in the prison's vocational programs was "reasonable" in light of "tight state prison budgets,"[49] as if cost considerations should somehow outweigh the protection of women (or any group of individuals) from unlawful discrimination.

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[42] Memorandum to Steve Brogan, Office of Legal Policy, from John Roberts, re "Development of Legislative Changes to 42 U.S.C. § 1983," August 9, 1982.
[43] 496 U.S. 498 (1990).
[44] 503 U.S. 347 (1992).
[45] Memorandum to Fred. F. Fielding from John G. Roberts, re "Draft 'Status of the States' 1982 Year-End Report," January 17, 1983.
[46] Memorandum to Fred F. Fielding from John G. Roberts, re "Nancy Risque Request for Guidance on Letter from Congresswoman Snowe et al.," February 20, 1984.
[47] Memorandum re Canterino v. Wilson, *supra* note 2. The Department of Justice intervened in the case in support of the plaintiffs, despite Roberts' recommendation, and the district court found that the prison system in question had indeed unlawfully discriminated on the basis of gender. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky. 1982).
[48] See, *e.g. Craig v. Boren*, 429 U.S. 190 (1976), *Califano v. Westcott*, 443 U.S. 76 (1979).
[49] Memorandum re Canterino v. Wilson, *supra* note 2.

Roberts has also consistently argued in favor of narrowing the scope of Title IX of the Education Amendments of 1972, the key law prohibiting gender discrimination in education.[50] During his tenure in the Reagan Justice Department, Roberts argued in 1981 in favor of a proposal to limit the reach of Title IX by applying it only to schools that received *direct* federal aid and not *indirect* federal support such as student loans and grants.[51] While the administration – and eventually the Supreme Court – fortunately rejected his view, the end result would have been to allow many schools to receive significant federal funding without being required to comply with Title IX's provisions.

In 1982, Roberts argued that Title IX applied only to specific, individual programs within schools that receive specifically earmarked federal funds,[52] even though the institution as a whole benefits from the funding. When the Supreme Court accepted this argument in *Grove City College v. Bell*,[53] a dramatic decrease in civil rights enforcement in colleges and universities resulted. Congress clarified that it had intended for educational institutions, rather than specific programs, to be covered under Title IX by passing the Civil Rights Restoration Act in 1987,[54] over the objections of Roberts.[55]

As Deputy Solicitor General, Roberts again took a position that would have seriously weakened Title IX. In *Franklin v. Gwinnett County School District*,[56] Roberts co-authored a brief in which he argued that a high school student could not obtain damages under Title IX for years of sexual harassment and sexual abuse by her coach. His overly restrictive view of proper remedies under Title IX was rejected unanimously by the Supreme Court, which found that sexual harassment is an intentional violation of Title IX and that its victims can recover money damages. Roberts' position in *Franklin*, and his restrictive views on Title IX in general, raise serious questions about whether he would allow women to fully vindicate their legal rights. These concerns would apply to victims of racial and disability-based discrimination seeking redress under Title VI or section 504 of the Rehabilitation Act, which are parallel in structure to Title IX, as well.

**Judge Roberts' position in *Bray v. Alexandria* raises questions about his willingness to protect women from discrimination.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief and delivered two oral arguments in *Bray v. Alexandria Women's Health Clinic*,[57] in support of Operation Rescue's legal position in a case involving trespassing and preventing women from accessing health clinics, tactics that "present[ed] a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its name."[58] What is troubling about John Roberts' role in *Bray* is that he readily threw the weight of the U.S. government behind

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[50] P.L. 92-318 (86 Stat. 235), approved June 23, 1972.
[51] Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re: "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance,'" December 8, 1981.
[52] Memorandum to the Attorney General from John Roberts, re "*University of Richmond v. Bell*," August 31, 1982.
[53] 465 U.S. 555 (1984).
[54] Civil Rights Restoration Act of 1987, P.L. 100-259 (102 Stat. 28), approved March 22,1988.
[55] Memorandum to Fred F. Fielding from John G. Roberts, re "Correspondence from T.H. Bell on *Grove City* Legislation, July 24, 1985.
[56] 503 U.S. 60 (1992).
[57] 506 U.S. 263 (1993).
[58] *Id.* at 313 (Stevens, J. dissenting).

Operation Rescue's position and against using federal civil rights law to stop aggressive and dangerous tactics from being used to prevent women from accessing health care. In doing so, he once again advanced an overly restrictive view of federal authority to enforce constitutional rights.

**HUMAN RIGHTS**

**Judge Roberts' expansive view of administrative power to suspend fundamental due process protections.** In *Hamdan v. Rumsfeld*,[59] Judge Roberts joined an opinion that gave broad leeway to the administration to try suspected terrorists in military tribunals that lack many of the important protections normally available to criminal defendants. Under the ruling, Hamdan would have no right to be present throughout his trial and would not have a right to see all of the evidence against him. Furthermore, the court ruled that Hamdan and similar detainees could not seek judicial relief under the Geneva Conventions. This decision raises serious questions not only about Judge Roberts' views on the separation of powers but also on basic principles of civil and human rights.

**Judge Roberts' willingness to curtail *habeas corpus* appeals in death penalty cases.** While in the Reagan administration, Roberts called for severely restricting the ability of individuals facing the death penalty to allege constitutional violations in federal court. He asserted that it is rare for "the meritorious claim [to have] anything to do with the petitioner's innocence," and that "the question would seem to be not what tinkering is necessary in the system, but rather why have federal *habeas corpus* at all?"[60] He later argued that the Supreme Court should hear fewer appeals and stop serving as the "fourth or fifth guesser in death penalty cases."[61] Given the irreversible nature of the death penalty, and the fact that at least 116 individuals have been convicted of capital crimes and then exonerated since 1973,[62] it is irresponsible to so cavalierly dismiss *habeas corpus* appeals or any other legal safeguard.

**Judge Roberts' distorted views on civil and human rights in Africa.** Judge Roberts' troubling statements on civil and human rights matters have not been limited to purely domestic issues. A 1982 memorandum included disparaging comments about TransAfrica Forum,[63] an African American organization that wanted to dismantle apartheid systems around the world, including in South Africa. When asked by Kenneth Starr to respond to a gift magazine subscription from TransAfrica, Roberts wrote: "Sometimes silence is golden. TransAfrica is the American lobby group supporting various Marxist takeover attempts in Africa, particularly in Namibia. The only appropriate reply would be a curt acknowledgment-- not even a 'thanks for

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[59] 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005).
[60] R. Jeffrey Smith and Jo Becker, *Sifting Old, New Writings for Roberts' Philosophy*, THE WASHINGTON POST, August 21, 2005 at A01.
[61] Memorandum to Fred F. Fielding from John G. Roberts, re "Chief Justice's Proposals," February 10, 1983.
[62] Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty*, September 2004.
[63] TransAfrica was established with the support of the Congressional Black Caucus in 1977 to advocate on behalf of people of African descent. Its educational affiliate, TransAfrica Forum, was formed in 1981 and produced a quarterly journal and monthly issue briefs. John Roberts was asked to draft a letter of response to the complimentary subscription TransAfrica Forum had provided the Attorney General.

the free subscription'--and I think it best not to respond at all. The fact that Randall Robinson is the brother of ABC's Max Robinson does not legitimate the organization."[64]

When Judge Roberts wrote this memorandum, future South African President Nelson Mandela was a political prisoner, and had been incarcerated by the apartheid regime for 18 years. The South African regime was launching cross-border attacks against its neighbors, emboldened by the now-discredited Reagan administration policy of "constructive engagement." With this terse note, Roberts dismissed any notion of the legitimacy of the struggle against apartheid, the rigid legal system of white minority rule imposed through brutal force against the people of South Africa and Namibia. Despite worldwide support for the popular movements that were struggling against apartheid, he omitted any mention of the racist system that was the subject of worldwide concern. His response suggests that he viewed even the historic battle against South Africa's repressive system of apartheid and illegal occupation of Namibia through a distorted ideological prism. The work of TransAfrica – and many other organizations – was simply a part of longstanding efforts to win equal rights for people of African descent around the world.

**CONCLUSION**

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political agenda. Unfortunately, Judge Roberts' record fails to show such a commitment, and for that reason, we must oppose his confirmation as Chief Justice.

Thank you for the opportunity to testify before the Committee today. I would be pleased to answer any questions Senators may have now, or to provide additional information if needed.

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[64] Memorandum to Kenneth Starr from John Roberts, February 16, 1982.

**FOR IMMEDIATE RELEASE**
August 30, 2005

**Contact:** Estuardo V. Rodriguez, Jr.
**Direct:** 202-463-4806

***HISPANIC JUDICIAL ADVOCACY GROUP ANNOUNCES OPPOSITION TO SUPREME COURT NOMINEE JUDGE JOHN ROBERTS***

*LULAC National President, Hector Flores, joins HFJ to announce LULAC Executive Boards unanimous vote opposing Judge Roberts*

WASHINGTON, D.C. – Led by longtime civil rights activist, Dolores Huerta, Hispanics for a Fair Judiciary (HFJ) announced today that it had completed its review of nominee Judge John Roberts and opposes his nomination to the Supreme Court. HFJ was joined by Hector Flores, National President of LULAC, who announced that the National Executive Board had voted unanimously to oppose Judge John Roberts' nomination as well.

"Having Judge Roberts on the Supreme Court will serve to turn back the clock on much of the progress that has been made by communities of color and women who continue to face challenges in their pursuit of equality and fairness in the workplace, higher education, immigration and voting rights," stated Dolores Huerta.

Of the reasons for opposing Roberts, most compelling was the memo by Roberts regarding the Plyler v. Doe case, "Roberts, chastised the U.S. government for not intervening in that case to ensure that Texas be allowed to deny children of undocumented immigrants access to public schools, essentially ostracizing these children and creating a shadow class of citizens unable to educate themselves and improve their circumstances," remarked Professor Reynaldo Anaya Valencia from St. Mary's University School of Law.

"Ultimately, it is at the local level that our community suffers the impact and repercussions of unfairly decided cases regarding workers' rights, affirmative action, police powers, immigrant's rights, voting rights, and other issues," stated Arlington County Board Member, Walter Tejada, "These are high stakes cases and we cannot ignore the signs indicating that Roberts will jeopardize all the progress that has been made."

"Roberts' early writings and interviews he has given suggest a limited view of the federal government's authority to enact key worker, civil rights and environmental protections, a similarly narrow view of the vital role our courts and our government play in safeguarding individual rights, especially civil and women's rights, and an expansive view of presidential power and law enforcement authority," stated HFJ member Maria Cardona.

***Hispanics for a Fair Judiciary*** (HFJ) was formed in April 2005 through the efforts of Alliance for Justice in order to provide Hispanic leaders across the nation a platform and voice in matters related to our nation's judicial system. HFJ consists of Hispanic civil rights leaders as well as Hispanic state and local elected officials. The group is led by long-time civil rights advocates Raul Yzaguirre, former president of the National Council of La Raza and Dolores Huerta, as well as MALDEF and PRLDEF.

Testimony of Joe Solmonese, President,
Human Rights Campaign
On the Nomination of John G. Roberts, Jr. as Chief Justice of the Supreme Court of the United States

*Before the United States Senate Judiciary Committee*

September 16, 2005

Members of the Committee:

I appreciate this opportunity to represent the Human Rights Campaign before this Committee. The Human Rights Campaign is a bipartisan organization that works to advance equality based on sexual orientation and gender identity and expression, to ensure that gay, lesbian, bisexual and transgender ("GLBT") Americans can be open, honest and safe at home, at work and in the community.

As a community that is particularly vulnerable to discrimination and bias-motivated violence, and that has recently been the target of discriminatory legislation, GLBT Americans are profoundly concerned about nominations to the Supreme Court of the United States. The Court is, and has been, a protector of unpopular minorities from sometimes misguided majorities. Thanks to our independent judiciary, this country abandoned its shameful system of "separate but equal," enabled individuals to regain control over reproductive decisions, and, most recently, affirmed that GLBT people cannot be branded criminals because of who we are.[1]

On August 25, 2005, the Human Rights Campaign announced its opposition to the nomination of John G. Roberts, Jr. as Associate Justice, for the reasons set forth in this testimony. Subsequently, Roberts was nominated as Chief Justice. In light of the expansive powers that the Chief Justice holds, including the power to determine who writes opinions, this nomination is more troubling still.

Starting September 12, this Committee held hearings during which Committee members questioned Judge Roberts regarding his record. Judge Roberts' responses, while articulate and deft, did not satisfy the heavy burden of proving, against the weight of his record, that as a Supreme Court justice he would uphold our civil rights and liberties.

## I. The Due Process Rights of Privacy and Liberty

In *Lawrence v. Texas*, the Court concluded that sodomy laws—which until 2003 served as justification for many forms of discrimination against GLBT people[2]—violate the Due

[1] *See Lawrence v. Texas*, 539 U.S. 558 (2003).
[2] *See id.* at 560.

Process right to liberty.[3] That case cites the Due Process privacy cases—notably *Roe v. Wade*[4] and *Griswold v. Connecticut*.[5] The legal relationship between the right to privacy described in *Griswold v. Connecticut* and *Roe v. Wade* and the right to liberty that the Court recognized in *Lawrence v. Texas* is clear. It is therefore critical to the GLBT community that a justice recognize the well-settled principle that there is a line in our lives beyond which government may not encroach—a line known as the Due Process right to privacy and liberty.

Judge Roberts' record contains strong indications that he does not recognize a constitutional right to privacy. He has written that while privacy is something most of us feel entitled to have, it is not a "right" in the constitutional sense:

> "Courts cannot, under the guise of constitutional review, re-strike balances struck by the legislature or substitute their own policy choices for those of elected officials. Two devices which invite courts to do just that are "fundamental rights" and "suspect class" review. It is of course difficult to criticize "fundamental rights" in the abstract. All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution."[6]

As a government attorney, Roberts also co-authored a brief arguing that *Roe v. Wade* was "wrongly decided and should be overruled." He said that the Court's conclusion that there is a right to abortion "finds no support in the text, structure, or history of the Constitution."[7]

In yet another writing, Roberts denigrated the "so-called right to privacy."[8]

We are aware that Roberts indicated, in his appeals-court confirmation hearings, that he understood that *Roe v. Wade* is well-settled precedent. This does not indicate that Roberts would uphold *Roe* (or *Lawrence*) if elevated to the Court. Although court of appeals judges are bound to follow the Supreme Court's precedent, justices of the Supreme Court may re-visit cases that they believe are wrongly decided. *Lawrence v. Texas* in fact re-visited—and reversed—a Supreme Court case decided 17 years earlier.[9]

In the course of his confirmation hearings, Judge Roberts acknowledged that the Court has protected a Due Process right to privacy, but he did not claim to agree with this protection, nor did he commit to uphold the Court's privacy precedents, stating instead that he would apply the Court's settled analysis regarding *stare decisis*, but not indicating

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[3] *See id.* at 578.
[4] 410 U.S. 113 (1973).
[5] 381 U.S. 479 (1965).
[6] "Draft Article on Judicial Restraint" at 5, from Holdings of the National Archives and Records Admin. Record Group 60. Accession #60-89-372. Box 30 of 190 Folder: John G. Roberts Misc.
[7] Brief for Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1990) (WL 505725).
[8] Memorandum from John G. Roberts to Attorney General dated December 11, 1981.
[9] *See Bowers v. Hardwick*, 478 U.S. 1039 (1986).

whether cases such as *Roe* or *Lawrence* would survive his application of this doctrine.[10] As Senator Schumer pointed out, Judge Roberts' response to questions regarding privacy was substantially identical to then-Judge Clarence Thomas' response in his own hearing. Senator Schumer correctly noted that since being confirmed, Justice Thomas has consistently denied the existence of a Due Process right to privacy.[11] He further noted that Justice Thomas expressed this view when dissenting in the *Lawrence* decision.[12] Judge Roberts stated that he was "not willing to state a particular view on the *Lawrence* decision," including Justice Thomas' dissent.[13]

The combination of his record and his responses in the hearing point to a very limited or non-existent view of the Due Process right to privacy, and no commitment to upholding the liberty that the Court recognized in *Lawrence.*

II. Stripping Courts of Jurisdiction to Hear Constitutional Claims

Our concern that Judge Roberts would not vigorously enforce constitutional protections is reinforced by his writings on so-called "court stripping" statutes. When Roberts was serving in the Reagan Justice Department, he authored a memorandum setting forth arguments in favor of legislation to strip courts of jurisdiction to hear certain classes of constitutional claims. Although the memorandum makes clear that it is an advocacy piece drafted at the behest of his superiors, a later writing indicates that Roberts apparently agrees that such legislation is constitutional. In commenting on an analysis in which then Assistant Attorney General Theodore Olson wrote that opposing the bills on constitutional grounds would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises, and Brinks!"[14] It appears from this writing that Roberts believed that the Constitution *should be read* to permit Congress to sharply limit the Court's constitutional function, thereby narrowing litigants' avenues for relief from unconstitutional legislation. We disagree with this conclusion as a matter of constitutional law.

Roberts' apparent belief that "court stripping" legislation is constitutional is particularly relevant at this time and to the GLBT community. This legislation, which failed to be enacted when Roberts last considered it, is once again darkening the halls of Congress. Two court-stripping bills passed the House of Representatives in 2004.[15] One of those bills, the so-called Marriage Protection Act, stripped the courts of jurisdiction to consider

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[10] *See* transcript of proceedings, September 13, 2005, questioning by Senator Specter.
[11] *See* transcript of proceedings, September 14, 2005, questioning by Senator Schumer.
[12] *See id.*
[13] *See id.*
[14] *See* Theodore Olson, "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases." April 12, 1982. With handwritten comments by John G. Roberts. Roberts apparently refers to Harvard Law Professor Lawrence Tribe, New York Times columnist Anthony Lewis, and then-ABA President David Brinks, who opposed such bills.
[15] "Marriage Protection Act," H.R. 3313, passed 233-194 on July 22 2004 (stripping jurisdiction over challenges to the "Defense of Marriage Act"); Pledge Protection Act, H.R. 2028, passed 247-173 September 23, 2004 (stripping jurisdiction over cases involving the Pledge of Allegiance).

challenges to the "Defense of Marriage Act," a discriminatory law that uniquely affects GLBT people and our families.

Should a bill like the Marriage Protection Act be passed into law, Judge Roberts' record raises concerns that he would uphold it.

Jurisdiction-stripping bills fundamentally alter the system of checks and balances, rendering constitutional protections functionally meaningless. If such statutes are constitutional, then there is no limit to Congress' power, and no redress for American citizens who are the objects of discriminatory legislation.

Senator Kohl questioned Judge Roberts regarding his writings on bills that strip the courts of jurisdiction over constitutional claims.[16] Although Judge Roberts stated that such bills are "bad policy," he did not refute his earlier claim that they are constitutional, stating instead "I don't think I should express a determinative view because, as you know, these proposals do come up and one may be enacted."[17] The hearings, and Justice Roberts' writings, are peppered with clear statements about the distinction between policy questions — which are the province of the legislatures—and constitutional questions—which are province of the Court. This is, indeed, the essence of his claim to embrace "judicial restraint" and "modesty." Therefore, the best evidence of his philosophy regarding court stripping is his work in the Justice Department, advancing an argument that the Administration ultimately rejected.

III. Congress' Authority to Enact Protective Legislation

Because the GLBT community is particularly vulnerable to hate violence and to employment discrimination, Congress' power to legislate to prevent these social ills is of vital importance to GLBT Americans. The GLBT community is also disproportionately affected by HIV and AIDS, disabilities protected under the Americans with Disabilities Act. Therefore, judicial decisions that limit the scope of that Act[18] are particularly detrimental to the GLBT community.

In *Rancho Viejo v. Norton*,[19] Roberts wrote a dissent from a denial of rehearing in which he argued that Congress' power to enact environmental protection legislation was quite limited. Although the Rehnquist Court has in fact curtailed Congress' Commerce Clause power in recent years, Roberts' *Rancho Viejo* reasoning goes far beyond current Supreme Court precedent. Not only did the DC Circuit reject this reasoning, but the Supreme Court later rejected it in another context.[20]

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[16] *See* transcript of proceedings, September 13, 2005, questioning by Senator Kohl.
[17] *See id.*
[18] *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001)(holding that in enacting the ADA, Congress had not abrogated states' Eleventh Amendment sovereign immunity by showing a pattern of unconstitutional state discrimination against disabled).
[19] 334 F.3d 1158 (D.C. Cir. 2003)(Roberts, J., dissenting from denial of rehearing *en banc*).
[20] *See Gonzales v. Raich*, 2005 U.S. Lexis 4656 (June 6 2005) (holding that application of federal drug laws to people who grew marijuana for their own medical use was a valid exercise of Commerce power,

Judge Roberts declined to answer Senator Feingold's question regarding Congress' authority to prohibit discrimination against gay and lesbian Americans in employment, stating "I don't know if that's an issue that's going to come before the courts. I don't know if Congress has taken that step yet. And until it does, I think that's an issue that I have to maintain some silence on."[21] Roberts failed, in the hearing, to demonstrate respect for Congress' authority to remedy discrimination.

IV. Equal Protection

We are aware that Judge Roberts, as a partner at the DC law firm of Hogan & Hartson, provided limited assistance to the attorneys prosecuting the landmark GLBT rights case *Romer v. Evans*, a case on which his law firm served as co-counsel.[22] While his participation in that case is notable, we are concerned that Judge Roberts' view of the Equal Protection Clause—the constitutional provision upon which the Court relied in striking down a discriminatory state amendment—is narrow, and out of the mainstream.

Under current law, laws that create separate classifications for GLBT people are subject only to "rational basis" review, meaning that they must be rationally related to a legitimate state interest. Scholars who follow GLBT-rights law have seen encouraging signs, in the form of *Romer* and *Lawrence*, that courts are on their way to applying a more rigorous standard, so-called "rational basis with teeth."

Judge Roberts been critical of applications of the Equal Protection Clause to classifications other than race.[23] In his article on judicial restraint, Roberts criticized the Court for applying "suspect class" analysis to other classifications. Although currently GLBT people are not accorded "suspect class" status,[24] Roberts' narrow view of the Equal Protection Clause bodes poorly for litigants seeking the protections of that provision.

Furthermore, even if Roberts' views of suspect class status were not relevant, it appears that his judicial philosophy would lead him to apply the "rational basis" test less rigorously than the *Romer* Court did. His writings criticizing what he calls unwarranted intrusions into the legislative arena[25] illustrate that he might defer to legislatures even when discriminatory animus underlies a statute if the affected group is not a "suspect class."[26]

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because even though the activity was purely *intra*state, the regulation valid as part of a scheme of regulating interstate activities).

[21] *See* transcript of proceedings, September 14, 2005, questioning by Senator Feingold.

[22] 517 U.S. 620 (1996).

[23] *See* Draft Article on Judicial Restraint, *supra* note 5.

[24] *See Romer*, 517 U.S. at 635.

[25] *See* Draft Article on Judicial Restraint, *supra* note 5.

[26] [26] *See also Hedgepath v. WMATA*, 2004 WL 595070 (D.C. Cir. 2004), in which Roberts upheld, under rational basis review, a DC policy of arresting and detaining minors for offenses that would result only in a citation for adult offenders.

In the hearings, Roberts claimed that his writings as a Reagan Administration attorney reflected the views of his superiors, but did not illuminate his own views on enforcement of the Equal Protection Clause.

V. Withholding of documents regarding Roberts' role as political Deputy Solicitor General

As set forth above, the information about Roberts' record and philosophy that has been made available paints a picture of a justice who would limit, rather than protect, civil rights. The Administration's decision to withhold documents relating to Roberts' service as political Deputy Solicitor General under President George H.W. Bush creates further concerns about the nominee. While the American people know that Roberts participated—and was, in fact, a decision-maker—in important civil rights cases in that job, no documents have been released that would enable the people nor this distinguished Committee to assess Roberts' legal opinions regarding these cases. In light of the troubling record that has come to light, the need for these important documents is all the more urgent and we remain extremely disappointed that these documents have never come to light, in order to do the rigorous review necessary for an individual nominated to have a lifetime appointment as the leader of the federal judiciary.

## CONCLUSION

As set forth in the legal analysis sections above, the evidence released thus far overwhelmingly indicates that Judge Roberts would vote with the Court's right wing, and that he would not carry out his responsibility to uphold constitutional rights. In the course of this Committee's hearing, Judge Roberts had an opportunity to rebut the overwhelming evidence in his record, but declined to do so. For all of the reasons set forth above, the Human Rights Campaign urges this Committee to reject the nomination of John G. Roberts, Jr. to the Supreme Court of the United States.

**TESTIMONY OF RODERICK JACKSON**
**BEFORE THE COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**
**ON THE NOMINATION OF JOHN ROBERTS TO CHIEF JUSTICE OF THE UNITED STATES**

September 15, 2005

Good afternoon. My name is Roderick Jackson. It is a privilege and an honor to be here today.

It's hard for me to believe that I am here today – after all, I'm just a teacher and the Acting Head Coach of the girls' basketball team at Ensley High School in Birmingham, Alabama. But my story shows the impact the Supreme Court can have on the lives of regular citizens and how key a role the Court plays in making sure that our civil rights laws truly guarantee fair treatment for all.

I was born and raised in Birmingham, where I early on learned the value of hard work and of taking responsibility for myself, my family, and those in my charge. My father died when I was two, and I helped to support my family, working my way through high school, college, and, ultimately, graduate school. But for the six years I served in the Army Reserves, I have spent my life in the community where I grew up.

For two years, 1999 until May, 2001, I was the head coach of the girls' basketball team at Ensley High School. We had a good team. They played good ball, they worked hard, and they won many games. In fact, six of my seven seniors who graduated in 2001 received college scholarships.

But my team didn't have it easy, and the girls were treated worse than the boys in many ways. The girls were not allowed to practice in the new, regulation gym used by the boys' team; instead, the girls had to use the old gym with its wooden backboards, bent

rims, and no heat. The girls couldn't get to the ice machine; on one occasion, I was forced to break into it with a screw driver to get ice for an injured player. And while the school bought basketball shoes for the boys, I had to buy shoes with my own money to enable my girls to play.

Money from the school was another major problem. The girls were routinely denied any share of the money given to the school athletics program by the City of Birmingham – of the $8,000 given one year, for example, the girls never saw a dime. While the boys' team was allowed to keep the money from admissions and from concession sales during their games, the girls were not. This caused serious problems. For one thing, the girls – unlike the boys -- couldn't afford to hire a bus to travel to away games, and had to make their own arrangements to travel by car unless the boys had a game at the same place and the same time. In addition, because teams had to pay for their own game officials, the lack of financial support for the girls' team meant that we were in a continuous hole.

To me, this was just unfair. Also, I had learned about Title IX as part of my teacher training and thought it was against the law for schools not to treat girls as well as boys. So I did what I thought was the right thing during my second year as coach – I went through the chain of command at my school and the school district to ask for equal treatment for my girls' team. The school was not merely indifferent to the unfairness – they were angry that I was trying to stand up for myself and my students, and told me just to "play ball." Instead of addressing the problems, they fired me from my coaching job.

Being fired was the beginning of a tough period for me. I not only lost the satisfaction of coaching; I also lost the extra income I earned and the higher retirement

benefits I would have gotten based on that money. I was labeled a trouble-maker and for two and one-half years was turned down for every coaching position I applied for at other schools. And the young ladies at Ensley lost the only person who was willing to speak up for them.

So I went to court to try to get my job back. I ended up representing myself before the court of appeals, which said that I couldn't sue because Congress hadn't included a specific reference to retaliation in Title IX. I was about ready to throw in the towel. I thought I'd just misunderstood the law – that it didn't, in fact, offer any protection for me or for my girls' team.

But then, with the help of the National Women's Law Center and the law firm of O'Melveny and Myers, I took my case to the Supreme Court. The Court, in a 5-4 decision written by Justice O'Connor, made clear that Title IX, and laws like it, do indeed provide effective protection against discrimination. I came to Washington for the argument, and it was a thrill; I felt like Justice O'Connor was looking right at me in the courtroom. In her opinion, she said that protesting discrimination, as I did, is a critical part of enforcement of Title IX and that prohibiting retaliation for these protests is essential to realizing the goals of the law.

This decision, and my involvement in this case, has had a significant impact on me – and, I hope, on others as well. The Supreme Court restored my faith that the laws of this country really do protect my rights and those of my students. The Court's decision sends the message that teachers and others like me can stand up for what we think is right without worrying that we will lose our jobs or otherwise be penalized as a result. In fact, people come up to me on the street in Birmingham to thank me for what I

did. So Justice O'Connor's opinion gives new hope that this great country will continue to move toward ensuring true equality of opportunity, and that the laws will be understood to protect the rights of those who continue to be disadvantaged.

But the decision could easily not have come out the way it did. A shift in even one vote would have left me without any remedy. That's why today's hearing, and the Supreme Court confirmation process, are so important to regular people like me. I urge you to confirm Justices who will understand their key role in protecting our civil rights, who will recognize the significant impact of their decisions on our everyday lives, and who will help to continue to make the promise of the law a reality.

Thank you.

***BY Fax to: (202) 224-9102***

Friday, July 29, 2005

The Honorable Arlen Specter, Chairman and
The Honorable Patrick Leahy, Ranking Minority Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman and Ranking Member of the Senate Committee on the Judiciary,

As a concerned citizen I would hope that the Senate will forego the opportunity to play obstructionist partisan politics and do the job that the citizenry has elected them to do. Judge Roberts credentials are unquestionably suitable for the elevated position of Supreme Court Justice and for interpreting the Constitution rather than legislating from the bench.

The recent, abomidable USSC decision on eminent domain demonstrates why we need SC Justices that will protect our Constitutional Rights rather than destroy them. I believe that Judge Roberts will treat our Constitutional rights with the weight they deserve.

Those who try to put "legislating" judges on the bench are those who can not achieve their ends by the democratic legislative process. I don't want a small number of unelected individuals doing an end run around the legislative process by which "We the people" make our voices heard.

Let's get an up or down vote on Judge Roberts and get him on the bench.

Sincerely,

Niles Johanson
6083 Via Regla
San Diego CA, 92122

Testimony of Beverly Jones before the Senate Judiciary Committee,
Regarding the Nomination of John Roberts for
Chief Justice of the United States Supreme Court

September 15, 2005

Statement of Beverly Jones

Chairman Specter, Members of the Judiciary Committee, Judge Roberts:
My name is Beverly Jones, and I am from Lafayette, Tennessee. I would like to begin by thanking the Committee for inviting me to testify in these proceedings concerning the confirmation of Judge Roberts to be Chief Justice of the United States Supreme Court. If Judge Roberts is confirmed, his decisions will impact the lives of Americans for decades to come. His decisions will help determine the quality of life afforded to many Americans. Today, as you consider John Roberts's nomination, you will not know what his decisions may or may not be, but I hope that as you deliberate on this nomination you will not underestimate the importance his role and decisions will have on everyone, including people like me. If I may, Mr. Chairman, I would like to share with you the importance that the Constitution, the law and the Supreme Court have had for my life, and for my rights as a person with a disability.

I was a plaintiff in *Tennessee v. Lane,* a disability rights case that went up to the Supreme Court concerning the rights of people with disabilities to have access to the courts in Tennessee. The Supreme Court took the case to decide whether I could enforce the rights that Congress gave me under the Americans with Disabilities Act.

When Congress passed the Americans with Disabilities Act in 1990, it found that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the ability of such individuals to participate in, and contribute to society." On July 26, 1990, when President George H.W. Bush signed the law, he reaffirmed this finding and declared that just as we tore down the Berlin Wall to free the people of Eastern Europe, we would tear down the barriers that keep people with disabilities from participating in society.

For me, the passage of the ADA was like opening a door that had been closed to me for so long. I lost my ability to walk due to a traffic accident in 1984, and have used a wheelchair since then. At the time I became disabled, I decided that I would not allow what I wanted in life to be denied because of my physical limitations. At the time of my accident, I was a wife and mother, but had little education and limited job skills. A local judge encouraged me to look into becoming a court reporter and from there my ambitions began.

I completed court reporting school the year that the Americans with Disabilities Act was passed. But, to my surprise, when I began my first assignments, I found that I could not get into many of Tennessee's courtrooms and courthouses because they were inaccessible to people who use wheelchairs. I was forced to turn down jobs, or face humiliating experiences.

Approximately seven out of ten courthouses in Tennessee were inaccessible when I filed my suit. In some cases, I could not even get in the front door – or the side or back door. In the years following the passage of the ADA, some courthouses became more accessible. But even in 1998, when my lawsuit was filed, a number of the courthouses I worked in remained inaccessible to me. Courtrooms were located only on upper floors, and reachable only by climbing stairs. I was often forced to ask complete strangers to carry me up the stairs.

This experience was humiliating and frightening. But as a single mom supporting myself and two kids, I could not afford to quit my job or strictly limit my work to accessible courthouses. After the passage of the ADA, I worked tirelessly to bring to the attention of public officials throughout Tennessee the requirements of the law, and to encourage them to do what the law required in terms of making public buildings, including courthouses, accessible. I spoke to local, state, and federal officials. I talked with anyone who would listen. Almost all of the time, my inquiries were met with polite ambivalence; a shrug of a shoulder; a pat on the back; a comment about keeping it up. I just could not seem to get any action. I could not get anyone's attention. I filed a complaint with the Justice Department, however I never heard anything back from them. The door that I thought had been opened was still closed and my freedom to live my dream was still a dream, and turning into a nightmare. The law was not working for me. Nobody, including the state of Tennessee, took either me or the law seriously until I and others brought a lawsuit.

The first thing that the State of Tennessee did was to challenge the constitutionality of the ADA, and so my case went through the courts for six years without any court reaching the substance of my claims. In 2004, my case reached the United States Supreme Court, which voted by a 5-4 margin to uphold my right to enforce the protections that the ADA gave me. It was then that the importance of who was deciding the issues in my case struck me in a most direct way.

The Court's decision revolved around whether Congress had developed enough evidence to show that individuals with disabilities were in fact being unconstitutionally discriminated against by states. That was not required by the Court at the time the law was passed, but now it was a critical issue. In my case, five Justices including found that Congress had developed sufficient evidence to show unconstitutional discrimination in cases like mine and allowed my case to go forward. Many changes have already been made in Tennessee as a result of the ruling, and I am now able to do my job with much greater ease and without humiliation and danger.

My case is over. We have accomplished what we wanted to be achieved. But what I have been able to accomplish with the help of Congress is not the end of the issue. For me it would be a hollow victory and a horrible legacy to see *Tennessee v. Lane* as the end of the road. There are too many others who need the protections of the law and the Constitution.

In fact, disability rights under the ADA will be considered again on November 9, 2005, when the Supreme Court will hear a case called *Goodman v. Georgia*. This case involves a man who is in prison in Georgia; the case was brought by a man who is a paraplegic just like me. He requires a wheelchair to move about. This man is confined in a 12 foot by 3 foot cell for twenty-three to twenty-four hours a day because of the inaccessibility of the prison facilities. He has to sleep in his wheelchair because his bed

is inaccessible and he has suffered broken bones because of his attempts to transfer in the past. The prison chapel and prison library are inaccessible and so he cannot participate in those services like all of the other inmates. His toilet is not accessible and he has been required to sit in his own body waste because of that. He has been unable to take a shower for more than two years because of the fact that the showers are inaccessible. He has been denied medical care and physical therapy because of the fact that those facilities are inaccessible. On November 9, the Court will consider whether Congress has the power to ensure that this man will be permitted to access the same services as every other prisoner in that facility.

Just as I don't know Judge Roberts, I don't know Tony Goodman. I don't know if he is a good or bad person. But that is not the point. All I know is that just as I should not have had to endure the humiliation, embarrassment, fear and pain that I did for more than fourteen years, he should not either. And if John Roberts is confirmed to Chief Justice, he must know that there are many others like Tony Goodman who need the protection of the law.

The role that Judge Roberts will play in defining the boundaries of the Constitution and the power of Congress to protect citizens just like me is critical. It is my hope that the Senate – led by my own Senator, Bill Frist – will carefully review the record of John Roberts to determine if he is committed to the protection of the rights and freedoms of every American. This will be your last opportunity to have him explain to you what his opinions are about the role of Congress in protecting civil rights for everyone, including citizens with disabilities.

Now, I am not here today to prejudge Judge Roberts. But I do know that there are those within the disability community who believe that John Roberts's record with respect to disability rights raises serious concerns. I understand that Judge Roberts has advocated that the ADA should be narrowly interpreted to protect only the so-called, "truly disabled." And that he has also argued to restrict people's ability to go to court to enforce the protections of laws such as Medicaid – an extremely important law that provides basic health care for many people with disabilities who cannot afford that care on their own. And that in the past, he has advocated narrow views of the powers that Congress uses to pass civil rights laws.

Because my case involved Congress's power to enact the Americans with Disabilities Act, I understand just how important it is to ensure that the judges on our courts respect Congress's authority to provide protections that are so desperately needed. Without the protections that Congress guaranteed in the Americans with Disabilities Act, my life and the lives of millions of other people with disabilities would be a lot harder.

For all of these reasons, I urge the Senate to pay close attention to Judge Roberts' professed and proven ability to ensure that the rights that people with disabilities fought so hard to secure are not stripped away. Members of the Senate, I hope that you will give John Roberts's record very careful scrutiny before voting on this nomination. I hope that the rights of millions of Americans with disabilities are important enough to merit that type of careful consideration. Thank you.

**TESTIMONY OF**
**THE HONORABLE NATHANIEL R. JONES**
**REGARDING THE NOMINATION**
**OF JOHN G. ROBERTS, JR. TO THE U.S. SUPREME COURT**
**Senate Committee on the Judiciary**
**Thursday, September 15, 2005**

Chairman Specter, Senator Leahy, esteemed members of this Committee—I am honored to have this opportunity to appear before you today to assist you to more effectively evaluate the fitness of Judge John G. Roberts, Jr. to be confirmed as Chief Justice of the United States.

My acceptance of your invitation to appear and offer testimony is prompted by conscience and driven by a profound obligation to introduce into the record an historical perspective on race and civil rights remedies.

You are confronted with a serious constitutional and moral responsibility. I pray that you will not shirk your duty. You are considering, under the Constitution's Advice and Consent clause, the fitness of a Supreme Court nominee who has, in the past, argued against the use of federal judicial power to eradicate the vestiges of slavery and badges of servitude. This record triggers serious questions and demands straight answers.

While I appear in my own right, more importantly, I am invoking the voices of distinguished legal giants on whose shoulders I stand and whose voices have been stilled by time: Dean Charles Hamilton Houston, Justice Thurgood Marshall, Judge William H. Hastie, Clarence Mitchell, James A. Nabrit, Judge Spottswood Robinson, Judge A. Leon Higginbotham, Jr., and many others who have my deep and enduring respect. These individuals believed in the Constitution, and fashioned a strategy for using the law and courts to attack racial segregation. They set the stage for the development of remedies to remove the stain of racial segregation that law imposed on this land.

You may ask why I invoke the names of and purport to speak in the voice of these towering legal giants and hold up their contributions to the advancement of civil rights jurisprudence. My reason is twofold.

First, my professional and personal experiences qualify me to do so.

Second, since he was nominated by the President, serious questions have been raised concerning Judge Roberts' views about the relevance and legality of remedies aimed at ending racial discrimination. Unfortunately, very few Americans know the history of the myriad ways the positive law—legislatures and courts—reinforced and perpetuated racial discrimination in America. It is up to this Committee, therefore, to assure that, at the very least, the next Chief Justice of the United States understands that history and most importantly, why remedial action was and continues to be necessary.

Given the gravity of the concerns raised about the nominee's views on racial remedies, views which, if acted upon, would result in nothing less than a virtual dismantling of those

remedies—remedies that saved the soul of the nation—this Committee has a heavy and unavoidable burden to probe deeply into his current views.

The nominee's participation in the strategy to strip Federal courts of jurisdiction to issue school desegregation remedial decrees, and to raise the standard of scrutiny with regard to remedies that involved race, requires careful scrutiny. So extreme and radical were those proposals attributed to the nominee that the then-president of the American Bar Association, David Brink, condemned them as a "legislative threat to our nation…" The Conference of Chief Justices of the States called "court stripping" "a hazardous experiment with the vulnerable fabric of the nation's judicial system." You must seek the "why" of his involvement in light of the pervasiveness of segregation laws and their enforcement by courts, and whether those positions remain with him.

One's fitness to be the Chief Justice transcends what so many have thus far focused upon—stellar academic achievements and a degree of unquestioned professional competence. The nominee's views and his unquestionably activist attempts to thwart the federal courts' efforts to dismantle the segregation schemes it had erected and sustained, bring into play something much more fundamental than technical competence, given that he is being considered for a lifetime seat on the nation's highest court. The critical question before you is one of values, not competence.

To understand why this is true, one need only consider the most wretched decision the Supreme Court ever handed down on the question of human rights, *Dred Scott v. Sanford.* The author of that decision, Chief Justice Roger B. Taney was undoubtedly highly qualified from a technical and professional standpoint, having been appointed by President Andrew Jackson after his service as Secretary of Treasury. Yet, when faced with the fundamental question of whether a one-time slave, Dred Scott, had standing to sue to retain his newly acquired free status, Justice Taney wrote that black people—slaves—were not persons within the contemplation of the framers of the Constitution and were therefore powerless to sue. Had Chief Justice Taney been imbued with a different scale of values, our national history on race might have been considerably different.

Similarly, had those charged with wielding awesome judicial power at the time of the *Plessy v. Ferguson* case in 1896 understood that the 14th Amendment's guarantees were intended to include black people, America would have been spared a horrible chapter. Instead, Justice Henry Billings Brown and the Supreme Court majority stood the 14th Amendment on its head, thereby constitutionalizing and legitimizing racial discrimination. The author of the majority opinion had all of the professional and academic equipment one customarily looks to in measuring one's fitness for service on the Supreme Court—academic credentials and prior judicial experience. Justice Brown had served on the Sixth Circuit Court of Appeals and was the holder of degrees from both Harvard and Yale. Yet he lacked the values that sensitized him to understand why the 13th, 14th and 15th Amendments had to become a part of the Constitution. That responsibility fell to the lone dissenter, John Marshall Harlan, the son of Kentucky slave owners, a graduate of Centre College and Transylvania University. Justice Harlan offered an eloquent prophecy that the court and the nation would regret the doctrine it had imposed on the nation. At first glance, Justice Brown's academic and career credentials may have appeared more impressive than Justice Harlan's. But in the final analysis, it was Justice Harlan, with his

superior values, who was unquestionably the finer judge. Clearly, if Justice Harlan's dissent had been the majority view, we would not be faced with the continuing struggles over race. Had Justice Harlan prevailed, we would have been a much more fair, unified and harmonious country over the last half century.

So pervasive did "separate but equal" become that many whites were freed of moral and legal guilt as they ghettoized blacks, denied them job opportunities, excluded them from places of public accommodation, relegated their children to inferior schools, denied them admission to colleges and universities, and operated a court system on an apartheid basis, with whites in control and blacks under control.

To those who quarrel with the view that the Supreme Court's "separate but equal" doctrine freed white America to harm and repress black Americans, I cite the finding of the Kerner Commission.

> What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.

When Charles Houston launched his strategy to overturn the *Plessy v. Ferguson* decision, American law was firmly supportive of racial segregation. Houston and his colleagues, Thurgood Marshall and William Hastie, went from courtroom to courtroom challenging what they firmly believed to have been a hijacking of the 14th Amendment. Race was at the heart of these efforts because it was race that drove the Supreme Court to inject racism into the tributaries of this nation.

These giants had a profound belief in the Constitution's promise to establish justice, insure domestic tranquility and secure the blessings of liberty. Through the careful building of precedents, with much sacrifice and struggle, the Houston strategy resulted in the 1954 *Brown v. Board of Education* decision. That decision proved to be the launching pad for widespread attacks on racial discrimination.

Many other things operated in tandem with the litigation strategy that targeted the nation's racial affliction. At the beginning of World War II, organizations pressed President Franklin D. Roosevelt to issue an Executive Order that would require defense contractors to cease their discriminatory hiring practices. When he balked, A. Philip Randolph and Walter White of the NAACP threatened a massive march on Washington. On the eve of the planned march, the President relented and issued an order banning discrimination in the defense industry and created a Fair Employment Practices Board. When Harry Truman followed FDR as President, he issued a series of Executive Orders aimed to, among other things, end segregation in the Armed Forces. He broke ground with the appointment of the first black Article III judge, William H. Hastie.

President Eisenhower renewed and extended the Truman orders with respect to government contracting and federal employment. He tapped his vice president, Richard Nixon, to oversee these programs aimed at ending racial discrimination in and by the federal

government. During his administration, the first civil rights bill since Reconstruction was enacted in 1957 designed to deal with the barriers still existing that interfered with the ability of blacks to vote in the South.

Thereafter, John F. Kennedy introduced many other initiatives aimed at making the government more racially inclusive. Foremost among these actions was the appointment of minorities to sub-cabinet positions and, and in keeping with his campaign promise, he appointed a number of blacks as district judges, placed Thurgood Marshall on the Second Circuit, and broke ground by appointing the first two blacks to served as United States Attorneys—Cecil Poole and Merle M. McCurdy in Ohio.

Again, I cite the foregoing to emphasize that race was at the heart of all of these activities. It should come as no surprise, then, that when writings and views of a nominee appear to challenge the use of federal power to address the harmful vestiges of racist governmental policies, questions are raised and answers demanded. It should also come as no surprise that black Americans and those who collaborated with us to effect change, are alarmed and wary that his elevation to the Supreme Court could result in an unraveling of the gains won at such a high price.

There is a tendency among persons who lack a sense of history to dismiss the claims raised by civil rights groups as nothing more than the whining of special interest groups. I'm old enough to know, firsthand, that such accusations are nothing new. In their day, Charles Houston, Thurgood Marshall, Martin Luther King, Medgar Evers and others who are now universally hailed as American heroes, were similarly accused of less-than-honorable motives. Yet, they kept their eyes on the prize and, through great sacrifice and commitment, pulled our nation back from the abyss. Their mission then and that mission now is not a "special interest"—it is the very core of our nation's creed. Mischaracterizing our concerns as irrelevant and cynical is flat-out wrong and an insult to the memory of these great Americans and to me personally.

In urging you to closely scrutinize the nominee's record, I neither wear the hat of a political partisan, nor have a political agenda. The legislative and judicial remedies aimed at ending the scourge of segregation do not belong to any particular party—they were the work of both Republicans and Democrats. The landmark *Brown v. Board of Education* opinion was authored by Chief Justice Earl Warren, a Republican who was appointed by a Republican President, Dwight D. Eisenhower. The most significant legislative accomplishments in the area of civil rights grew out of the leadership of President Kennedy and President Johnson but with the significant collaborative efforts of Republican Senators Everett Dirksen, Jacob Javits, and Edward Brooke, Democratic Majority Leader John McCormack, Congressman Emanuel Celler, and Congressman William McColloch. These bipartisan victories vindicated the faith of black and white Americans, whose efforts were spearheaded by such persons as Clarence Mitchell, Jr. and Joseph Rauh, among others.

Neither political partisanship nor loyalties should override the solemn duty that the Constitution has placed upon you. It will be for history, not your contemporaries, to judge your deeds.

# Chapter I. Code of Conduct for United States Judges

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## CHAPTER I. CODE OF CONDUCT FOR UNITED STATES JUDGES[1]

### Introduction

This Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. In addition, the Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code. Persons to whom the Code applies must arrange their affairs as soon as reasonably possible to comply with the Code and should do so in any event within one year of appointment.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chairman of the Committee on Codes of Conduct as follows:

Chairman, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the
United States Courts
One Columbus Circle, N.E.

Washington, D.C. 20544
(202) 502-1100

CODE OF CONDUCT FOR UNITED STATES JUDGES[1]

* * * * *

**CANON 3**

**A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY**

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:
A. Adjudicative Responsibilities.

* * * * *

(6) A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

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COMMENTARY

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**Canon 3A(6).** The admonition against public comment about the merits of a pending or impending action continues until completion of the appellate process. If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A. This provision does not restrict comments about proceedings in which the judge is a litigant in a personal capacity, but in mandamus proceedings when the judge is a litigant in an official capacity, the judge should not comment beyond the record.
"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by the rules of professional conduct applicable in the various jurisdictions.

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1. The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. Canon 3C(1)(c) was revised at the September 1999 Judicial Conference. The Compliance Section was clarified at the September 2000 Judicial Conference.

2. Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, (202-502-1100).

3. This Code governs the conduct of United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. In addition, certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section.

*from the office of*

# *Senator Edward M. Kennedy*

*of Massachusetts*

**FOR IMMEDIATE RELEASE**
September 12, 2005

**CONTACT:** Laura Capps/Melissa Wagoner
(202) 224-2633

**OPENING STATEMENT BY SENATOR EDWARD M. KENNEDY ON NOMINATION OF JOHN ROBERTS TO CHIEF JUSTICE OF THE SUPREME COURT**

***(As Prepared for Delivery)***

Judge Roberts, I join in welcoming you and your family to this committee, and to this famous room – the site of so many historic hearings.

Today, our nation's flags are at half mast to honor the memory of Chief Justice Rehnquist and his deep dedication to his beloved Supreme Court. We know that Judge Roberts was especially close to him, and our thoughts and prayers go to the Rehnquist family and all who knew him.

As we are all well aware, the Senate's action on this nomination is profoundly important. It's a defining opportunity to consider the values that make our nation strong and just, and how to implement them most effectively, especially the guiding principle of more than two centuries of our history – that we are all created equal.

Our commitment to this founding principle is especially relevant today. Americans are united as rarely before in compassion and generosity for our fellow citizens whose lives have been devastated by Hurricane Katrina.

That massive tragedy also taught us another lesson. The powerful winds and floodwater of Katrina tore away the mask that has hidden from public view the many Americans who are left out and left behind. As one nation under God, we cannot continue to ignore the injustice, the inequality, and the gross disparities that exist in our society.

Across the years, we have experienced times of great turmoil and great triumph, as each succeeding generation struggled to live up to our founding principle and give it meaning for everyone. Americans have shed blood, campaigned and marched. They have worked in countless quiet ways, as well, to see that every one of our citizens is part of our democracy and has an equal opportunity for a good education, a good job, and a good life.

Today, grandparents who were denied the right to vote expect their grandsons and granddaughters to be able to cast a ballot without discrimination or intimidation. And our society is better because of that progress.

Today, fathers and mothers expect their daughters to have the same opportunities as their sons to attend college, play sports, and earn fair pay. And our society is better because of that progress.

Today, parents expect their disabled children to live in hope – to receive an education that draws out their talent, and enables them to reach for their dreams like all other Americans. And our society is better because of that progress.

Too many have sacrificed too much, worked too hard, and come too far, to turn back the clock on that progress. Americans today expect their elected representatives to carry on the great unfinished business of making America the land of opportunity for all, and we expect our courts to defend our progress as their constitutional responsibility.

The challenge today is especially difficult because of vast global economic changes and major new threats to our national security, and we need the ingenuity, innovation, and commitment of every American.

Our military leaders are the first to say that highly qualified, racially diverse armed forces are essential to defending our country and the cause of freedom at home and abroad.

Every citizen counts. We must continue to remove barriers that hold back millions of our people. We must draw strength from our diversity as we compete in a new world full of promise and peril.

So the central issue before us in these hearings is whether the Supreme Court will preserve the gains of the past, and protect the rights that are indispensable to a modern, more competitive, more equal America. Commitment to equality for all is not only a matter of fairness and conscience. It is also our path to sustained national strength and purpose.

We also are a government of the people in which citizens have a strong voice in the great issues that shape our lives. Our system of checks and balances was drawn up in full awareness of the principle that absolute power corrupts absolutely, and was designed to make sure that no branch of government becomes so powerful that it can avoid accountability. The people have a right to know that their government is promoting their interests, not the special interests, when it comes to the price of gasoline and the safety of prescription drugs, the air we breathe and the water we drink, and the food and other products we buy. The people have a right to keep government from intruding into their private lives and most personal decisions.

But the tragedy of Katrina shows in the starkest terms why every American needs an effective national government that will step in to meet urgent needs that individual states and communities cannot meet on their own.

Above all, the people and their Congress must have a voice in decisions that determine the safety of our country and the integrity of our individual rights. We expect Supreme Court Justices to uphold those rights and the rule of law in times of both war and peace.

All this – and more – will be before the Supreme Court in the years ahead, and its judgments will affect the direction and character of our country for generations to come.

Judge Roberts you are an intelligent, well-educated and serious man. You have vast legal experience and you are considered to be one of the finest legal advocates in America. These qualities are surely important qualifications for a potential Supreme Court Justice. But they do not end the inquiry or our responsibility. This Committee and the full Senate must also determine whether you have demonstrated a commitment to the constitutional principles that have been so vital in advancing fairness, decency and equal opportunity in our society.

We have only one chance to get it right, and a solemn obligation to do so. If confirmed, you could serve on the Court for a generation or more, and the decisions you make as a Justice will have a direct impact on the lives of our children, our grandchildren and our great grandchildren.

Because of the special importance of an appointment like yours, the Founders called for shared power between the President and the Senate. The Senate was not intended to be a rubber stamp for a President's nominees to the Supreme Court – and, as George Washington himself found out, it has not been.

Judges are appointed "by and with the advice and consent of the Senate," and it is our duty to ask questions on great issues that matter to the American people, and to speak for them. Judge Roberts, I hope you will respond fully and candidly to such questions, not just to earn our approval, but to prove to the American people that you have earned the right to a lifetime appointment to the highest court in the land.

Unfortunately, Mr. Chairman, there are real and serious reasons to be deeply concerned about Judge Roberts' record. Many of his past statements and writings raise questions about his commitment to equal opportunity and the bi-partisan remedies we have adopted in the past. This hearing is John Roberts' job interview with the American people. He will have a fair chance to express his values, state his views, and defend his record. The burden on him is especially heavy, because the Administration, at least so far, has chosen not to allow the Senate to have access to his full record. We can only wonder what they don't want us to know.

In particular, we need to know his views on civil rights, voting rights, and the right to privacy – especially the removal of existing barriers to full and fair lives for women, minorities, and the disabled.

From the start, America was summoned to be a shining city on a hill. But each generation must keep building that city. Even in this new century, some Americans are still denied a voice at the ballot box because of their color, denied a promotion because of their gender, denied a job because of their age, denied hope because they are gay, or denied an appropriate education because they are disabled. Long-established rights to privacy are under heavy siege.

We need a Chief Justice who believes in the promise of America, and the guarantees of our Constitution, a person who will enter that majestic building near here and genuinely believe the four inspiring words inscribed in marble above the entrance, "Equal Justice Under Law."

I look forward to hearing from Judge Roberts about whether, if he joins the Supreme Court, he will uphold the progress we have made and will guarantee that all Americans have their rightful place in the nation's future.

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**TESTIMONY OF PETER N. KIRSANOW BEFORE THE SENATE**

**JUDICIARY COMMITTEE ON THE NOMINATION OF**

**JUDGE JOHN G. ROBERTS TO THE UNITED STATES SUPREME COURT**

**SEPTEMBER 15, 2005**

Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I am appearing in my personal capacity.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to, among other things, study and collect information relating to discrimination or denial of equal protection laws under the constitution because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection and serve as a national clearinghouse of informatioı relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function and with the help of my assistant I have examined the civil rights-related opinions of Judge John Roberts as well as his record as an advocate in the context of prevailing civil rights jurisprudence. This was done by reviewing the opinions in the civil rights-related cases in which Judge Roberts participated while on the D.C. Circuit Court of Appeals and by examining the civil rights-related cases in which Judge Roberts was involved as an advocate before the Supreme Court. A more limited examination was also conducted of some of the civil rights-related memoranda written by Judge Roberts while Associate White House counsel, which are of lesser analytical value since, among other things, they often reflected the settled views of the Administration

Our examination reveals that Judge Roberts' approach to civil rights issues is consistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions as well as governing precedent. His opinions evince appreciable degrees of judicial discipline, modesty and restraint and are consistent with his assertion during his confirmation

proceedings for the D.C. Circuit that, "My judicial philosophy accordingly insists upon some rigor in ensuring that judges properly confine themselves to the adjudication of the case before them, and seek neither to legislate broadly nor to administer the law generally in deciding that case." In short Judge Roberts' record on civil rights-related issues is exemplary: legally sound, intellectually honest and with an understanding and appreciation for the historical bases for civil rights laws.

Our examination also underscores that some aspects of Judge Roberts' record on civil rights have been mischaracterized and many of the criticisms are misplaced -- conflating Judge Roberts' positions as a lawyer advising or advocating on behalf of a client with his personal policy preferences. Three brief examples:

First, some have contended that during the 1982 reauthorization of the Voting Rights Act Judge Roberts supported an "anti-civil rights" interpretation of the Voting Rights Act. A review of Judge Roberts' record as Special Assistant to Attorney General William French Smith shows that he explicitly counseled in favor of reauthorization of the entire Voting Rights Act. Judge Roberts expressed concern, consistent with the Administration's position, regarding substantively redefining Section 2 of the Act in a manner that would sever the Act from its constitutional connection to the Fifteenth Amendment related to intentional or purposeful discrimination. His memoranda reflected the Administration's positive, supportive vision of voting rights, and expressed a concern that changing Section 2 could risk introducing confusion and uncertainty into one of the most successful pieces of civil rights legislation in the nation's history. Section 2 was indeed amended to incorporate an effects test, but Judge Roberts continued, on behalf of his client, to advocate vigorous enforcement of Section 2. As Principal

Deputy Solicitor General, Judge Roberts participated in three Section 2 cases and two Section 5 cases. In *Chisom v. Roemer*, Judge Roberts argued on behalf of the United States that the effects test under Section 2 applies to the election of state court judges. Indeed, in *Chisom* he argued not only in support of the effects test, but for an *extension* thereof. Also, in *Voinovich v. Quilter*, he argued that the State of Ohio's redistricting plan, which was largely based on an NAACP proposal, did not violate the Voting Rights Act or the Fifteenth Amendment. The Court agreed with the government's position unanimously.

Second, some have claimed that Judge Roberts has a regressive view of affirmative action. Perhaps the most frequently cited criticism of Judge Roberts' analysis of affirmative action is a memorandum he wrote to then Attorney General William French Smith questioning some of the arguments in a 1981 report of the U.S. Commission on Civil Rights. A detailed examination of the Commission's report shows that Judge Roberts' criticism was not only correct, but imperative.

In *United Steelworkers v. Weber* and *Johnson v. Transportation Agency* the Supreme Court upheld the legality of private employer affirmative action plans designed to remedy a manifest racial imbalance in an employer's workforce resulting from past discrimination or a traditionally segregated workforce. Although the terms "manifest imbalance" and "traditionally segregated workforce" were sufficiently nebulous for circuit courts to provide their own definitions in a given context, most courts require that there be some direct evidence of unlawful discrimination against the beneficiary group. The affirmative action programs of public sector employers face an even greater evidentiary burden: the need to survive strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. In other words, the program must promote a compelling governmental interest and be narrowly tailored to serve that interest. What qualifies

as a compelling governmental interest is limited almost exclusively to remedying actual instances of discrimination by a particular employer.

The Commission's report, however, dispensed with the need for such proof. The report endorsed the use of affirmative action plans even when there is absolutely no evidence of unlawful discrimination. According to the report, a mere "imbalance" in numbers, *i.e.*, a showing that the percentage of minorities in an organization or workplace is below the respective percentages in society at large is all that is necessary to justify an affirmative action requirement. Not only was the Commission's report inconsistent with the status of the law in 1981, but it also fails to comport with the post-*Richmond v. Croson/Adarand Constructors v. Pena/Grutter v. Bollinger* affirmative action requirements.

Judge Roberts opposed unlawful racial quotas or racial set-asides untethered to a showing of discrimination. He supported the "bedrock principle of treating people on the basis of merit without regard to race or sex." And he declined to promote personal policy preferences.

Judge Roberts' measured approach to civil rights is further on display when his analysis on behalf of a client's interests in *Adarand Constructors v. Pena* is contrasted with his role as a judge in *Sioux Valley Rural Television, Inc. v. FCC*. The former case involved racial preferences in government contracting; the latter case involved racial preferences in government licensing. In *Adarand* Roberts represented a construction-industry trade association as an amicus challenging the federal government's practice of awarding general contractors on federal projects a financial incentive to hire subcontractors who were "socially and economically disadvantaged." The government's presumption was that "socially and economically disadvantaged" meant small minority businesses.

On behalf of his client, Judge Roberts argued that racial preferences in the award of construction contracts by the federal government should be subject to strict scrutiny under the Equal Protection component of the Due Process Clause of the Fifth Amendment. (The Court had previously held in *City of Richmond v. J.A. Croson Co.* that strict scrutiny applied to racial preferences an award of state contracts.) Roberts further argued that the only governmental interest that would satisfy strict scrutiny is the need to remedy specifically identified instances of past discrimination. Roberts also argued that once the objective of remedying specifically identified past discrimination is established, the narrow tailoring prong of strict scrutiny requires that the government (1) carefully consider race-neutral alternatives; (2) link any numerical objectives to the availability of qualified minority firms in the relevant market; (3) must establish durational limits; and (4) accord preferences only to those toward whom past discrimination has been proven. The "socially and economically disadvantaged"/small minority business preference simply did not pass strict scrutiny.

The Court held that all racial classifications, whether created by federal, state or local governmental actors are subject to strict scrutiny. The Court remanded the case for further consideration to address, among other things, the question of narrow tailoring.

In *Sioux Valley* a coalition of FCC licensees challenged the FCC's restructuring of certain preferences awarded to bidders on FCC broadcast licenses, contending that such restructuring demonstrated an unconstitutional motive to perpetuate race and gender-based preferences.

Prior to *Adarand* the FCC had provided a 25% bidding credit for businesses owned by women and minorities. The effect of the bidding credit was to reduce by 25% the amount a winning bidder owed the FCC for a license. The FCC also provided an advantage to small business bidders by permitting them to make a 20% down payment on the bid with the balance

paid out over five years. Small businesses owned by women or minorities could take advantage of both the minority/female bidding preference and the installment payment plan.

After *Adarand* the FCC revoked the minority/women bidding credit but, rather than eliminating the credit entirely, extended it to all winning small business bidders. In doing so, the FCC noted that such revocation would not harm the minority and female businesses that had previously received the credit since all such businesses qualified for and would now receive the small business credit.

The petitioners in *Sioux Valley* contended that while the new credit was facially neutral, it was impermissibly motivated by a racial purpose or object. The petitioners noted that in implementing the new race-neutral policy, the FCC had explicitly stated that the policy would not negatively affect the recipients of the revoked minority/female bidding credit because all of them also qualified as small businesses. Judge Roberts wrote the majority opinion for the D.C. Circuit Court of Appeals denying the petitioners' challenge. Judge Roberts stated that simply because the FCC had noted that the rule change would not harm the minority/female businesses that had previously gotten the credit does not evince discriminatory intent.

Judge Roberts could have reasonably struck down the racially neutral FCC rule change, since such change surgically and conveniently preserved bidding preferences for a subset of small businesses, all of which were minority/female businesses. Indeed, as an advocate in *Adarand* Judge Roberts had challenged, on behalf of his clients, preferences that were directed at "socio-economically disadvantaged individuals," the relevant and convenient subset of which consisted of minority-owned subcontractors.

Judge Roberts declined to strike down the rule. Instead, he deferred to the agency's action. It is submitted that this is a prime example of Judge Roberts' judicial approach and

temperament that are the best protection against erosions to civil rights liberties: a faithful and disciplined interpretation of the law.

A third contention unsupported by our examination of Judge Roberts is that the civil rights arguments he made on behalf of clients are regressive or out of the mainstream. A review of the scores of cases Judge Roberts has litigated before the Supreme Court in nearly two decades produces 23 cases that may be termed, in the traditional sense, "civil rights cases." That is, the issues in the cases involved matters pertaining to constitutional provisions such as the Fifth or Fourteenth Amendments or statutes such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, or the Americans with Disabilities Act, etc. Consider that of the tens of thousands of cases litigated annually in the lower courts, the Supreme Court reviews only several dozen a year. By the time the arguments advance to the Supreme Court they have already passed through a torturous gauntlet of legal analyses. Most arguments that survive to be heard before the Court, therefore, are taut and tempered. Yet 50% of these arguments must necessarily fail, regardless of how lucid, cogent or substantive they may be. Probabilities would suggest, therefore, that if Judge Roberts somehow slipped past the Supreme Court gatekeepers and was making regressive or nonmainstream arguments before the Court, such arguments would be rejected virtually 100% of the time, or at a bare minimum, far more than 50% of the time. Yet the record shows that the Court agreed with the position Judge Roberts argued on behalf of his clients 71% of the time. This is hardly indicative of positions inconsistent with prevailing civil rights jurisprudence.

Of the 13 justices before whom John Roberts argued, 11 agreed with his advocacy interests more than 50% of the time. These justices included those that might be considered in the colloquial sense "conservative," such as Justice Rehnquist (75% of the time), Justice Scalia (71% of the time), and Justice Thomas (71% of the time). Yet they also include Justices

colloquially described as "liberal," such as Justice Ginsberg (60% of the time), Justice Souter (59% of the time) and Justice Stevens (58% of the time). Even Justice Thurgood Marshall, considered the premiere civil rights litigator of the twentieth century, agreed with Judge Roberts' advocacy position 67% of the time, nearly the same as Justices Scalia and Thomas and more than Justice O'Connor.

Another measure of Judge Roberts' judicial modesty is reflected in an analysis of the 129 three-judge panel decisions in which he participated while on the D.C. Circuit. His votes on such panels were generally consistent with those of the other panel members, regardless of whether the judges were appointed by Democrats or Republicans.

One hundred twenty-four of the 129 panels resulted in unanimous opinions. Judge Roberts voted with the majority 125 of 129 times and authored 45 majority opinions, 43 of which were unanimous. In the four cases in which he did not join the majority, Judge Roberts dissented in one, concurred in part and dissented in part in another, and concurred in the judgment incurred in part of the final two.

Judge Roberts sat with two Democratic-appointed judges in 20 cases, 17 of which resulted in unanimous decisions. He wrote the majority opinion seven times, six of which were unanimous. Judge Roberts sat on 65 panels comprised of another Republican-appointed colleague and one Democratic-appointed colleague. Of those cases, 63 were unanimous and two were decided by 2-1 votes. Judge Roberts wrote the majority opinion 23 times, 22 of which were unanimous. In one of the 2-1 decisions, Judge Roberts voted with the majority upholding civil rights claims against a state actor's Eleventh Amendment sovereign immunity defense. In that case he joined the opinion of his Democratic-appointed colleague.

In the remaining 44 panels, Judge Roberts sat with two other Republican-appointed colleagues. All 44 panels produced a unanimous result. Judge Roberts wrote 15 of the opinions.

In summary, Judge Roberts voted with his colleagues 97% of the time. Even when he was on panels with two other Democratic-appointed judges, the decisions were unanimous 85% of the time. Clearly not all of these cases were civil rights related, but it is just as clear that Judge Roberts' record on the D.C. Circuit demonstrates that he is not an outlier.

Judge Roberts' 25-year record on matters pertaining to civil rights demonstrates an unwavering commitment to equal protection under the law and a comprehensive understanding of our civil rights laws that would make him an impressive addition to the Supreme Court.

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

July 29, 2005

Dear Senator Specter:

I am writing in support of the candidacy of Judge John Roberts for the position of Justice of the United States Supreme Court. I urge you to give this nominee a fair hearing followed by an affirmative vote in order to place him on the bench prior to the convening of the next Supreme Court session in October.

It is exceedingly clear that this man is undoubtedly well qualified to assume this position of leadership in our nation. Judge Roberts graduated with honors from Harvard Law School and from there he has gained an immense amount of quality experience to help him be a strong addition to the highest court in our land. All details of his work in private practice and his public positions with the Solicitor General's office and his current placement with the Federal Appeals Court point to a person with impeccable credentials. We would be well served by such a wise and fair minded gentleman who views our constitution as a revered document to follow not one which can be shaped to meet the current mood of the day.

Our country needs this type of highly qualified and experienced legal scholar in a place of leadership. He has received glowing support from individuals on both sides of the aisle which further attests to his ability to be a fair arbiter of justice.

The citizens of this country are hoping to see a fair process for this quality individual. In addition to a fair hearing and confirmation, I would urge you to not allow this man to be harmed by unfair accusations purely aimed at him for political purposes. Let's restore the dignity to this process that the world needs to see coming from the United States Senate as they go about the business of peacefully governing our great country.

Once again I urge you to vote to affirm the placement of Judge Roberts on the Supreme Court. Thank you for your consideration of this request and may God bless you as you proceed with this most important business.

Sincerely,

Barbara Kleinsmith

Barbara Kleinsmith
2531 Foothill Lane
Brea, California 92821

Jul 29 05 11:25p Gary Kleinsmith 714 990-0508 p.1

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
**September 12, 2005**

**The Honorable Herb Kohl**
United States Senator , Wisconsin

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Opening Statement of Sen. Herb Kohl on the Supreme Court Confirmation Hearing of Judge John Roberts to be Chief Justice of the United States

Thank you, Mr. Chairman.

Judge Roberts, let me also extend my welcome to you this afternoon and to your family.

Judge Roberts, if confirmed you will succeed Justice Rehnquist and serve as only the 17th Chief Justice in the history of the United States, and the youngest in 200 years. You are nominated to a position of awesome power and responsibility. The decisions you and the other Justices make will shape the lives of every person in America for generations. Yet for only a few days this week will the people, through their Senators, be able to question and judge you.

That means that we on this Committee who will be questioning you have an awesome power and responsibility as well.

Judge Roberts, our democracy, our rights, and everything we hold dear about America are built on the foundation of our Constitution. That remarkable document has endured throughout our history. In the hands of the Supreme Court, it has established a right to equal education regardless of race. It has guaranteed an attorney and a fair trial to all Americans, rich and poor alike. It has allowed women to keep private medical decisions private. It has allowed Americans to speak, vote, and worship without interference from their government.

You will lead the Court in its most solemn duty to interpret the Constitution and the rights it grants to all Americans. The Court has the last say in what will be the scope of our rights and the breadth of our freedoms. The Court even has power over which constitutional questions it will hear and which cases the Court will decide. That is why the Supreme Court is so vital to our lives -- and who decides these issues, Judge Roberts, is therefore of unsurpassed importance.

Moreover, you will enjoy even greater authority as Chief Justice of the United States than your fellow Associate Justices. You will not only lead an entire branch of our government if you are confirmed, but you will have a less evident, but an even more important power because it will be your sole responsibility to determine which Justices write which opinions when you are in the majority. Who writes the opinion governs the principle the case stands for and whether the precedent it sets is broad and important or narrow and less consequential.

If you are confirmed for this lifetime position, your decisions and those of your colleagues will be the final word on the rights and freedoms of all Americans for decades to come. You will have no constraints on the decisions you reach -- other than your understanding of the Constitution and your heart. That is why it is so essential that we -- the democratic representatives in a democratic country -- take this week to probe that understanding and that heart.

This process of lifetime tenure is unique in our system of government. The President, Senators, and Governors make decisions every day. Our choices and our opinions are transparent to the public. And every few years, we are accountable for the decisions we make and the votes we cast. If the people do not like our votes or disagree with our record, they vote for someone else and we are gone.

Just as we want -- and need -- to know much more about you, we presume that you want the country to know a lot about what is in your mind and in your heart. People in high places of public trust in this country have a responsibility to share their thoughts about important issues like civil rights, privacy, property rights, the separation of church and state, civil liberties and much more. We hope you understand the need to be totally forthcoming in your answers to questions on these issues. Evasions, avoidance, and hiding behind legal jargon simply will not suffice.

So, the panel will ask you about some of the most important issues that you will face should you be confirmed. For example, the right to privacy. In early writings, you questioned this freedom, calling it a [QUOTE] "so-called right to privacy", so we expect you to discuss with us your current thinking on this basic question.

This past term, the Court decided a ground breaking case concerning the government's power of eminent domain. The Supreme Court held that the government may take private land not only for public use, but also for private development. Public opinion is opposed to this outcome. So, we look forward to hearing your views on this important issue.

The Supreme Court's decisions may be most important when they address the breadth of our civil rights. Some people think that your early writings were cavalier in dismissing many civil rights protections. For example, you were active in efforts to narrowly define voting rights protections. And, your narrow interpretation of Congressional power to address civil rights and other important issues while a judge on the D.C. Circuit gives some pause. The American people deserve to know how you will approach cases involving voting rights, gender discrimination, violence against women, and affirmative action, among many others.

Finally, some speculate that if confirmed you will seek to weaken the separation between church and state. Your critics point to positions you took as a government attorney critical of Supreme Court decisions on prayer in school. So, we need to hear your views about the Establishment Clause of the Constitution as well.

Judge Roberts, if confirmed we can expect that you will serve 25 or 30 years as Chief Justice of the United States. You will likely become the most influential Justice of your generation. During these decades, you will help shape the nature of our country and our democracy. It will be your job to give life and meaning to the broad and lofty promises of the Constitution -- such essential principles as "due process", "equal protection", and "free speech" -- and to stand up for the rights and civil liberties of the underrepresented and unpopular.

Before we decide whether to entrust you with this power, we ask you to stand before the public and explain your views, express our hopes, and expound on your approach to the bedrock principles that guide us as a Nation.

We have an obligation to find out where you will take us before we decide whether we want you to lead us there. And, most importantly, you have an obligation to tell us.

This would be an appropriate time to share my perspective on how I will judge a nominee. In judging this and other Supreme Court nominations, my test has been judicial excellence. To me, judicial excellence involves four elements. First, a nominee must possess the competence, character, and temperament to serve on the Supreme Court. He or she must have a keen understanding of the law, and the ability to explain it in ways that the American people will understand.

Second, judicial excellence means that a Supreme Court Justice must have a sense of the values which form the core of our political and economic system. We have a right to require the nominee to understand and respect our constitutional values.

Third, judicial excellence requires a sense of compassion. The law is more than an intellectual game, and more than a mental exercise. As Justice Black said, [QUOTE] "The Courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." [UNQUOTE]

A Supreme Court Justice must understand this. He or she must recognize that real people, with real problems are affected by the decisions rendered by the Court. They must have a connection with and an understanding of the problems that people struggle with on a daily basis. Justice, after all, may be blind, but it should not be deaf.

And finally, judicial excellence requires candor before confirmation. We are being asked to give the nominee enormous power. So, we want to know how he or she will exercise this power and how they see the world -- and we need and we deserve -- to know what is in your mind and in your heart.

Judge Roberts, I am convinced that you satisfy the requirements of competence, character and temperament. I enjoyed meeting you a few weeks ago and appreciated our discussion. Your legal talents are undeniably impressive. Yet, while we are now familiar with your abilities, we still know precious little about your legal philosophy and views on the crucial issues you will face on the Supreme Court in the years ahead. So, we look forward to these hearings as an opportunity to learn more and measure whether you meet our test of judicial excellence.

Thank you, Mr. Chairman.

September 6, 2005

Honorable Arlen Specter, Chairman

Honorable Orrin G. Hatch
Honorable Charles E. Grassley
Honorable Jon Kyl
Honorable Mike DeWine
Honorable Jeff Sessions
Honorable Lindsey O. Graham
Honorable John Cornyn
Honorable Sam Brownback
Honorable Tom Coburn

Honorable Patrick Leahy
Honorable Edward M. Kennedy
Honorable Joseph R. Biden, Jr.
Honorable Herbert Kohl
Honorable Diane Feinstein
Honorable Russell D. Feingold
Honorable Charles E. Schumer
Honorable Richard J. Durbin

Dear Members of the United States Senate Committee on the Judiciary:

As a civil rights organization that litigates on behalf of lesbian, gay, bisexual and transgender (LGBT) people and those with HIV, Lambda Legal has serious concerns about John Roberts's nomination to the U.S. Supreme Court.

His record raises troubling questions about his judicial philosophy, specifically in terms of his views on the right to privacy, Congress's power to enact laws that address matters of national concern like civil rights, the guarantee of equal justice for all and other issues that have important implications for LGBT and HIV-affected people.

The U.S. Senate now has the responsibility of closely scrutinizing these issues and many others to determine whether John Roberts can be a Supreme Court justice who will protect the individual rights of all Americans. It is critical that the Senate exercise its constitutional duty to fully vet the Roberts nomination rather than serve as a mere rubber stamp for the President's choice. And it is equally critical that Roberts answer the tough questions that the Senate has a constitutional responsibility to ask about his judicial philosophy.

On behalf of the LGBT and HIV-affected communities and the thousands of Lambda Legal members who have attached their names to this letter, we respectfully submit the following questions to pinpoint areas that we believe must be explored during the confirmation hearings. We urge you to pose these questions in ways that will ensure meaningful responses and to engage in in-depth follow-up, so that the Senate and the

American people truly will know whether or not John Roberts deserves a lifetime seat on the highest court in our nation.

Equal Protection (*Romer v. Evans*)

1. Do you agree with the analysis of the majority of the Supreme Court in *Romer v. Evans* that when an enactment targeting a group of Americans sweeps as broadly as Colorado's Amendment 2, which prohibited all legislative, executive or judicial action designed to protect lesbians and gay men, it can be explained only by animus?

2. Do you agree with the analysis of the majority of the Supreme Court in *Romer v. Evans* that a law that can be explained only by antigay animus does not satisfy the requirements of equal protection?

3. Do you agree with the dissenting opinion in *Romer v. Evans* that voters may prohibit all legislative, executive and judicial action to protect gays and lesbians in order to preserve traditional morals?

4. Do you agree with the dissenting opinion in *Romer v. Evans* that moral disapproval of homosexuality is sufficient justification to establish the constitutionality of laws that treat lesbians and gay men differently than heterosexuals?

5. Do you agree with the dissenting opinion in *Romer v. Evans* that the majority in that case, by striking down Colorado's Amendment 2, inappropriately took sides in a debate that should have been allowed to be resolved exclusively through the political process?

6. In written answers recently submitted to the Senate Judiciary Committee, you said "To the extent the term 'judicial activism' is used to describe unjustified intrusions by the judiciary into the realm of policy making, the criticism is well founded." While it's of course true that if the intrusion is "unjustified," the criticism would be well founded, what are examples of cases where you believe the intrusion was unjustified? What guideposts do you believe judges should follow in determining when they may be making an unjustified intrusion into the realm of policy making, as opposed to doing their job of enforcing the law as well as the guarantees of the Constitution? Do you believe that the analysis of the majority of the Supreme Court in *Romer v. Evans* constituted such an "unjustified intrusion"? Do you believe that the analysis of the majority of the Supreme Court in *Lawrence v. Texas* constituted such an "unjustified intrusion"?

7. Recent news reports indicated that you assisted one of the attorneys representing the plaintiffs in *Romer v. Evans* in preparing for oral argument. Why did you choose not to indicate that you had done any work related to that case in the

answers you submitted to the Senate Judiciary Committee describing your *pro bono* work? Did you agree or disagree with the legal arguments advocated by the plaintiffs's attorneys in that case, including the equal protection argument ultimately accepted by the Court majority? If you agreed with some of the arguments advanced by the plaintiffs in the case but not others, please identify each and explain why you agreed or disagreed with them.

Right to Liberty (*Lawrence v. Texas*)

8. Do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that, under the U.S. Constitution, religious or moral beliefs cannot be the sole basis for the enactment and enforcement of criminal laws?

9. Do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that the right to liberty under the due process clause gives individuals the right to engage in private, adult, consensual, noncommercial sex without interference by the government? If so, do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that the right belongs equally to lesbians and gay men as to heterosexuals? Do you believe that lesbian and gay people should be denied "fundamental rights" to which others are constitutionally entitled?

10. Do you agree with the dissenting opinion in *Lawrence v. Texas*, authored by Justice Scalia, that promotion of a majoritarian morality is, on its own, a legitimate state interest? If so, do you agree with the dissenting opinion that this interest is sufficient for so-called sodomy laws to withstand constitutional scrutiny?

11. Do you agree with the dissenting opinion in *Lawrence v. Texas*, authored by Justice Scalia, that it should be left entirely to the political process to decide whether a state may enact laws making it a crime for lesbians and gay men to have certain forms of private, consensual, noncommercial sex with other adult partners?

12. Do you agree with Justice O'Connor's concurring opinion in *Lawrence v. Texas* that, when a law exhibits a desire to harm a politically unpopular group like lesbians and gay men, the Supreme Court has applied a more searching form of rational basis review to strike down such laws under the equal protection clause?

13. Do you agree with Justice O'Connor's concurring opinion in *Lawrence v. Texas* that moral disapproval of gay people is not a sufficient state interest to satisfy rational basis review under the equal protection clause?

Right to Privacy

14. Do you agree that there is a right to privacy under the U.S. Constitution and that this right limits the ways in which government can restrict individual rights?

15. Do you agree with the analysis of the majority of the Supreme Court in *Roe v. Wade* that the constitutional right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy?

16. Do you agree with Justice Douglas's opinion for the Court in *Griswold v. Connecticut* that laws prohibiting the sale or use of contraceptives violate the constitutional right to privacy for married couples? And with the Court's decision in *Eisenstadt v. Baird* that this right belongs equally to those who are not married?

17. Does the *amicus* brief you helped author in *Rust v. Sullivan* reflect your judicial philosophy regarding whether *Roe v. Wade* was decided correctly?

18. Does the *amicus* brief you helped author in *Bray v. Alexandria Women's Health Clinic* reflect your judicial philosophy regarding the scope of the Civil Rights Act of 1871?

Federalism

19. Do you agree with the analysis of the majority of the Supreme Court in *Tennessee v. Lane* that Congress acted within its power in providing disabled individuals the right to sue in state courts under the Americans with Disabilities Act?

20. What limits does your judicial philosophy place on Congress's power to enact laws to address important national interests like protecting civil rights? How does your dissent from the denial of *en banc* review in *Rancho Viejo, LLC v. Norton* shed light on your judicial philosophy?

Disability Discrimination

21. Do you agree with the analysis of the majority of the Supreme Court in *Bragdon v. Abbott* that HIV infection is a disability that limits one or more major life activities, and therefore HIV discrimination is covered by the Americans with Disabilities Act?

22. Do you agree with Chief Justice Rehnquist's dissenting opinion in *Bragdon v. Abbott* that decisions about having children, whom to marry, where to live and how to earn a living are not major life activities under the Americans with Disabilities Act?

23. Do you agree with Chief Justice Rehnquist's dissenting opinion in *Bragdon v. Abbott* that conditions like HIV, which affect reproductive and other important

personal decisions, are not disabilities that entitle affected individuals to protection under the Americans with Disabilities Act?

Gender Discrimination

24. Do you agree with the analysis of the majority of the Supreme Court in *Price Waterhouse v. Hopkins* that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964?

25. Does the *amicus* brief you helped author in *Franklin v. Gwinnett County Public Schools* reflect your judicial philosophy about the availability of damages as a remedy for sexual harassment under Title IX of the Education Amendments of 1972?

Separation of Church and State

26. Do you agree with the analysis of the majority of the Supreme Court in *Lemon v. Kurtzman* and its approach to analyzing whether a challenged government action violates the establishment clause of the U.S. Constitution?

27. According to your judicial philosophy, what if any limitations does the U.S. Constitution impose on government funding and government sponsorship of religious activity?

Congress's Power to Strip the Federal Courts of Authority

28. Opponents of the federal courts's decisions in politically controversial areas have sometimes suggested they might be able to change substantive law through a change in procedural rules referred to as "court stripping" or "jurisdiction stripping," whereby the legislature would limit the jurisdiction of the federal courts in regard to specific controversial areas of law.

    a. According to your judicial philosophy, does Article III, Sec. 2 of the U.S. Constitution, which states, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make," authorize Congress to preclude the Supreme Court's review of certain controversial topics?

    b. According to your judicial philosophy, does Article III of the U.S. Constitution, which grants Congress the discretion to create lower federal courts, authorize Congress to preclude the lower federal courts's review of certain controversial topics?

*Stare Decisis*

29. In *Planned Parenthood v. Casey*, the Supreme Court listed several basic factors for determining whether or not a prior case can be overturned. These factors were:

    a. whether [the decision's] central rule has been found unworkable;

    b. whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the question;

    c. whether the law's growth in the intervening years has left [the decision's] central rule a doctrinal anachronism discounted by society;

    d. and whether [the decision's] premises of fact have so far changed in the ensuing [years] as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

    Do you agree that each of these factors is necessary for determining whether to overrule a prior case? Would you add any additional factors for consideration of whether or not to overrule precedent?

Approach to Constitutional Interpretation

30. The approaches that judges and scholars take to constitutional interpretation have been described in various ways – for example, constitutional "originalism," "interpretivism" and "nonintepretivism," among others.

    a. Which schools of constitutional jurisprudence best describes your approach to the federal Constitution, and why?

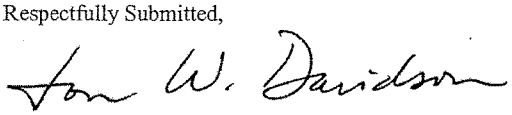
    b. Some in the press have referred to your constitutional approach as "minimalist." Do you agree that this term accurately describes your approach to interpreting the Constitution? If so, what does "minimalism" mean to you? Why do you believe that this is the best approach to constitutional interpretation, if you do? If you depart in some ways from minimalism, in what ways do you depart and why? Whatever you describe as your approach to constitutional interpretation, why do you believe it is the best approach?

    c. Former judge and constitutional scholar Robert Bork is often called an originalist in his approach to the Constitution. Which aspects, if any, of Bork's constitutional philosophy do you agree with, and disagree with,

and why? What are the principal ways in which Bork's approach and yours are similar and different?

d. Even if no one scholar's or judge's approach to constitutional interpretation and jurisprudence more generally is identical to yours, whose do you believe comes closest and why? There may be more than one. What do you admire about these scholars or judges? Which of their decisions, legal texts or analyses do you find particularly persuasive and why?

Respectfully Submitted,



Jon W. Davidson
Legal Director
Lambda Legal

Attachment: Petition Signatures

Law Professors' Letter Regarding Supreme Court Nominee John G. Roberts, Jr.

September 12, 2005

Dear Senate Judiciary Committee Member:

We write in opposition to the nomination of Judge John G. Roberts as Chief Justice of the United States. His legal ability, experience and professional credentials are very strong, and we respect that elections matter; President Bush is entitled to select a qualified nominee. Our concern is about this nominee's impact on the next several decades of jurisprudence, and our sense of how Judge Roberts is likely to affect the lives of LGBT Americans. A review of what is available from his record indicates that Judge Roberts's views, as revealed by his own writing, are not consistent with the preservation of the basic constitutional and statutory protections that have protected LGBT Americans. We therefare urge you to ensure yourselves that we are wrong, or to oppose his nomination.

Judge Roberts has belittled the constitutional right to privacy. As a Reagan Administration attorney, Roberts wrote that courts have intruded "into areas properly and constitutionally belonging to the other branches or to the states."[1] Although he declined to name specific cases that so intruded, he wrote that courts had assumed functions belonging to the states through "so-called `fundamental rights' analysis.'[2] Roberts strongly implies that privacy is not in fact a fundamental right with constitutional support:

> Courts cannot, under the guise of constitutional review, re-strike balances struck by the legislature or substitute their own policy choices for those of elected officials. Two devices which invite courts to do just that are "fundamental rights" and "suspect class" review. It is of course difficult to criticize "fundamental rights" in the abstract. All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution.[3]

Alternatively, although a doctrine he does support—"judicial restraint"[4]—sounds in the abstract worthy, it is also the potential abandonment of personal liberties to the whims of legislatures. We find no support in the history and text of the Constitution, nor in the precedents developed since *Marbury v. Madison,*[5] for this limitation of the Court's role.

The combination of questioning a basic right to privacy, and his strong advocacy of "judicial restraint", gives us pause. Judge Roberts's failure to recognize the right to privacy has a potentially damaging impact on LGBT Americans. The case of *Lawrence v. Texas,*[6] in which the Court struck down criminal sodomy laws, cites privacy cases *as* the legal underpinning of its holding. Although the Court recognized a Due Process right to "liberty" as opposed to "privacy" in its opinion, it is

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[1] "Draft Article on Judicial Restraint," from Holdings of the National Archives and Records Admin. Record Group 60. Accession #60-89-372. Box 30 of 190 Folder: John G. Roberts Misc.

[2] *See id.*

[3] *Id.*

[4] *See id.*

[5] 5 U.S. 137 (1803).

[6] 539 U.S. 558 (2003).

clear that both *Lawrence* and the privacy cases protect personal autonomy from intrusion by the state.

Judge Roberts intimates approval of Congress stripping the Federal Courts of jurisdiction to review entire classes of cases. Our concern that Judge Roberts would not enforce constitutional protections is reinforced by his writings on "court stripping" statutes. When Roberts was serving in the Reagan Justice Department, he authored a memorandum setting forth arguments in favor of legislation to strip courts of jurisdiction to hear certain classes of constitutional claims. Although the memorandum makes clear that it is an advocacy piece drafted at the behest of his superiors, a later writing indicates that Roberts apparently agrees that they are constitutional. In commenting on an analysis in which then Assistant Attorney General Theodore Olson wrote that opposing the bills on constitutional grounds would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises, and Brinks!"[7] It appears from this writing that Roberts believed that the Constitution *should be read* to permit Congress to eliminate the Court's constitutional function, thereby narrowing litigants' avenues for relief from unconstitutional legislation. We disagree with this conclusion as a matter of constitutional law. And, as a matter of realpolitik, recent "court stripping" legislation from Congress has been targeted at endangering the constitutional rights of LGBT Americans.

Support for "court stripping" legislation is particularly relevant to this nomination for two reasons. First, such legislation is once again darkening the halls of Congress. Two court-stripping bills —one regarding the Pledge of Allegiance, one regarding challenges to the Defense of Marriage Act— passed the House of Representatives in 2004. The Court may see challenges to similar legislation in the upcoming years, and Judge Roberts's record raises concerns that he would uphold legislation that would fundamentally alter the system of checks and balances without which constitutional protections are functionally meaningless.

Support for the elimination of judicial review entirely is deeply troubling for those who view the federal courts as arbiters of constitutional protection. We are deeply troubled by the notion that whole classes of law and protection may be carved from Article III review.

**Judge Roberts's** cramped view of the Commerce Clause is deeply troubling. Judge Roberts's reported opinion involving the Commerce Clause, and Congress's authority to regulate broadly relying on Commerce Clause power, is cause for great concern. The enforcement of modern federal civil rights statutes rely in part on a robust Commerce Clause power. The recent activism of the Supreme Court in questioning Congress' authority to rely on the Commerce Clause for jurisdiction is already deeply troubling; Judge Roberts is likely to weigh in on the side of conservative activists in further limiting federal authority.

In a dissent from the denial of *en bane* rehearing in *Rancho Viejo, LLC v. Norton,*[9] Judge Roberts took a position that, if adopted by a majority of the Court, would severely limit Congress' authority to address national concerns. In that case, the D.C. Circuit upheld the Endangered Species Act as applied to a housing developer's challenge to limitations imposed to protect an

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[7] *See* Theodore Olson, "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases." April 12, 1982. With handwritten comments by John G. Roberts. Roberts is apparently referring to Harvard Law Professor Lawrence Tribe, New York Times columnist Anthony Lewis, and then-ABA President David Brink;, who opposed such bills.

[8] "Marriage Protection Act," H.R. 3313, passed 233-194 on July 22 2004 (stripping jurisdiction over challenges to the "Defense of Marriage Act"); Pledge Protection Act, H.R. 2028, passed 247-173 September 23, 2004 (stripping jurisdiction over cases involving the Pledge of Allegiance).

[9] *See* 334 F.3d 1158 (D.C. Cir. 2003).

endangered species that lived only in one state. Roberts's dissent encouraged completely re-framing the way that courts review challenged statutes under the Commerce Clause, striking down any regulations on intrastate activities even if they are a part of a larger scheme of regulation of a class of activities affecting interstate Commerce. This approach—which the Court recently rejected in *Gonzales v. Raice—would* undermine Congress's authority to enact civil rights, environmental, and workplace protections.

The enforcement of the Employment Non-Discrimination Act and the Local Law Enforcement Hate Crimes Prevention Act" when passed, and other civil rights statutes, relies in part on a robust view of Congress's Commerce Clause authority. This view is entirely lacking in Judge Roberts's record.

Full disclosure of relevant documents and rigorous questioning of the nominee is essential to fulfill the Senate's constitutional role of advice and consent. A Supreme Court nominee is not entitled to a presumption of confirmation, nor does the nominating president enjoy an unfettered right to interfere with the Senate's constitutional role in the judicial selection process. We are particularly troubled that the Senate has had no access to relevant documents relating to Judge Roberts's service as Principal Deputy Solicitor General from 1989 to 1993.

In light of this severe impediment to the Senate's ability to assess Judge Roberts's record, we remind that a Senator may ask, and the nominee must answer, questions relating to the nominee's philosophy with regard to already-decided cases. In the words of Second Circuit judge Roger J. Miner:

> "If I were a Senator, I would not tolerate evasion or stonewalling in answering my questions. While a nominee may not disclose how he or she would decide a particular case, there are a number of questions that he or she should be required to answer — questions respecting an understanding of history; questions about important prior decisions of the Court; questions designed to elicit an understanding of the current issues confronting the Court; questions of approach to judging, of philosophy, of adherence to *stare decisis.* I would not accept an answer that obviously is untrue, such as one that denies having taken any position on a controversial issue before the Court that is under discussion by the entire nation. If I could not get the answers I wanted, I would vote 'no?'"

Judge Roberts has expressed on numerous occasions that the courts have improperly intruded into matters appropriately dealt with by the legislatures. Although he has declined to enumerate such cases in most instances, in his capacity as a litigator before the Court he has included *Roe v. Wade* among those cases. It is therefore reasonable both to ask him to name decided cases with which he disagrees on the grounds of "judicial restraint" and to seek an answer, both with regards to *Roe* and other cases with similar constitutional underpinnings.

For all of these reasons, we cannot support Judge Roberts, and urge you, consistent with your constitutional obligation under the Advice and Consent, to withhold your support as well. His personal comportment and credentials are no substitute for the troubling body of evidence before us.

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[m] 125 S.Ct. 2195 (2005)(upholding federal government's power to prosecute users of medical marijuana who grew the drug for their own consumption).

H.R. 2662.

'Hon. Roger J. Miner [Judge, Second Circuit Court of Appeals, nominated to district court and elevated to Second Circuit by Pres. Reagan], *Remark: Advice and Consent in Theory and Practice,* 41 AM. U. L. REV 1075, 1083-84 (1992).

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Institutional affiliations are for identification purposes only. The signatures do not reflect the official policy of the named law schools.

September 1, 2005

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The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
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Dear Senators Specter and Leahy,

As law professors from across the United States, we write to express our opposition to the confirmation of Judge John Roberts to the United States Supreme Court.

The record made available to date suggests that Judge Roberts holds a limited view of Congress' authority to enact key worker, civil rights and environmental protections and a similarly narrow view of the vital role our courts and our government play in safeguarding individual rights, especially civil and women's rights. In contrast, Judge Roberts holds an expansive view of presidential power and law enforcement authority. If transformed into decisional law, these views, taken together, could produce a government with little power to protect its citizenry and a citizenry with greatly reduced power to protect itself from the abuses of government and other powerful interests. In other words, they could produce a national order contrary to the promises of our Constitution and the rights it guarantees.

*Congress' authority to correct nationwide problems.* In his very first opinion on the bench, Judge Roberts dissented to express an exceedingly restrictive view of Congress' authority to enact important regulatory legislation. He suggested that Congress did not have the power, under the Constitution's Commerce Clause, to protect what he called a "hapless toad" through endangered species laws. No court has ever declared an application of the Endangered Species Act unconstitutional. Judge Roberts' apparent view of Congress' authority potentially threatens a wide swath of legislation rooted in the Commerce Clause, including civil rights safeguards, minimum wage and maximum hour laws, clean air, clean water, and workplace safety protections.

*Judicial authority to protect individual rights.* During his years of service in the administrations of Presidents Reagan and George H.W. Bush, under the banner of so-called "judicial restraint," Judge Roberts helped push legal policies that sought to weaken the vital, historic role of the federal courts as an enforcer of individual rights, including, prominently, the rights of racial minorities and women.

Judge Roberts has shown a lack of appreciation for the importance of remedying this country's shameful legacy of racial discrimination. Less than twenty years after the enactment of the Voting Rights Act, he opposed reinvigorating Section 2 following the Supreme Court's decision

in *Mobile v. Bolden*, characterizing the revision as a "radical experiment."[1] Judge Roberts argued that "violations of § 2 should not be made too easy to prove" since doing so would "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[2] Fortunately, Congress overwhelmingly rejected Judge Roberts' position, leading to increased minority representation in state and local governments. Judge Roberts also defended the constitutionality of legislation stripping the Supreme Court of its ability to hear desegregation cases and legislation stripping the lower federal courts of their authority to remedy school desegregation with busing. In addition, he condemned a key Supreme Court decision striking down a Texas law allowing schools to deny admission to the children of undocumented aliens; called the Fair Housing Act "government intrusion"; advised the Justice Department not to seek standard remedies in job discrimination cases – offers of employment and backpay – calling them "staggering"; criticized a long-standing executive order requiring federal contractors to set flexible, reasonable goals and timetables, not "quotas," for hiring more minorities to correct unlawful workplace disparities; asserted that an affirmative action program failed because it "required the recruiting of inadequately prepared candidates"; and as Acting Solicitor General, with final decision-making authority over the government's position, sought to invalidate the Federal Communication Commission's affirmative action program in broadcast licensing, an extremely rare move given that the Solicitor General's Office, pursuant to its statutory mandate, almost always defends federal government policy.

Judge Roberts has similarly taken positions that would undermine women's rights, particularly in the areas of sex discrimination and reproductive choice. While in the Reagan Justice Department, he advocated several positions that would have limited the effectiveness and scope of Title IX, the law barring discrimination against women in education. He also asserted a cost defense to gender discrimination and argued that the Constitution's equal protection clause should not give heightened constitutional protection to women facing government-sponsored sex discrimination – positions the Supreme Court had rejected. As associate White Counsel in the Reagan White House, Judge Roberts derided bipartisan state and national efforts to fix what he referred to as the "purported gender gap"[3] in job pay, confidently dismissing men's pay advantage over women as attributable to factors like seniority and women leaving the workforce for family reasons. Later, as deputy Solicitor General, he co-authored a brief arguing that Title IX did not permit a girl who was repeatedly sexually harassed by her teacher to sue for compensatory damages, an argument the Supreme Court rejected, in part for leaving the girl "no remedy at all."

Judge Roberts' record on reproductive choice is also of great concern. In a brief and on public television, he argued, as principal deputy Solicitor General, that a civil rights law did not protect women from harassment by violent anti-abortion demonstrators at abortion clinics. He also wrote in a government brief that *Roe v. Wade "was wrongly decided and should be overruled."*

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[1] Memorandum from John Roberts to The Attorney General, Edward Schmultz, W. Bradford Reynolds, Stan Morris, Bruce Fein, Kenneth Starr, Thomas DeCair, and Tex Lezar re: "Response to Vernon Jordon on the Voting Rights Act", attaching draft article, (Nov. 17, 1981) (on file with Alliance for Justice).

[2] Memorandum from John Roberts to The Attorney General re: "Voting Rights Act: Section 2", attaching a statement entitled "Why Section 2 of the Voting Rights Act Should Be Retained Unchanged" (Dec. 22, 1981) (on file with Alliance for Justice).

[3] Memorandum from John G. Roberts to Fred F. Fielding re: Draft "Status of the States" 1982 Year End Report (Jan. 17, 1983) (on file with Alliance for Justice).

Judge Roberts has taken similarly regressive positions on a host of other federal rights and protections. While in the Reagan Justice Department, he dismissed what he referred to as the "so-called right to privacy" and generally objected to the notion of "fundamental rights," with specific criticism of *Griswold v. Connecticut*. He also referred to litigation under 42 U.S.C. § 1983, a landmark law, as the "most serious federal court problem" and decried "the damage" wrought by the Supreme Court's holding that federal statutory rights were enforceable under Section 1983. As principal deputy Solicitor General, without invitation from the Supreme Court, he weighed in on two cases seeking to restrict Section 1983's scope, asserting in one that federal courts had no authority to enforce federal Medicaid law and, in the other, that they could not enforce the federal law requiring state child welfare agencies receiving federal funds to make reasonable efforts to keep or reunite foster children with their natural families. Judge Roberts also defended the George H.W. Bush administration's position that private citizens have limited rights to enforce environmental protections, even where Congress tries to provide them broader enforcement authority.

*Expanding Executive Authority.* On the bench and in the Reagan and George H.W. Bush administrations, Judge Roberts has accorded great deference to the authority of both the president and law enforcement. As to presidential power, he joined a D.C. Circuit decision adopting the Bush administration's position that detainees designated as "enemy combatants" may be tried for war crimes before military commissions lacking basic procedural safeguards, ruling that the Geneva Convention, which provides trial protections to prisoners of war, is unenforceable in U.S. courts and, alternatively, did not apply to the detainees. In addition, disagreeing with the other judges on a three-judge panel, Judge Roberts adopted the Bush administration's position that a presidential order validly eliminated lawsuits against Iraqi officials brought by American POWs for torture they suffered during the first Gulf War. During his service in the Reagan administration, Judge Roberts vigorously defended the unfettered exercise of presidential power. Among other things, he embraced the rather extreme libertarian fantasy of reconsidering the constitutionality of and abolishing independent regulatory agencies – like the Federal Reserve Board, the National Labor Relations Board, the Consumer Products Safety Commission and the Occupational Safety and Health Commission – on the theory that they usurp powers reserved for the president.

Judge Roberts' overly deferential view of law enforcement authority is also noteworthy. On the bench, he has rejected several significant claims of improper search and seizure, dissenting in one case where the majority reversed the conviction, breaking from precedent in another to justify the search, and denying relief in a third to a 12-year-old girl who was arrested and detained for eating a french fry on the subway, even though an adult caught doing the same thing would have been given a citation. This limited judicial record is a natural extension of what Judge Roberts advocated in the Reagan and first Bush administrations. As the principal deputy Solicitor General, according to the *Wall Street Journal*, "his office chose to get involved in dozens of state cases to limit the rights of criminal defendants."[4] For instance, the office sought to erect new procedural hurdles to federal *habeas corpus* review of state convictions and to bar certain kinds of *habeas* claims from being heard, including alleged *Miranda* violations and claims of actual innocence. As an advisor in the Reagan administration, Judge Roberts

[4] Jess Bravin, *Judge Roberts's Rules of Law and Order*, WALL STREET JOURNAL, Aug. 8, 2005 at A4.

advocated overriding the strong ethical and legal prohibitions on law enforcement officials directly communicating with criminal defendants known to be represented by counsel, limiting *habeas* relief, and curtailing the rule that requires exclusion of evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.

*Expanding the role of religion in public institutions.* In the Reagan administration, Judge Roberts approved a speech by Education Secretary Bill Bennett criticizing Supreme Court decisions barring religion in schools as antithetical to "the preservation of a free society"; defended the constitutionality of legislation stripping the Supreme Court of jurisdiction to hear school prayer cases; and called a Supreme Court decision invalidating a religiously-inspired moment of silence "indefensible." Judge Roberts applauded then-Associate Justice Rehnquist's dissent for seeking to overturn a landmark precedent – "the *Lemon* test" – which ensures government neutrality toward religion. As principal deputy Solicitor General, Judge Roberts joined efforts to do what he had tacitly praised Justice Rehnquist for attempting: Judge Roberts co-authored briefs asking the Court to scrap the *Lemon* test and uphold a school district's practice of paying clergy to deliver religious prayers at graduation ceremonies. The Supreme Court struck down the practice as impermissibly advancing religion.

* * *

Judge Roberts is a gifted lawyer with impressive professional qualifications. His existing record, however, demonstrates that he does not appreciate the important role that an independent judiciary plays in safeguarding individual rights and enforcing legal protections. Perhaps additional portions of his record, withheld by the current administration, would tell us something different. Judge Roberts' 1989-1993 service as principal deputy Solicitor General warrants close examination. The position of second-in-charge of the Solicitor General's Office was the most important, most influential position Judge Roberts held as a lawyer. And because the position gave him the opportunity to express his legal views on the most important issues facing the nation – voting rights, school desegregation, sex discrimination, access to justice, affirmative action, church-state separation, criminal justice – the limited set of documents sought by Judiciary Committee Democrats could potentially provide the best insight into how he would approach the law if confirmed. The White House's refusal to disclose these documents, however, leaves the Senate and the American people with the record set forth above.

Because Judge Roberts, if confirmed, will replace retiring Justice Sandra Day O'Connor, his views on the law are doubly significant. The current court is closely divided. Justice O'Connor has provided the swing vote in many landmark 5-4 decisions. If Judge Roberts steps into her shoes, he will wield enormous power to shape or reshape the law in many of the areas touched on above, including access to the courts, Congress' legislative authority, civil rights, women's rights, privacy rights and worker and environmental protections. Based on the existing record, it is evident that as Justice O'Connor's replacement, Judge Roberts would move the Court away from preserving these vital safeguards.

On the existing record, we do not believe that Judge Roberts warrants a lifetime seat on our nation's highest court, and we urge the Senate to withhold its consent to his confirmation.

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# Press Release

FOR IMMEDIATE RELEASE:
August 30, 2005

CONTACT: Kim Alton
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## Lawyers' Committee for Civil Rights Urges Senate Not to Confirm John Roberts Until Satisfied He Will Not be Hostile to Civil Rights

***Senate Urged to Conduct Thorough Inquiry During Confirmation Hearing***

(Washington, DC) – The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is highly troubled by John Roberts's existing record on civil rights issues which reveal a disturbing hostility towards core civil rights legal principles. In a statement released today, the Lawyers' Committee strongly urged the Senate Judiciary Committee to thoroughly question Judge Roberts during next week's confirmation hearing in order to determine whether he would alter the balance of the Supreme Court in a direction adverse to civil rights.

The Lawyers' Committee's statement expresses serious concerns about Roberts's publicly released records from the 1980s, which "consistently endorse, in several contexts, restrictive views on the protection of civil rights." For example, Roberts's writings "favored the more demanding intent test instead of the effects test in voting rights cases; opposed busing for school desegregation; attacked affirmative action as "quotas;" and favored relief only for individual victims of discrimination instead of relief for the classes of victims."

"Judge Roberts's memoranda consistently embrace narrow interpretations of civil rights laws and exhibit strong support for limiting the remedies available to victims of unlawful discrimination," said Barbara R. Arnwine, Executive Director of the Lawyers' Committee. For instance:

- Roberts opposed the Justice Department's efforts to protect Black job applicants from **racial discrimination in an employment case** involving a local school district that refused to hire Blacks.
- Roberts opposed critical amendments to the **Voting Rights Act and the Fair Housing Act** that have been instrumental in providing electoral success and equal housing opportunities for many Americans.
- Roberts opposed **school busing** plans as a remedy for segregated school districts and instead supported court stripping legislation as a means to eliminate busing and white flight.
- Roberts argued in favor of rolling back the scope of **affirmative action** policies to include only recruitment programs.

In light of the anti-civil rights positions expressed in these writings, the statement concludes that had Judge Roberts's "views prevailed, much of the racial progress that our nation celebrates in voting, employment, housing, and educational diversity would not have been achieved."

The Lawyers' Committee request that the Senate Judiciary Committee "obtain from Judge Roberts the information necessary to determine whether, with his confirmation, Justice O'Connor's deciding vote on an otherwise evenly-balanced Court would be replaced by a vote for cutting back on civil rights protections."

The Lawyers' Committee urges the Judiciary Committee to exercise its full authority during the confirmation hearing by directing questions to Judge Roberts that address, if and how, and in what capacity, the views he expressed in his earlier writings would shape his consideration of civil rights as a member of the Supreme Court.

The full text of the Lawyers' Committee's statement of concern can be found at www.lawyerscommittee.org

The Lawyers' Committee is a nonpartisan, nonprofit civil rights legal organization, formed in 1963 at the request of President John F. Kennedy to provide legal services to address racial discrimination.

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# STATEMENT

ON THE NOMINATION OF

**JUDGE JOHN G. ROBERTS, JR.**

AS AN

**ASSOCIATE JUSTICE OF**

**THE SUPREME COURT OF THE UNITED STATES**

August 30, 2005

**Lawyers' Committee for Civil Rights Under Law Statement on the Nomination of John G. Roberts, Jr. as an Associate Justice of the Supreme Court of the United States**

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August 30, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy,

We enclose the Statement of the Lawyers' Committee for Civil Rights Under Law on the nomination of Hon. John G. Roberts, Jr. for the position of Associate Justice of the Supreme Court of the United States.

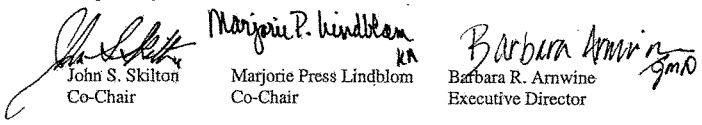
The Lawyers' Committee for Civil Rights Under Law is a national, nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law.

We urge each member of the Committee, before casting a vote to send Judge Roberts's nomination to the full Senate, to be convinced that, as an Associate Justice, Judge Roberts would not alter the balance of the Supreme Court in a direction hostile to civil rights.

We request the opportunity to testify at the Senate Judiciary Committee hearing.

We hope the Statement is of assistance to the Judiciary Committee. We will be monitoring the hearings on the nomination and, if warranted, we will submit an additional written statement on the nomination.

Respectfully,



John S. Skilton
Co-Chair

Marjorie Press Lindblom
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Executive Director

**Statement of the Lawyers' Committee for Civil Rights Under Law On the Nomination of Hon. John G. Roberts, Jr. as an Associate Justice of the Supreme Court of the United States**

## INTRODUCTION

The Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States since its creation in 1963 at the urging of President John F. Kennedy. Because of the critical importance of the Supreme Court of the United States to the protection of civil rights under our Constitution and laws, the Senate's duty of advice and consent as to the appointment of Justices requires Senators to understand any nominee's attitudes and convictions on issues affecting civil rights. To carry out its duty in this case, the Senate depends on the Judiciary Committee to examine Judge Roberts about his views on the existence and manifestation of invidious discrimination in our society, and on the nation's progress, commitment, and resolve toward elimination of such discrimination and its effects.

We acknowledge Judge Roberts' impressive credentials and his years of public service. Indeed, the years he spent in private practice were with a law firm that has supported the Lawyers' Committee for Civil Rights Under Law and its affiliated local Lawyers' Committees with substantial pro bono work, including work by Judge Roberts himself. However, professional credentials are not the end of the inquiry. It is imperative for the Senate Judiciary Committee, as part of the Senate's constitutional "advice and consent" obligation, to explore whether a nominee's legal thinking is outside the mainstream of established jurisprudence or is manifestly hostile to core civil rights legal principles.

Judge Roberts's writings as a lawyer in the Reagan Administration in the 1980s include statements and positions relating to civil rights that are troubling and must be the subject of further inquiry. We do not know whether the views disclosed were his own or tracked the views of others for whom he was then working; nor do we know, if they were his own views, whether he now holds them and if they would shape his consideration of civil rights questions as a member of the Supreme Court. Although there is less information available about his personal views on civil rights jurisprudence in subsequent

years, the nominee has made statements, in interviews and elsewhere, that reinforce our concerns.

The views expressed in many of the memoranda that Mr. Roberts wrote in the 1980s opposed established civil rights precedents and policies. They demonstrated hostility towards vigorous civil rights enforcement. He wrote in terms that reflected a narrow interpretation of the civil rights laws, and that supported severe limitations on remedies available to redress unlawful discrimination, including stripping the courts of jurisdiction to prevent consideration of critical civil rights issues. His writings favored the more demanding discriminatory intent test instead of the discriminatory effects test in voting rights cases; opposed busing for school desegregation (including cases of *de jure* segregation); attacked affirmative action as "quotas"; and favored relief only for individual victims of discrimination instead of relief for the classes of victims such as racial minorities and women.

During this same period, the Lawyers' Committee for Civil Rights Under Law actively opposed these positions in court cases and in the legislative arena. Fortunately, the viewpoints expressed in Mr. Roberts's memoranda on many of these issues were rejected by Congress and the courts. Had his views prevailed, much of the racial progress that our nation celebrates in voting, employment, housing and educational diversity would not have been achieved. For these reasons, explained in greater detail below, Mr. Roberts's nomination requires the most careful scrutiny by the Senate Judiciary Committee.

**OVERVIEW OF JUDGE ROBERTS'S CIVIL RIGHTS RECORD**

Mr. Roberts worked in the federal government in the early to mid-1980s first as Special Assistant to Attorney General William French Smith at the Department of Justice and then as Associate Counsel in the office of the White House Counsel, Fred Fielding. He had civil rights issues as a part of his portfolio, and in the process dealt with the issues on which the Reagan Administration sought to reverse decisions about civil rights issues that had been made by prior administrations, Republican as well as Democratic. These included anti-busing legislation, the Civil Rights Restoration law then under

consideration following the *Grove City College v. Bell*[1] decision, reauthorization of the Voting Rights Act of 1982 and the amendments to the Fair Housing Act of 1968. Mr. Roberts's available writings address a number of sensitive issues, as discussed below.

**Narrow Scope of Civil Rights Protections:** In 1981, while at the Department of Justice, Mr. Roberts criticized the Civil Rights Division's position in employment discrimination lawsuits against two school districts[2] where the Division advocated for relief for those who applied but were discriminatorily rejected; Mr. Roberts disagreed, saying "[a] school board with a blanket policy of rejecting all blacks simply because they were blacks, for example, would be discriminatorily rejecting black applicants, but unless the applicants were more qualified than white applicants who were hired, the fact of discriminatory rejection would not give rise to a claim for relief under Title VII."[3] Mr. Roberts took this position notwithstanding Supreme Court precedent holding that, after the plaintiff has proven a pattern or practice of discrimination, there is a presumption of entitlement to relief, and the plaintiff "need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination."[4] Mr. Roberts's view would have required individualized determinations of liability, effectively eliminating the utility of class actions for such cases, and substantially foreclosing access to the courts for victims of discrimination to redress their claims.

In a White House memorandum in 1983, Mr. Roberts listed *Bob Jones University v. United States*[5] among "instances in which the Administration has refused to interpret statutes in a broad manner beyond the discernable intent of the enacting Congress."[6] The Reagan Administration had taken the position, contrary to its predecessors, that a statute denying tax-exempt status to charitable entities whose conduct violates public policy was

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[1] 465 U.S. 555 (1984) (receipt of federal educational grants by some students does not trigger institutional-wide coverage under Title IX of the Education Amendments of 1972).
[2] Memorandum from John Roberts, Special Assistant to the Attorney General, to William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, re; *Employment Discrimination Suits Against Clayton and Gwinnett Counties*, (Oct. 26, 1981). (All unpublished memoranda by Mr. Roberts and other unpublished materials referenced in the footnotes are attached to this document in an appendix).
[3] *Id.*
[4] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 (1976).
[5] 461 U.S. 574 (1983).
[6] Memorandum from John Roberts to Richard A. Hauser, re: *Brookings Institution Remarks* (Dec. 5, 1983).

not sufficient authority for the IRS to deny tax-exempt status to an institution that engaged in racially discriminatory practices. Reversing the government's position in the lower courts, the Administration supported the private institution before the Supreme Court on the ground that without a specific statutory disapproval of race discrimination, the IRS could not deny the tax exemption.[7] Eight Justices of the Supreme Court held that the public policy against such discrimination was ample authority for the IRS action. Six months later, Mr. Roberts wrote that "[w]e did not distort our reading of the legislation to fit our policy preferences." Such a grudging attitude toward the scope of authority available to government agencies to implement even the basic, constitutional guarantee against race discrimination would, in a Supreme Court Justice, portend the narrowing of our nation's civil rights protections in the future.

In a memorandum dated July 24, 1985, Mr. Roberts discussed a pending Senate bill that was intended to reverse the effect of the Supreme Court's holding in *Grove City College v. Bell* that Title IX's proscription against sex discrimination in education applied only to the specific program that benefited from federal assistance.[8] Mr. Roberts said the bill would "radically expand the civil rights laws to areas of private conduct never before considered covered."[9] To the contrary, as the Lawyers' Committee pointed out in its *amicus curiae* brief in *Grove City College*, the Department of Health, Education & Welfare and the Department of Education had always interpreted Title IX to apply to the entire institution receiving federal funds, consistent with the legislative history of the Civil Rights Act.[10] The proposed bill was enacted in March 1988 over President Reagan's veto and confirmed the application of anti-discrimination provisions to any entity that received federal funding, not merely to the program the federal government was funding.[11]

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[7] It is not clear what role, if any, Mr. Roberts had in the formulation of the Administration's position. Among a number of documents that have not yet been disclosed are materials from the "Bob Jones" file he maintained; and an administrative appeal to obtain their release has not yet been decided.

[8] Section 901 (a) of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), prohibits sex discrimination in "any education program or activity receiving federal financial assistance," with certain enumerated exceptions.

[9] Memorandum to Fred F. Fielding from John Roberts, re: *Correspondence from T.H. Bell on Grove City Legislation* (Jul. 24, 1985).

[10] Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in *Grove City College v. Bell*.

[11] *See* 20 U.S.C. §1687 (2005).

**Restrictive Views of the Voting Rights Act:** When he served as a Special Assistant to Attorney General Smith in 1981 and 1982, Mr. Roberts assisted in developing arguments in support of the Reagan administration's position on reauthorization of the Voting Rights Act. The position Mr. Roberts articulated was that the Act should be extended but without the key provision overturning the ruling in *City of Mobile v. Bolden*,[12] which held that a plaintiff seeking to establish a violation of Section 2 of the Act must prove intentional discrimination.[13] The Lawyers' Committee testified in the Senate that the "effects test" that preceded *Bolden* was necessary to "effectuate the purposes of the Fourteenth and Fifteenth Amendments and the Voting Rights Act — to eliminate invidious discrimination affecting the right to vote."[14] Mr. Roberts wrote that Voting Rights Act violations should not be established upon a showing of discriminatory effects because to base liability upon such proof, standing alone, would be tantamount to the use of "quotas" and "proportional representation."[15] Applying the "quota" label to evidence of voting outcomes that cannot be explained in race-neutral terms and that are the product of years of suppression of minority voters ignores the extraordinary difficulty of obtaining evidence of actual discriminatory intent. It also reflects, at best, an excessively narrow reading of the Voting Rights Act and a willingness to accommodate governments whose electoral systems were originally designed to and still do exclude minority voters. Mr. Roberts's views did not prevail in the extension ultimately enacted. The views Mr. Roberts expressed embody a refusal to recognize the evidence of discrimination that continues to this day. Congress's 1982 affirmation of the effects or results test, which Mr. Roberts opposed, enabled literally hundreds of at-large voting system cases commenced by advocates for minority voting rights to succeed when they could not have proven a Voting Rights Act violation in the terms Mr. Roberts proposed. These victories have generated what is generally lauded as "a quiet revolution" of robust minority representation in local, county, state, and federal government.

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[12] 446 U.S. 55 (1980) (proof of intent required in vote dilution cases).
[13] Memorandum from John Roberts to the Attorney General, re: *Talking Points for White House Meeting on Voting Rights Act* (Jan. 26, 1982).
[14] Statement of Frank Parker, Director, Voting Rights Project of the Lawyers' Committee for Civil Rights under Law (Feb. 11, 1982).
[15] Memorandum from John Roberts to the Attorney General, re: *Voting Rights Act: Section* 2 and statement attached (Dec. 22, 1981).

**Opposition to Fair Housing Act Amendments:** In January 1983, when Mr. Roberts served in the White House Counsel's office, he recommended that the Administration "go slowly" on legislation that would amend and strengthen the 1968 Fair Housing Act.[16] As with the Voting Rights Act, Mr. Roberts objected to an "effects" test, stating that "[g]overnment intrusion (though [sic] an 'effects test') quite literally hits much closer to home in this area than in any other civil rights area."[17] He also opposed amending the Act to create a "national administrative remedy."[18] Eventually, in 1988, legislation was enacted amending the Fair Housing Act, which, contrary to Mr. Roberts's 1983 advice, did not weaken the effects test under existing precedent and included new national enforcement authority to overcome the major weakness at the Department of Housing and Urban Development.[19] That authority has been used to vindicate the rights of thousands of citizens whose complaints would either have gone completely unredressed or have been handled in a much less efficient and effective way if Mr. Roberts's views had prevailed. For example, in fiscal year 2004 alone, HUD reported that resolutions of complaints filed pursuant to the Act, as amended in 1988, provided over $11 million in monetary relief to victims of housing discrimination.[20]

**Support for Jurisdiction-Stripping Legislation:** While in the Justice Department in 1982, Mr. Roberts argued (apparently at the request of Kenneth Starr to outline the "pro" position) that Congress has the power under the "exceptions clause" (Article III, Section 2, Clause 2 of the Constitution) to strip the Supreme Court of its jurisdiction over any class of cases it deems appropriate, subject only to the guarantees of due process and equal protection.[21] Mr. Roberts argued that these guarantees would not prevent Congress from divesting the Supreme Court — indeed, all federal courts — of

[16] Memorandum to Fred F. Fielding from John Roberts, re: *Fair Housing* (Jan. 31, 1983).
[17] *Id.*
[18] *Id.*
[19] *See* 42 U.S.C. §3610 (2005).
[20] *2005 State of Fair Housing Report*, U.S. Department of Housing and Urban Development, 1 (2005).
[21] Mr. Roberts's twenty-seven page memorandum is entitled, *Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments*, copied to the Attorney General, Deputy Attorney General Edward C. Schmults, Assistant Attorney for the Office of Legal Counsel Theodore B. Olson, and Counselor to the Attorney General Kenneth W. Starr (undated). The memo is in response to a memorandum to the Attorney General from Assistant Attorney General Olson, *Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases* (Ap. 12, 1982).

jurisdiction over school desegregation cases.[22] This was a position on the proposed jurisdiction-limiting legislation that then-Assistant Attorney General Theodore Olson urged the Reagan Administration to oppose.

While employed in the White House in February 1984, Mr. Roberts addressed an anti-busing bill that would have prohibited lower federal courts from ordering busing to desegregate public schools. As before, although Theodore Olson had concluded that the bill would exceed Congress's authority, Mr. Roberts argued that a decade of experience with busing established that "busing promotes segregation rather than remedying it, by precipitating white flight," and that Congress could properly find that legislation prohibiting busing was necessary under the Equal Protection Clause to prevent racial discrimination.[23] Despite the absence of any judicial support for the position (Congress has never tried to exercise any such power, so the issue has never been litigated), he wrote without qualification that Section 5 of the Fourteenth Amendment gives Congress the power to strip the courts of jurisdiction based on a Congressional finding disapproving the overall effects of court-ordered remedies. This position would mean that Congress alone would determine the scope of protection offered by the Fourteenth Amendment, depriving the federal courts of their independent power and obligation to enforce that Amendment's crucial provisions.[24]

**Favoring Limitations on Affirmative Action:** In 1981, Mr. Roberts argued for changing the Department of Labor's implementation of President Nixon's Executive Order on equal employment opportunity obligations of government contractors because of the Department of Justice's opposition to any consideration of race or gender in hiring decisions absent "specific proof of discrimination." His proposal was to limit affirmative action to recruitment efforts, "enforcing color and sex blindness in actual decisions but accepting 'affirmative action' programs which increase the pool of applicants or compel the employer to consider a wider group with more blacks and women."[25] In 1981,

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[22] *Id.*

[23] Memorandum to Fred F. Fielding from John Roberts (Feb. 15, 1984).

[24] This position is distinct from the position taken by civil rights advocates, that Congress has the power to make its own findings that discrimination exists, and on that basis to enact remedial legislation. Judicial challenges to such legislation would still be available, with appropriate respect by each branch of government for the powers held by the others.

[25] Memorandum to the Attorney General from John Roberts, re: *Meeting with Secretary Donovan on Affirmative Action* (Dec. 2, 1981).

Mr. Roberts wrote to Attorney General Smith about a report from the United States Civil Rights Commission describing the use of affirmative action programs to remedy discrimination. Mr. Roberts wrote that the report failed to note the "inherent flaws" in such programs: "There is no recognition of the obvious reason for failure: the affirmative action program required the recruiting of inadequately prepared candidates."[26] In 1990, Mr. Roberts filed a brief as Acting Solicitor General arguing that the Federal Communication Commission's affirmative action program concerning the licensing of minority-controlled firms violated equal protection and was not justified under a diversity rationale.[27] The effects of this position are still being felt, with minority ownership of broadcast media a shadow of what it would have been had this program not been dismantled. In 2003, responding to a written question about his role in enforcing the Reagan Administration's policy of "color blindness" with regard to addressing problems of discrimination and segregation, Mr. Roberts said that "race certainly may be taken into account in devising remedies for de jure segregation," which, given the limited number of instances of de jure segregation now that we are more than 125 years after the Civil War amendments that were designed to outlaw them, suggests a view that race-conscious programs are appropriate only in the most limited circumstances.[28] Mr. Roberts stated in a 1995 television interview that to "give benefits on the basis of race . . . violates equal protection."[29]

We are concerned that Judge Roberts may be convinced that, aside from relief for specific victims who prove injuries caused by intentional discrimination, the goals of remedying conditions caused by past discrimination, rectifying racially-disparate adverse impact, and enhancing diversity cannot justify consideration of race or gender in making decisions such as hiring, contracting, and admission into schools.[30] This would

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[26] Memorandum to the Attorney General from John Roberts, re: Meeting with Secretary of State Donovan on Affirmative Action (Dec. 22, 1981).

[27] *See* Brief for United States, *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 549 (1990).

[28] *See* written response to question, *Confirmation Hearing on Federal Appointments*, 108th Cong. 135, Pt. 1 at 413.

[29] Transcript of the McNeil-Lehrer NewsHour, National Public Radio (Jun. 12, 1995).

[30] During his 2003 confirmation hearing for the D.C. Circuit Court of Appeals, Mr. Roberts characterized more recent work he did in representing the interests of indigenous Hawaiians in *Rice v. Cayetano*, 528 U.S. 495 (2000), as a defense of affirmative action. But in arguing that case, he expressly

be inconsistent with positions taken by a majority of the Supreme Court in, for example, *Grutter v. Bollinger*.[31]

**"Judicial Restraint," "Judicial Activism" and Civil Rights Enforcement:** Mr. Roberts argued that the Attorney General should not intervene on behalf of female inmates in a sex discrimination case involving job training because it would be inconsistent with the administration's belief in judicial restraint and that, if equal treatment of male and female prisoners were required, "the end result in this time of state prison budgets may be no programs for anyone."[32] This advice countered the recommendation of William Bradford Reynolds, then head of the Justice Department's Civil Rights Division, who endorsed the rights of the female inmates. In another White House memorandum, Mr. Roberts wrote that workload issues in the federal courts could be addressed, in part, by the courts "abdicating the role of fourth or fifth guesser in death penalty cases," and reforming habeas corpus to avoid "judicial activism," which he identified as the basic cause of the litigation burden on the federal courts.[33] Experience has shown that judicial review is essential to the just administration of capital punishment, allowing exploration of issues of discrimination in the administration of the system and avoiding in many (but not all) cases the execution of those who are innocent and those whose crimes do not fit within the categories the legislature has prescribed for death.

We recognize that Judge Roberts expressed the views noted above many years ago, when he was an advocate participating in debates within the Executive Branch. Those views may differ from the attitudes and convictions that would influence his judicial decisions as a member of the Supreme Court. The records from the 1980s and other subsequent statements nevertheless consistently endorse, in several contexts, restrictive views on civil rights protections, such as the view that permissible policies cannot take race or ethnicity into account except as remedies for the individual victims of

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distinguished his arguments for special treatment of indigenous Hawaiians from arguments about the scope of relief in civil rights cases involving African Americans.

[31] 539 U.S. 306 (2003).

[32] Memorandum to the Attorney General from John Roberts, February 12, 1982 re: *Proposed Intervention in Canterino v. Wilson* (Feb. 12, 1982).

[33] Memorandum to Fred Fielding from John Roberts, re: *Chief Justice's Proposals*, (Feb. 10, 1983); Memorandum to Fred Fielding from John Roberts, re: Letter to the President from Alabama Attorney General Charles A. Graddick (Ap. 28, 1983).

intentional discrimination. The Judiciary Committee should ask questions and obtain answers from Judge Roberts making his views clear on these still vital issues.

**Limits on the Power of Congress:** We also think it important that the examination of Judge Roberts's record include analysis of a subject that plays a large role in judicial review of remedial legislation: limitations on the power of Congress to legislate. His judicial opinions have addressed this topic outside the context of civil rights legislation (in environmental regulation, for example, enacted pursuant to the Commerce Clause).[34] In his prior confirmation hearings, Judge Roberts suggested that he viewed the Congressional power to pass civil rights laws pursuant to Section 5 of the Fourteenth Amendment as substantially broader than its power to legislate under the Commerce Clause. The Lawyers' Committee has consistently emphasized how Section 5 provides broad authority for Congressional action. An overly narrow reading of Congress's Commerce Clause authority would threaten civil rights protections because Congressional regulation of private entities derives generally from its Commerce Clause authority. Consequently, on this issue, the record needs to be as clear as it can be, as recent Supreme Court decisions have cut back on Congressional power in unexpected ways. The country deserves to know whether or not Judge Roberts would support curtailing Congressional authority to protect civil rights.

## CONCLUSION

Justice Sandra Day O'Connor cast the deciding vote in Supreme Court decisions that have preserved the scope of civil rights laws and interpreted the Constitution to permit the promotion of a more diverse and less discriminatory society. *See, e.g., Grutter v. Bollinger*;[35] *Tennessee v. Lane*;[36] *Hunt v. Cromartie*;[37] *Brentwood Academy v. Tennessee Secondary School Athletic Association*.[38]

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[34] *See Rancho Viejo, LLC v. Norton,* 334 F3rd 1158 (D.C. Cir. 2003) (Roberts, J. dissenting, denial of petition for rehearing en banc).
[35] 539 U.S. 306 (2003) (upholding the University of Michigan Law School's race-conscious admissions policy intended to achieve a diverse student body).
[36] 541 U.S. 509 (2004) (Title II of the Americans with Disabilities Act validly abrogated state sovereign immunity against suits by individuals seeking access to the courts).
[37] 526 U.S. 541 (2001) (reversing grant of summary judgment because a genuine issue of material fact existed as to whether congressional district was the product of unconstitutional racial gerrymandering)
[38] 531 U.S. 288 (2001), recognizing athletic association as a state actor in §1983 civil rights action).

The Judiciary Committee must obtain from Judge Roberts the information necessary to determine whether, with his confirmation, Justice O'Connor's deciding vote on an otherwise evenly-balanced Court would be replaced by a vote for cutting back on civil rights protections.

As additional information becomes public, we will communicate any further views and look forward to the opportunity to do so. In the end, the written record can provide only an incomplete basis for conclusions about Judge Roberts's views. Whether that record is a fair indication of Judge Roberts's current views on these matters can be known only if the Senate Judiciary Committee conducts the most thorough inquiry and Judge Roberts is complete and candid in his testimony and his other communications with the Committee.

As we noted at the outset, there is no more solemn duty than the one the Senate faces in deciding whether to give or withhold its consent to Judge Roberts's nomination. Judge Roberts's record raises very troubling questions on matters of vital importance to the quality of our civil rights protections and therefore to the vitality of the constitutional guarantee of equal justice under the law. We urge each member of the Committee, before casting a vote to send Judge Roberts's nomination to the full Senate, to be convinced that, as an Associate Justice, Judge Roberts would not alter the balance of the Supreme Court in a direction hostile to civil rights.

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|---|---|---|
| John S. Skilton<br>Co-Chair | Marjorie Press Lindblom<br>Co-Chair | Barbara R. Arnwine<br>Executive Director |

# LAWYERS FOR ROBERTS

September 1, 2005

Dear Mr. Chairman,

We write to you as members of the bar who strongly support the nomination of John Roberts to the United States Supreme Court.

Each of us is a lawyer in private practice, business or academia. We represent both Democrats and Republicans. Many of us have served in high-level positions with the federal government or a state government.

We all share a deep respect and admiration for Judge Roberts, and a firm belief in his legal acumen, good judgment, independence and personal decency. None of us has any doubt about his ability to construe and apply the law fairly and impartially.

We urge the Senate to give its consent to Judge Roberts' nomination.

Sincerely,

Prof. Vincent Alexander, New York, New York
Mr. Kenneth Anderson, Dallas, Texas
Mr. Emil Arca, New York, New York
Mr. John Armentano, New York, New York
Mr. Michael Armstrong, New York, New York
Mr. Mark A. Baker, Helena, Montana
Ms. Eve Baskowitz Ross, Chicago, Illinois
Mr. G. Ward Beaudy, Dallas, Texas
Mr. David Beck, Houston, Texas
Mr. Charles H. Bell, Jr., Sacramento, California
Mr. Warren Belmar, Washington, D.C.
Mr. Timothy Belz, Clayton, Missouri
Mr. David Berg, Houston, Texas
Mr. Timothy S. Bishop, Chicago, Illinois
Hon. Frank Blake, Atlanta, Georgia
Mr. J.C. Boggs, Washington, D.C.
Mr. James Bopp, Jr., Terre Haute, Indiana
Mr. Mark Boden, Washington, D.C.
Mr. Michael Brem, Houston, Texas
Mr. Daryl Bristow, Houston, Texas
Mr. Robert Brooks, New York, New York
Mr. Roger Brooks, New York, New York
Ms. Ann K. Browning, Newport Beach. California

Mr. W. Steven Bryant, Houston, Texas
Mr. Eric Buermann, Miami, Florida
Mrs. Patricia Cafferata, Reno, Nevada
Prof. Steven G. Calabresi, Chicago, Illinois
Mr. William Sayle Carnell, Alexandria, Virginia
Mr. Vincent T. Chang, New York, New York
Mr. Frederic Cohen, Encino, California
Mr. Mark Cole, Magnolia, Texas
Mr. Ronald Coleman, New York, New York
Mr. Carville Collins, Baltimore, Maryland
Mr. Daniel P. Collins, Los Angeles, California
Mr. William P. Cook, Washington, D.C.
Mr. Charles J. Cooper, Washington, D.C.
Mr. Erin Nealy Cox, Dallas, Texas
Mr. John T. Cox, Dallas, Texas
Ms. Christina Melton Crain, Dallas, Texas
Mr. Robert Crotty, New York, New York
Mr. Ted Cruz, Austin, Texas
Mr. Donald A. Daugherty, Milwaukee, Wisconsin
Mr. William B. Dawson, Dallas, Texas
Mr. Anthony D'Auria, New York, New York
Mr. Hayden R. Dempsey, Tallahassee, Florida
Ms. Carol Dinkins, Houston, Texas
Ms. Sara Church Dinkler, San Francisco, California
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CC: Senator Patrick Leahy

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The Honorable Arlen Specter
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United States Senate
Washington, D.C. 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

August 3, 2005

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest and most diverse civil and human rights coalition, we write to you to express serious concern regarding the nomination of Judge John G. Roberts, Jr. as associate justice of the Supreme Court of the United States. What is known to date regarding Judge Roberts' record, in the Reagan and Bush I administrations and as a judge on the U.S. Court of Appeals for the D.C. Circuit, raises significant questions regarding his commitment to the protection of individual rights, freedoms and legal safeguards.

LCCR strongly urges that all Senators exercise their full "advice and consent" responsibility by engaging in a searching and thorough review of Judge Roberts' record and his judicial philosophy. We call upon the Senate Judiciary Committee to engage in full and fair hearings in which all requested documents are produced and examined, and committee members are permitted to adequately question Judge Roberts and receive full and complete answers. Before the full Senate considers acting on the nomination of Judge Roberts, the American people have a right to know precisely how his appointment to the Supreme Court would impact their rights, their freedoms and their lives.

Since Judge Roberts' record on many issues remains unclear, the American people are entitled to learn far more about his views on key constitutional and other legal issues in order to determine whether he should be confirmed by the Senate. The burden lies with Judge Roberts to demonstrate his commitment to an independent Court, not to a political agenda that will move the Court further to the right. His confirmation should depend on his willingness to answer questions about his judicial philosophy and the White House's willingness to open his long record in the Reagan and Bush I administrations as a high-level political appointee. There is no automatic right to a Supreme Court confirmation, even for someone who was previously confirmed for a lower federal court.

The Court is the final arbiter of our laws, and its rulings can drastically impact the lives and the rights of all Americans. As such, we believe that every nominee to the Supreme Court must be carefully evaluated on the basis of his or her entire record, including whether he or she has demonstrated a strong commitment to the protection of civil rights and liberties, human rights, the environment, worker protections, privacy, and religious freedom. We believe that in these areas, there are aspects of Judge Roberts' record that

have already emerged and which raise serious concerns that must be closely scrutinized by the Judiciary Committee before the Senate can determine his suitability to serve on the Supreme Court. For example, LCCR concerns include:

- **Judge Roberts' efforts to shape civil rights policies, including court-ordered desegregation of public schools, voting rights and Title IX, during his tenure in the Reagan administration.** According to reports,[1] Judge Roberts' legal memoranda released thus far, dating from his tenure in the Department of Justice from 1981 to 1982 and the office of White House Counsel from 1982 to 1986, reveal troubling statements on civil rights issues. For example, Roberts argued that Congress was not only able to, but also justified in, enacting legislation that would strip the federal courts of jurisdiction to desegregate public schools. In another memorandum, Roberts argued in favor of slowing down the consideration of a housing discrimination bill. Another report points out that Roberts also wrote materials promoting the Reagan administration's unsuccessful efforts to require plaintiffs in Voting Rights Act cases to prove that election rules were intentionally discriminatory, a requirement that would have allowed many discriminatory voting schemes to go unchallenged. In other memoranda, Roberts argued for the narrowest possible interpretation of Title IX of the Education Amendments of 1972,[2] and justified unequal treatment of women on the ground that it saves money. These arguments have dangerous implications for other civil rights laws as well as the laws against sex discrimination.

  These memoranda raise serious questions about Judge Roberts' views on matters of utmost importance to the civil rights community, particularly given the fact that Roberts was serving as a political (rather than a career) appointee and was attempting to influence administrative actions and policies. As such, the Committee should 1) require the White House to produce all documents relevant to these and other civil rights matters and 2) require Judge Roberts to clarify whether they represent his current views on the very important civil rights issues they raise.

- **Judge Roberts' narrow interpretation of Title IX is troubling.** In addition to Roberts' efforts to narrow Title IX of the Education Amendments of 1972 during his years in the Reagan administration, noted above, he later took positions that would have seriously weakened Title IX. In *Franklin v. Gwinnett County School District*,[3] Roberts co-authored a brief as Deputy Solicitor General in which he tried to prevent a high school student from obtaining damages for sexual harassment and sexual abuse by her coach. Roberts' overly restrictive view of proper remedies under Title IX was rejected unanimously by the Supreme Court, which found that sexual harassment is an intentional violation of Title IX and that its victims can recover money damages. Roberts' position in the case raises questions about whether he would narrow long-standing interpretations of Title IX in ways that would limit the ability of women to fully vindicate their legal rights.

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[1] Jo Becker and Amy Argetsinger, *The Nominee As a Young Pragmatist*, THE WASHINGTON POST, July 22, 2005, at A1; Charlie Savage, *Civil rights groups cite concerns over Roberts*, THE BOSTON GLOBE, July 22, 2005; R. Jeffrey Smith, Jo Becker and Amy Goldstein, Documents Show Roberts Influence In Reagan Era; THE WASHINGTON POST, July 27, 2005 at A1.
[2] P.L. 92-318 (86 Stat. 235), approved June 23, 1972.
[3] 503 U.S. 60 (1992).

- **Judge Roberts' aggressive approach to narrowing Congressional authority under the Commerce Clause, which serves as the basis for many critical federal laws.** In his dissent to the D.C. Circuit's denial of a rehearing *en banc* of *Rancho Viejo, LLC v. Norton*,[4] Judge Roberts questioned whether the Endangered Species Act[5] could be applied, under the Commerce Clause, to prohibit real estate developers – plainly operating in interstate commerce – from endangering a particular species whose habitat lies entirely within the boundaries of a single state. Roberts' opinion in *Rancho Viejo* raises legitimate questions about whether his views on Congressional power would call into question many other important laws, including, for example, the ban on discrimination in places of public accommodation in the Civil Rights Act of 1964. In light of his dissent, the Committee should carefully and thoroughly examine his views on the Commerce Clause as well as other provisions and doctrines that undergird federal guarantees of equal opportunity, environmental quality, and access to health care, education, and other essential government benefits.

- **Judge Roberts' expansive view of administrative power to suspend fundamental due process protections.** In *Hamdan v. Rumsfeld*,[6] Judge Roberts joined an opinion that gave broad leeway to the administration to try suspected terrorists in military tribunals that lack many of the important protections normally available to criminal defendants. Under the ruling, Hamdan would have no right to be present throughout his trial and would not have a right to see all of the evidence against him. Furthermore, the court ruled that Hamdan and similar detainees could not seek judicial relief under the Geneva Conventions. This decision raises serious questions not only about Judge Roberts' views on the separation of powers but also on basic principles of civil and human rights.

- **Judge Roberts' attempt to undermine the wall of separation between church and state.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Lee v. Weisman*.[7] He not only argued that it was constitutional for a public school to sponsor prayers at graduation ceremonies, but also urged the Court to scrap the long-standing test that federal courts have used to decide whether laws and practices violate the Establishment Clause. His argument was not only rejected by the Court but criticized by the majority for its erroneous First Amendment analysis. The Committee should determine whether Roberts, if confirmed, would respect the religious liberties of all Americans.

- **Judge Roberts' position in *Bray v. Alexandria* raises questions about his willingness to protect women from discrimination.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Bray v. Alexandria Women's Health Clinic*[8] in support of Operation Rescue's tactics of trespassing and blockading women's access to health clinics, tactics that "present[ed] a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its

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[4] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).
[5] P.L. 93-205 (87 Stat. 884), approved December 28, 1973.
[6] 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005).
[7] 505 U.S. 577 (1992).
[8] 506 U.S. 263 (1993).

name."[9] What is most alarming about John Roberts' role in Bray is not only that he argued on behalf of the US government on the side of an organization that targeted women, he did so without renouncing the aggressive and dangerous tactics used to prevent women from accessing health care.

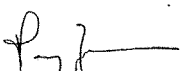
LCCR urges the Committee to carefully question Judge Roberts on whether he would respect precedent on matters of well-settled law, such as *Brown v. Board of Education*,[10] *Miranda v. Arizona*,[11] *Plyler v. Doe*,[12] *Baker v. Carr*,[13] *Roe v. Wade*,[14] *Lemon v. Kurtzman*,[15] *Swann v. Charlotte-Mecklenburg Board of Education*,[16] *Engel v. Vitale*[17] and *National Labor Relations Board v. Jones & Laughlin Steel Corporation*.[18] Our nation simply cannot afford to return to a pre-1930s interpretation of the U.S. Constitution or the rights and liberties that it guarantees.

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political agenda.

Thank you for your consideration. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2880. We look forward to working with you.

Sincerely,

Wade Henderson
Executive Director



Nancy Zirkin
Deputy Director

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[9] *Id.* at 313 (Stevens, J. dissenting).
[10] 347 U.S. 483 (1954).
[11] 384 U.S. 436 (1966).
[12] 457 U.S. 202 (1982).
[13] 369 U.S. 186 (1962).
[14] 410 U.S. 113 (1973).
[15] 403 U.S. 602 (1971).
[16] 402 U.S. 1 (1971).
[17] 370 U.S. 421 (1962).
[18] 301 U.S. 1 (1937).

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The Honorable Arlen Specter
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The Honorable Patrick L. Leahy
Ranking Member
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United States Senate
Washington, D.C. 20510

September 15, 2005

Dear Chairman Specter and Ranking Member Leahy:

As the nation's oldest, largest, and most diverse civil and human rights coalition, the Leadership Conference on Civil Rights (LCCR), we write to express our opposition to the confirmation of Judge John G. Roberts, Jr., as Chief Justice of the United States.* Over the last 50 years, the Supreme Court has often used its constitutional power to protect the civil and human rights of all Americans. The Court's rulings to protect and defend these rights stand in direct contrast to John Roberts' consistent embrace, throughout his public career, of an extremely narrow, rigid interpretation of our civil rights laws. Thus, based on a careful review of the memoranda and other materials that have been released so far from the Reagan and Bush I administrations, decisions from Judge Roberts' brief tenure on the U.S. Court of Appeals for the D.C. Circuit, as well as his testimony this week before the Committee, LCCR believes that Judge Roberts' clear hostility to broad civil rights protections requires that the Senate reject his nomination.

The Supreme Court is the final arbiter of our laws, and its rulings can drastically impact the lives, liberties, and rights of all Americans. As such, LCCR believes that no individual should be confirmed to the Supreme Court unless he or she has clearly demonstrated a strong commitment to the protection of civil rights and liberties, human rights, privacy, and religious freedom. In these areas, all evidence reviewed to date shows that Judge Roberts' record is highly troubling. Our concerns are only exacerbated by the refusal of the White House to fully disclose all requested and relevant documents, particularly memoranda written by Judge Roberts while he served as Deputy Solicitor General during the Bush I administration. The administration has access to these memos, and certainly reviewed them as part of their selection process of Judge Roberts for the Supreme Court. Release of the memos would simply let the American people know what the White House already knows about Judge Roberts' judicial philosophy on critical civil and human rights issues.

Judge Roberts' overall record reflects a jurist whose views are at odds with the mainstream jurisprudence of the last half-century. The range of issues that delineate the current Roberts record is broad and extensive, including Roberts' views on the limitations

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* *Some organizations in the Leadership Conference have not opposed Judge John Roberts' confirmation to the US Supreme Court.*

on congressional power; the extent to which federal funds can be used to enforce civil rights; and the scope of our nation's most important civil rights laws. The following is a summary of the reasons for LCCR's opposition:

**CIVIL RIGHTS ENFORCEMENT**

**Judge Roberts' effort to limit the scope of the Voting Rights Act of 1965.** Judge Roberts' record to date fails to demonstrate that he is committed to upholding the constitutional and statutory foundations that protect the right to vote. During the 1981-82 reauthorization of the Voting Rights Act of 1965,[1] Roberts aggressively promoted – in more than 25 memoranda and other written materials – the Reagan administration's unsuccessful efforts to strike language, included by the House in a bill that was passed by an overwhelming 389-24 margin, which allowed plaintiffs in discrimination cases to establish a violation of Section 2 of the Voting Rights Act if they could show that the voting practice or procedure in question had a discriminatory effect. This effort by Roberts to weaken the reauthorization bill, if successful, would have brought most voting rights litigation to a grinding halt.

Roberts argued against the "effects" test for Voting Rights Act cases even though he understood that it was aimed at eliminating discriminatory practices. What is especially disconcerting is that he based his position in part on the view that "widely accepted practices"[2] used by states in their election systems should somehow be protected from judicial scrutiny, even when such practices have been shown to prevent African Americans from fully participating in the voting process. This appeal to "widely accepted practices" speaks volumes and carries with it dangerous implications. After all, if federal courts had not been empowered to invalidate "widely accepted" state and local practices, our nation's voting rights revolution would never have happened.

In other memoranda, Roberts argued that the "effects" test would "establish a quota system" and "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[3] He urged the Attorney General to "not be fooled by the House vote or the 61 Senate co-sponsors of the House bill into believing that the President cannot win on this issue," alleging that "many members of the House did not know" what they were doing when they overwhelmingly approved the effects test.[4] Roberts urged the Attorney General to use the materials and analysis he had written, which he thought could help Senators become more "educated" on the differences between the President's position and the "serious dangers" in the House-passed version.[5] Instead of the "effects" test, Roberts argued in favor of requiring plaintiffs to prove that election officials acted with the intent to discriminate – a much higher burden that would have allowed many discriminatory voting schemes to go unchallenged.

The bill to reauthorize the Voting Rights Act that was eventually passed by Congress and signed into law by President Reagan included the "effects" language, despite Roberts' objections.

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[1] Voting Rights Act Amendments of 1982, P.L. 97-205 (96 Stat. 131), approved January 12, 1983.
[2] Memorandum to the Attorney General from John Roberts, re "Section 2 of the Voting Rights Act and *Mobile v. Bolden*," November 6, 1981.
[3] Memorandum to the Attorney General from John Roberts, re "Voting Rights Act: Section 2," December 22, 1981.
[4] Memorandum to the Attorney General from John Roberts, re "Talking Points For White House Meeting on Voting Rights Act," January 26, 1982.
[5] *Id.*

Roberts' opposition to the use of an "effects" test to prove racial discrimination with regard to what the NAACP Legal Defense and Educational Fund describes as "the nation's most effective civil rights statute"[6] suggests a cramped and unrealistic view of civil rights law, and raises serious questions about his commitment to equal opportunity and the protection of civil and human rights for all Americans.

**Judge Roberts' hostile attitude toward affirmative action.** Throughout his career, Roberts has strongly attacked affirmative action policies. When the U.S. Commission on Civil Rights issued a report in 1981 that said affirmative action programs needed to be expanded, he wrote a memo arguing that it relied on "circular logic" and that it was pushing "racial quotas."[7] Roberts in 1981 also tried to undermine a long-standing policy in the executive branch that encouraged affirmative action by government contractors. When Reagan administration officials indicated their intent to continue the policy, Roberts complained in a memorandum to the Attorney General that it advanced "offensive preferences" based on race and gender.[8] Even though the Supreme Court had ruled voluntary affirmative action programs were legal in *United Steelworkers v. Weber*, Roberts argued that the ruling "has only four supporters on the current Supreme Court" and that "[we] do not accept it as the guiding principle in this area."[9]

In a 1990 *amicus curiae* brief in the case of *Metro Broadcasting Inc. v. Federal Communications Commission*,[10] Roberts took the unusual step of taking the opposite side of another federal agency in an effort to fight its affirmative action policy – and referred to the FCC's program as "a policy in search of a purpose."[11] More recently, in his private capacity, Roberts characterized affirmative action as "racism" in a 1995 television interview.[12] If confirmed to the Supreme Court, the evidence strongly suggests that Roberts would use his position to abolish policies that have long been used to remedy past discrimination and advance racial, ethnic, and gender diversity.

**Judge Roberts' aggressive approach to narrowing Congressional authority under the Commerce Clause, which serves as the basis for many critical federal laws.** John Roberts' record demonstrates a disturbing pattern of action to restrict legal protections of average citizens. Too often his efforts have resulted in overturning safety protections for workers, consumers, and public health. In his dissent to the D.C. Circuit's denial of a rehearing *en banc* of *Rancho Viejo, LLC v. Norton*,[13] Judge Roberts questioned whether the Endangered Species Act[14] could be

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[6] NAACP Legal Defense and Educational Fund, Inc., *Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States*, August 31, 2005 at 18.

[7] Charlie Savage, *Roberts Vote Seen as Critical in Racial Issues: Earlier Writings Opposed Affirmative Action Plans*, THE BOSTON GLOBE, August 7, 2005 at A1.

[8] Memorandum to the Attorney General from John Roberts, re "Meeting with Secretary Donovan on Affirmative Action," December 2, 1981.

[9] *Id.*

[10] 497 U.S. 547 (1990).

[11] *Metro Broadcasting, Inc. v. Federal Communications Commission*, No. 89-453, Brief of Amicus Curiae United States in Support of Petitioners, 1989 U.S. Briefs 453, February 9, 1990.

[12] Interview, MacNeil/Lehrer News Hour, June 12, 1995 (While discussing the recent Supreme Court ruling in *Adarand Constructors v. Pena*, Roberts stated that "what the Supreme Court said today is that you don't overcome racism by engaging in it yourself").

[13] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

[14] P.L. 93-205 (87 Stat. 884), approved December 28, 1973.

applied, under the Commerce Clause, to prohibit real estate developers – plainly operating in interstate commerce – from endangering a particular species whose habitat lies entirely within the boundaries of a single state. Roberts' extraordinarily narrow perspective of Congressional power expressed in his *Rancho Viejo* dissent raises serious concerns about his views on the legitimacy of such major and historically effective pieces of civil rights infrastructure as the ban on discrimination in places of public accommodation in the Civil Rights Act of 1964 and, equally, on Congress' authority to move the country forward with additional civil rights laws such as hate crime and non-discrimination legislation to better protect the lesbian, gay, bisexual and transgender community.

**Judge Roberts' troubling views on immigrants' rights.** In a 1982 decision, the U.S. Supreme Court[15] struck down, on Equal Protection grounds, a Texas law that prevented undocumented immigrant children from attending public schools. The 5-4 decision guaranteed the right of undocumented children to attend public schools and recognized that undocumented immigrants could claim protection under the Fourteenth Amendment. Justice Brennan, writing for the majority, pointed out that it was "difficult to conceive of a rational justification for penalizing these children"[16] for being in the U.S. based on the actions of their parents. Justice Brennan also pointed out that the denial of a basic education and the stigma of illiteracy would impose "a lifetime of hardship on a discrete class of children not accountable for their disabling status."[17] In a memorandum to then-Attorney General William French Smith,[18] Roberts criticized the ruling as a decision by the product of the "activist duo," Justices Brennan and Marshall. Roberts advised the Attorney General that the Reagan administration should have filed an *amicus curiae* brief in favor of upholding the Texas law because the weight of a brief from the U.S. Solicitor General on the "values of judicial restraint could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case."[19] Roberts also endorsed the idea of a national I.D. card,[20] and in another instance he pointed out that President Reagan should mention his support for a legalization proposal in an upcoming interview with a Latino publication because he thought readers would be pleased that Reagan wanted to grant legal status to their "illegal amigos."[21]

**Judge Roberts' attempt to undermine the wall of separation between church and state.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Lee v. Weisman*.[22] He not only argued that it was constitutional for a public school to sponsor prayers at graduation ceremonies, but also urged the Court to scrap the long-standing test that federal courts have used to decide whether laws and practices violate the Establishment Clause. The test Roberts urged on the Court would have allowed highly sectarian prayers in public schools and would have threatened the longstanding rights of religious minorities. His argument was not only rejected by

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[15] Plyler v. Doe, 457 U.S. 202 (1982)
[16] *Id.* at 220.
[17] *Id.* at 223.
[18] Memorandum to the Attorney General from Carolyn B. Kuhl and John Roberts, re "*Plyler v. Doe* - The Texas Illegal Aliens Case," June 15, 1982.
[19] *Id.*
[20] Memorandum to Fred F. Fielding from John G. Roberts, re "National I.D. Comments," October 21, 1983.
[21] Memorandum to Fred F. Fielding from John G. Roberts, re "Presidential Interview with *Spanish Today*," September 30, 1983.
[22] 505 U.S. 577 (1992).

the Court but criticized by the majority for its erroneous First Amendment analysis. Earlier in his career, Roberts repeatedly endorsed legislation that would strip the federal courts of the ability to even hear cases dealing with school prayer.[23]

**Judge Roberts' narrow views on disability law.** Following the Supreme Court decision in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*,[24] Roberts authored a memorandum that endorsed troubling views on the ability of the federal government to assist people with disabilities. *Rowley* involved Amy Rowley, an eight-year-old deaf student who sought to have a sign language interpreter provided to assist her in school. Lower federal courts ruled that Rowley was qualified under the Education for All Handicapped Children Act of 1975[25] to receive a state-sponsored sign language interpreter. The Solicitor General's office supported her claim when the case reached the Supreme Court on appeal, but in a majority opinion written by Justice Rehnquist, the Supreme Court reversed, stating that Rowley was entitled only to an adequate education and that states were not required to "maximize the potential of handicapped children commensurate with the opportunity provided to other children."[26] A week after the ruling, Roberts wrote a memorandum that attacked the lower court rulings in Rowley's favor as "an effort by activist lower court judges to impose potentially huge burdens on the states," and faulted the Justice Department for weighing in on Amy Rowley's side of the case.[27]

**Judge Roberts' leadership in "anti-busing initiatives."** While in the Reagan Justice Department, Roberts strongly supported, in his words, "our anti-busing initiatives"[28] and referred to busing as a "failed experiment."[29] In advising the Attorney General, Roberts dismissed recommendations by Arthur Flemming, former chairperson of the U.S. Commission on Civil Rights as stressing the "purported need for race-conscious remedies such as busing." In a 1981 memo, Roberts characterized Flemming's arguments as not compelling because they relied on "long quotes from old Supreme Court cases."[30] The case Roberts referred to was *Swann v. Charlotte-Mecklenburg Board of Education*,[31] which was decided only 10 years earlier and clearly upheld the use of cour-ordered busing to remedy school desegregation. Roberts did not recognize the seminal Supreme Court case as controlling.

**Judge Roberts' support for "court stripping" legislation, which undermines the ability of the federal courts to enforce constitutional protections.** Roberts waged a campaign inside the Reagan administration to support a bill introduced by Senator Helms and others to strip the federal courts of authority to require busing as remedy for illegal segregation. Both Robert Bork

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[23] *See, e.g.* Memorandum to Fred F. Fielding from John G. Roberts, re "S. 47, "Voluntary School Prayer Act of 1985," May 6, 1985.
[24] 458 U.S. 176 (1982)
[25] Public Law 94-142 (89 Stat. 773), approved November 29, 1975; now codified as the Individuals with Disabilities Education Act, 20 U.S.C. Chapter 33.
[26] *Rowley*, 458 U.S. at 189.
[27] Memorandum to the Attorney General from John Roberts, re "Government Participation and Supreme Court Decision in *Board of Education v. Rowley*," July 7, 1982.
[28] Memorandum to William French Smith from John Roberts, re "Summary of Flemming Correspondence," October 5, 1981.
[29] Memorandum to the Attorney General from John Roberts, re "Meeting with Clarence Pendleton, Chairman, U.S. Civil Rights Commission," September 15, 1982.
[30] Memorandum re Flemming, *supra* note 28.
[31] 402 U.S. 1 (1971).

and Ted Olson thought the bill was unconstitutional. Roberts had no such reservations. His memoranda heaped scorn on critics of the legislation, and claimed that Congress had power to eradicate busing as a "failed experiment."[32] Judge Roberts' writings from his tenure in the Reagan Justice Department indicate that he believes that so-called "court stripping" statutes, which withdraw constitutional claims from judicial scrutiny, are constitutional. In commenting on an analysis by then-Assistant Attorney General Theodore Olson, who wrote that opposing a bill to strip the courts of jurisdiction in school desegregation cases would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read."[33] He has also claimed that Congress has the power to strip courts of the ability to hear cases involving matters such as public school prayer and abortion.[34]

Apparently, Roberts believes that the Constitution *should be read* to permit Congress to limit or even eliminate the constitutional role of the federal judiciary in providing relief from unconstitutional legislation. LCCR finds this extremely troubling because the judicial branch has often been the sole protector of the rights of minority groups against the will of the popular majority, and our concerns are particularly relevant to the present day because Congress has voted on a number of court-stripping bills in recent years, including the so-called "Marriage Protection Act."[35] To use another example, if Congress had passed a statute stripping the federal courts of jurisdiction to hear cases raising claims of lesbian, gay, bisexual and transgender rights, the federal constitutional issue presented and vindicated in *Romer v. Evans*[36] would never have reached the Supreme Court. No candidate for the federal judiciary, especially for the Supreme Court, should advocate closing the courthouse doors to any group of Americans.

**Judge Roberts' narrow interpretation of relief under Section 1983.** While in the Reagan Justice Department and again as Deputy Solicitor General, Roberts sought to narrow the definition of "rights" under Section 1983,[37] originally enacted as part of the Civil Rights Act of 1871. In a 1982 memorandum, he made clear his strong disagreement with the Supreme Court's ruling in *Maine v. Thiboutot*,[38] which held that Section 1983 provides a remedy for violations of statutory rights as well as constitutional ones, and discussed ways to "undo the damage created by *Thiboutot*."[39] In *Wilder v. Virginia Hospital Association*,[40] Roberts argued before the Supreme Court that Medicaid rights were not privately enforceable under Section 1983. And in *Suter v. Artist M.*,[41] he took the position that children could not utilize Section 1983 to enforce provisions of the Adoption Assistance and Child Welfare Act, which required states to make

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[32] Memorandum re Meeting with Clarence Pendleton, *supra* note 29.
[33] Handwritten comments by John Roberts on memorandum to the Attorney General from Ted Olson, re "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases," April 12, 1982.
[34] Jo Becker, R. Jeffrey Smith and Sonya Geis, *In 1980s, Roberts Criticized the Court He Hopes to Join*, THE WASHINGTON POST, August 20, 2005 at A04.
[35] Marriage Protection Act of 2003 (H.R. 3313, 108th Cong., passed by U.S. House of Representatives on July 22, 2004).
[36] 517 U.S. 620 (1996).
[37] 42 U.S.C. § 1983.
[38] 448 U.S. 1 (1980).
[39] Memorandum to Steve Brogan, Office of Legal Policy, from John Roberts, re "Development of Legislative Changes to 42 U.S.C. § 1983," August 9, 1982.
[40] 496 U.S. 498 (1990).
[41] 503 U.S. 347 (1992).

reasonable efforts to reunite children with their families. Section 1983 is a critical federal provision that ensures that individuals can obtain relief when their federal rights have been violated by state or local officials, and has long been a primary tool for holding states accountable. Any efforts to limit its scope should be viewed as extremely troubling.

**WOMEN'S RIGHTS**

**Judge Roberts' troubling, dismissive attitude toward gender discrimination and his efforts to undermine a key law preventing it.** Throughout his government service, Roberts advocated positions on gender discrimination that are well outside of the mainstream. Indeed, Roberts' writings often seem to reflect outright denial that gender-based discrimination even exists, with memoranda authored by him even referring to "perceived problems of gender discrimination."[42] In one memorandum, he ridiculed the concept of equal pay for comparable work as a "radical redistributive concept" and mocked several female Republican members of Congress who had asked the administration not to oppose it in a pending court case.[43]

During Roberts' tenure in the Reagan Justice Department, he argued that there should be no "heightened judicial review" of laws and policies that discriminate against women. In the gender discrimination case *Canterino v. Wilson*, in which state prison officials discriminated against women by providing dramatically fewer vocational training and work opportunities than were available to men, Roberts urged his superiors to not intervene in the case because they would be forced to argue in favor of a higher standard of scrutiny.[44] This is disturbing because the Supreme Court had already ruled – definitively – that laws or policies that discriminated on the basis of gender were required to meet a higher burden under the Equal Protection Clause.[45] Equally troubling is the fact that Roberts also argued against government intervention on the ground that discriminatory treatment of men and women in the prison's vocational programs was "reasonable" in light of "tight state prison budgets,"[46] as if cost considerations should somehow outweigh the protection of women (or any group of individuals) from unlawful discrimination.

Roberts has also consistently argued in favor of narrowing the scope of Title IX of the Education Amendments of 1972, the key law prohibiting gender discrimination in education.[47] During his tenure in the Reagan Justice Department, Roberts argued in 1981 in favor of a proposal to limit the reach of Title IX by applying it only to schools that received *direct* federal aid and not *indirect* federal support such as student loans and grants.[48] While the administration – and eventually the Supreme Court – fortunately rejected his view, the end result would have been to

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[42] Memorandum to Fred. F. Fielding from John G. Roberts, re "Draft 'Status of the States' 1982 Year-End Report," January 17, 1983.

[43] Memorandum to Fred F. Fielding from John G. Roberts, re "Nancy Risque Request for Guidance on Letter from Congresswoman Snowe et al.," February 20, 1984.

[44] Memorandum re Canterino v. Wilson, *supra* note 2. The Department of Justice intervened in the case in support of the plaintiffs, despite Roberts' recommendation, and the district court found that the prison system in question had indeed unlawfully discriminated on the basis of gender. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky. 1982).

[45] See, *e.g. Craig v. Boren*, 429 U.S. 190 (1976), *Califano v. Westcott*, 443 U.S. 76 (1979).

[46] Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re "Proposed Intervention in *Canterino v. Wilson*," February 12, 1982.

[47] P.L. 92-318 (86 Stat. 235), approved June 23, 1972.

[48] Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re: "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance,'" December 8, 1981.

allow many schools to receive significant federal funding without being required to comply with Title IX's provisions.

In 1982, Roberts argued that Title IX applied only to specific, individual programs within schools that receive specifically earmarked federal funds,[49] even though the institution as a whole benefits from the funding. When the Supreme Court accepted this argument in *Grove City College v. Bell*,[50] a dramatic decrease in civil rights enforcement in colleges and universities resulted. Congress clarified that it had intended for educational institutions, rather than specific programs, to be covered under Title IX by passing the Civil Rights Restoration Act in 1987,[51] over the objections of Roberts.[52]

As Deputy Solicitor General, Roberts again took a position that would have seriously weakened Title IX. In *Franklin v. Gwinnett County School District*,[53] Roberts co-authored a brief in which he argued that a high school student could not obtain damages under Title IX for years of sexual harassment and sexual abuse by her coach. His overly restrictive view of proper remedies under Title IX was rejected unanimously by the Supreme Court, which found that sexual harassment is an intentional violation of Title IX and that its victims can recover money damages. Roberts' position in *Franklin*, and his restrictive views on Title IX in general, raise serious questions about whether he would allow women to fully vindicate their legal rights. These concerns would also apply to victims of racial and disability-based discrimination seeking redress under Title VI or section 504 of the Rehabilitation Act, which are parallel in structure to Title IX.

**Judge Roberts' position in *Bray v. Alexandria* raises questions about his willingness to protect women from discrimination.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief and delivered two oral arguments in *Bray v. Alexandria Women's Health Clinic*,[54] in support of Operation Rescue's legal position in a case involving trespassing and preventing women from accessing health clinics, tactics that "present[ed] a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its name."[55] What is troubling about John Roberts' role in *Bray* is that he readily threw the weight of the U.S. government behind Operation Rescue's position and against using federal civil rights law to stop aggressive and dangerous tactics from being used to prevent women from accessing health care. In doing so, he once again advanced an overly restrictive view of federal authority to enforce constitutional rights.

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[49] Memorandum to the Attorney General from John Roberts, re "*University of Richmond v. Bell*," August 31, 1982.
[50] 465 U.S. 555 (1984).
[51] Civil Rights Restoration Act of 1987, P.L. 100-259 (102 Stat. 28), approved March 22,1988.
[52] Memorandum to Fred F. Fielding from John G. Roberts, re "Correspondence from T.H. Bell on *Grove City* Legislation, July 24, 1985.
[53] 503 U.S. 60 (1992).
[54] 506 U.S. 263 (1993).
[55] *Id.* at 313 (Stevens, J. dissenting).

**HUMAN RIGHTS**

**Judge Roberts' expansive view of administrative power to suspend fundamental due process protections.** In *Hamdan v. Rumsfeld*,[56] Judge Roberts joined an opinion that gave broad leeway to the administration to try suspected terrorists in military tribunals that lack many of the important protections normally available to criminal defendants. Under the ruling, Hamdan would have no right to be present throughout his trial and would not have a right to see all of the evidence against him. Furthermore, the court ruled that Hamdan and similar detainees could not seek judicial relief under the Geneva Conventions. This decision raises serious questions not only about Judge Roberts' views on the separation of powers but also on basic principles of civil and human rights.

**Judge Roberts' willingness to curtail *habeas corpus* appeals in death penalty cases.** While in the Reagan administration, Roberts called for severely restricting the ability of individuals facing the death penalty to allege constitutional violations in federal court. He asserted that it is rare for "the meritorious claim [to have] anything to do with the petitioner's innocence," and that "the question would seem to be not what tinkering is necessary in the system, but rather why have federal *habeas corpus* at all?"[57] He later argued that the Supreme Court should hear fewer appeals and stop serving as the "fourth or fifth guesser in death penalty cases."[58] Given the irreversible nature of the death penalty, and the fact that at least 116 individuals have been convicted of capital crimes and then exonerated since 1973,[59] it is irresponsible to so cavalierly dismiss *habeas corpus* appeals or any other legal safeguard.

**Judge Roberts' distorted views on civil and human rights in Africa.** Judge Roberts' troubling statements on civil and human rights matters have not been limited to purely domestic issues. A 1982 memorandum included disparaging comments about TransAfrica Forum,[60] an African American organization that wanted to dismantle apartheid systems around the world, including in South Africa. When asked by Kenneth Starr to respond to a gift magazine subscription from TransAfrica, Roberts wrote: "Sometimes silence is golden. TransAfrica is the American lobby group supporting various Marxist takeover attempts in Africa, particularly in Namibia. The only appropriate reply would be a curt acknowledgment-- not even a 'thanks for the free subscription'--and I think it best not to respond at all. The fact that Randall Robinson is the brother of ABC's Max Robinson does not legitimate the organization."[61]

When Judge Roberts wrote this memorandum, future South African President Nelson Mandela was a political prisoner, and had been incarcerated by the apartheid regime for 18 years. The South African regime was launching cross-border attacks against its neighbors, emboldened by

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[56] 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005).
[57] R. Jeffrey Smith and Jo Becker, *Sifting Old, New Writings for Roberts' Philosophy*, THE WASHINGTON POST, August 21, 2005 at A01.
[58] Memorandum to Fred F. Fielding from John G. Roberts, re "Chief Justice's Proposals," February 10, 1983.
[59] Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty*, September 2004.
[60] TransAfrica was established with the support of the Congressional Black Caucus in 1977 to advocate on behalf of people of African descent. Its educational affiliate, TransAfrica Forum, was formed in 1981 and produced a quarterly journal and monthly issue briefs. John Roberts was asked to draft a letter of response to the complimentary subscription TransAfrica Forum had provided the Attorney General.
[61] Memorandum to Kenneth Starr from John Roberts, February 16, 1982.

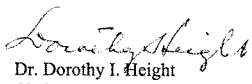
the now-discredited Reagan administration policy of "constructive engagement." With this terse note, Roberts dismissed any notion of the legitimacy of the struggle against apartheid, the rigid legal system of white minority rule imposed through brutal force against the people of South Africa and Namibia. Despite worldwide support for the popular movements that were struggling against apartheid, he omitted any mention of the racist system that was the subject of worldwide concern. His response suggests that he viewed even the historic battle against South Africa's repressive system of apartheid and illegal occupation of Namibia through a distorted ideological prism. The work of TransAfrica – and many other organizations – was simply a part of longstanding efforts to win equal rights for people of African descent around the world.

**CONCLUSION**

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political agenda. Unfortunately, Judge Roberts' record and testimony fails to show such a commitment, and for that reason, we must oppose his confirmation as Chief Justice.

Thank you for your consideration. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2880. We look forward to working with you.

Sincerely,



Dr. Dorothy I. Height
Chairperson

Wade Henderson
Executive Director

## Press Release

### LULAC National Executive Board Unanimously Opposes Roberts Nomination to the Supreme Court

**John Roberts' Record is Antagonistic toward Immigrant Rights, Voting Rights, Education, and Affirmative Action Among Others**

August 30, 2005, Media Contact: Brenda Alvarez, (202) 833-6130

Washington, DC - The National Executive Board of the League of United Latin American Citizens (LULAC) unanimously voted to oppose the nomination of John Roberts to the Supreme Court. Although he does not have an extensive public record, what exists suggest that Roberts' ideological positions may not allow him to be a fair and impartial judge, respectful of the important role of the Supreme Court.

The National Executive Board was especially concerned with John Roberts' record in the Plyler v. Doe case which raised significant questions about his position on immigrant rights and opportunities. "Over its long history, LULAC has fought hard to ensure that immigrants' rights were protected. Plyler v. Doe overturned a Texas law that would have withheld state funds from school districts for the education of undocumented children and denied them enrollment into the school system," stated Hector Flores LULAC National President. "Roberts' comments while he was special assistant to the Attorney General in a memo dated June 15, 1982 clearly demonstrate that he criticized the court's decision."

It is clear through Roberts' limited public record that he has been a consistent advocate of the positions of the extreme right wing. During the Reagan administration, Roberts helped promote efforts to severely limit the circumstances under which minorities could bring suit under the 1965 Voting Rights Act. Roberts also argued against affirmative action saying that the program was bound to fail because they required "the recruiting of inadequately prepared candidates."

Furthermore, in a patronizing 1983 memo while he was at the White House, Roberts commented that the Reagan administration would be favorably viewed by the Hispanic community because, "I think this audience would be pleased that we are trying to grant legal status to their illegal amigos."

A hard right candidate for a lifetime appointment to the nation's highest court will certainly threaten the impartiality of our court system.

"This attitude combined with his stance on affirmative action, voting rights and civil liberties has lead LULAC to believe that John Roberts is not the right person for the Supreme Court," President Flores added.

The League of United Latin American Citizens is the oldest and largest Latino civil rights organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans through community-based programs operating at more than 700 LULAC councils nationwide.

Click here for more information

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**OPENING STATEMENT OF SENATOR PATRICK LEAHY, RANKING MEMBER**
**HEARING BEFORE THE SENATE COMMITTEE ON THE JUDICIARY**
**ON THE NOMINATION OF JOHN G. ROBERTS, JR.,**
**TO BE CHIEF JUSTICE OF THE SUPREME COURT**
**MONDAY, SEPTEMBER 12, 2005**
**SENATE CAUCUS ROOM**

A few days ago William H. Rehnquist passed away after 33 years of service on the Supreme Court, including 19 as the Chief Justice. Last week many of us paid our respects for his service at the monumental building across the street in which the Chief Justice devoted himself to protecting the independence of the federal judiciary. The facade of that Court exhibits the enduring strength and dignity of marble from Vermont, a place that served as a refuge for the Chief Justice.

## Self-Government And The Common Good

Today, the devastation and despair facing millions of our fellow Americans in the Gulf region is a tragic reminder of why we have a federal government and why it is critical that our government be responsive. We need the federal government for our protection and security; to cast a lifeline to those in distress; and to mobilize vital resources, beyond the ability of any local or State government, for the common good.

The full dimensions of the disaster are not yet known. Bodies of loved ones need to be recovered, families need to be reunited, the survivors need to be assisted, long-term health risks and environmental damage need to be assessed. But if anyone needed a reminder of the need and role for government, the last days have provided it. If anyone needed a reminder of the growing poverty and despair among too many Americans, we now all have it. And if anyone needed a reminder of the racial divide that remains in our nation, no one can now doubt that we still have miles to go.

I believe that the American people still want, expect and demand their government to help ensure justice and equal opportunity for all and especially for those who, through no fault of their own, were born into poverty. The American people deserve a government as good as they are, with a heart as big as theirs. We are all Americans and all Americans should have the opportunity to earn a fair share of the bounty and blessings that America offers.

## We The People

We have been given a great Constitution. It begins: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the

United States of America." Our Constitution is the framework for our government and the foundation of our rights and liberties.

Vermont joined the Union in the same year that the Bill of Rights was ratified. Those of us from the Green Mountain State, the nation's 14th state, have historically been protective of our fundamental rights and liberties. Vermonters understand the importance of the Constitution and Bill of Rights and of those constitutional amendments that have expanded individual rights over time.

In these hearings, we will be discussing constitutional issues that may seem legalistic. But these are vital questions that affect each of us, every day. When we discuss the Constitution's Commerce Clause or Spending Power, for example, we are asking about congressional authority to pass laws to ensure clean air and water, children's and seniors' health, safe food and drugs, safe workplaces – even wetland protection and levees that should protect our communities from natural disasters.

Our constitutional values remain constant as we strive to realize the American promise of fairness, equality, and justice. I have noted that our Constitution begins with the words "We the People." When the Constitution was written, "We the People" did not include Native Americans or African-American slaves but only "free Persons." It took more than four score years and a Civil War before the Constitution was amended to include as citizens "all persons born or naturalized in the United States." Even then, the Constitution failed to accord half of the people one of democracy's defining rights -- women were not yet guaranteed the right to vote. That was not remedied until 1920. Decades later still, it took an historic constitutional ruling by the United States Supreme Court in the case of *Brown v. Board of Education,* and landmark legislation by the federal government, for America to begin to provide a measure of equality to many who were held back for so long because of the color of their skin.

I have long been a proponent of First Amendment freedoms and open government because the public's right to know what our government is doing promotes accountability and invigorates our system of checks and balances.

Federal judges are not elected. Once confirmed, they serve for life. The people never have the opportunity for effective oversight of their work. The judiciary is the most insulated branch of government from public accountability.

This hearing is the only opportunity for the American people to examine what kind of justice John Roberts will dispense, if promoted to the Supreme Court, and the direction in which he would lead the federal judiciary. This hearing is the only chance that "We the People" have to hear from and reflect on the suitability of the nominee to be a final arbiter of the meaning of the Constitution. Open and honest public conversation with the nominee in these hearing rooms is an important part of this process.

Our Fundamental Rights In A New Century

This hearing is about the fundamental rights of all Americans. Judge John Roberts is the first nominee of the 21st Century. If he is confirmed he serves not just for the remaining three years of the Bush Administration but could serve through the administrations of the next seven or eight presidents. He would be deciding matters that affect not only all of Americans today, but also our children and grandchildren.

Nearly 20 years ago, I noted how critical it is for the Senate to engage in a public exploration of the judicial philosophy of Supreme Court nominees saying: "There can hardly be an issue closer to the heart of the Senate's role than a full and public exposition of the nominee's approach to the Constitution and to the role of the courts in discerning and enforcing its commands. That is what I mean by judicial philosophy." This truth has not changed, as today we consider a successor to Chief Justice Rehnquist and will then be called upon to consider a successor for Justice Sandra Day O'Connor.

## The Arc of the Law

What is more difficult to see is the arc of the law in the years ahead, as Justices will vote on which cases to accept and how to decide them. Ours is a government of laws, but when faced with a vacancy on the Supreme Court, we are reminded that our fellow citizens on the Court interpret and apply those laws. The balance and direction of the Supreme Court are now at issue with two vacancies. Chief among emerging concerns are whether the Supreme Court will continue its recent efforts to restrict the authority of Congress to pass legislation to protect the people's interests in the environment, safety, and civil rights; and, whether the Supreme Court will effectively check the enhanced presidential power that has been amassed in the last few years.

The light of the nominations process is intense because it is the only time that light will shine, and the afterglow lasts for the rest of a Justice's career. "We the People" have just this one chance to inquire whether this person should be entrusted with the privilege and responsibility of interpreting our Constitution and dispensing justice from the nation's highest court. On behalf of the American people, it is our job to do all we can to make sure we get it right.

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LEGAL momentum
Advancing Women's Rights

**IN CONGRESS**
**Congress Must Examine Roberts' Record on Women's Rights**

Minutes after President Bush announced his nomination of Judge John G. Roberts, Jr. to the Supreme Court, members of the media were already predicting Roberts would be "warmly welcomed."

But isn't that skipping a few steps?

Legal Momentum, the nation's oldest women's legal rights organization, calls on Congress to thoroughly examine Roberts' record, especially on the issues crucial to women. If they look deeper, Senators will find Roberts is anything but a blank slate. His record on issues such as reproductive rights, violence against women, federalism and affirmative action is deeply concerning. Though he has no significant record as a sitting judge, throughout his career he has taken numerous positions opposing women's rights.

As Deputy Solicitor General, Roberts argued in favor of the "gag rule," which prohibited federally funded family planning clinics from discussing the option of abortion with patients. Even though the validity of Roe v. Wade was not the issue, Roberts wrote, "[w]e continue to believe that Roe was wrongly decided and should be overruled..." In another case, Legal Momentum argued before the Supreme Court that anti-abortion protestors violated women's civil rights when they blocked the entrances to reproductive health clinics. Roberts filed a brief in support of the violent anti-choice group Operation Rescue, writing "Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions."

Legal Momentum is also concerned that, as a Supreme Court justice, Roberts may continue the trend of the Court to limit the reach of federal laws passed by Congress to protect women's and civil rights, such as the Violence Against Women Act.

The Senate must not only examine these and other positions taken by Roberts throughout his career, but further explore his record by requesting documents such as Department of Justice memos. Roberts' record on issues of deep importance to women must not go unnoticed.

# # #

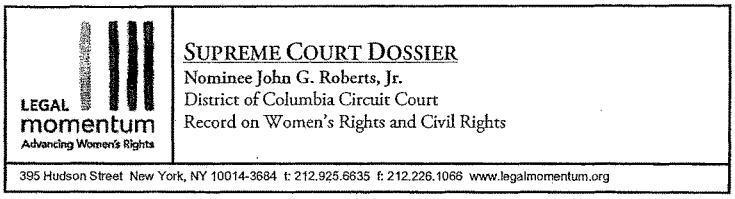
**Take Action!** Click here to urge your Senators to examine Roberts' record!

**Learn more!** Click here to read Legal Momentum's in-depth report on Roberts.

In This Section

- Judicial Nominations
- Social Security and Women
- Welfare Reauthorization
- Security and Financial Empowerment Act
- Violence Against Women Act
- Federal Marriage Amendment

LEGAL momentum
**is the new name of NOW Legal Defense and Education Fund**




SUPREME COURT DOSSIER
Nominee John G. Roberts, Jr.
District of Columbia Circuit Court
Record on Women's Rights and Civil Rights

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John G. Roberts was born in 1955 in Buffalo, NY. He received both his A.B. and J.D. from Harvard University. His early legal career was spent clerking, first for Second Circuit Judge Henry Friendly and then for Justice William Rehnquist. He subsequently served as Special Assistant to the Attorney General William French Smith, as Associate Counsel to President Reagan from 1982 -1986, and as Principal Deputy Solicitor General under Ken Starr from 1989 - 1993. From 1986 – 1989 and then 1993 – 2003, he was a partner in the Washington law firm of Hogan & Hartson. In 2003, he was nominated by George W. Bush to the District of Columbia Circuit and he received his commission on June 2, 2003.

Judge Roberts has no significant record as a sitting judge with regard to issues impacting the rights of women; however he filed over two hundred briefs before the Supreme Court while he was in private practice and in the Solicitor General's office. In those briefs, he took numerous positions directly antagonistic to women's rights, and, in particular, to the right of women to have information about and access to abortions. Indeed, in every case in which both Roberts and Legal Momentum participated before the Supreme Court, we have been on opposite sides of the issues. Moreover, in the two cases in which Roberts participated directly involving abortion rights, his legal theories were countered by Justice O'Connor in her opinions, suggesting that Roberts would not be a moderate conservative Justice following in Justice O'Connor's footsteps, but a more extreme Justice in the mold of Justice Scalia.

**Abortion Gag Rule**

In *Rust v Sullivan,* Roberts, as Deputy Solicitor General, represented the respondent Louis Sullivan, Secretary of Health and Human Services, successfully arguing for the validity of the "gag rule" imposed by the administration of the first President Bush forbidding the mention of abortions by recipients of family planning (Title X) funds. That rule provided:

> A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

The brief in which Roberts participated in said:

"[w]e continue to believe that *Roe* was wrongly decided and should be overruled…the Court's conclusion in *Roe* that there is a fundamental right to an abortion…finds no support in the text, structure, or history of the Constitution."[i]

Legal Momentum, as NOW Legal Defense and Education Fund, filed a brief opposing Roberts' position and arguing that the gag rule was invalid.

The Supreme Court upheld the gag rule. Among the dissenters was Justice O'Connor, who would have held that the agency rule contravened the governing Congressional legislation.[ii]

President Clinton rescinded the gag rule on his first day in office. It has not been reinstated domestically since then.

**Blockading of Abortion Clinics**

In the 1980s, Legal Momentum, under its former name of NOW Legal Defense and Education Fund, represented the National Organization for Women in attempting to establish the legal principle that the blockading of abortion clinics by ant-abortions protestors violated 42 U.S.C. §1985(3), also known as the Ku Klux Klan Act, because it constituted a conspiracy to interfere with respondents' rights to travel interstate and to obtain abortions. Under the name *NOW v Operation Rescue,* both the District Court of the Eastern District of Virginia and the Fourth Circuit Court of Appeals ruled in favor of NOW, enjoining the protests of Operation Rescue. Roberts entered the fray in the Supreme Court, filing an *amicus curiae* brief and arguing before the Court on behalf of the United States. His brief argued, among other things, that "Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions."[iii] Roberts relied on the Supreme Court's infamous decision, in *Geduldig v. Aiello,* 417 U.S. 484 (1974), that discrimination against pregnant women is not sex discrimination, but only a permissible distinction between "pregnant women and non-pregnant persons," *id.* at 497.

The Supreme Court agreed with Roberts' position and ruled in favor of Operation Rescue. Justice O'Connor, then the lone woman on the Supreme Court, and the Justice whom Roberts would replace if he is confirmed, dissented from the Court's opinion and would have held that the blockading of the abortion clinics fell squarely within the ambit of the Ku Klux Klan Act. Among other things, she wrote:

> If women are a protected class under § 1985(3), and I think they are, then the statute must reach conspiracies whose motivation is directly related to characteristics unique to that class. The victims of petitioners' tortious actions are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of women. ...
>
> . . . It is undeniably petitioners' purpose to target a protected class, on account of their class characteristics, and to prevent them from the equal enjoyment of these personal and property rights under law. The element of class-based discrimination that *Griffin* read into § 1985(3) should require no further showing.
>
> I cannot agree with the Court that the use of unlawful means to achieve one's goal "is not relevant to [the] discussion of animus." To the contrary, the deliberate decision to isolate members of a vulnerable group and physically prevent them from conducting legitimate activities cannot be irrelevant in assessing motivation. ... The clinics at issue are lawful operations; the women who seek their services do so lawfully. In my opinion, petitioners' unlawful conspiracy to prevent the clinics from serving those women, who are targeted by petitioners by virtue of their class characteristics, is a group-based, private deprivation of the "equal protection of the laws" within the reach of § 1985(3).[iv]

Congress subsequently passed the Freedom of Access to Clinic Entrances Act (FACE), prohibiting the blockading of abortion clinics.

**Applicability of Title IX to the NCAA**

In private practice, Roberts represented the NCAA as lead counsel, successfully arguing that Title IX, which prohibits sex discrimination in federally-funded educational institutions, does not apply to the NCAA, which is not a direct recipient of federal funds but only an indirect beneficiary in that it is financed virtually exclusively by institutions which receive federal funds. [v] Legal Momentum joined a brief arguing for NCAA's obligation to comply with Title IX.[vi] A unanimous Supreme Court ruled in favor of the NCAA.

**Participation of Disadvantaged Individuals in the Construction Industry**

Roberts and Legal Momentum were once again at odds before the Supreme Court in *Adarand Constructors v. Mineta.* Legal Momentum argued as *amicus curiae* for the validity of the "Disadvantaged Business Enterprise ("DBE") program of the U.S. Department of Transportation ("DOT"), which implements the congressional mandate--first established in the Small Business Act ("SBA"), and reaffirmed in subsequent legislation--of ensuring that "small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [vii]

Roberts, on the other hand, represented the Associated General Contractors of America as *amicus curiae*, arguing that the program was invalid because minority hiring goals must be supported by detailed evidence of past discrimination.[viii]

The Supreme Court concluded that it had improvidently granted certiorari because the issue of standing had not been adequately addressed below, and it left in effect the Court of Appeals ruling that the DBE program is consistent with the constitutional guarantee of equal protection.

In sum, whenever Legal Momentum and John G. Roberts have participated in the same Supreme Court case, we have been on opposite sides. Given that we believe our positions further the rights of women, we think Judge Roberts' positions are antithetical to those rights.

*Published on July 19, 2005*

*Special thanks to Legal Momentum Board of Legal Advisors co-chair Amy L. Katz for her legal research assistance.*

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[i] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392). 1989 U.S. Briefs 1391

[ii] *Rust v. Sullivan*, 500 U.S. 173, 204 (1991) (Blackmun, Marshall, Stevens and O'Connor, dissenting)

[iii] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Bray v. Alexandria Women's' Health Clinic*, 1990 U.S. Briefs 985, April 11, 1991

[iv] *Bray v. Alexandria Women's' Health Clinic*, 506 U.S. 263, 350-351 (1993) (O'Connor, J., dissenting)

[v] Brief of Petitioner, *NCAA v. Smith*, 1998 U.S. Briefs 84

[vi] Brief of National Women's Law Center, *et al.*, as *Amici Curiae* in support of Respondents, *NCAA v. Smith*, 1998 U.S. Briefs 84

[vii] Brief of *Amici Curiae* NOW Legal Defense and Education Fund, Lawyers Committee for Human Rights, and Allard K. Lowenstein International Human Rights Clinic in Support of Respondents, 2000 U.S. Briefs 730, *Adarand Constructors v. Mineta*

[viii] Brief of *Amicus Curiae* for the Associated General Contractors of America, Inc., in Support of Petitioner, 2000 U.S. Briefs 730, *Adarand Constructors v. Mineta*

Testimony
*United States Senate Committee on the Judiciary*
**Nomination of John G Roberts (Witness List for September 15)**
**September 15, 2005**

**The Honorable John Lewis**
United States House of Representatives [D-GA-5th District] ,

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Testimony of Congressman John Lewis
Before the Senate Judiciary Committee
Confirmation Hearing of John G. Roberts, Jr.
September, 2005

Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Leahy, and distinguished members of the Committee, I am honored to be here today.

As many of you know, this is not the first time I have come before this committee. I was here fourteen years ago when the nomination of another Justice to the Supreme Court prompted me to speak out. I am here today with the hope that this Committee will hear my words and take heed.

When I was growing up in rural Alabama, I saw those signs that said, "White men, Colored men," "White Women, Colored Women" I used to ask my parents, my grandparents, "Why racism? Why racial discrimination?" And they would tell me, "Don't get in trouble. Don't get in the way."

As a participant in the civil rights movement of the 1960's, I decided to get in the way. I was beaten, arrested, and jailed more than 40 times for peaceful, nonviolent protests against legalized segregation in the South. During that time, I saw American citizens with their heads cracked open by nightsticks, lying in the streets, weeping from teargas, trampled by horses, and attacked by police dogs, calling helplessly for medical aid.

Back then, legalized discrimination was enforced by state and local officials. The Federal government was our only hope, and we depended on the Supreme Court to act as a sympathetic referee in the struggle for justice and civil rights. I remember one occasion when the Court issued a decision on public transportation, an elderly black woman was overheard to say, "God Almighty has spoken from Washington."

In 1965, Judge Roberts was only ten years old. He may be a brilliant lawyer, but I wonder whether he can really understand the depth of what it took to get the Voting Rights Act passed. People stood day-after-day in unmovable lines to pass the so-called literacy test. They had to interpret certain sections of the Constitution, count the number of jelly beans in a jar, or the number of bubbles in a bar of soap just to register to vote.

I fear that if Judge Roberts is confirmed to be Chief Justice of the United States, the Supreme Court would no longer hear the people's cries for justice. I fear the leadership of the Court would promote politics over the protection of individual rights and liberties. If the Federal Courts had abandoned us in the Civil Rights Movement, in the name of judicial restraint, we might still be struggling with the burden of legal segregation in America today.

Judge Roberts' memos reveal him to be hostile toward civil rights, affirmative action, and the Voting

Rights Act. He has even said that Voting Rights Act violations, and I quote "should not be made too easy to prove."

Under the Court's decision in Mobile v. Bolden, the Court weakened the Voting Rights Act. Under this ruling, many political subdivisions would have been permitted to maintain at-large election systems, diluting minority voting strength. This may be less obvious than the violence and intimidation of 1965, but it is no less harmful to our nation's principles of inclusive democracy.

Section 2 has been successful in reducing barriers and has increased the number of minority elected officials. There is no doubt in my mind that had Judge Roberts' narrow reading of the Voting Rights Act prevailed, fewer people of color would be serving in Congress, and at both the state and local levels today.

As our nation is still reeling from the tragedy of Hurricane Katrina, the timing of these hearings could not be more significant. What happened in New Orleans and along the Gulf Coast of Mississippi and Louisiana exposed the issues of race, class, and fairness yet again. We are still a nation deeply divided by race and class.

All Americans, of every race, of every religion or nationality, whether they are women or men, gay or straight, or people with disabilities—all of us need equal access to a fair and independent judiciary, to insure "equal justice under the law".

The stakes are higher than ever. We cannot afford to elevate an individual to such a powerful, life-time position, whose record demonstrates such a strong desire to reverse the hard-won civil rights gains that so many sacrificed so much to achieve. We've come such a great distance. We cannot afford to stand still. We cannot afford to go back. We must go forward to the creation of one America. Senators, I implore you to get in the way. Thank you, Mr. Chairman.

# Third Judicial District Court

Denise Posse Lindberg
District Judge

Mr. Chairman, Mr. Leahy, members of the Committee:

My name is Denise Posse Lindberg. I am a state trial court judge from the state of Utah, and I am honored to appear before you in enthusiastic support of the nomination of Judge John G. Roberts as Chief Justice of the United States. He brings to this appointment a keen intellect and sound judgment, fairness and decency, and exceptional knowledge of and respect for the law, the Court, and our constitutional system. He has all the attributes necessary to be a Chief Justice in the highest traditions of that office.

I am here today because everything I know about John Roberts convinces me that he is exactly the right person for this demanding and crucial position at this equally demanding and crucial time in our nation's history. I preface my comments by noting that although our lives have intersected at various times over the past fifteen years, I cannot say that we are close personal friends. However, over that period of time I have observed his career from three different vantage points. First, I came to know him in my role as a law clerk to Justice Sandra Day O'Connor. Second, I was his colleague at the Washington, D.C. law firm of Hogan & Hartson and was a member of the Appellate practice group which he headed. Third and finally, I am a fellow judge who has reviewed his judicial record.

My first exposure to John Roberts came on opening day of October Term, 1990 at the Supreme Court when then-Deputy Solicitor General Roberts was scheduled to present one of the

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"First Monday" arguments. I expected a professional presentation from the Solicitor General's office, but the skill and effectiveness with which then-Deputy Solicitor General Roberts argued his case far exceeded my expectations. Notwithstanding his relative youth at the time, his composure, his clear command of the relevant facts and law, and his exceptional ability to engage with the Court in a discussion of the issues made a lasting impression on me.

John Roberts argued five additional cases during my term at the Court, and brought to each the same thorough preparation and skill. My respect for him as an outstanding appellate advocate was firmly established by the time my clerkship ended.

Following my clerkship I joined Hogan & Hartson's appellate practice group and worked with John on a number of cases following his return to the firm. John was a hands-on manager, doing much of his own drafting and working closely with other attorneys to ensure he was fully conversant with every aspect of the case. He also generously lent his assistance and expertise to cases where he was not, officially, the "counsel of record." I particularly recall the unstinting support and guidance he offered on my first solo effort at drafting a brief for a case before the U.S. Court of Appeals for the D.C. Circuit. Generally, appellate writing is a team effort, with different attorneys drafting sections of the brief under one person's overall direction and editing. That particular case, however, involved a *pro bono* matter I had taken on, so I was responsible for drafting the entire brief. He willingly spent considerable time reviewing my drafts and providing feedback. For someone with his exceptional talent it would have been easy for John to become impatient with a less-experienced colleague. But that never happened. He was a genuinely nice person to work with, incredibly bright but never arrogant. He gave his time freely, and his feedback on my work was invariably insightful, helpful and courteous. He had a

way of making complex issues seem simple, but not simplistic. John analyzed issues creatively without distorting precedent or stretching a point of law beyond proper bounds. In short, consistent with the best traditions of our profession, John's work was always principled and carefully circumscribed. I learned appellate practice from watching John work, and being taught by him.

My personal and professional experiences with, and observations of, John are not unique. In recent conversations with some of our former colleagues, similar comments were frequently repeated. For example, another former O'Connor clerk and former associate at Hogan, Amy Kett, told me how much it had meant to her that John had taken time to go hear her argue her first case before the D.C. Circuit. Additionally, as head of the appellate group John facilitated and gave his complete support to Amy's efforts to balance her career with the demands of raising a family.

John reveres the law, and treats it–and everyone connected with it–with utmost respect. One example of this occurred following an associate's oral argument before an appellate panel. In debriefing the case John gently reminded the associate always to shake opposing counsel's hand. It was a small thing, but emblematic of his commitment to civility in the practice of law.

My final comments about John come from my perspective as a judge, evaluating the work of a fellow judge. In preparing these remarks I reviewed a substantial number of his published opinions. I also read some of the commentary that attempts to draw inferences about his views based on those writings. I have noted three problems with some of that commentary. In some cases commentators have failed to acknowledge that judges do not choose the cases that come before the bench, but must instead respond to particular facts in light of applicable law. Others

overlook the fact that whenever an appellate judge writes for the court, that judge is not writing simply for him- or herself, but rather must reflect the judgment of at least one other member of the appellate panel. Others appear to misunderstand the judicial role. John has correctly noted that judges "do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law."

University of Chicago law professor Cass Sunstein has described John's judicial writing as "careful, lawyerly and narrow."[1] I agree. I would further describe his body of work as judicious -that is, reflecting sound judgment. In each opinion I reviewed, John focused on the case before him and did not overreach. He was respectful of precedent. In short, he demonstrated the judicial restraint that this body has said is an important consideration in evaluating a nominee to the Court. For example, in *Rancho Viejo v. Norton,*[2] a dissent from denial of rehearing *en banc* (for which, in my view, he has been unfairly criticized), John correctly noted the inconsistency between the panel's opinion and binding Supreme Court precedent. He also noted that the panel's opinion created a circuit split. Rather than reflecting hostility to the Endangered Species Act, as some have characterized it, his dissent offered the possibility that *en banc* review would "afford the opportunity to consider alternative grounds for sustaining application of the Act" in a manner that would be more consistent with Supreme Court precedent.

To be sure, policy issues acquire a different salience when one moves from the Court of Appeals to the Supreme Court. To the best of my knowledge John is personally, judicially, and

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[1]Cass R. Sunstein, *Minimal Appeal*, THE NEW REPUBLIC, August 2005, at 17.

[2]334 F.3d 1158, 1160 (D.C. Cir. 2003).

constitutionally conservative. I would not hazard a guess as to his specific views on "hot button" issues, nor as to the areas of law or policy on which we may personally agree or disagree. What is important to me is that John Roberts is disciplined, thoughtful, and respectful of the role of the judiciary in our constitutional structure. He will not impose his personal policy preferences on his reading of the law. I have complete confidence that he will be judicious in the exercise of power.

To the office of Chief Justice John will bring a remarkable combination of skills, personality, and respect for constitutional principles that will make him highly effective. His vast intellectual skills and winsome personality will enable John to work effectively with his colleagues and bring consensus to a divided Court. These same traits will make him an outstanding leader of the federal judiciary and will allow him to work cooperatively with the coordinate branches of government.

I urge this Committee to recommend to the full Senate swift confirmation of his nomination. Thank you for this opportunity to share my views.

## List of Cases Ruth Bader Ginsburg Discussed

### Supreme Court Decisions/Opinions She Agreed With

- Marbury v. Madison (1803) [p. 188, 289, 312]
- Gibbons v. Ogden (1824) [p. 312]
- Worcester v. Georgia (1832) [p. 126]
- Abrams v. United States (1919) (Holmes and Brandeis's dissent) [p. 312]
- Gitlow v. New York (1925) (Holmes and Brandeis's dissent) [p. 312]
- Whitney v. California (1927) (Brandeis's concurrence) [p. 312]
- DiSanto v. Pennsylvania (1927) [p. 317] (agreeing with Brandeis statements on stare decisis)
- Burnet v. Coronado Oil (1932) [p. 317] (agreeing with Brandeis statements on stare decisis)
- Erie v. Thompkins (1939) [p. 317]
- Skinner v. Oklahoma (1942) [p. 270]
- Brown v. Board (1954) and its antecedents (McLaurin (1954), Sweatt v. Painter (1950), Sipuel (1948), Gaines (1938)) [p. 124, p. 312]
- Poe v. Ullman (1961) (Justice Harlan's dissent) [p. 270]
- Griswold v. Connecticut (1965) [p. 270]
- White v. Cook (1966) [p. 191]
- Miranda v. Arizona (1966) [p. 327]
- Brandenburg v. Ohio (1969) [p. 313]
- Reed v. Reed (1971) [p. 121-122]
- Lemon v. Kurtzman (1971) [p. 155, p. 179]
- Roe v. Wade (1972) [p. 149, 271]
- Frontiero v. Richardson (1973) [p. 121, p. 170]
- Weinberger v. Wiesenfeld (1975) [p. 138. P. 170]
- Moore v. City of East Cleveland (1977) [p. 270, 271, 282]
- Welsh v. United States (1979) (Harlan's concurrence) [p. 172, 173]
- Califano v. Westcott (1979) [p. 175, 191]
- Northern Pipeline v. Marathon Pipeline (1982) [p. 190]
- Michael H. v. Gerald D. (1989) (O'Connor/Kennedy concurrence) [p. 282]

- Planned Parenthood v. Casey (1992) [p. 150, p. 302]

**Supreme Court Decisions She Disagreed With**

- Dred Scott v. Sanford (1857) [p. 126, p. 210, p. 275]
- Lochner (1905) and its progeny [p. 288]
- Korematsu v. United States (1944 ) [p. 210]
- Goesart v. Cleary (1948) [p. 167]
- Hoyt v. Florida (1961) [p. 137]

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
**September 12, 2005**

**The Honorable Richard Lugar**
United States Senator , Indiana

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Senator Richard Lugar
Introduction of Judge John G. Roberts to Senate Judiciary Committee

Thank you, Mr. Chairman. It is a privilege and pleasure to appear before you, Senator Leahy and my other distinguished colleagues who serve on this important Committee, to introduce the President's nominee to serve as the 109th Justice of the Supreme Court and the 17th Chief Justice of the United States, John G. Roberts, Jr.

As is now well known, Judge Roberts was born in Buffalo, New York, but moved at age eight to Indiana. The Roberts family settled in Long Beach, a small Hoosier community on the shores of Lake Michigan. John attended local schools there and in nearby La Porte, and in 1973 was graduated first in his high school class of 22, having also excelled in numerous extra-curricular activities – including co-captaining the football team despite self-described status as "a slow-footed halfback." Summers were spent, as they still are by young Hoosiers today, earning money for college, which in John Roberts' case included work in the local steel mill.

Judge Roberts' path would lead first to Harvard, and then to serving his fellow citizens in numerous important posts in our Nation's Capital. But as one friend remarked when his nomination was first announced, "If you ask John where he's from, he says Indiana." One of my friends, a native Hoosier who worked alongside him in the Reagan White House Counsel's Office, also testifies to Judge Roberts' open appreciation of and pride in his Indiana roots. I know Committee members will understand my observing that our State takes a certain pride of its own in his nomination by the President to lead our Nation's highest court.

Growing up in Indiana, one learns early-on that talent and accomplishments count – but honesty and integrity count more. One learns, too, that arrogance is scorned and pomposity will quickly be punctured. Modesty about one's gifts, and the obligation to use them responsibly and in the service of others, are lessons taught in the home and the classroom, and reinforced in the workplace and the public square. Love of country runs deep, as does profound gratitude for living in the heartland of a Nation endowed as none other in history with the blessings of liberty. For Hoosiers, the term "Midwestern values" is not a cliché but a way of life, passed-on by word and living example from one generation to the next.

I believe most Americans realized, while listening to his thoughtful, humble remarks on the evening the President first introduced him as a Supreme Court nominee, that those values were at the core of John Roberts, both as a judge and as a man. Those introduced to him long ago – from the Hoosier neighbors, classmates and teachers of his youth, to those who later worked and served with him in the White House and other arenas – speak with one voice that this is the John Roberts they have always known.

Judge Roberts' intellectual and professional qualifications to serve on the Supreme Court are beyond debate. He completed Harvard College in three years, graduating summa cum laude. He was

graduated magna cum laude from Harvard Law School, serving on the Harvard Law Review. A clerkship with Second Circuit Judge Henry Friendly, among the most renowned jurists in our history, was followed by a Supreme Court clerkship with then-Associate Justice William Rehnquist. A year's service as Special Assistant to William French Smith, President Reagan's first Attorney General, was succeeded by four years of serving the President directly as Associate White House Counsel. After five years in a leading law firm, John Roberts returned to public service as principal Deputy Solicitor General under the first President Bush. In that role and after his subsequent return to private practice, he argued 39 times before the Supreme Court, earning wide acclaim as an advocate of exceptional skill. His reputation for personal courtesy, fairness, decency and integrity was equally well-earned and widespread, among colleagues and opposing counsel alike and on both sides of the political aisle. Two years ago, the Senate unanimously confirmed him for his current position on the United States Court of Appeals for the District of Columbia Circuit, arguably the most important of the federal circuit tribunals and, as this Committee knows, on which three current members of the Supreme Court also served.

Simply put, John Roberts is a brilliant lawyer and jurist with an extraordinary record of accomplishment and public service. On this score alone, he readily merits the American Bar Association's "well qualified" rating, which is the highest it gives. He merits it all the more given the personal character and values that have marked each stage of that service. As the Founders observed when our Constitution was drafted, few persons "will have sufficient skill in the laws to qualify them for the stations of judges," and "the number must be still smaller of those who unite the requisite integrity with the requisite knowledge." Judge Roberts embodies the rare combination that the Framers envisioned. He also has remarkable industry and self-discipline, which are essential to a Court that Americans respect, as Justice Louis Brandeis remarked and Chief Justice Rehnquist reminded us, in large part "because we do our own work."

This exceptional blend of professional and personal qualifications is especially important now, given the further responsibilities Judge Roberts has been called on to assume on the passing of the Chief Justice. Among the many tributes to this extraordinary public servant, I have been struck most by the observations of his colleagues on the Court. Whatever differences may mark their judicial philosophies, they stand as one in praising the qualities that made him such an outstanding Chief Justice for nearly two decades.

As Justice Scalia noted, in leading "a philosophically diverse group of Justices . . . [h]is keen intellect and sound judgment commanded the respect of his colleagues, and his personal qualities of considerateness and fairness won their affection." In Justice O'Connor's words, "He led the Court with firm principles but with a light touch," and "secure[d] the cooperation and admiration of all of the Justices for the years in which he served." Justice Ginsburg called him simply "the fairest, most efficient boss I have ever had," who "fostered a spirit of collegiality . . . perhaps unparalleled in the Court's history."

I know Judge Roberts is keenly and humbly aware of the large shoes he has now been asked to fill, the more so since the late Chief Justice was his own initial boss when he arrived in Washington a quarter century ago. All Americans can be grateful that Judge Roberts not only learned but has lived the lessons taught by his mentor and role model. In my judgment, he is supremely qualified to carry forward the tradition of fair, principled and collegial leadership that so distinguished the man for whom he once worked and has now been nominated to replace.

Under the judicial confirmation standards that prevailed throughout most of our history, my remarks could appropriately end at this point, and this Committee and the Senate as a whole could proceed to

consider Judge Roberts' nomination in light of the outstanding qualifications just summarized. Indeed, as Senator Biden noted shortly before chairing 1993 confirmation hearings for Judge (now Justice) Ruth Bader Ginsburg, nominees almost never testified in such hearings before 1955; and the last Supreme Court Justice from Indiana, Sherman Minton, was confirmed without controversy despite declining even to appear before this Committee following his nomination by President Truman.

I am not troubled by the fact that Committee hearings, including testimony by Supreme Court nominees, are now firmly established as part of the confirmation process. These proceedings serve a vital role in our deliberations, and are a vivid course in "living history" for all Americans. It is important that we write that history well.

Today's Supreme Court regularly faces issues of enormous public import and attendant controversy. Many are deeply divisive, with well-funded, well-organized advocacy groups passionately committed to one or the other side, and for whom the central, well-nigh exclusive focus is simply "who wins." Media coverage in the "information age," whether on talk radio or countless cable outlets featuring "talking heads" for each side, fuels both the controversy and the resultant tendency to see the Supreme Court as a kind of "political branch of last resort." When a Court vacancy occurs, the confirmation process takes on the trappings of a political campaign, replete with interest-group television ads that often reflect the same over-simplifications and distortions that are disturbing even in campaigns for offices that are in fact political.

All of this may be understandable. It remains, in my view, a fundamental departure from the vision of the courts and their proper role that animated those who crafted our Constitution. The Founders were at pains to emphasize the difference between the "political branches" – the Executive and the Legislature – and the Judiciary. Their concern about the potential dangers of passionate, interest-driven political divisions, which Madison famously called the "mischiefs of faction," influenced their design of our entire governmental structure. But they were especially concerned that such mischiefs not permeate those who would sit on the bench. Otherwise, they warned, "the pestilential breath of faction may poison the fountains of justice," and "would stifle the voice both of law and of equity."

I believe that each of us in the Senate bears a special responsibility to prevent that from occurring. The primary focus of these hearings and our subsequent debate and vote on the floor will be Judge Roberts and his qualifications. But another focus will be whether the Senate, in discharging the solemn "advise and consent" duty conferred by the Constitution, is faithful to the trust the Founders placed in us. That focus necessarily will shine with special intensity on this Committee, as millions of the fellow citizens we serve follow its proceedings in the coming days.

Former Yale Law School Dean Eugene Rostow once described Supreme Court Justices as "inevitably teachers in a vital national seminar." When vacancies occur and Supreme Court nominees are presented for confirmation, members of the Senate – and particularly members of this Committee – become guest lecturers in that seminar, with all Americans in the classroom paying close attention. I believe that seminar's vital lesson should not and must not be "who wins" a given case, or how the nominee might "vote" on a given controversy of the moment. Rather, the timeless lesson that transcends any particular case and whatever controversy may swirl about it is how our courts resolve disputes, from the momentous to the mundane, in administering a fair, impartial system of justice that must stand outside the political passions and pressures of the day, and whose judges must put aside whatever personal views they may have on the issues presented.

I believe this Committee taught that lesson well in 1993, when then-Chairman Biden, in

foreshadowing the impending confirmation hearings on Judge Ginsburg, cautioned that she should not be questioned about "how she will decide any specific case that may come before her." The full Senate followed suit, confirming Judge Ginsburg by a vote of 96-3. This occurred even though many of the 96 undoubtedly disagreed with one or another aspect of her judicial philosophy, and had little doubt that her votes as a Supreme Court Justice might well differ from their own preferences.

I have every confidence that Judge Roberts, in addition to the extraordinary intellectual, professional and personal qualities he will bring to the task of leading our Nation's highest court, will also bring a profound understanding of and commitment to the transcendent principles I have endeavored to summarize about the proper role of the judiciary in our constitutional system. I am confident as well that just as in Judge Ginsburg's 1993 confirmation proceedings, this Committee and the great majority of my Senate colleagues will demonstrate that same understanding and commitment as we consider the confirmation of Judge Roberts.

I thank you, Mr. Chairman, and all members of the Committee for your courtesy in allowing me to introduce Judge John G. Roberts, Jr., a distinguished son of Indiana whom I believe will prove to be an outstanding Chief Justice of the United States.

**Statement of Maureen E. Mahoney in response to the request of the United States Senate Committee on the Judiciary to provide testimony at its hearing on the Judicial Nomination of John G. Roberts, Jr. to serve as Chief Justice of the Supreme Court of the United States**

**September 12, 2005**

Many witnesses have detailed Judge Roberts' record of achievement and his reputation as one of the finest lawyers of his generation. All of this is true, and leaves no doubt that he has the intelligence and legal experience necessary to perform the role of Chief Justice. Others have nevertheless raised concerns that Judge Roberts may not be fair-minded and may arrive at the Court determined to implement a partisan agenda. I would like to explain why I do not share these concerns. I first met Judge Roberts in 1980 when he succeeded me as a law clerk for then-Associate Justice William H. Rehnquist. Since that time, I have come to know him as a colleague in the Solicitor General's Office, as a fellow appellate advocate in private practice, and as a friend. This 25-year history has given me the opportunity to take careful measure of the man the President has selected to lead the federal judiciary, and I am convinced there is no better choice.

First, it bears emphasis that Judge Roberts was admired by lawyers in the Solicitor General's Office regardless of their political affiliations. Lawyers in the Solicitor General's Office often spend many years or even decades working there, so the office is always made up of people with views from across the political spectrum. In that environment, Judge Roberts was not viewed as a political operative but as a brilliant lawyer and excellent advocate, reflecting the highest traditions of the office. He worked to craft consensus positions among government lawyers and served as a model advocate for us all. Indeed, thirteen of his former colleagues from the Solicitor General's Office signed a letter addressed to this Committee in 2001 explaining that, despite these lawyers' "diverse political parties and persuasions," they all confirmed that

Judge Roberts was "attentive to and respectful of all views," had the "deepest respect for legal principles and legal precedent," and that he would be a "truly superb addition to the federal court of appeals." The years he spent in private practice only reinforced his reputation as an extraordinary lawyer who made it his hallmark to thoroughly understand every side of difficult issues.

Second, this Committee should not presume that positions advocated by Judge Roberts on behalf of the United States while serving as a Deputy Solicitor General represent the views that he will adopt as a Justice of the Supreme Court. It is not the responsibility of the Deputy Solicitor General to establish the policy of the Administration with respect to issues such as affirmative action and abortion. To the contrary, lawyers in the Solicitor General's Office have the responsibility to advance the policies of the Administration they are serving at the time, within the bounds of sound legal reasoning. An historical example illustrates the point well. While serving as Solicitor General, Thurgood Marshall filed a brief for the United States urging the Court to reject the rule adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966). The brief Solicitor General Marshall filed on behalf of the Government asserted that "post-arrest interrogation . . . is an essential tool in law enforcement," and that immediate questioning after a crime "could be virtually precluded if the government were required to assure that every suspect under arrest had the advice of an attorney." Brief of the United States at 31, 40, *United States v. Westover*, 384 U.S. 436 (1966) (Case No. 761 consolidated with *Miranda v. Arizona*). The Solicitor General therefore asserted that an accused did not have a constitutional right to be informed during post-arrest interrogation that "he may consult with counsel if he chooses to do so," *id.* at 44, because such an inflexible rule would, "more often than not, cast out the baby with the bath." *Id.* at 38. After he was appointed to the Supreme Court the following year, Justice

Marshall nevertheless departed from the position he advocated as Solicitor General and dissented in cases limiting the scope of *Miranda*. *See New York v. Quarles*, 467 U.S. 649, 674 (1984); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). Justice Marshall obviously understood the difference between the roles of the Solicitor General and a Supreme Court Justice in our legal system, and I have no doubt that Judge Roberts does too. This Committee should be confident that Judge Roberts will approach each case with an agile, open mind.

Third, I saw Judge Roberts almost every day in the Solicitor General's Office during this period, and he unfailingly treated everyone in the office with respect and dignity. I have been particularly troubled by suggestions in the news media that Judge Roberts is somehow biased against women or not concerned with their professional opportunities. In fact, Judge Roberts actively endeavored to advance the professional careers of women. I know this first-hand because he recruited me to join him in the Solicitor General's Office as one of the four deputies in 1991. This is a highly coveted position and Judge Roberts unquestionably knew many qualified men who could have served ably in the job. But there were only two women lawyers in the Solicitor General's Office at the time and Judge Roberts reached out to encourage me to apply. With his encouragement and assistance, I became one of the few women in history to hold this position and served as one of the highest ranking women in the Department of Justice. A year later, when a judge on the District Court for the Eastern District of Virginia retired, Judge Roberts again recommended me for the vacancy and helped shepherd me through the process that culminated in my nomination. No woman had ever served on that court and Judge Roberts tried to help me to be the first.

In summary, I can think of no better nominee to succeed Chief Justice Rehnquist -- the man Judge Roberts and I knew as a boss, a mentor, and a friend. I regard Judge Roberts'

nomination as particularly fitting because he exemplifies many of the characteristics so admired in our late Chief Justice. Both of these men were blessed with exceptional intelligence, a charming wit, and an abiding sense of modesty. Above all, Chief Justice Rehnquist understood that judges must approach the task of deciding cases with humility; and with the understanding that they have been asked to serve, not chosen to rule. I have no doubt that Judge Roberts learned that lesson well. While many will attempt to predict how Judge Roberts might decide this case or that, I can predict for you with certainty that however he decides, he will be guided to the result by his study of the law, and never the other way around. Judge Roberts should be confirmed as our next Chief Justice.

# Congress of the United States
Washington, DC 20515

July 29, 2005

The Honorable Bill Frist
Majority Leader
United States Senate
S-230, The Capitol
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
S-221, The Capitol
Washington, DC 20510

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

As Members of the Congressional Hispanic Conference, we are writing to endorse President George W. Bush's nomination of Judge John Roberts for the Supreme Court of the United States.

We agree with Senator Reid, when he stated that "the President has chosen someone with suitable legal credentials." Judge Roberts is not only a jurist with a superb legal background, but he has shown himself to be a man of integrity with a stellar professional reputation for fair-mindedness.

Most importantly, we are confident that Judge Roberts will faithfully defend the United States Constitution. By upholding our Constitution—the very backbone of our Republic—Judge Roberts will be a staunch defender of the rights of all Americans, regardless of their ethnicity, race, gender, or economic status.

As a nominee for the U.S. Court of Appeals for the District of Columbia Circuit, Judge Roberts was approved by the Senate Judiciary Committee with overwhelming bipartisan support and was unanimously confirmed by the Senate on *the same day*.

We also strongly believe that the Senate should follow the confirmation process of Justice Ruth Bader Ginsburg, which was a model of bipartisanship and was conducted in a timely manner. During Justice Ginsburg's confirmation, Senators appropriately did not make unfair, unprecedented, and exhaustive demands about her personal views on specific political issues. We believe that one of the most critical characteristics a Supreme Court Justice should have is to judge cases and issues as they arise before the Court, based on the facts and the Constitution. Asking a potential Justice to pre-judge individual cases based on his or her personal political views is a disservice to the rights of all Americans under the Constitution.

PRINTED ON RECYCLED PAPER

As Members of the Congressional Hispanic Conference, we support the nomination of judges who will protect the rights of all Americans, and thus we are proud to support Judge John Roberts' nomination to the Supreme Court. We strongly urge you to conduct fair and timely hearings, to hold an up-or-down vote, and to confirm Judge Roberts in time for the start of the Supreme Court's session on October 3rd of this year.

Sincerely,

Ileana Ros-Lehtinen, Chair
Congressional Hispanic Conference

Luis G. Fortuño, Vice-Chair
Congressional Hispanic Conference

Henry Bonilla, Member
Congressional Hispanic Conference

Lincoln Diaz-Balart, Member
Congressional Hispanic Conference

Mario Diaz-Balart, Member
Congressional Hispanic Conference

Chris Cannon, Associate Member
Congressional Hispanic Conference

Randy Neugebauer, Associate Member
Congressional Hispanic Conference

CC: Members of the Senate Judiciary Committee

**Congress of the United States**
**Washington, DC 20515**

September 1, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

We are writing to convey our support for the nomination of Judge John Roberts for the U.S. Supreme Court and to encourage the Senate to confirm his appointment expeditiously. The American people deserve to witness a dignified and professional process that upholds the vision of our founding fathers.

Judge Roberts has demonstrated his commitment to this country, the Constitution, and the laws of the United States both as a public servant and as a private sector attorney. When he was considered for the U.S. Court of Appeals for the District of Columbia Circuit, Judge Roberts' nomination was endorsed by well-respected Republicans and Democrats alike. He was described as having "one of the best legal minds of his generation."

Judge Roberts' distinguished record shows that he recognizes the appropriate role that the judiciary plays in a democratic system of government. Judges have a duty to interpret our laws and our Constitution rather than substitute their personal beliefs for the law. We believe Judge Roberts will interpret the Constitution rather than legislate from the bench.

America would be well served if Judge Roberts is confirmed before the Supreme Court begins its session in October.

Sincerely,

Lamar Smith
Member of Congress

Steve Chabot
Member of Congress

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Tom DeLay
Member of Congress

Roy Blunt
Member of Congress

Eric Cantor
Member of Congress

Deborah Pryce
Member of Congress

Bill Thomas
Member of Congress

Bob Goodlatte
Member of Congress

Howard Coble
Member of Congress

Spencer Bachus
Member of Congress

Chris Cannon
Member of Congress

Bill Jenkins
Member of Congress

Steve King
Member of Congress

Ric Keller
Member of Congress

Tom Feeney
Member of Congress

Dan Lungren
Member of Congress

Mike Pence
Member of Congress

Bob Inglis
Member of Congress

Henry Hyde
Member of Congress

Joe Barton
Member of Congress

Don Manzullo
Member of Congress

Kenny Marchant
Member of Congress

JoAnn Davis
Member of Congress

John Mica
Member of Congress

John Kline
Member of Congress

Phil Gingrey
Member of Congress

Ander Crenshaw
Member of Congress

Mario Diaz-Balart
Member of Congress

Jeff Flake
Member of Congress

Tom Reynolds
Member of Congress

Kay Granger
Member of Congress

Todd Akin
Member of Congress

Shelley Moore Capito
Member of Congress

Gil Gutknecht
Member of Congress

Darrell Issa
Member of Congress

Trent Franks
Member of Congress

Louie Gohmert
Member of Congress

Katherine Harris
Member of Congress

Henry Bonilla
Member of Congress

Chip Pickering
Member of Congress

Sam Johnson
Member of Congress

Joe Wilson
Member of Congress

John Culberson
Member of Congress

Pete Sessions
Member of Congress

John Shimkus
Member of Congress

John Doolittle
Member of Congress

Ginny Brown-Waite
Member of Congress

Mary Bono
Member of Congress

Ileana Ros-Lehtinen
Member of Congress

John Duncan
Member of Congress

Mark Foley
Member of Congress

Michael Burgess
Member of Congress

Mike Rogers
Member of Congress

Zach Wamp
Member of Congress

Randy Neugebauer
Member of Congress

Joe Pitts
Member of Congress

Lynn Westmoreland
Member of Congress

Ed Whitfield
Member of Congress

Ralph Hall
Member of Congress

John Carter
Member of Congress

Wally Herger
Member of Congress

Peter King
Member of Congress

Jeb Hensarling
Member of Congress

Ken Calvert
Member of Congress

Gary Miller
Member of Congress

Tom Tancredo
Member of Congress

Mike Oxley
Member of Congress

Virginia Foxx
Member of Congress

Michael T. McCaul
Member of Congress

Scott Garrett
Member of Congress

Jeff Miller
Member of Congress

Mike Conaway
Member of Congress

Gresham Barrett
Member of Congress

Dana Rohrabacher
Member of Congress

Jerry Lewis
Member of Congress

Roger Wicker
Member of Congress

Roscoe Bartlett
Member of Congress

Jon Porter
Member of Congress

Rob Bishop
Member of Congress

Mike Turner
Member of Congress

J. D. Hayworth
Member of Congress

John Boozman
Member of Congress

Thelma Drake
Member of Congress

Ernest Istook
Member of Congress

Tom Osborne
Member of Congress

Mexican American Legal Defense and Educational Fund

**MALDEF Report on and Statement of Opposition to the Confirmation of John G. Roberts to the United States Supreme Court**

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## I. EXECUTIVE SUMMARY

This report provides information on the background, qualifications, and record of United States Supreme Court nominee John G. Roberts, Jr. and the basis for MALDEF's decision to oppose his confirmation.

Judge Roberts is impressively credentialed: he is an honors graduate of both Harvard College and Harvard Law School; was a law clerk to Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit and to then-Associate Supreme Court Justice William Rehnquist; has argued before the Court 39 times; and was confirmed by unanimous consent to the U.S. Court of Appeals for the District of Columbia Circuit in 2003.

Based on our review of Roberts's record, we believe that he does not meet the standards by which MALDEF evaluates candidates for the federal bench. These criteria, approved by the Board of Directors in April 2002, require a nominee to affirmatively demonstrate a commitment to protecting the rights of ordinary residents of the United States and to preserving and expanding the progress that has been made on civil rights and individual liberties. MALDEF's judicial nominee standards reflect a robust appreciation for those core constitutional protections and legal doctrines upon which many of the civil rights gains and successes of the Latino community have been predicated. Among these are the equal protection clause, due process protections, the First and Fourth Amendments, and the right to privacy. MALDEF also recognizes the importance of legal rights in the areas of education, voting, immigration and employment. MALDEF looks to the nominee's views on Congress' constitutional authority to pass civil rights or other protective legislation, whether the nominee has or is likely to take an unduly narrow view of the application of protective statutes, such as construing no private right of action under otherwise valid statutes or regulations or prohibiting recovery for otherwise illegal actions. MALDEF will look to a nominee's interpretation of statutes to determine whether the nominee has carved out exceptions not written into the law that disadvantage civil rights litigants, such as by negating a private right of action or preventing vulnerable individuals from availing themselves of the protection of the law. Honesty, integrity, respect, character, temperament and intellect are basic minimum requirements. No nominee is assumed to be eligible and qualified for confirmation but must show that he or she meets the standard to serve the public.

We reviewed Roberts's judicial record – which, because his tenure on the Court of Appeals has been so brief, is relatively thin. He has authored 60 opinions, of which 49 were majority opinions, five were concurrences, and six were dissents. During his two years on the

federal bench, he has decided relatively few cases that relate directly to MALDEF's program areas. Because Roberts's judicial record provides limited insight into his judicial philosophy or how he would approach the civil rights issues that are central to MALDEF's mission, we also conducted review of materials dating from his tenure as a political appointee during the early years of the Reagan Administration, first as a special assistant to Attorney General William French Smith, and later as Associate White House Counsel.

These documents reveal that Roberts played a key role in the Reagan Administration's efforts to roll back civil rights. Working directly for the Attorney General and later as Associate White House counsel, Roberts authored numerous memoranda on civil rights issues generally; on affirmative action, on stripping federal courts of jurisdiction to hear certain cases, on school desegregation remedies and on "judicial restraint," among other subjects. Perhaps most troubling of these, from MALDEF's perspective, is a memorandum Roberts authored faulting the Department of Justice for the outcome in the landmark case of *Plyler v. Doe*, which MALDEF litigated and which guaranteed, on equal protection grounds, the right of undocumented immigrant children to free public K-12 schooling. Roberts wrote that the Administration had missed an opportunity to intervene in *Plyler* for the purpose of urging judicial restraint, and to potentially change the outcome of the litigation. (A copy of Roberts's *Plyler* memorandum appears at the end of this document). When he was Associate White House Counsel, he expressed in a memorandum his personal view supporting a national identification card, was dismissive of the general civil liberties concerns as "symbolic" and did not recognize the historic and present-day racial and ethnic discrimination issues that ID cards involve.

Roberts also played a key role behind the scenes in crafting and advancing the Administration's campaign to limit minority voting rights under the Voting Rights Act: he was a passionate strategist, analyst, and advocate for the most extreme of the Reagan Administration's policies on this issue, and can be fairly described as one of the architects of the Administration's public and media approach in this area. He showed similar zeal in attacking affirmative action programs, the use of busing to effect school desegregation, and such core anti-discrimination laws as Title IX, which guarantees gender equity in education programs.

MALDEF also examined Roberts's record as a Deputy Solicitor General in the first Bush Administration and in private practice at the law firm of Hogan & Hartson. Our review of his work during this period was limited to publicly-filed briefs and other materials. The White House has refused to release any internal documents from Roberts's tenure with the Solicitor General's Office, basing its objection in deliberative process and attorney-client privileges. Although there is some caution associated with drawing too many conclusions from the positions Roberts took as a legal advocate for private clients and for the government, it bears noting that Roberts has frequently and successfully opposed plaintiffs seeking to vindicate their rights in such areas as employment/contracting, privacy, and voting. As Acting Solicitor General, Roberts filed the federal government's amicus brief against the FCC's preference for minority-owned firms seeking license renewals.

It is our view that John Roberts fails to meet the MALDEF judicial endorsement criteria. Our opposition to his confirmation is based upon his record on issues that are at the core of

MALDEF's mission – immigrant rights, political and legal access, affirmative action and education.

## II. RECORD IN THE REAGAN JUSTICE DEPARTMENT AND WHITE HOUSE COUNSEL'S OFFICE

While serving in the Reagan Administration as Special Assistant to the Attorney General and later as Associate White House counsel, Roberts authored numerous memoranda on core civil rights issues that are central to MALDEF's mission. We place importance upon Roberts's Reagan Administration memos for numerous reasons. First, he authored these documents as a political appointee during the first Reagan Administration term, when Republicans won back control of the U.S. Senate and when much of the Reagan "revolution" reversing historic civil rights gains took place. Second, Roberts had the academic and legal credentials to work virtually anywhere. That he chose (and was chosen by) the Reagan Justice Department and White House speaks volumes about where he placed himself on the political and legal spectrum. Third, Roberts's policy memos were plainly intended to shape and influence policy, rather than merely reflect or support the Administration's position. In some cases, his statements suggest he is farther away from MALDEF's positions than was the actual position taken by the Reagan Administration. Finally, not to give his writings great weight minimizes the intellectual and legal force with which he thinks and writes. He was not simply a junior lawyer writing fact-based memoranda on individual cases. He was part of an inner circle of conservative ideologues who had direct access to the Attorney General and other key Administration opponents of civil rights. Unfortunately, we have little reason to believe that his views may have significantly changed or will change in the future.

### A. Immigrants' Rights

*Plyler v. Doe*, 457 U.S. 202 (1982), is the landmark MALDEF class action in which the Supreme Court invalidated a Texas statute limiting free K-12 education to "citizens of the United States or legally admitted aliens." The 5-4 decision both guaranteed the right of undocumented children to attend school and recognized that undocumented immigrants may claim protection under the Equal Protection Clause of the Fourteenth Amendment. The ruling in *Plyler* was a careful and pragmatic decision with a significant public policy component; Justice Brennan, writing for the Court, emphasized that the denial of a basic education and the stigma of illiteracy "imposed a lifetime hardship on a discrete class of children not accountable for their disabling status."

On the day that this critically important ruling came down, John Roberts, then at the Reagan Justice Department, immediately co-authored a memorandum for the Attorney General entitled "*Plyler v. Doe* – 'The Texas Illegal Aliens Case.'" The memorandum quotes with approval from Chief Rehnquist's dissent in the case, which Roberts says "chastizes the majority" for manipulating Equal Protection doctrine to achieve an "'an unabashedly results-oriented approach.'"

Roberts faults the Solicitor General's office for not filing a brief in support of Texas to advance the values of "judicial restraint" and specifically opine on the applicability of the Equal

Protection Clause. Such a brief, Roberts adds, "could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case."

*Plyler* has had a nationwide impact and been tremendously important for immigrant children and their families during the 23 years since the ruling. Nonetheless, anti-immigrant groups have continually taken aim at the outcome in *Plyler*, perhaps most notably through California's Proposition 187 and initiatives in other states that we have and continue to oppose. Members of the Senate Judiciary Committee should thoroughly question him whether he believes that *Plyler* was decided correctly, whether he would apply *stare decisis* in the context of *Plyler*, and what his views are on the underlying legal bases for *Plyler*.

As Associate White House Counsel, Roberts took the opportunity of a routine clearance of INS testimony before a Congressional committee to expound upon his own personal views on immigration in 1983. In an October 21, 1983 memorandum to White House Counsel Fred Fielding regarding an INS official's testimony on law enforcement efforts to combat fraudulent documents, Roberts wrote,

> "I recognize that our office is on record in opposition to a secure national identifier, and I will be ever alert to defend that position. I should point out, however, that I personally do not agree with it. I yield to no one in the area of commitment to individual liberty against the spectre of overreaching central authority, but view such concerns as largely symbolic so far as a national I.D. card is concerned. We already have, for all intents and purposes, a national identifier – the social security number – and making it in form what it has become in fact will not suddenly mean Constitutional protections would evaporate and you could be arbitrarily stopped on the street and asked to produce it. And I think we can ill afford to cling to symbolism in the face of the real threat to our social fabric posed by uncontrolled immigration."

The ease with which Roberts dismisses civil liberties and privacy concerns surrounding national identification cards and his failure to reflect upon or demonstrate any recognition of the concerns of Latinos and other minorities regarding discriminatory law enforcement stops is disturbing as is his characterization of "uncontrolled" immigration as a "real threat to our social fabric."

In a September 30, 1983 memorandum that either highlights an attempt at humor or exposes a real insensitivity, Roberts suggested to Fielding that written remarks by President Reagan for a publication called "Spanish Today" include a reference to the legalization program in the Simpson-Mazzoli bill. Roberts wrote, "I think this audience would be pleased that we are trying to grant legal status to their illegal amigos." (emphasis in original)

B. Voting Rights

One of the most troubling issues to surface in our review of his record is Roberts's involvement in the Reagan Administration's concerted efforts to prevent Congress from countering the Supreme Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which dramatically weakened certain critical provisions of the Voting Rights Act. Roberts played a pivotal role in the Administration's public campaign and legislative strategy against efforts to strengthen the Act.

In 1980, a divided Court handed down its ruling in *Mobile v. Bolden*, narrowly interpreting the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the Constitution to require minority voters to prove racially discriminatory intent when litigating cases under Section 2. Previously, it had been sufficient to prove a discriminatory "result" under Section 2, which applies nationwide and addresses voting practices and procedures that discriminate against minority voters. Two years after *Bolden*, Congress, by overwhelming majorities in both the House and the Senate, legislatively overturned *Bolden*'s "intent" requirement and amended Section 2 to make clear that the provision extended to discrimination in both purpose and effect. It did so over the prolonged and vociferous objections of the Reagan Administration.

The internal memoranda make clear that Roberts played a key role in the Administration's campaign to prevent Congress from amending the Voting Rights Act to counter the holding of *Mobile v. Bolden*. Roberts authored not only legal analyses on the issue, but also talking points for the Attorney General, national and local op-ed pieces and letters to the editor (for publication under the name of Attorney General French), strategic guidance, and legal and policy recommendations. Indeed, it appears Roberts was at the center of crafting the Administration's policies and messaging during the bitter fight over reauthorization of the Act. The Reagan Administration's public strategy, as articulated by Roberts throughout these internal memoranda, was to loudly profess support for the Voting Rights Act "as is" – that is, without Congress' contemplated amendments to Section 2. Roberts – and the Reagan Administration – continually took the position that the Supreme Court had really changed nothing when it interpreted Section 2 to require minority voters to show proof of discriminatory intent. Of course, as civil rights advocates and the media noted at the time, *Bolden* had in fact dramatically weakened the protections of the Voting Rights Act, and now required minority voters to meet a virtually insurmountable burden of proof to proceed under Section 2. Congress' legislative reinstatement of the "effects" standard was a restorative measure, and not the dramatic departure that Roberts and Reagan Administration attempted to portray it as.

Among the many documents that Roberts authored on the Voting Rights Act during this period were the following:

- A November 17, 1981 memorandum to the Attorney General and others in the Department suggesting responses to a New York Times editorial by Vernon Jordan, which had criticized Reagan for his "sham" endorsement of the Voting Rights Act. Roberts's draft comments disingenuously characterized the proposed Congressional fix to Section 2 as a "radical

experiment" rather than a restoration of Congress's original intent and defended the Administration's endorsement of a "bailout" fallback provision.

- A December 22, 1981 memorandum to the Attorney General articulating the problems Roberts perceived with "switching" to an effects test, and expressing Roberts's urgent view that "something must be done to educate the Senators on the seriousness of this problem" (emphasis in original). The memorandum endorsed Justice Stewart's *Bolden* view that an effects test for Section 2 "would establish essentially a quota system for electoral politics by creating a right to proportional racial representation on elected governmental bodies" (emphasis in original).

- Several January 1982 drafts of "Qs and As" or talking points on the intent/effects question, for transmission to the Attorney General and to the White House, again equating an effects test with "quotas," and opining that such a system would be neither consistent with the intent of the Framers or the intent of Congress.

- January 1982 drafts of a letter to the editor responding to a critical editorial in the *Washington Post*, again refuting that the holding in *Mobile v. Bolden* changed previous understandings of the law, and opining that the proposed fix to Section 2 would introduce "uncertainty and confusion" into the provision.

- Various drafts of a February 1982 op-ed piece for submission to the *New York Times*, eventually published under the Attorney General's name. The piece called the reinstatement of the effects test a "dramatic change," again invoking the alarmist "quota" language and endorsing Griffin Bell's view that "overruling the *Mobile* decision by statute would be 'an extremely dangerous course of action under our form of government.'"

- Memoranda articulating a "fallback" or compromise position on Section 2 of the Act, both for internal use and for circulation to Senators. This proposed fallback position would have involved writing into Section 2 that discriminatory purpose could be shown through indirect or circumstantial evidence and would not require a "smoking gun." Roberts acknowledged, in a February 16, 1982 memo to William Bradford Reynolds, Kenneth Starr, David Hiller, and Chuck Cooper on the "fallback position," that Section 2 "does not by its terms require proof of purpose and any effort to introduce the concept directly will hardly be viewed as a compromise."

- Background materials for the Attorney General's speeches to both conservative and progressive groups on the Voting Rights Act.

- March 1982 drafts of op-ed pieces on Section 2, which Roberts intended to be tailored for publication in as many regional newspapers as possible.

- March 1982 talking points for Reagan's use on an Alabama trip with Senator Heflin, a "critical vote in the Judiciary Committee," asserting that an effects test in the Act would lead to the invalidation of "any electoral system, no matter how long in place, that is not neatly tailored to achieve proportional representation along racial lines."

What is abundantly clear from the internal memoranda and other available documents is that Roberts was not on the sidelines during the debate over the Voting Rights Act and the Administration's aggressive campaign to roll back minority voting rights; he was a passionate strategist, analyst, and advocate for Reagan's policies on this issue, and one of the architects of the Administration's public relations strategy.

## C. Federal Civil Rights Law Enforcement

### 1. Title IX (Gender Equity in Educational Programs) and other Federal Civil Rights Law Enforcement

Both while working with Attorney General Smith and later with White House Counsel Fielding, Roberts authored several memoranda that advocated limiting the scope of Title IX, which guarantees gender equity in education programs. Roberts's writings suggest a tendency to take an unduly narrow view of Congress' authority to pass such protective legislation, and to take an unduly narrow view of the application of protective statutes themselves – and therefore implicate one of MALDEF's most important criteria for evaluating nominees to the federal bench. The rationale to limit Title IX's protection to only those areas that are funded by the federal government would have applied equally to the enforcement of other civil rights laws. That is why overturning the *Grove City* decision was one of MALDEF's highest legislative priorities. With bipartisan majorities, Congress did so by passing the Civil Rights Restoration Act.

Specifically, Roberts drafted the following notable materials during his time at the Reagan Administration:

- A July 24, 1985 memorandum to White House Counsel Fred F. Fielding re: "Correspondence from [Secretary of Education] T.H. Bell on *Grove City* Legislation." The 1984 Supreme Court decision in *Grove City College v. Bell*, held that 1) federal student aid loans and grants constitute federal financial assistance to the institution attended by the beneficiary students such that they trigger coverage of the institution under Title IX; and 2) Title IX applies only to the specific program within the institution that receives the funds (in this case the college's admissions office) rather than the institution as a whole.

Roberts's memo to Fred Fielding, White House Counsel, suggests strong personal support for limiting the coverage of Title IX to the program that receives federal financial assistance. He wrote: "There is a good deal of intuitive sense to the argument. Triggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions program is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students."

Roberts's view on the proper coverage of Title IX was rejected by Congress with enactment of the Civil Rights Restoration Act, which countered the holding of *Grove City College* and ensured that Title IX applies to the entire institution receiving federal aid. In his memorandum, Roberts noted with apparent displeasure that a bill that counters the holding of

*Grove City College* would "radically expand the civil rights laws to areas of private conduct never before considered covered."

- A December 8, 1981 memorandum to the Attorney General regarding a "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance,'" in which he urged support for such an amendment in regulations issued under Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973. The effect of the amended definition that Roberts endorsed would be to limit the scope of these civil rights statutes. Although Roberts recognized that there were strong legal arguments to be made in opposition to his position, he wrote that "the case has not been made that the legislative history clearly bans Education's proposed change, and therefore I recommend acceding to it." In other words, his view was that if the proposed limitation on the scope of these civil rights statutes was not clearly contrary to the relevant authorities, the scope of the civil rights protections should be abridged.

- A February 12, 1982 memorandum to Attorney General Smith Re: "Proposed Intervention in *Canterino v. Wilson*," in which Roberts recommended against intervention in a sex discrimination case against the Kentucky state prison system. The suit sought to remedy disparities in vocational training programs available to men and women in the prison and was based in the Equal Protection Clause and Title IX.

Roberts's memo countered Assistant Attorney General for Civil Rights William Bradford Reynolds, who had recommended that DOJ intervene in the case. Roberts offered the following justifications in support of his recommendation to not intervene:

> 1) "Private plaintiffs are already bringing suit, so there is no need for involvement by the Civil Rights Division";
> 2) Intervention would be "inconsistent with [] themes in your judicial restraint effort: . . . relief could well involve judicial interference with state prison programs, and you have stressed leaving such matters to the state authorities whenever possible"; and, most disturbingly,
> 3) "Many reasonable justifications for the Kentucky practices can be readily advanced, such as economies of scale calling for certain programs for the male prisoners but not for the many fewer female prisoners. If equal treatment is required, the end result in this time of tight state prison budgets may be no programs for anyone."

- An August 31, 1982 memorandum to the Attorney General regarding "*University of Richmond v. Bell*, in which Roberts argued that the U.S. Department of Education was constrained in its investigations of Title IX violations in that it could only investigate programs which directly receive federal funds: "I strongly agree with [Assistant Attorney General for Civil Rights Brad Reynolds's] recommendation not to appeal [a lower court ruling that limited the investigations.] Under Title IX federal investigators cannot rummage wil-nily [*sic*] through institutions, but can only go as far as the federal funds go." Roberts's views on this issue have since been rejected (see below).

### 2. School Desegregation / Busing / "Court-Stripping"

In the debate over the separation of powers in the arena of school desegregation, Roberts, as both Special Assistant to Attorney General French and as Associate White House Counsel, advanced ideological positions that were even more extreme than those held by many of his colleagues in the Reagan Administration. Perhaps most notably, Roberts was a vigorous proponent of proposals to strip lower federal courts of the power to order busing as a remedy, thereby reducing the role of the courts in remedying unlawful discrimination. These memoranda can fairly be described as advocacy pieces in support of his view that busing is not a required remedy for school desegregation. Among the memoranda that Roberts authored on this issue were the following:

- An April 6 (no year noted, likely 1982) note to the Attorney General and Letter re: "Bill to Restrict Busing." In a "redraft" of a section of a letter to House Judiciary Committee Chairman Rodino, Roberts argued in favor of the constitutionality of a federal bill that would have stripped the lower federal courts of the authority to order busing as a remedy to segregation in the schools. In his prefatory "note for the Attorney General," Roberts noted that his analysis borrowed from an earlier Office of Legal Counsel opinion on this matter "without focusing as that opinion did on the view that busing may be constitutionally required." He further noted that the organization of his piece was "best suited to obscuring possible conflicts" regarding the constitutionality of the statute.

- An August 25, 1981 memorandum to the Attorney General regarding "Summary of Material Sent by Arthur Flemming, Chairman of the U.S. Commission on Civil Rights," in which Roberts characterized Flemming's memo as "subject to serious criticism as failing to recognize the actual effect of race-conscious remedies." One of Roberts's primary critiques was that "the memorandum stresses the importance of busing without even confronting the fact that it has been ineffective in redressing racial imbalance, a fact increasingly reflected in judicial opinions."

- A February 15, 1984 memorandum to White House Counsel Fred F. Fielding re: "Proposed Justice Report on S. 139," in which Roberts described an "extended internal debate" during his time at the Justice Department over Congress's role in devising remedies for unlawful segregation in the schools (and expresses his support for a more limited role for the courts). Roberts noted that Ted Olson "reads the early busing decisions as holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation." After noting that Congress "can conclude – evidence supports this – that busing promotes segregation rather than remedying it, by precipitating white flight," Roberts opined that "it is within Congress's authority to determine that busing is counterproductive and to prohibit the federal courts from ordering it."

### 3. Reorganization / Dismantling of U.S. Department of Education

While at the Department of Justice, Roberts drafted materials endorsing the dismantling of the U.S. Department of Education or a severe limitation upon its powers. These materials also urged continuing efforts to weaken the monitoring and enforcement powers of the Department's Office for Civil Rights (OCR). Roberts co-authored a November 10, 1981 memorandum to the Attorney General, re: Talking Points Regarding Proposed Department of Education Reorganization, describing two proposals for the reorganization of the U.S. Department of Education: 1) the creation of a sub-cabinet "National Education Foundation" and 2) the dismantling of the Department entirely.

"As you know," the memorandum noted, "the President's own goal all along has been to dismantle the Department of Education, taking the opportunity to review each function and to terminate those which involve unduly intrusive federal regulation and which are better handled at the state level" (emphases in the original). The memo acknowledged the lack of public support for a wholesale dismantling of the Department, but recommended that the Administration should nonetheless attempt to "restructure" (i.e., limit) the federal role in education as much as possible.

Troublingly, the memo also urged that the Administration not "abandon our efforts to reduce costly and unnecessary OCR monitoring and administrative functions. For example, amendments to Title VI (gender) and Title IX (race) regulations to narrow the scope of federal civil rights jurisdiction over educational institutions would reduce these monitoring activities." This raises concerns regarding Roberts's commitment to the continued federal role in reducing discrimination in educational settings.

## D. Affirmative Action in Contracting

Roberts's memoranda on affirmative action from his 1981-82 stint in the Attorney General's office demonstrate an apparent hostility towards affirmative action programs. Although Roberts's memoranda focused on affirmative action in government contracts, the views he endorsed raise concerns with respect to the education context as well. They appear to be in tension with Justice O'Connor's majority opinion in *Grutter v. Bollinger*, which held that the Equal Protection Clause does not prohibit the narrowly tailored use of race in university admissions decisions.

Roberts attempted to discredit affirmative action programs and their underlying rationales with a zeal that suggests that these memoranda may well reflect personal views on the subject, not merely the work product of a government attorney/advocate.

Among Roberts's most troubling writings on this issue were:

- An August 25, 1981; memorandum to the Attorney General Regarding "Summary of Material Sent by Arthur Flemming, Chairman of the U.S. Commission on Civil Rights." Chief among Roberts's critiques of Fleming's report was that: "[t]he reverse discrimination involved in affirmative action quotas is simply dismissed as 'benign.'" Roberts's analysis did not distinguish between race-based preference systems developed to remedy past

discrimination and other forms of racial discrimination. The memorandum concluded that "[i]f a meeting is held with Mr. Flemming, a strong response to his view of civil rights enforcement could be made."

- A December 2, 1981 set of talking points for the Attorney General, prepared for an upcoming meeting with the Secretary of Labor on the subject of affirmative action in the Department of Labor's dealings with government contractors. Roberts began by noting the Administration's position that: "Under our view of the law it is not enough to say that blacks and women have been historically discriminated against as groups and are therefore entitled to special preferences."

- A December 22, 1981 memorandum to the Attorney General, summarizing the U.S. Commission on Civil Rights's 1981 report on affirmative action. He characterized the report, which found that structural discrimination continued to affect American society, as "self-serving," and its logic in support of affirmative action as "perfectly circular." Roberts attacked the failures of certain affirmative action programs, which the Commission's report had attributed to structural discrimination within the programs, as the necessary effect of affirmative action: "There is no recognition of the obvious reason for the failure [of the affirmative action program]: the affirmative action program required the recruiting of inadequately prepared candidates" (emphasis in the original). In other words, Roberts reasoned that affirmative action programs would necessarily fail because the minority candidates who qualify for the programs would lack sufficient skills to meet the job requirements.

Further, in an "innocuous" (as he described it) response to the Commission's Chairman drafted for the Attorney General's signature, Roberts neatly summarized the Reagan Administration's position on affirmative action: "[The administration] will not . . . answer discrimination with more discrimination by according preferential treatment based on race or sex to those who have not been proven to be victims of specific acts of unlawful discrimination."

### E. Disability Rights

In a July 7, 1982 memorandum to the Attorney General regarding "Government Participation and Supreme Court Decision in *Board of Education v. Rowley*," Roberts summarized a disability rights case brought under the Education for All Handicapped Children Act. The issue presented in this case was whether the federal statute required a school board to provide a free sign language interpreter for a hearing-impaired child.

At the outset, Roberts's memo noted that the child "was an excellent lip reader" and that the school board had decided that a sign language interpreter was not needed. After opining that the federal statute was vague, Roberts wrote that the lower courts engaged in "judicial activism [by using] the vague statutory language [of the Act] to overrule the [school] board and substitut[ing] their own judgment of appropriate educational policy." Roberts concluded approvingly that "[i]n this case a conservative majority of the Supreme Court turned back an effort by activist lower court judges to impose potentially huge burdens on the states."

## III. RECORD AS DEPUTY SOLICITOR GENERAL IN THE FIRST BUSH ADMINISTRATION

The White House has withheld from public review and disclosure to the Senate Judiciary Committee records from Roberts's tenure as principal deputy Solicitor General in the first Bush Administration. Senate Judiciary Committee members immediately denounced this move and made specific requests for documents related to 16 cases on which Roberts worked; these cases involved affirmative action, redistricting, equal opportunity in education, the First Amendment, school prayer, and voting rights. The White House continues to refuse to disclose the requested information, arguing that internal deliberations require an assurance of confidentiality in order to be effective. The argument that confidentiality is necessary to allow attorneys to express freely their own legal views runs counter to the Administration's argument that Roberts's memos and filings do not necessarily express his own views but are those of his client alone.

Based upon public reports and publicly-filed briefs, we have been able to ascertain that Roberts had involvement in the following key cases:

- *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), in which Roberts, serving as Acting Solicitor General, submitted an amicus brief in support of a broadcaster that challenged certain FCC affirmative action programs as unconstitutional violations of the equal protection doctrine. The FCC programs granted preferences to minority-owned firms in the awarding of broadcast licenses. Roberts argued that the FCC's use of a racial classification required that the Court review the programs using a "strict scrutiny" analysis and find that the classification was "narrowly tailored" to achieve a "compelling government interest" in order to rule that the programs passed constitutional muster. Roberts contended that the affirmative action program at issue here neither satisfied a compelling government interest nor was narrowly tailored. Roberts's brief further declared that the Court "has endorsed only one sufficiently compelling justification for a racial classification: remedying the effects of identified present or past discrimination."

The Court disagreed with Roberts's position and held that Congress and the FCC implemented the programs at issue primarily to promote programming diversity, which was an "important government objective that can serve as a constitutional basis for the policies." Further, the Court found that the programs were "substantially related" to the achievement of this government objective and did not impose "impermissible burdens on nonminorities."

The Court rejected Roberts's argument that the affirmative action programs at issue necessarily triggered a "strict scrutiny" analysis because they relied upon racial classifications. The Court recognized, in effect, that all racial classifications are not equal and that certain limited circumstances exist in which the government may permissibly implement affirmative programs that employ racial classifications in order to meet "important government objectives." Examples of such objectives have included achieving diversity in broadcasting and in higher education (*See Regents of University of California v. Bakke*; *see also Grutter v. Bollinger*). Roberts's reasoning would disallow these objectives.

- *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), in which Roberts co-authored an amicus brief that argued against granting relief to African American students challenging segregation in their local schools. In 1972, the district court found that the Oklahoma City School District had failed to eliminate *de jure* segregation in its schools and entered a decree imposing a school desegregation plan. In 1977, finding that the school district has achieved "unitary" status, the district court issued an unpublished order freeing the district from the desegregation plan and terminating the case. This order was not appealed. In 1984, the school district adopted a "Student Reassignment Plan" that would have the effect of re-segregating many of the previously desegregated schools.

Roberts argued for the United States that "court-ordered desegregation of a school district is a process with both a beginning and an end" and argued against "perpetual [desegregation] decrees -- and accompanying judicial supervision -- as a general rule." The brief further argued that once a school district is declared unitary, it should once again governed only by "traditional equal protection standards, which prohibit only intentional acts of discrimination."

Robert L. Dowell and other minority students in Oklahoma City countered that the school district should not be fully released from its desegregation plan only to take actions that would result in the subsequent "re-segregation" of district schools.

The Court, in a majority opinion written by Chief Justice Rehnquist, agreed with Roberts's position and held that a desegregation case may not be re-opened once the school district has been released from a court-ordered desegregation plan. The Court further held that the district court must provide affected parties with notice of the dissolution of a decree but that once the desegregation plan has been terminated the district's actions with respect to school segregation will be based solely upon whether they violate the Equal Protection Clause, irrespective of the terms and conditions of the desegregation plan.

The effect of the Court's holding was to limit the relief available to students who attend segregated schools that have formerly been subject to desegregation decrees and are in the process of being re-segregated. Roberts's position and the Court's ruling favor the legal fiction that the dissolution of a desegregation decree is equal to desegregation itself, while ignoring that the effect of this reasoning is to allow the re-segregation of the public schools.

- *Freeman v. Pitts*, 503 U.S. 467 (1992), in which Roberts co-authored an amicus brief arguing that the Court should incrementally release a Georgia school district from its court-imposed desegregation decree because the district had substantially complied with many of its terms. The district court found that the school district was a "unitary" system in regards to four of six relevant factors and ruled that it would offer no other relief in these four areas while continuing to monitor the remaining two facets of the desegregation plan. The district court, in effect, released the district from its desegregation plan incrementally, element by element. The Court of Appeals for the Eleventh Circuit reversed, holding that the district court should retain full remedial authority over the school system until it achieved unitary status in all areas at the same time for several years.

In his brief for the United States, Roberts argued that a federal court may require no further remedial action with respect to a particular facet of a school system once that facet is fully desegregated, and that the district court should thus release the school district from the components of the plan whose terms have been met. The Court agreed with Roberts's position and held that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." The Court noted that "[t]he term 'unitary' is not a precise concept" and it "does not confine the discretion and authority of the District Court."

- *Rust v. Sullivan*, in which Roberts co-authored the government brief in support of new regulations preventing family planning programs that receive federal aid from providing education or services related to abortion. Although *Rust v. Sullivan* did not directly implicate *Roe*, Roberts's brief specifically noted that "[w]e continue to believe that Roe was wrongly decided and should be overruled. . . . [T]he Court's conclusion[] in Roe that there is a fundamental right to an abortion . . . find no support in the text, structure, or history of the Constitution." This position highlights Roberts's apparent willingness to scale back clearly established rights, tendency toward a textualist approach to the Constitution, and views on the right to privacy that inheres in the due process clause of the Fourteenth Amendment. The *Rust* brief points toward a reluctance to invoke substantive due process doctrine to preserve and protect established individual rights, including the right to privacy. While this doctrine is often discussed in the context of choice, it implicates a wide range of areas including child-rearing, school curricula, contraception, and marriage (for example, the ruling in *Loving v. Virginia*, in which the Supreme Court struck down an anti-miscegenation statute prohibiting interracial marriage, was based in part of substantive due process doctrine).

## IV. PRIVATE PRACTICE AT HOGAN & HARTSON

During the hearings on his confirmation to the District of Columbia Circuit, Judge Roberts attempted to head off questions about his work in private practice by warning against ascribing the beliefs of a lawyer's client to the lawyer himself. It is true that a lawyer is ethically bound to zealously represent his client whether he or she agrees with that client's position or not, so Roberts's position is not wholly unjustified. However, it is not irrelevant that Roberts almost invariably chose, for 13 years of his career, to represent large corporate and business interests, often against individuals seeking to assert their statutory or constitutional rights.

During his tenure at Hogan & Hartson, Roberts worked on the following notable cases:

- *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). As counsel for the Associated General Contractors of America, Inc., Roberts filed a brief in support of a nonminority subcontractor who argued that certain Department of Transportation affirmative action programs were unconstitutional violations of equal protection. Congress created these programs to remedy past discrimination in federal transportation contracting practices.

While Roberts conceded that "remedying the effects of past or present discrimination is a compelling government interest that would justify a racial preference in an appropriate case," he argued that Congress did not produce evidence of past discrimination sufficient under prior Supreme Court precedent (*Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-6 (1989)) to justify the affirmative action programs at issue. Roberts's brief contended that under applicable law, the programs in question should be struck down because of an absence of "evidence of discrimination in every sector of the construction industry, in every geographical market, against every racial group covered by the [preference] program." In arguing that Congress did not make sufficiently specific findings, Roberts's brief dismissed the body of evidence cited by Congress in support of these programs as conclusory, amorphous, irrelevant, inaccurate, and readily explainable by "nonracial factors."

- *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002). Roberts represented the petitioner Toyota Motor Manufacturing, Kentucky, Inc. which was sued by a former employee under the Americans with Disabilities Act (ADA) of 1990 for failure to provide her with reasonable accommodations required by the Act. The Court held that the lower court did not apply the proper standard to determine if the employee was disabled under the ADA because it only analyzed a limited class of manual tasks and failed to ask whether the employee's impairments prevented her from performing tasks of central importance to people's daily lives.

- *Nat'l Collegiate Athletic Assoc. v. Smith*, 525 U.S. 459, 119 S.Ct. 924 (1999) – Roberts argued for petitioner National Collegiate Athletic Association (NCAA) which was sued under Title IX by a student athlete who alleged that the NCAA discriminated against her based on her sex by denying her permission to play intercollegiate volleyball at a federally assisted institution. The court held that the NCAA was not amenable to a private action under Title IX because NCAA's receipt of dues from federally funded member institutions did not suffice to hold the NCAA, the dues recipient, under the Title.

- *Gonzaga University v Doe*, 536 U.S. 273, 122 S.Ct. 2268 (2002) – Roberts represented petitioners Gonzaga University and Roberta S. League, the university's teacher certification specialist, against charges brought by a former student to enforce the Family Educational Rights and Privacy Act (FERPA) of 1974, which prohibits federal funding of educational institutions that have a practice of releasing education records to unauthorized persons. The court held that the action was foreclosed because FERPA does not create personal rights to enforce under 42 U.S.C. § 1983.

- *Rice v. Cayetano*, 528 U.S. 495 (2000). While in private practice, Roberts represented the Governor of Hawaii in an action brought by a Hawaii citizen who had been barred from voting in certain Hawaiian elections by a voting qualification that restricted voting rights in these elections to certain native Hawaiians (those descended from ancestors who were on the island in 1778). Roberts argued in his brief that "the case presents the question whether Congress and the State of Hawaii . . . may honor the special obligation to indigenous Hawaiians, in the same fashion Congress and many States have for centuries attempted to do with respect to America's other indigenous people." Central to Roberts's position was the contention that

Hawaiians must not be treated "differently from all other indigenous people" or given "second-class status among the Nation's indigenous people.

While Roberts's position in *Cayetano* has been scrutinized as a potential measure of his views regarding affirmative action, Roberts clearly characterized the case as one "about Congress' authority to recognize and deal with the Nation's indigenous people." In fact, he argued that the classification at issue is not one that distinguishes on the basis of race, but on the basis of "rather unique legal and political status" of indigenous Hawaiians. The Court disagreed, holding that Hawaii's denial of the vote to those not in the favored class of indigenous Hawaiians was a "clear violation of the Fifteenth Amendment" because the classification used ancestry as a proxy for race.

## V. JUDICIAL RECORD/NOTABLE CASES

Given the limited judicial record, it is difficult to discern definite patterns or ideological tendencies in Judge Roberts's jurisprudence. However, it is fair to say that a number of his decisions raise concerns with respect to certain of MALDEF's standards for evaluating judicial nominees – specifically, our inquiries into whether a candidate's record shows 1) an insensitivity or hostility to rights protected by key provisions of the Constitution, including the Equal Protection Clause, the Due Process Clause, the First and Fourth Amendments to the U.S. Constitution, and the right to privacy; 2) an insensitivity or hostility to statutory provisions that protect the rights of Latinos; 3) a tendency to take an unduly narrow view of Congress' authority to pass such protective legislation, or to take an unduly narrow view of the application of protective statutes themselves; and 4) a lack of commitment to protecting litigants' right of access to the courts under applicable statutory and constitutional provisions.

### A. Commerce Clause

In *Rancho Viejo, LLC v. Norton*, 357 U.S. App. D.C. 336 (2003), a developer filed suit in federal court alleging that application of the Endangered Species Act of 1973 ("ESA") to protect the arroyo toad (an endangered species located entirely within the state of California) exceeded Congress's powers under the Commerce Clause under the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating in part the Gun Free School Zone Act) and *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating in part the Violence Against Women Act). The district court granted summary judgment in favor of the defendants (government agencies and the Secretary of Interior), finding that the regulation was constitutional and Congress had the authority under the Commerce Clause to regulate private lands in order to protect the toad. The district court relied on the "taking" provision of the ESA to conclude that "taking" of the arroyo toad in order to build homes was an economic activity that substantially affected interstate commerce. In its ruling, the lower court noted that the regulated activity in this case was economic in nature (unlike the activities challenged in *Lopez* and *Morrison*), and that federal Courts of Appeals have upheld the ESA as constitutional under the Commerce Clause.

Rancho Viejo appealed the decision and petitioned for rehearing en banc. The petition was denied, with Judge Roberts dissenting from the denial of rehearing and arguing that the

district court's approach to Commerce Clause analysis was flawed. Judge Roberts's dissent maintained that the district court had inappropriately focused upon whether the challenged regulation (i.e., building of homes) substantially affected interstate commerce, rather than whether the activity being regulated (i.e., taking of arroyo toads) did so, a position that he described as in conflict with the Supreme Court's rulings in *Lopez* and *Morrison*. Roberts would have granted a rehearing en banc in order to "consider alternative grounds for sustaining application of the [Endangered Species] Act that may be more consistent with Supreme Court precedent."

The Commerce Clause is a critically important instrument for Congress to enact legislation protective of individual rights and freedoms. Judge Roberts's opinion in *Rancho Viejo* suggests a willingness to contract the scope of Congress' power under the Commerce Clause. This represents a narrower view of the Commerce Clause than that endorsed by the rest of the D.C. Circuit, other circuits, and by the Supreme Court; the Court essentially repudiated Judge Roberts's interpretation in *Gonzales v. Reich*, 2005 U.S. LEXIS 4656, at *29, which upheld the government's authority under the Commerce Clause to prosecute individuals growing marijuana (an act that was legal under state law) for their own use, on the advice of a physician – even where such activity was purely local. Although it is possible that the final line of Roberts's dissent, urging consideration of "alternative grounds for sustaining application" of the ESA, may mitigate the balance of his dissent, the opinion is sufficient to raise serious concerns about Roberts's judicial philosophy and its implications for MALDEF's work and mission. In the context of environmental justice, Judge Roberts's view would drastically reduce or even terminate federal environmental protection efforts that are not near other state land borders. For Latinos, this would have a devastating effect on the effort against environmental degradation along the Southwest border, all of Puerto Rico, and much of Florida.

### B. Individual Rights/Access to the Courts

Judge Roberts's position in *Taucher v. Brown-Hruska*, 396 F.3d 1168 (2005) raises serious concerns regarding his philosophy on access to the courts and whether he has an anti-plaintiff bias or tendency in civil rights cases. In *Taucher*, the Court of Appeals reversed and vacated an award for attorneys' fees that were granted under the Equal Access to Justice Act (EAJA). EAJA is a critical tool for public interest attorneys that work to enforce and vindicate civil rights, and opens the courthouse doors for plaintiffs who might not otherwise be able to raise and litigate their claims.

EAJA allows for an award of attorneys' fees in cases where a plaintiff is a prevailing party against the U.S. government, unless the government's legal position is "substantially justified." Judge Roberts, writing for the majority in *Taucher*, vacated the award for attorneys' fees by finding that the Commission's defense was a reasonable one on the merits. The Commission, Roberts wrote, did not "act in defiance of a string of losses" or in conflict with an "unbroken line of authority."

Judge Edwards, taking a starkly different view, issued a strident dissent from the majority opinion. Judge Edwards's opinion noted that a Court of Appeals is bound to engage in a strictly limited review under an abuse-of-discretion standard. Judge Edwards wrote further that the

"Government's positions bordered on frivolous" and that it was "absolutely clear on the record at hand" that the district court did not abuse its discretion in awarding attorneys' fees."

In *Acree v. Republic of Iraq*, 361 U.S. App. D.C. 410 (2005), American soldiers who were held as prisoners of war (POWs) by the Iraqi government while serving in the 1991 Gulf War brought suit in district court under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Plaintiffs sued defendants, including the Republic of Iraq and Saddam Hussein, for compensatory and punitive damages for the torture suffered during their captivity. The district court entered a default judgment for plaintiffs and awarded over $959 million in damages. Following judgment for plaintiffs, the United States filed a motion to intervene, contesting the district court's subject matter jurisdiction. The district court denied the motion as untimely.

The appellate panel held that the district court abused its discretion in denying the United States's motion to intervene. Although the Court of Appeals rejected the government's argument that the language in the Emergency Wartime Supplemental Appropriations Act (EWSAA) made the terrorism exception to the FSIA inapplicable to Iraq, it nonetheless vacated the district court's judgment for the soldiers and dismissed the lawsuit for failure to state a cause of action.

Judge Roberts concurred with the majority's judgment, but on a different basis. Rather than finding a failure to state a claim, Judge Roberts agreed with the government's argument that the EWSAA made FSIA inapplicable to Iraq, and that the Presidential Determination of May 7, 2003 stripped federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity. Thus, Judge Roberts would have dismissed the case for want of jurisdiction.

Judge Roberts, in his *Acree* analysis, acknowledged that the jurisdictional question was a close one, and conceded that the majority had case law on its side. Yet he opted in his opinion to accept, unlike the majority, the interpretation that was *more* restrictive of a plaintiff's right to sue to vindicate civil rights. Again, the ruling raises questions about whether Judge Roberts has shown an appropriate commitment to protecting litigants' right of access to the courts under applicable statutory and constitutional provisions.

Judge Roberts again blocked a civil rights litigant's access to the courts in *Int'l Action Ctr. v. United States*, 361 U.S. App. D.C. 108 (2004), this time invoking the doctrine of qualified immunity, which is often used to bar actions against government wrongdoers. In this case, Judge Roberts, writing for the majority, reversed and remanded the district court's decision that denied summary judgment for police supervisors based on qualified immunity grounds for the inaction theory of liability. Plaintiffs, in a §1983 action, claimed the supervisors were personally liable for constitutional torts because they failed to properly train and supervise subordinate officers, which led to tortious conduct. The supervisors sought interlocutory review of the district court's denial of qualified immunity as it pertained to this theory of liability. The Court of Appeals held that, absent an allegation that the supervisors had actual or constructive knowledge of past transgressions or were aware of "clearly deficient" training, the supervisors did not violate any constitutional right through inaction.

Finally, there is the case of *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (2004), which has received a great deal of attention in the media and from public interest organizations. Judge Roberts, writing for the unanimous panel, affirmed the judgment of the district court that the arrest of a 12-year-old girl who violated a zero-tolerance policy by eating a French fry at a Metrorail station did not violate the Fourth and Fifth Amendments of the Constitution. Because D.C. law did not provide for the issuance of citations for non-traffic offenses committed by juveniles under the age of 18, any delinquent act could be cause to be taken into custody. A juvenile citation policy was implemented following this incident.

The plaintiff's first claim was that her arrest constituted disparate treatment that violated the equal protection component of the Fifth Amendment. She argued that the policy's classification should be reviewed under heightened scrutiny because classifications based on status as a minor are "quasi-suspect," and because her arrest burdened a fundamental right to be free of physical restraint by the government. Roberts, writing for the court, concluded that classifications based on youth did not trigger heightened scrutiny, noting that the D.C. Circuit, along with other circuits, has historically reviewed classifications based on youth under a rational basis standard. The majority noted also that characteristics that define the young are not particularly obvious, distinguishing, or immutable. Thus, the Court of Appeals used rational basis review and found that the policy was rationally related to the legitimate governmental interest in ensuring parents are notified of their child's transgressions.

The plaintiff's second claim, that her arrest was an unreasonable seizure in violation of the Fourth Amendment, was rejected because police had probable cause to believe the girl had committed a criminal offense, however minor. The Court relied on *Atwater v. City of Lago Vista*, in which the Supreme Court upheld the custodial arrest of a woman for failing to fasten her seatbelt and those of her children.

As noted above, the facts of this case have generated significant discussion and attention in the media. Despite the lamentable circumstances of the girl's arrest (which Roberts acknowledged in the first line of his opinion), her civil rights claims were objectively weak under controlling Supreme Court precedent. Roberts's position may, however, provide some insight into how his approach on the Supreme Court might differ from that of Justice O'Connor. *Atwater v. City of Lago Vista*, on which Judge Roberts relied in *Hedgepeth*, was decided by a 5-4 margin, with Justice O'Connor expressing deep misgivings about the arrest in that case, and proposing a kind of proportionality test that would be applicable to Fourth Amendment analysis. O'Connor's view ultimately did not prevail, but her approach is in many ways a sharp contrast to that of Roberts, her would-be successor.

### C. Employment/Labor Rights

In *Booker v. Robert Half Int'l, Inc.*, 2005 U.S. App. LEXIS 13124 (2005), Judge Roberts limited an employee's ability to effectively vindicate statutory rights in the area of labor and employment. The Court of Appeals affirmed a judgment compelling an employee to arbitrate his racial discrimination claim. Judge Roberts, writing for the majority, found that inclusion of a severability clause in the arbitration agreement and a "healthy regard for the federal policy favoring arbitration" supported severing the unenforceable punitive damages clause and

enforcing the remainder of the agreement. At the district court level, the EEOC as amicus curiae opposed enforcing the agreement.

The employee had argued that enforcing the modified arbitration agreement was inconsistent with the terms of the contract between the parties, did not provide for sufficient discovery, and limited his possibility of relief. The employee also argued that the modified agreement should be unenforceable based on public policy reasons. If modified agreements are enforced then employers are encouraged to "overreach," knowing that the illegal provisions may be struck down but that the arbitration agreement will still be enforced.

Judge Roberts rejected the employee's arguments, using a contract law analysis to conclude that severing and enforcing the arbitration agreement was consistent with the intent of the contracting parties. He described the employee's argument regarding limited discovery as "speculative," since the scope and tools of discovery were at the discretion of the arbitrator and no arbitrator had been chosen yet. He went on to distinguish cases in which the public policy rationale persuaded courts to strike arbitration clauses in their entirety, contending that those cases often involved agreements that did not contain severability clauses and were "pervasively infected with illegality."

**D. Criminal Justice/Prisoners' Rights**

In *Hamdan v. Rumsfeld*, 2005 U.S.App. LEXIS 14315 (2005). Judge Roberts joined in a recent D.C. Circuit decision that granted the Bush Administration extraordinary power to try suspected terrorists in special military tribunals without basic due process protections; denied these detainees the ability to enforce the provisions of the Geneva Convention in federal court; and undermined bedrock principles of international human rights law. In permitting the military tribunals to go forward, the majority gave an expansive reading to Congress's resolution authorizing the President to respond to the September 11 attacks. The decision is troubling in both its erosion of fundamental due process rights, and the tremendous deference and expansive wartime authority it bestows upon the executive. Given that Latino immigrants and other members of the Latino community have become caught in the wide net cast by the "War on Terror," the *Hamdan* decision raises serious questions about how far Roberts would be willing to take that deference as a sitting Justice.

Roberts's participation in the *Hamdan* decision also raises the ethical question of whether he should have recused himself from the case, in which the Bush Administration was the party-defendant. The *Washington Post* has reported that White House aides were interviewing Roberts about his possible nomination to the Court during the same time that he sat on the panel for *Hamdan*. Under the applicable canons of judicial ethics, a "judge must recuse himself or herself in any case in which the judge's 'impartiality might reasonably be questioned.'" 28 U.S.C. § 455(a).

In *United States v. Lawson*, 2005 U.S. App. LEXIS 10798 (2005), the defendant was charged and indicted for aggravated bank robbery, aiding and abetting, and brandishing a firearm during a crime of violence. Judge Roberts, writing for the majority, affirmed the district court's rulings denying the defendant's motion to exclude out-of-court identifications and suppress other

evidence and rejected the defendant's claim that the search violated his Fourth Amendment rights.

Roberts found that the out-of-court identifications were admissible because the identification procedure was not impermissibly suggestive. The second identification, made from surveillance photographs, was arguably a suggestive medium, but the Court of Appeals found that its admission was harmless beyond a reasonable doubt; Judge Roberts wrote that the government had produced enough evidence of guilt. The Court of Appeals also found that the district court did not abuse its discretion in allowing the government to present evidence of other crimes given that the probative value of the evidence substantially outweighed the danger of unfair prejudice.

In *Nat'l Council of Resistance of Iran v. Dep't of State,* 373 F.3d 152 (2004), NCRI petitioned for review of the State Department's designation of the organization as a foreign terrorist organization (FTO), because NCRI was an alias of a known FTO. Judge Roberts, writing for the majority, denied the petition for review. Being designated an FTO allows various branches of the U.S. Government to sever financial support to the organization, primarily through freezing accounts and prosecuting people supporting the organization. The Secretary of State has the power to make these designations under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

In a previous case brought by NCRI, the D.C. Circuit Court of Appeals had remanded in order to provide the petitioners due process of law, allowing such designated organizations to respond to evidence in the State Department's administrative record, file evidence on its behalf, and be meaningfully heard by the Secretary of State. The State Department complied and made changes to its designation process to ensure constitutionality.

Judge Roberts defined alias status to be when "one organization so dominates and controls another that the latter can no longer be considered meaningfully independent from the former." The Court of Appeals found that the State Department had substantial evidence to come to the conclusion that NCRI was dominated and controlled by a known FTO, and thus NCRI was also an FTO.

Most recently, the USA PATRIOT Act amended the AEDPA to allow the Secretary of State to designate FTOs without disclosing why the classification was made and also criminalizing any acts that support a FTO. However this provision of the USA PATRIOT Act was declared unconstitutional in 2004 by a federal district court judge in Los Angeles.

## VI. PUBLIC SPEECHES AND STATEMENT

John Roberts's documented public appearances and interviews are extremely limited, and his public comments almost invariably measured and careful. The most notable of these public statements have merely hinted at Roberts's personal conservative ideology. For example, in a July 2nd, 2000 appearance on WFAA's *Capital Conversation*, recently rebroadcast on ABC's *This Week with George Stephanopolous*, Roberts suggested that the Rehnquist Court was "not very conservative." In support of this view he cited the Court's decision to uphold *Miranda*,

which he described as a "defeat" for conservatives. In the same interview, Roberts pointed to the Court's ruling upholding the Boy Scouts' ban on gay troop leaders as an important First Amendment "victory."

## VII. BIOGRAPHICAL BACKGROUND

Judge Roberts was born in 1955 in Buffalo, New York, and grew up in Long Beach, Indiana, where his father held a management position at Bethlehem Steel. He graduated first in his class from La Lumiere Boarding School, and went on to Harvard College and Harvard Law School. His wife, Jane Sullivan Roberts, is also a lawyer.

### A. Educational Background

Judge Roberts is an honors graduate of Harvard College (1976) and Harvard Law School (1979), and was Managing Editor of the Harvard Law Review.

### B. Employment History

Summarized below is Judge Roberts's employment history, beginning with the present and moving backward through his graduation from law school.

- 2003-Present: Judge, United States Court of Appeals for the District of Columbia Circuit
- 2001: Nominated to the Federal Bench by President George W. Bush
  - No Senate action.
- 1993-2003: Hogan & Hartson, Washington, D.C.
  - Senior Partner in charge of Corporate Appellate Practice;
  - Matters and clients included: the Lobbying Office of Management and Budget for the Cosmetic, Fragrance, and Toiletry Association; Toyota; U.S. Chamber of Commerce; and multiple health maintenance organizations;
  - In 2000, met with Florida Governor Jeb Bush to provide advice on legal aspects of election disputes during the Florida recount.
- 1992: Nominated to Federal Bench by President George H.W. Bush
  - No Senate action.
- 1989-1993: Principal Deputy Solicitor General of the United States
  - Worked under Solicitor General Kenneth W. Starr in first Bush administration.
- 1986-1989: Hogan & Hartson, Washington, D.C.
  - Developed Civil Litigation practice, with an emphasis on appellate matters.
- 1982-1986: Associate White House Counsel to President Ronald Reagan
- 1981-1982: Special Assistant to U.S. Attorney General William French Smith

- 1980-1981: Law Clerk to then-Associate Justice William Rehnquist, United States Supreme Court

  1979-1980: Law Clerk to Judge Henry J. Friendly, United States Court of Appeals for Second Circuit

C. **Significant Memberships/Affiliations**

- American Law Institute, elected October 1990.
- American Academy of Appellate Lawyers, elected August 1998.
- Edward Coke Appellate American Inn of Court, joined January 2001.
- Federalist Society (membership in dispute: Although Judge Roberts is reportedly listed as a member of the Society's Steering Committee in a 1997-1998 Leadership Directory, and he has addressed the Federalist Society on multiple occasions, the White House asserts that he did not pay the group's $50 membership fee and cannot recall being a member).
- National Legal Center for the Public Interest (unpaid advisor to non-profit organization with prominently conservative leadership, and whose mission, according to its website, includes the promotion of "individual rights, free enterprise, private ownership of property, balanced use of private and public resources, limited government, and fair and efficient judiciary." Resigned upon assuming the bench.)
- Republican National Lawyers' Association

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# Current Trends Acquired Immune Deficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs

The etiology of the underlying immune deficiencies seen in AIDS cases is unknown. One hypothesis consistent with current observations is that a transmissible agent may be involved. If so, transmission of the agent would appear most commonly to require intimate, direct contact involving mucosal surfaces, such as sexual contact among homosexual males, or through parenteral spread, such as occurs among intravenous drug abusers and possibly hemophilia patients using Factor VIII products. Airborne spread and interpersonal spread through casual contact do not seem likely. These patterns resemble the distribution of disease and modes of spread of hepatitis B virus, and hepatitis B virus infections occur very frequently among AIDS cases.

There is presently no evidence of AIDS transmission to hospital personnel from contact with affected patients or clinical specimens. Because of concern about a possible transmissible agent, however, interim suggestions are appropriate to guide patient-care and laboratory personnel, including those whose work involves experimental animals. At present, it appears prudent for hospital personnel to use the same precautions when caring for patients with AIDS as those used for patients with hepatitis B virus infection, in which blood and body fluids likely to have been contaminated with blood are considered infective. Specifically, patient-care and

laboratory personnel should take precautions to avoid direct contact of skin and mucous membranes with blood, blood products, excretions, secretions, and tissues of persons judged likely to have AIDS. The following precautions do not specifically address outpatient care, dental care, surgery, necropsy, or hemodialysis of AIDS patients. In general, procedures appropriate for patients known to be infected with hepatitis B virus are advised, and blood and organs of AIDS patients should not be donated.

The precautions that follow are advised for persons and specimens from persons with: opportunistic infections that are not associated with underlying immunosuppressive disease or therapy; Kaposi's sarcoma (patients under 60 years of age); chronic generalized lymphadenopathy, unexplained weight loss and/or prolonged unexplained fever in persons who belong to groups with apparently increased risks of AIDS (homosexual males, intravenous drug abusers, Haitian entrants, hemophiliacs); and possible AIDS (hospitalized for evaluation). Hospitals and laboratories should adapt the following suggested precautions to their individual circumstances; these recommendations are not meant to restrict hospitals from implementing additional precautions.

A. The following precautions are advised in providing care to AIDS patients:

1. Extraordinary care must be taken to avoid accidental wounds from sharp instruments contaminated with potentially infectious material and to avoid contact of open skin lesions with material from AIDS patients.

2. Gloves should be worn when handling blood specimens, blood-soiled items, body fluids, excretions, and secretions, as well as surfaces, materials, and objects exposed to them.

3. Gowns should be worn when clothing may be soiled with body fluids, blood, secretions, or excretions.

4. Hands should be washed after removing gowns and gloves and before leaving the rooms of known or suspected AIDS patients. Hands should also be washed thoroughly and immediately if they become contaminated with blood.

5. Blood and other specimens should be labeled prominently with a special warning, such as "Blood Precautions" or "AIDS Precautions." If the outside of the specimen container is visibly contaminated with blood, it should be cleaned with a disinfectant (such as a 1:10 dilution of 5.25% sodium hypochlorite (household bleach) with water). All blood specimens should be placed in a second container, such as an impervious bag, for transport. The

container or bag should be examined carefully for leaks or cracks.

6. Blood spills should be cleaned up promptly with a disinfectant solution, such as sodium hypochlorite (see above).

7. Articles soiled with blood should be placed in an impervious bag prominently labeled "AIDS Precautions" or "Blood Precautions" before being sent for reprocessing or disposal. Alternatively, such contaminated items may be placed in plastic bags of a particular color designated solely for disposal of infectious wastes by the hospital. Disposable items should be incinerated or disposed of in accord with the hospital's policies for disposal of infectious wastes. Reusable items should be reprocessed in accord with hospital policies for hepatitis B virus-contaminated items. Lensed instruments should be sterilized after use on AIDS patients.

8. Needles should not be bent after use, but should be promptly placed in a puncture-resistant container used solely for such disposal. Needles should not be reinserted into their original sheaths before being discarded into the container, since this is a common cause of needle injury.

9. Disposable syringes and needles are preferred. Only needle-locking syringes or one-piece needle-syringe units should be used to aspirate fluids from patients, so that collected fluid can be safely discharged through the needle, if desired. If reusable syringes are employed, they should be decontaminated before reprocessing.

10. A private room is indicated for patients who are too ill to use good hygiene, such as those with profuse diarrhea, fecal incontinence, or altered behavior secondary to central nervous system infections. Precautions appropriate for particular infections that

concurrently occur in AIDS patients should be added to the above, if needed.

B. The following precautions are advised for persons performing laboratory tests or studies on clinical specimens or other potentially infectious materials (such as inoculated tissue cultures, embryonated eggs, animal tissues, etc.) from known or suspected AIDS cases:

1. Mechanical pipetting devices should be used for the manipulation of all liquids in the laboratory. Mouth pipetting should not be allowed.

2. Needles and syringes should be handled as stipulated in Section\A (above).

3. Laboratory coats, gowns, or uniforms should be worn while working with

potentially infectious materials and should be discarded appropriately before leaving the laboratory.

4. Gloves should be worn to avoid skin contact with blood, specimens containing blood, blood-soiled items, body fluids, excretions, and secretions, as well as surfaces, materials, and objects exposed to them.

5. All procedures and manipulations of potentially infectious material should be performed carefully to minimize the creation of droplets and aerosols.

6. Biological safety cabinets (Class I or II) and other primary containment devices (e.g., centrifuge safety cups) are advised whenever procedures are conducted that have a high potential for creating aerosols or infectious droplets. These include centrifuging, blending, sonicating, vigorous mixing, and harvesting infected tissues from animals or embryonated eggs. Fluorescent activated cell sorters generate droplets that could potentially result in infectious aerosols. Translucent plastic shielding between the droplet-collecting area and the equipment operator should be used to reduce the presently uncertain magnitude of this risk. Primary containment devices are also used in handling materials that might contain concentrated infectious agents or organisms in greater quantities than expected in clinical specimens.

7. Laboratory work surfaces should be decontaminated with a disinfectant, such as sodium hypochlorite solution (see A5 above), following any spill of potentially infectious material and at the completion of work activities.

8. All potentially contaminated materials used in laboratory tests should be decontaminated, preferably by autoclaving, before disposal or reprocessing.

9. All personnel should wash their hands following completion of laboratory activities, removal of protective clothing, and before leaving the laboratory. C. The following additional precautions are advised for studies involving experimental animals inoculated with tissues or other potentially infectious materials from individuals with known or suspected AIDS.

10. Laboratory coats, gowns, or uniforms should be worn by personnel entering rooms housing inoculated animals. Certain nonhuman primates, such as chimpanzees, are prone to throw excreta and to spit at attendants; personnel attending inoculated animals should wear molded surgical masks and goggles or other equipment sufficient to prevent potentially infective droplets from reaching the mucosal surfaces of their mouths, nares, and eyes. In addition, when handled, other animals may disturb excreta in their bedding. Therefore, the above precautions should be taken when handling them.

11. Personnel should wear gloves for all activities involving direct contact with experimental animals and their bedding and cages. Such manipulations should be performed carefully to minimize the creation of aerosols and droplets.

12. Necropsy of experimental animals should be conducted by personnel wearing gowns and gloves. If procedures generating aerosols are performed, masks and goggles should be worn.

13. Extraordinary care must be taken to avoid accidental sticks or cuts with sharp instruments contaminated with body fluids or tissues of experimental animals inoculated with material from AIDS patients.

14. Animal cages should be decontaminated, preferably by autoclaving, before they are cleaned and washed.

15. Only needle-locking syringes or one-piece needle-syringe units should be used to inject potentially infectious fluids into experimental animals. The above precautions are intended to apply to both clinical and

research laboratories. Biological safety cabinets and other safety equipment may not be generally available in clinical laboratories. Assistance should be sought from a microbiology laboratory, as needed, to assure containment facilities are adequate to permit laboratory tests to be conducted safely. Reported by Hospital Infections Program, Div of Viral Diseases, Div of Host Factors, Div of Hepatitis and Viral Enteritis, AIDS Activity, Center for Infectious Diseases, Office of Biosafety, CDC; Div of Safety, National Institutes of Health.

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# Current Trends Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus

The information and recommendations contained in this document were developed and compiled by CDC in consultation with individuals appointed by their organizations to represent the Conference of State and Territorial Epidemiologists, the Association of State and Territorial Health Officers, the National Association of County Health Officers, the Division of Maternal and Child Health (Health Resources and Services Administration), the National Association for Elementary School Principals, the National Association of State School Nurse Consultants, the National Congress of Parents and Teachers, and the Children's Aid Society. The consultants also included the mother of a child with acquired immunodeficiency syndrome (AIDS), a legal advisor to a state education department, and several pediatricians who are experts in the field of pediatric AIDS. This document is made available to assist state and local health and education departments in developing guidelines for their particular situations and locations.

These recommendations apply to all children known to be infected with human T-lymphotropic virus type III/lymphadenopathy-associated virus (HTLV- III/LAV). This includes children with AIDS as defined for reporting purposes (Table 1); children who are diagnosed by their physicians as having an illness due to infection with HTLV-III/LAV but who do not meet the case definition; and children who are asymptomatic but have virologic or serologic evidence of infection with HTLV-

III/LAV. These recommendations do not apply to siblings of infected children unless they are also infected.

BACKGROUND

The Scope of the Problem. As of August 20, 1985, 183 of the 12,599 reported cases of AIDS in the United States were among children under 18 years of age. This number is expected to double in the next year. Children with AIDS have been reported from 23 states, the District of Columbia, and Puerto Rico, with 75% residing in New York, California, Florida, and New Jersey.

The 183 AIDS patients reported to CDC represent only the most severe form of HTLV-III/LAV infection, i.e., those children who develop opportunistic infections or malignancies (Table 1). As in adults with HTLV-III/LAV infection, many infected children may have milder illness or may be asymptomatic.

Legal Issues. Among the legal issues to be considered in forming guidelines for the education and foster care of HTLV-III/LAV-infected children are the civil rights aspects of public school attendance, the protections for handicapped children under 20 U.S.C. 1401 et seq. and 29 U.S.C. 794, the confidentiality of a student's school record under state laws and under 20 U.S.C. 1232g, and employee right-to-know statutes for public employees in some states.

Confidentiality Issues. The diagnosis of AIDS or associated illnesses evokes much fear from others in contact with the patient and may evoke suspicion of life styles that may not be acceptable to some persons. Parents of HTLV-III/LAV-infected children should be aware of the potential for social isolation should the child's condition become known to others in the care or educational setting. School, day-care, and social service personnel and others involved in educating and caring for these children should be sensitive to the need for confidentiality and the right to privacy in these cases.

ASSESSMENT OF RISKS

Risk Factors for Acquiring HTLV-III/LAV Infection and Transmission. In adults and adolescents, HLTV-III/LAV is transmitted primarily through sexual contact (homosexual or heterosexual) and through parenteral exposure to infected blood or blood products. HTLV-III/LAV has been isolated from blood, semen, saliva, and tears but transmission has not been documented from saliva and tears. Adults at increased risk for acquiring HTLV-III/LAV include homosexual/bisexual men, intravenous drug abusers, persons transfused with contaminated blood or blood products, and sexual contacts of persons with HTLV-III/LAV infection or in groups at increased risk for infection.

The majority of infected children acquire the virus from their infected mothers in the perinatal period (1-4). In utero or intrapartum transmission are likely, and one

child reported from Australia apparently acquired the virus postnatally, possibly from ingestion of breast milk (5). Children may also become infected through transfusion of blood or blood products that contain the virus. Seventy percent of the pediatric cases reported to CDC occurred among children whose parent had AIDS or was a member of a group at increased risk of acquiring HTLV-III/LAV infection; 20% of the cases occurred among children who had received blood or blood products; and for 10%, investigations are incomplete.

Risk of Transmission in the School, Day-Care or Foster-Care Setting. None of the identified cases of HTLV-III/LAV infection in the United States are known to have been transmitted in the school, day-care, or foster-care setting or through other casual person-to-person contact. Other than the sexual partners of HTLV-III/LAV-infected patients and infants born to infected mothers, none of the family members of the over 12,000 AIDS patients reported to CDC have been reported to have AIDS. Six studies of family members of patients with HTLV-III/LAV infection have failed to demonstrate HTLV-III/LAV transmission to adults who were not sexual contacts of the infected patients or to older children who were not likely at risk from perinatal transmission (6-11).

Based on current evidence, casual person-to-person contact as would occur among schoolchildren appears to pose no risk. However, studies of the risk of transmission through contact between younger children and neurologically handicapped children who lack control of their body secretions are very limited. Based on experience with other communicable diseases, a theoretical potential for transmission would be greatest among these children. It should be emphasized that any theoretical transmission would most likely involve exposure of open skin lesions or mucous membranes to blood and possibly other body fluids of an infected person.

Risks to the Child with HTLV-III/LAV Infection. HTLV-III/LAV infection may result in immunodeficiency. Such children may have a greater risk of encountering infectious agents in a school or day-care setting than at home. Foster homes with multiple children may also increase the risk. In addition, younger children and neurologically handicapped children who may display behaviors such as mouthing of toys would be expected to be at greater risk for acquiring infections. Immunodepressed children are also at greater risk of suffering severe complications from such infections as chickenpox, cytomegalovirus, tuberculosis, herpes simplex, and measles. Assessment of the risk to the immunodepressed child is best made by the child's physician who is aware of the child's immune status. The risk of acquiring some infections, such as chickenpox, may be reduced by prompt use of specific immune globulin following a known exposure.

RECOMMENDATIONS

1. Decisions regarding the type of educational and care setting for HTLV-III/LAV-infected children should be based on the behavior, neurologic development, and physical condition of the child and the expected type of

interaction with others in that setting. These decisions are best made using the team approach including the child's physician, public health personnel, the child's parent or guardian, and personnel associated with the proposed care or educational setting. In each case, risks and benefits to both the infected child and to others in the setting should be weighed.

2. For most infected school-aged children, the benefits of an unrestricted setting would outweigh the risks of their acquiring potentially harmful infections in the setting and the apparent nonexistent risk of transmission of HTLV-III/LAV. These children should be allowed to attend school and after-school day-care and to be placed in a foster home in an unrestricted setting.

3. For the infected preschool-aged child and for some neurologically handicapped children who lack control of their body secretions or who display behavior, such as biting, and those children who have uncoverable, oozing lesions, a more restricted environment is advisable until more is known about transmission in these settings. Children infected with HTLV-III/LAV should be cared for and educated in settings that minimize exposure of other children to blood or body fluids.

4. Care involving exposure to the infected child's body fluids and excrement, such as feeding and diaper changing, should be performed by persons who are aware of the child's HTLV-III/LAV infection and the modes of possible transmission. In any setting involving an HTLV- III/LAV-infected person, good handwashing after exposure to blood and body fluids and before caring for another child should be observed, and gloves should be worn if open lesions are present on the caretaker's hands. Any open lesions on the infected person should also be covered.

5. Because other infections in addition to HTLV-III/LAV can be present in blood or body fluids, all schools and day-care facilities, regard- less of whether children with HTLV-III/LAV infection are attending, should adopt routine procedures for handling blood or body fluids. Soiled surfaces should be promptly cleaned with disinfectants, such as household bleach (diluted 1 part bleach to 10 parts water). Disposable towels or tissues should be used whenever possible, and mops should be rinsed in the disinfectant. Those who are cleaning should avoid exposure of open skin lesions or mucous membranes to the blood or body fluids.

6. The hygienic practices of children with HTLV-III/LAV infection may improve as the child matures. Alternatively, the hygienic practices may deteriorate if the child's condition worsens. Evaluation to assess the need for a restricted environment should be performed regularly.

7. Physicians caring for children born to mothers with AIDS or at increased

risk of acquiring HTLV-III/LAV infection should consider testing the children for evidence of HTLV-III/LAV infection for medical reasons. For example, vaccination of infected children with live virus vaccines, such as the measles-mumps-rubella vaccine (MMR), may be hazardous. These children also need to be followed closely for problems with growth and development and given prompt and aggressive therapy for infections and exposure to potentially lethal infections, such as varicella. In the event that an antiviral agent or other therapy for HTLV-III/LAV infection becomes available, these children should be considered for such therapy. Knowledge that a child is infected will allow parents and other caretakers to take precautions when exposed to the blood and body fluids of the child.

8. Adoption and foster-care agencies should consider adding HTLV-III/LAV screening to their routine medical evaluations of children at increased risk of infection before placement in the foster or adoptive home, since these parents must make decisions regarding the medical care of the child end must consider the possible social and psychological effects on their families.

9. Mandatory screening as a condition for school entry is not warranted based on available data.

10. Persons involved in the care and education of HTLV-III/LAV-infected children should respect the child's right to privacy, including maintaining confidential records. The number of personnel who are aware of the child's condition should be kept at a minimum needed to assure proper care of the child and to detect situations where the potential for transmission may increase (e.g., bleeding injury).

11. All educational and public health departments, regardless of whether HTLV-III/LAV-infected children are involved, are strongly encouraged to inform parents, children, and educators regarding HTLV-III/LAV and its transmission. Such education would greatly assist efforts to provide the best care and education for infected children while mini- mizing the risk of transmission to others.

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August 18, 2005

Hon. Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
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Dear Mr. Chairman:

A recent story in the Washington Post suggested that it might have been improper for Judge John Roberts to participate on the D.C. Circuit panel that decided the recent case of *Hamdan v. Rumsfeld*. The *Post* story relied heavily on a short article written by three professors, Stephen Gillers, David Luban and Steven Lubet, and published on the internet in *slate.com*.

I write to provide perspective on the issues raised by these articles and to make clear that Judge Roberts' participation on the panel was proper. To briefly suggest my background to draw such a conclusion, I have taught and written in the field of legal and judicial ethics for over thirty years. The law school text that I co-author has long been the most widely used in the country, and it covers judicial ethics in considerable detail.

There are several points on which all observers would agree. First, 28 U.S.C. § 455 requires Judge Roberts or any other federal judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The key term, of course, is "reasonably." Anyone could assert that a given judge was not impartial. Indeed, a litigant might be expected to do so whenever he or she preferred to have someone else hear their case. Thus, the statute does not allow litigants (or reporters or professors) to draw a personal conclusion about the judge's impartiality; the conclusion must be "reasonable" to a hypothetical outside observer.

Second, saying as some cases do, that judges must avoid even "the appearance of impropriety" adds nothing to the analysis. Unless the "appearance" is required to be found reasonable by the same hypothetical outside observer, the system would become one of peremptory challenges of judges. That is not the system we have, nor would it be one that guarantees the judicial authority and independence on which justice ultimately depends.

Third, there is no dispute that judges may not hear cases in which they would receive a personal financial benefit if they were to decide for one party over another. The first case cited (albeit not by name) by Professors Gillers, Luban & Lubet was Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). It simply decided that a judge had a personal interest conflict and could not decide a case that would financially benefit a university on whose Board of Trustees the judge sat. In short, the case says nothing relevant to Judge Roberts' conduct.

Fourth, a judge may not hear a case argued by a private firm or government office with which the judge is negotiating for employment. The reason again is obvious. That was the fact situation in the remaining two cases cited by Professors Gillers, Luban & Lubet in their *slate.com* article. The cases break no new ground and provide no new insights relevant to this discussion.

Critics of Judge Roberts suggest, however, that his "interviews" with the Attorney General and with members of the White House staff were analogous to private job interviews. That is simply not the case. A judge's promotion within the federal system has not been – and should not be – seen as analogous to exploration of job prospects outside of the judiciary.

Except for the Chief Justice, every federal judge is at least in principle a potential candidate for promotion to a higher status in the judiciary. One might argue that no district judge should ever be promoted to a court of appeals, and no court of appeals judge should be elevated to the Supreme Court, but long ago, we recognized that such an approach would deny the nation's highest courts the talents of some of our most experienced and able judges. One need only imagine the chaos it would cause if we were to say that no federal judge could hear a case involving the federal government because he or she might be tempted to try to please the people thinking about the judge's next role in the federal judiciary. Nothing in § 455 requires us to say that it would be "reasonable" to assume such temptation. We properly assume that judges decide cases on their merits and see their reputation for so doing as their basis for promotion, if any.

To be fair to the critics, they argue that a judge's situation might be different once actual "interviews" begin for the new position. The problem with that, of course, is that interviews are only a step beyond reading the judge's decisions in a file, interviewing observers of the judge's work, and the like. That kind of thing goes on all the time, including in the media. Further, all accounts suggest that several judges were being "interviewed" and that for most of the period of the interviews, there was not even a Supreme Court opening to fill. Assuming, as even Professors Gillers, Luban & Lubet do, that no improper pressure or discussion took place in the interviews themselves, it is hard to see that physically meeting with White House staff transforms what is inevitable and proper in the judicial selection process into something more suspect.

Again, even Professors Gillers, Luban & Lubet ultimately concede that Judge Roberts should not have had to withdraw from all cases brought by the government as the logic of their criticism would seem to suggest. They argue instead that the *Hamdan* was special. It was "important" to the Administration and therefore required special caution.

I respectfully suggest that an "importance" standard for disqualification could not provide sufficient guidance for the administration of the federal courts. Every case is important, at least to the parties. Furthermore, while some cases have greater media interest than others, and some are watched more closely by one interest group or another, every case before the D.C. Circuit that involves the federal government is there because high level Justice Department officials have concluded that the appeal is worth filing or resisting.

Saying that some cases are important and others are not ultimately reveals more about the speaker's priorities than it does about the intrinsic significance of the case. Indeed, earlier this year, the Supreme Court decided *United States v. Booker* and *United States v. Fanfan* involving the Sentencing Guidelines. Few decisions have had more impact on the operation of federal courts in recent years, yet it was widely reported that Professor Gillers opined to Justice Breyer – correctly in my view – that he need not recuse himself even though his own work product as a former member of the Sentencing Commission arguably was indirectly at issue. Importance of the case was not the controlling issue for Professor Gillers then, and it is simply not a standard now that can clearly guide a judge as to which cases require disqualification and which do not.

Indeed, the critics of Judge Roberts' remaining a part of the *Hamdan* panel overlook the fact that judges of the D.C. Circuit are assigned to the cases that they hear on a random basis. That randomness is part of the integrity of the court's process and it guarantees that no panel can be "stacked" with judges favorable to one litigant or another. Weakening the standard for a reasonable appearance of impropriety, and making recusal turn on which litigants can place news stories accusing judges with of a lack of ethics would adversely affect the just outcomes of cases more than almost any other thing that might come out of the hearings on Judge Roberts' confirmation.

In short, in my opinion, no reasonable observer can "reasonably question" the propriety of Judge Roberts' conduct in hearing the *Hamdan* case. He clearly did not violate 28 U.S.C. § 455. Indeed, he did what we should hope judges will do; he did his job. He participated in the decision of a case randomly assigned to him. We should honor him, not criticize him, for doing so.

Respectfully,

Thomas D. Morgan
George Washington University Law School

**Statement of Ralph Nader**
**on the nomination of**
**John G. Roberts Jr. by President George W. Bush**
**to be Chief Justice of the**
**Supreme Court of the United States**
**submitted to the Senate Judiciary Committee**

**U.S. Senate, Washington, D.C., September 12, 2005**

Mr. Chairman and members of the Senate Judiciary Committee, thank you for the opportunity to submit testimony on the nomination of Judge John G. Roberts Jr. for the position of Chief Justice of the Supreme Court of the United States. I ask that this statement be made part of the printed hearing record.

In 1994 I testified before the Senate Judiciary Committee on the nomination of Stephen G. Breyer by President Clinton to be an Associate Justice of the Supreme Court of the United States. In that testimony I called attention to the importance of balance in the way our laws handle the challenges of corporate power in America.

I said:

> For our political economy, no issue is more consequential than the distribution and impact of corporate power. Historically, our country periodically has tried to redress the imbalance between organized economic power and people rights and remedies. From the agrarian populist revolt by the farmers in the late 19th and early 20th century, to the rise of the federal and state regulatory agencies, to the surging trade unionism, to the opening of the courts for broader non-property values to have their day, to the strengthening of civil rights and civil liberties, consumer, women's and environmental laws and institutions, corporate power was partially disciplined by the rule of law.

Today it is more important than ever for all Supreme Court Justices and, in particular, the Chief Justice[1] of the Supreme Court to have the inclination and wisdom to realize that our democracy is being eroded by many kinds of widely reported systemic corporate excesses. Giant

[1] The Chief Justice decides who will write the Court opinion (when he is in the majority), assigns Associate Justices to the federal Circuits, oversees the Administrative Office of the U. S. Courts, presides over presidential impeachments and submits to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

multinational corporations have no allegiance to any country or community, and the devastation and other injustices they visit upon communities throughout the United States and around the globe have outpaced the countervailing restraints that should be the hallmark of government by, for and of the people. Unfortunately, the structure and scope of these hearings are not likely to devote a sufficient priority to the corporate issues of our times.

In 1816 Thomas Jefferson wrote: "I hope we shall... crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." Imagine his reaction to the corporate abuses of Enron Corp, HealthSouth Corp., Tyco, WorldCom or Adelphia Communications Corp to name only a few, along with the drug, tobacco, banking, insurance, chemical and other toxic industries. The corporate crime and greed of today tower over the abuses of the "moneyed corporations" of Jefferson's day. The economic power of giant corporations is augmented by a flood of Political Action Committee (PAC) money and other donations that shape the quality and quantity of debate in our country and consequently drive our society to imperatives that are increasingly more corporate than civic.

You will hear about Judge Roberts from several perspectives, but it is safe to assume that questions and testimony about Judge Roberts' views on corporate power and the rule of law will be inadequate given the broad and profound impact giant corporations have on our democracy. An important procedural and substantive corollary is the important role our civil justice system plays in expanding the frontiers of justice and in giving individuals the ability to hold "wrongdoers" accountable in a court of law. "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice," said the famous jurist, Learned Hand.

Unfortunately, powerholders, corporations and other institutions which are supposed to be held accountable by the civil justice system, are striving to weaken, limit and override the province of juries and judges. Some companies, led by insurers, have used expensive and focused media to promote the view that civil juries are too costly and too unpredictable. This narrow and short-sighted perspective is contrary to the long-standing tenets of our democracy and in particular the Seventh Amendment to our Constitution.

The civil jury system of the United States embraces a fundamental precept of tested justice: ordinary citizens applying their minds and values can and to reach decisions on the facts in cases

that often involve powerful wrongdoers. This form of direct citizen participation in the administration of justice was deemed indispensable by this nation's founders and was considered non-negotiable by the leaders of the American revolution against King George III. But the civil jury is more than a process toward bringing a grievance to resolution. The civil jury is a pillar of our democracy necessary for the protection of individuals against tyranny, repression and mayhem of many kinds and for the deterrence of such injustices in the future. Our civil jury institution is a voice for and by the citizenry in setting standards for a just society. Jury findings incorporated in appellate court decisions contribute to one of the few authoritative reservoirs of advancing standards of responsibility between the powerful and the powerless -- whether between companies and consumers, workers, shareholders and community or between officialdom and taxpayers or citizens in general. Knowing the evolution of the common law and the civil jury provides compelling and ennobling evidence of this progression of justice. Chief Justice William Rehnquist wrote, " The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[2]

As the hearing unfolds, I suggest that the members of the Judiciary Committee devote some time to areas beyond those that are traditionally the focus of witnesses and questioning by Committee members and ask fundamental questions about the views of Judge Roberts, a former corporate lawyer at Hogan & Hartson, regarding corporate power and the civil justice system.

In the spirit of expanding the criteria by which the Committee and the public can measure Judge Robert's judicial and civic philosophy, I offer the following questions for you to pose to the nominee. Some of the questions are narrowly focused and some are broad-gauged. But, in their totality they constitute the broad kind of "litmus test" that should be applied in selecting and confirming all judges. In short, does the nominee, having met the threshold requirements of competency, believe that the rule of law should be used to broaden and deepen, procedurally and substantively, our democracy – even if it means the rights of the giant corporation or powerful interests must be circumscribed to protect the rights of the individual citizen and of our communities – rural or urban, large or small?

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[2] *Parklane Hosiery Co. V. Shore*, 439 U.S. 322 (1979).

In pursing its own line of questions, the Committee should not let its exploration of the nominee's views be artificially restricted. Judicial nominees have given two reasons for refusing to answer questions, but these reasons are contradictory. First, they say, if they publicly express their views, it will compromise them if the issue comes before the Court. Second, they say, judges do not decide legal issues in a vacuum: they only decide a concrete dispute in a specific adversarial context. Accordingly, some nominees claim it's silly or inappropriate, for example, to say whether they believe the Constitution protects the right to abortion, because Justices don't decide cases by asking such abstract questions. They face a particular statute, challenged by a particular party directly affected in a particular way, and the resolution of that dispute will turn on all those particulars.

This second response has a degree of merit -- and undercuts the first reason for refusing to answer most questions. Precisely because neither nominees nor the public can know in what context issues will reach the Court (if at all), it is not problematic for nominees to discuss their views. They should not say how they would decide an actual pending case, but, short of that, it is fine for them to discuss issues because that in no way commits them to taking sides in any actual dispute -- such disputes are invariably context-specific. For example, a nominee may be asked about the doctrine that treats a corporation as a "person" entitled to various constitutional rights. His or her thoughts on this issue will not tell us what he or she will do if such an issue is raised in a case before the Court. The latter may depend on the nature of the corporation (non-profit? media? multi-national?), the nature of the claimed right, and much more.

Moreover, even if the nominee testifies that he or she disapproves the doctrine, as a Justice the nominee may hold that the question is settled law. Or if a nominee says that he or she agrees with the doctrine, a new circumstance -- or a party making a new argument -- may lead the nominee to hold otherwise. Nothing a nominee says guarantees that he or she will decide any case any particular way. Nothing that is said has to be fixed in stone. Judges do give opinionated public speeches, do they not?

It may be wondered whether, in light of the above, any purpose is served by asking the nominee his views. The answer is yes. It's no secret that nothing a nominee says binds the nominee once he or she receives an office with life tenure. Nominees can't and shouldn't be bound. But especially with a nominee who has a limited public record, the hearings provide

some basis for gauging the nature and quality of his ideas, about his philosophy of due process for example. At any rate they have that potential -- if Senators do their job and do not accept a nominee's self-serving refusal to answer questions.

At the outset, it would behoove the Committee to establish the parameters the nominee will use in fashioning responses to your questions by asking:

> What criteria are you using to determine if you will directly answer or not answer questions posed to you by members of the Senate Judiciary Committee?
>
> If the Court has recently ruled on a matter, will you provide the Committee with your views on the Court's ruling?
>
> If a matter is long settled, will you provide the Committee with your views on the Court's ruling?

Once this baseline has been established, the following questions should shed light on nominee's approach to some major issues of our day.

1. Lloyd Cutler, speaking as a prominent corporate attorney, once said: "There is one point I want to make clear: we believe in the arguments that we make." Do you believe the arguments you have made on behalf of your corporate clients?

2. Do you believe limits on television station ownership abridge the free speech rights of *corporate* broadcasters?

3. What is your view of the First Amendment rights of the listeners being paramount to those of the broadcasters as articulated by the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1969)?

4. Do you see a problem when corporations are treated as equal participants, with every right to use their First Amendment rights to dominate public policy debates such as those that occur in state and local referenda?

5. Do you believe the Court should uphold state and Congressional limits on corporate political expression in order to equalize contributions to public debates?

6. Do you believe that a strict reading of the Constitution provides for the treatment of corporations as "persons" under the law for purposes of equal protection, freedom of speech or due process of law? And, if so, what in the Constitution's text provides a basis for this belief?

7. Many observers complain that law firms representing large corporations routinely abuse the

discovery process in order to delay and harass their opponents. Have you observed that phenomenon? If so, what should be done about it?

8. In 1986, in *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1 (1986) the Supreme Court (5 to 3) struck down a state regulation as violating a utility company's "right of conscience" under the First Amendment. What makes the case particularly unsettling is its disconnectedness to opinions past and future. As Justice Rehnquist observed in his lengthy dissenting opinion in the case, "the two constitutional liberties most closely analogous to the right to refrain from speaking - the Fifth Amendment right to remain silent and the constitutional right of privacy - have been denied to corporations based on their corporate status." Do you think it makes sense to attribute a right of conscience to a commercial corporation?

9. Would any trade agreement, such as GATT, NAFTA, or CAFTA ever require Senate ratification as a treaty?

10. Does the President have complete discretion to determine whether an international trade or other agreement must be submitted to the Senate for two-thirds treaty approval? If not, what are the criteria that determine when an international agreement must be submitted to the Senate for two-thirds treaty approval?

11. Are there limits on Congress' power to strip federal courts of jurisdiction over a particular issue? If so, what are such limits?

12. Do you believe victims of defective products that meet federal standards should be limited from recovering damages from the manufacturers of the defective products?

13. Do you believe Congress should federalize and pre-empt state products liability common law in any or all sectors?

14. Plaintiffs' trial lawyers have been blamed by their corporate critics for all sorts of problems with the economy and legal profession. Do you believe that those representing injured persons in product liability and medical malpractice cases are harming America?

15. So-called tort-reform is aimed at restricting the amount of non-economic damages, such as pain and suffering, a party can receive. Are you concerned that this interferes with the traditional role of juries and judges to find facts and mete out appropriate justice?

16. Do you believe the use of the government contractor defense should be limited in nonmilitary procurement? If so, how?

17. Some people say the Ninth Amendment can play no substantive role in protecting rights, that it's merely a statement of principle or reminder of limited government. Do you agree?

18. A number of legal scholars argue that the 11th Amendment has been interpreted by the Court

to shield states from liability for wrongdoing in a way that blatantly contravenes the original intention of the Amendment. Are you familiar with that scholarship and do you find it persuasive?

19. In what circumstances, if any, is it appropriate for a contractual arbitration clause to contract away substantive contract law, tort, or statutory rights? For instance, can an arbitration clause require arbitration of a worker's Title VII rights and at the same time limit the worker's compensatory damages to $200,000? Can that same clause require the loser to pay the winner's attorney's fees? Can that clause require that the parties to arbitration bear their own attorney's fees?

20. Describe the presumption against preemption of state law. Does it apply in some or all instances where federal law is said to preempt state law?

21. Is the presumption against preemption of state law (by federal law) similar to the plain statement rule that demands that Congress speak with unmistakable clarity if it wishes to override the states' sovereign immunity? If the presumption against preemption is not similar to the plain statement rule, explain how it is different?

22. How is the presumption against preemption applied in cases where federal regulatory law (regulating, for instance, drugs, boats, pesticides, motor vehicles, and the like) is said to preempt state tort law that provides monetary remedies to compensate for injuries caused by a product that the federal government regulates?

23. Do you believe Congress should pre-empt the state-law-based medical malpractice system?

24. What are your views on the "American rule" as opposed to the English rule under which the losing party in litigation generally pays the winner's costs, including attorney's fees?

25. What has been your reaction or views on Congressional funding levels for federally funded legal services programs over the last two decades? Should government be responsible for funding representation for poor people in civil litigation where important property or liberty interests are at stake? Or should that be mainly or entirely a private function?

26. Some scholars and judges believe that "Originalism" is the only principled method of constitutional interpretation. Do you agree?

27. Do you believe that a declaration of war by Congress is Constitutionally required for the United States to engage in war?

28. Does a Congressional delegation of the war-making discretion to the President in the form of a war resolution meet the test of Article One, Section Eight of the Constitution?

29. What level of equal protection scrutiny was applied in *Bush v. Gore, 531 U. S. 98 (2000)*?

30. What is the precedential effect of *Bush v. Gore*? In other words, what kinds of equal protection claims does *Bush v. Gore* control or apply to? After *Bush v. Gore*, may a political entity (city, county, state) holding an election use more than one type of voting methodology (paper ballots, standard machines, punch cards, etc.) knowing that the error rates (whether through undercounts or otherwise) are different from one methodology to another?

31. Is there a need to amend our open government laws to make the President subject to them in whole or in part? Would such amendments be constitutional?

32. Do you believe arguments before the Supreme Court should be televised in the way C-SPAN televises Congressional deliberations?

33. In your view, is the Freedom of Information Act functioning properly at this time? If not, what are the major problems facing the Act?

34. In *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U. S. 598 (2001)* case, the Court rejected the argument that a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change (the catalyst theory) in the defendant's conduct is entitled to attorney's fees. Does the rejection of the catalyst theory of fee recovery in the Supreme Court's *Buckhannon* decision apply across-the-board to federal fee-shifting statutes? If not, to what kinds of fee-shifting statutes is it likely to apply and to what kinds is its application more doubtful?

35. Brian Wolfman, Director of the Public Citizen Litigation Group notes, "The Bush administration says that *Buckhannon* applies to [Freedom of Information Act] FOIA cases, even though Congress stated explicitly, when it enacted FOIA, that fees should be available when FOIA cases settle. The Bush Justice Department has consistently argued to expand *Buckhannon* to every pro-consumer and civil rights statute in every conceivable situation." What approach (or approaches) to statutory construction of Congressional enactment was evident in the Supreme Court's *Buckhannon* decision? How would you describe the reliance on (or lack of reliance on) legislative history in the majority's reasoning in that case? Do you believe the Bush Justice Department is applying the *Buckhannon* decision correctly?

36. From both a legal (constitutional) and practical perspective, what is your view of the trend in the federal judiciary toward releasing more of its opinions in "unpublished" form, i.e., where the relevant court accords no precedential effect to the decision for other cases?

37. Should federal judges attend seminars which are funded by private corporations (or by foundations that are funded by such corporations) that have matters of interest to the corporations *before* the courts?

38. Do you believe a government attorney, in a subordinate position, should be forced (under penalty of discharge) to work on a case or argue a position that he or she believes is illegal,

unconstitutional or unethical? Or should government lawyers have a "right of conscience" like other professionals?

39. What kinds of participation in civic life may federal judges continue to be involved in once they assume their judicial positions?

40. How many hours or what percent of their work time do you think partners in major firms should devote to pro bono work each year?

41. How many hours on average did you bill per year as a partner and at what rates?

42. How many hours on average did you bill per year as an associate?

43. What was the nature of your pro bono work and approximately how much time per year did you devote to pro bono work?

44. Corporate attorneys and legal scholars have written books and articles decrying unethical or fraudulent billing practices in large corporate law firms. An article in the Summer 2001 Georgetown Journal of Legal Ethics titled *Gunderson Effect and Billable Mania: Trends in Overbilling and the Effect of New Wages* states that unethical billing practices are "a pervasive problem in law firms across the country" – do you agree?

45. Did you ever observe unethical billing practices when you were in private practice?

46. If so, what was the nature of and who were the protagonists of such practices?

I hope these questions, whether asked orally or submitted to the nominee in writing for response, spark a robust, constructive debate between the Committee members and the nominee. Such exchanges should provide the Senate and the larger public with insights into how Judge John G. Roberts will, if confirmed as Chief Justice, perform his duties.

Thank you.

George Nager
ATTORNEY AND COUNSELLOR AT LAW

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August 1, 2005

Senator Patrick Leahy
U.S. Senate
Washington, D.C. 20510

Senator Charles Schumer
U.S. Senate
Washington, D.C. 20510

Senator Hillary Clinton
U.S. Senate
Washington, D.C.20510

Dear Senators,

The recent disclosures of the writings and thoughts of Judge John Roberts concerning roles of the Judiciary, Executive and Legislative branches of government give me, and others and I am sure you all, grave misgivings. Today, in the current edition of The New York Times, there are two articles which add further deepening of concerns about the future of the Supreme Court, and indeed, the future of this, our Country. The reason I add this bit about The Times, is that the items of concern to me relate the question of Due process in the so-called "Tribunals" trials in Guantanamo; the front page of The Times reports that the chief prosecutors have filed reports that the process is already rigged. In short a charade is being practiced on us in this Country and the rest of the world. If the outcomes of the "tribunals" ever are likely to be subject to Court review, Judge Robert's opinion is already written, Do not question! And the second article concerned the Federalist Society. Reading the article, was almost like reading something about Opus Dei, it seemingly is that kind of institution. For me, it cannot be believed that Judge Roberts who was listed as a forming member of the Society, now seeks to dissemble any knowledge of the organization. His relationship with the Federalist Society bodes further ill to our constitutional form of government.

Although I believe you Senators share my concerns over this forthcoming appointment, I would share with you my thoughts of some of the questions that should be posed to Judge Roberts. I am positive that you all have probing questions to be asked, but I offer a couple that I would like propound.

Reading Judge Roberts views, it struck me that the man is a throwback to the time of the Divine Right of Kings. His views of the powers the executive branch are the same as uttered way back when, say when Edmond Burke took issue with the French Revolution. The King can do no wrong. Judge Roberts' view is that we must all truckle before the throne of the Executive, with no right of review of nay-saying. It would seem that in the education of Judge Roberts he somehow overlooks the Parliamentary revolt against such Divine Right led by one Oliver Cromwell. Judge Roberts' views of the power of the Executive to do away with fundamental rights of checks and balances of our Constitution is an infirmity of views which if left unchallenged, unchecked, would dissolve the Constitution.

He must and should be questioned as to where he gets the supremacy doctrine he so closely clings to, and why indeed, can he continue to hold such views given the Constitution of the United States. I would ask him if in the course of his education at Harvard, or anywhere he ever came across the writings of one Thomas Paine, perhaps the "Rights of Man", and his views on that tract. His answers might be illuminating, if he answers honestly. Which, quite frankly, I believe he will not, or will not indeed answer at all. And yet, such questions go to the very heart of our Constitutional liberties, and our Constitutional form of government of three equal, separate branches of Government. I do not believe he believes in this form of government, nor will he accept it, if appointed to the Supreme Court of the United States.

Very truly yours,

George Nager

GN/mm

Reading

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July 29, 2005

The Honorable Arlen Spector
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senaor Spector,

I am very impressed with Judge John G. Roberts, President Bush's nominee to the Supreme Court and I ask you to recommend his confirmation. This is an opportunity to place on the Court a man with a stellar educational and professional record who has already argued 39 cases before the Supreme Court. He was voted to the DC Circuit Court in 2003 by a **unanimous** Senate vote, and he has received the Edmund J. Randolph award from his peers. Please confirm Mr. Roberts without delay.

Additionally, I would ask any Senator who requests Judge Roberts to disclose how he would vote on any issue to read 'The Proper Scope of Questioning for Judicial Nominees' from the Republican Policy Committee (click on the link below).
http://rpc.senate.gov/_files/July2605QuesJudgesSD.pdf

Sincerely,

Jeanette Nathanson

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15th Street, NW · SUITE 950 · WASHINGTON, DC 20005
(202) 463-2940 FAX (202) 463-2953

August 15, 2005

Members
United States Senate
Washington, DC 20515

**RE: STRONG CONCERNS OVER JOHN ROBERTS' NOMINATION TO THE U.S. SUPREME COURT**

Dear Senator;

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I am writing to urge you to vigorously investigate crucial and disturbing concerns that have arisen during our investigation into the past works of Judge John Roberts regarding his beliefs towards basic civil rights issues including racial and gender discrimination, education equity, voting rights and affirmative action. If these concerns are not resolved completely and to our satisfaction, his nomination must be opposed.

Specifically, the NAACP is concerned about the following incidents in Judge Roberts' career that have come to light since Judge Roberts' nomination was announced:

- In the area of **Remedies in School Desegregation Cases:** As Assistant White House Counsel, Roberts argued with Assistant Attorney General Ted Olson about whether Congress could enact a law prohibiting federal courts from using busing to remedy school segregation. Olson believed Congress could not outlaw busing because the Supreme Court had held that busing was constitutionally required in some settings. Roberts admitted to spending several months in his work at the Justice Department "disputing Ted Olson's approach to these issues." Roberts concluded that it was within Congress's authority to prohibit federal courts from ordering busing for the purpose on racial intergration.

- In the area of **Court-Stripping**: Roberts strongly supported stripping the Supreme Court of its authority over classes of cases such as busing, school prayer and abortion. Justice Department documents at the time identified Robert Bork as viewing such restrictions as "probably unconstitutional."

- In the area of **Race Discrimination in Employment:** As Special Assistant in the Justice Department, Roberts lectured the staunchly conservative Assistant Attorney General for Civil Rights, William Bradford Reynolds, for too broadly interpreting fair employment laws regarding proof of discrimination and remedies for discrimination. In commenting on two employment discrimination cases against public employers in Georgia, Roberts wrote that settlement language

proposed by the Civil Rights Division did not "accurately reflect the requirements of Title VII or even what can reasonably be demanded of the defendants in a consent decree."

- In the area of **Gender Discrimination in Education:** Roberts again disagreed with Civil Rights Chief William Bradford Reynolds when Reynolds sought to intervene in a lawsuit challenging disparities in vocational training programs for male and female prisoners. Roberts argued against intervention, on the grounds that equalizing the treatment would cost too much, intervention was inconsistent with efforts to promote judicial restraint, and private plaintiffs were already bringing suit. The Civil Rights Division ended up intervening and winning the case.

- IN THE AREA OF **EDUCATION FOR UNDOCUMENTED IMMIGRANT CHILDREN**: ROBERTS CRITICIZED SOLICITOR GENERAL REX LEE FOR FAILING TO SUPPORT A TEXAS STATUTE ALLOWING SCHOOL DISTRICTS TO DENY ENROLLMENT TO CHILDREN NOT LEGALLY ADMITTED TO THE UNITED STATES. HE BELIEVED A SOLICITOR GENERAL'S BRIEF "SUPPORTING THE STATE OF TEXAS AND THE VALUES OF JUDICIAL RESTRAINT" COULD HAVE ALTERED THE OUTCOME IN *PLYLER V. DOE*.

- In the area of **Enforcement of Statutory Rights:** Roberts disagreed with his Justice Department colleagues' broad interpretation of a Supreme Court decision defining the scope of a civil rights law that enables federal statutory rights to be enforced. Roberts believed his colleagues' discussion of legislation to change this civil rights law assumed that *Maine v. Thiboutot* extended coverage of the law to "all statutory rights." Roberts noted that two Supreme Court cases (decided while he clerked for Justice William Rehnquist) "call [that interpretation] into question." He discussed ways "to undo the damage created by *Thiboutot*." He proposed recognizing the limits suggested by the other cases and recommended that legislative changes to the civil rights law be cast as "efforts to 'clarify' rather than 'overturn' that decision."

- In the area of **Affirmative Action:** As Special Assistant, Roberts worked to bring the Labor Department "into line with our views" promoting "color blindness in employment decisions." He found Labor's policy to be at odds with the Justice Department because it required "employers who contract with the government to engage in race and sex conscious affirmative action as a condition of doing business with the government." Roberts wrote: "Under our view of the law it is not enough to say that blacks and women have been historically discriminated against as groups and are therefore entitled to special preferences."

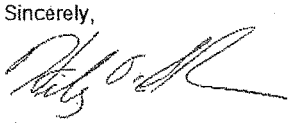
- In the area of **Voting Rights:** As Special Assistant, Roberts was a principal architect of the opposition to an "effects" test under the Voting Rights Act. However, the House of Representatives had voted for the effects test, by an overwhelming margin of 389 to 24, even before Roberts embarked on the campaign. The Senate, by 85-8, then approved a compromise bill essentially preserving the effects test. Even Strom Thurmond supported the bill.

- In the area of a **Ban on Discrimination by Federally-Funded Institutions**: While at the Justice Department, Roberts fought to restrict application of federal laws banning institutions that receive federal funds from discriminating. Roberts sought to narrow the law such that only specific programs receiving federal funds – instead of the entire institution – had to comply with civil rights laws. Congress later disagreed with Roberts by voting for broad application of the discrimination provisions. The Senate vote was 73 to 24; the House vote was 292 to 133.

As I said earlier, these issues are of a major concern to the membership of the NAACP and as such we urge you to review them as thoroughly as possible. In the event that any of the subjects are not completely resolved to our satisfaction, we will have to oppose the nomination and we will urge you to do the same.

Thank you in advance for your attention to the concerns of the NAACP. Should you have any questions or comments, I hope that you will not hesitate to contact me at (202) 463-2940.

Sincerely,



Hilary O. Shelton
Director

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August 31, 2005

**NAACP Opposes Nomination of Judge Roberts to Supreme Court**

Senate should demand direct and complete responses from Roberts

Washington, DC – The National Association for the Advancement of Colored People (NAACP) today announced its opposition to the nomination of Judge John Roberts to a seat on the U.S. Supreme Court.

Bruce S. Gordon, President & CEO, NAACP, said that after a thorough review of the records made available on Roberts, "the NAACP believes Roberts would work to undo the hard earned progress in the area of equal opportunity in the workplace and the marketplace."

Speaking at a press conference in the U.S. Capitol, Gordon said: "I am here today representing our 2200 membership units operating in every state in the nation and I'm speaking on behalf of the thousands of card carrying members in opposition to the nomination of Roberts to the Supreme Court."

Gordon was joined at the press conference by representatives of four other civil rights groups that oppose Roberts; Marcia Greenberger, Co-President, National Women's Law Center; Theodore M. Shaw, Director-Counsel and President, NAACP Legal Defense and Educational Fund (LDF); Ann Marie Tallman, President, Mexican American Legal Defense Fund (MALDEF) and Debra Ness, President, National Partnership for Women & Families.

"We have concluded that nominee Roberts' position on civil rights, voting rights and equal employment are opposite those of the NAACP," said Gordon. "While it comes as no surprise that the nominee's views are different than ours, it is the seemingly extreme nature of those views, the degree of difference, that make his candidacy unacceptable. Roberts has demonstrated a commitment to reversing the historic civil rights gains of the past 40 years."

Roberts criticized the U.S. Civil Rights Commission statement on affirmative action for giving "no

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recognition of the obvious reason for failure: the program required the recruiting of inadequately prepared candidates."

Gordon, who retired in 2003 as President, Retail Markets Group for Verizon, said: "As a person whose career in corporate America began during the early days of affirmative action, I take obvious exception to that statement. Neither I nor countless others like me considered ourselves as `inadequately prepared.' Affirmative action was not the reason for my success, it was the reason I got the chance to succeed."
Roberts argued against affirmative action while in the Office of the Solicitor General and in private practice. In two cases, Adarand Constructors v. Minetta, he argued that equal opportunity programs were not supported by evidence of past discrimination. In Metro Broadcasting v. FCC, he argued that the FCC's policies promoting minority ownership of radio and television stations denied equal protection.

Gordon said civil rights activists "put their lives at risk to deliver the right to vote to all Americans and the result was the Voting Rights Act of 1965." After a Supreme Court decision in The City of Mobile v. Bolden potentially weakened the Act, Congress voted to extend it. Gordon said: "Judge Roberts opposed the congressional action, and with the Voting Rights Act up for reauthorization in 2007, "there is little reason to believe that as a Supreme Court Justice he would defend the right of all people to vote if the Supreme Court is called upon to weigh in."

During five years with the Reagan Administration," Gordon said Roberts argued in support of misguided and harmful positions, often placing himself to the political right of staunch conservatives such as Assistant Attorney General for Civil Rights William Bradford Reynolds, Assistant Attorney General Ted Olson, Solicitor General Rex Lee and even one-time Supreme Court nominee Robert Bork."

Gordon said the Senate "must question the nominee and demand direct and complete responses. Today's announcement is an attempt to assure a confirmation process that serves the best interest of all Americans."

The NAACP has recommended that the White House confer with organizations and individuals that represent a broader and more diverse vision of the American People and nominate someone who has the judicial temperament and established commitment to protect the rights of all Americans regardless of race, gender, national origin, religion or sexual orientation.

Founded in 1909, the NAACP is the nation's oldest

and largest civil rights organization. Its half-million adult and youth members throughout the United States and the world are the premier advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors.

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CONTACT: NAACP Office of Communications
410.580.5125

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**August 31, 2005**

**NAACP Legal Defense Fund Opposes Roberts Nomination**

**Report Details Role in Weakening Voting, Other Civil Rights**

(Washington, DC) Today, the NAACP Legal Defense and Educational Fund, Inc. (LDF) formally announced opposition to John G. Roberts, Jr.'s nomination to the U. S. Supreme Court. At a press conference in Washington, D.C., LDF released a report detailing what it called Roberts' "consistent and active advocacy" for weakening federal enforcement of voting rights, affirmative action, school desegregation, fair housing, and other civil rights protections.

With the announcement of Justice Sandra Day O'Connor's retirement, LDF Director-Counsel and President Theodore M. Shaw called upon President Bush to nominate a successor who "is not ideologically rigid and predictable, but who is fair and open-minded, and committed to protecting the advances in civil rights that we as a nation have achieved."

Two months later, following LDF's analysis of thousands of documents from the National Archives and the Ronald Reagan Presidential Library, Shaw expressed regret that Roberts appears not to meet this standard.

LDF's research has revealed that Roberts has a strong and consistent record of advocating regressive positions on matters of civil rights, sometimes to the extreme. Roberts played a key role at the Justice Department at a time of severe retrenchment on civil rights. While many of his available records are from his early legal career, his views in opposition to civil rights laws were strongly held over a long period, and we have no evidence that he has changed his views.

Shaw said that if the known views of Roberts were enshrined in Supreme Court decisions:

- Federal courts would have been stripped of jurisdiction to order remedies in cases that employed student transportation in school desegregation cases. The Supreme Court's 1971 decision, Swann v. Charlotte-Mecklenburg Board of Education, sanctioning the use of busing as a remedy would have been overruled and school desegregation would have been virtually impossible.

- Federal Court habeas corpus review of state court criminal convictions would have been abolished. This would have meant that claims of racial discrimination in jury selection, such as that upheld by the Supreme Court in Miller-El v. Cockrell, would not have been heard. In fact, regardless of the merits, federal courts would never be able to review the constitutionality of a state court decision in a criminal conviction, including a sentence of death.

- The Voting Rights Act's application to electoral schemes that have the effect of diluting minority voting strength would have been barred, even in the face of racially polarized voting. In other words,

jurisdictions could maintain at-large schemes that prevent minority representation.

- The Fair Housing Act's long established "effects test," which bans practices and procedures that have the effect of discriminating in the sale or rental of housing, would have been eliminated.

- The rule that prohibits colleges, universities and other institutions that receive federal funding from discriminating on the basis of race, national origin, gender, or handicap would have been narrowed to apply only to the departments or units that receive the aid.

The report maintains that over the course of the nominee's career, Roberts has advanced positions that would significantly hamper the ability of individuals to enforce federal statutory rights. "This is an important component of John Roberts' overall record on civil rights, as the ability to ensure protections afforded by federal laws relating to Medicaid, public housing and other social safeguards is of paramount concern to low-income communities," the report warns.

Contrary to claims by some Roberts' supporters, the report found no indication in his subsequent private practice that Roberts' strong critiques of race-conscious affirmative action programs have changed since his days in the Reagan Justice Department. It also found no evidence that he has repudiated his earlier views supporting a narrow construction of federal civil rights laws.

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**NAM National Association of Manufacturers**

*John Engler*
*President and CEO*

August 10, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter:

I am pleased to inform you of the National Association of Manufacturers' endorsement of Judge John G. Roberts' nomination to the United States Supreme Court. The NAM appreciates your commitment to conducting a fair and thorough review of Judge Roberts' qualifications. We are confident that your leadership will provide a timely confirmation vote for Judge Roberts, allowing him to be seated when the Court term begins on October 3, 2005.

The NAM established a Judicial Review Committee to take a critical look at Judge Roberts' legal history. We will also conduct this exercise with future nominees. Our examination of Judge Roberts' record has determined him as fully qualified to serve as a Justice who will interpret the law as written, not an activist who will legislate from the bench.

Business and manufacturing need a legal system that is fair and predictable. The vast majority of cases before the federal courts relate to business issues such as contract law, employment law, regulatory issues, and property rights. Judge Roberts' background both as a litigator and jurist at the federal level will assist the Court in identifying business-related cases that are of national importance. The perspective Judge Roberts brings to deliberations in such cases will provide an understanding of the practical ramifications of these rulings.

Judge John G. Roberts is a well qualified nominee who will make an outstanding addition to the Supreme Court. Please help to ensure a prompt up or down vote so Judge Roberts may assume his duties by the first Monday in October.

Sincerely,

John Engler

JE/jn
cc: Members of the Committee on the Judiciary

**Position Statement of the National Association of Social Workers (NASW) Regarding the Confirmation of Judge John G. Roberts to the United States Supreme Court**

**Introduction**

The National Association of Social Workers, Inc. ("NASW"), a nonprofit professional association with over 150,000 members, is the largest membership association of social workers in the world. NASW works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies.

NASW opposes the nomination of Judge John G. Roberts to the United States Supreme Court. Furthermore, NASW joins other prominent organizations in calling for a thorough and deliberative confirmation process where Judge Roberts can demonstrate his commitment to constitutional protections for women's health and reproductive rights and to the significant progress that has been made in civil rights and liberties.

**Diversity**

NASW "supports the appointment of judges who reflect more accurately the demographic diversity of the United States, particularly in regard to people of color and women."[1] The appointment of Judge Roberts does not serve that goal and the appointment reflects a backward step in achieving diversity among the Justices. According to the Census 2000, 50.9 percent of the population of the United States is female, and women outnumber men

[1] National Association of Social Workers, *Civil Liberties and Justice*, *in* Social Work Speaks: National Association of Social Workers Policy Statements 37, 43 (Paula L. Delo et al. eds., 6th ed. 2003)[hereinafter *Civil Liberties and Justice*].

by 5.3 million.[2] With the retirement of Justice Sandra Day O'Connor, the percentage of women on the country's highest court will fall to 11 percent, a number far below the national average. In fact, Justice O'Connor, in a statement to the Associated Press on Wednesday, July 20, 2005, acknowledged that she was disappointed "to see the percentage of women on our court drop by fifty percent."[3] This reduction in the representation of women on the United States Supreme Court is especially relevant considering that, according to the American Bar Association, 48 percent of law school students last year were women.[4]

Since Justice O'Connor was nominated to the Supreme Court in 1981, becoming the first woman on the Court, the opportunities for women in the legal profession have changed dramatically. In 1981, approximately 7 percent of federal judges were women, whereas, today, 32.3 percent of federal judges are women. Furthermore, 16 percent of law firm partners, today, are women.[5] The failure of President Bush to nominate a woman to the Supreme Court undermines the significant progress that the legal profession has made in the last quarter century and does not reflect the demographic diversity of the United States.

**Choice**

The *NASW Code of Ethics*[6] states that "social workers promote clients' socially responsible self-determination."[7] Thus, in its *Policy Statement on Family Planning and Reproductive Choice*,[8] NASW encourages the recognition and protection of an individual's "unimpeded access to family planning and reproductive health services, including abortion

[2] U.S. Census Bureau, *Census 2000 Summary File 1* (2000).
[3] *O'Connor: Roberts is 'First Rate'*, CBS News, July 20, 2005, *available at* http://www.cbsnews.com/stories/2005/07/20/politics/printable710487.shtml.
[4] Adam Liptak, *O'Connor Leap Moved Women Up the Bench*, N.Y. Times, July 5, 2005, at A1.
[5] *Id.*
[6] National Association of Social Workers, *Code of Ethics of the National Association of Social Workers* (1996)[hereinafter *Code of Ethics*].
[7] *Id.* at 5.

services, [as] a fundamental human right that contributes to the advancement of women worldwide."[9] The nomination of Judge Roberts raises serious concerns for women's health and safety. In *Rust v. Sullivan*,[10] Roberts argued in a brief before the Supreme Court that *Roe v. Wade* "was wrongly decided and should be overruled . . . [T]he Court's conclusion in *Roe* that there is a fundamental right to an abortion . . . finds no support in the text, structure, or history of the Constitution."[11] Furthermore, in *Bray v. Alexandria Women's Health Clinic*,[12] Roberts intervened as amicus curiae for the United States, arguing that although only women can become pregnant, the behavior of anti-choice protestors at an abortion clinic did not constitute gender discrimination.[13] Roberts argued that the protestors were not conspiring to deprive women of equal protection. He contended that the protestors interfered with women's access to the abortion clinic "not because of who they are, but because of what they are doing,"[14] despite the admission of the protestors that their purpose was to "'depriv[e]' women of their ability to obtain the clinics' services."[15] Thus, the positions of Roberts, in these cases, raise serious concern for NASW about Judge Roberts's commitment to women's constitutionally based privacy rights.

**Civil Rights**

The *NASW Code of Ethics*[16] establishes an affirmative obligation for social workers "to prevent and eliminate discrimination, . . . to expand choice and opportunity for all people, . . . [and to] advocate changes in policy and legislation to improve social conditions and to promote

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[8] National Association of Social Workers, *Family Planning and Reproductive Choice*, *in* Social Work Speaks: National Association of Social Workers Policy Statements 124 (Paula L. Delo et al. eds., 6th ed. 2003).
[9] *Id.* at 127 (citing United Nations Commission for Human Rights (1979)).
[10] 500 U.S. 173 (1991).
[11] Brief for the Respondent at 13, Rust v. Sullivan, 500 U.S. 173 (1991)(Nos. 89-1391, 89-1392).
[12] 506 U.S. 263 (1993).
[13] Transcript of Oral Reargument of John Roberts, Jr., dated Oct. 6, 1992, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)(No. 90-985).
[14] *Id.* at 12.
[15] *Bray*, 506 U.S. at 346 (O'Connor, J. dissenting)(citing Nat'l Org. for Women v. Operation Rescue, 726 F.Supp. 1483, 1488 (Va. 1989)).
[16] *Code of Ethics*, *supra* note 6.

social justice."[17] As such, NASW opposes any executive order, legislation, or judicial decision that diminishes the gains in civil liberties and social justice obtained by the civil rights movements of the 1950s and 1960s. In its *Policy Statement on Civil Liberties and Justice*,[18] NASW (1) encourages the protection of the rights of criminal defendants,[19] (2) supports "the *full* implementation of existing civil rights legislation and its application,"[20] and (3) supports the preservation of the constitutional right to privacy.[21] The nomination of Judge Roberts raises concerns for NASW about his commitment to the advances made in civil liberties in the past half-century.

A number of arguments posited by Roberts, in various cases, "have undermined the preservation of individual liberties and set back long-standing societal efforts to broaden the application of social justice principles."[22] First, in *Denton v. Hernandez*, Roberts argued, as *amicus curiae* for the United States, that the Supreme Court should limit the rights of prisoners or criminal defendants.[23] Furthermore, Roberts authored the government's Supreme Court brief in *Burns v. United States*,[24] arguing that, absent an express requirement, a court may depart upward from the sentencing range established by the Sentencing Guidelines without first notifying the parties that it intends to depart.[25] Second, in two separate cases, Roberts co-authored *amicus* briefs for the United States, arguing for court supervision to be lifted in school desegregation cases. In *Board of Education of Oklahoma Public School v. Dowell*,[26] Roberts argued that despite the elimination of busing in elementary schools, thereby returning a number

[17] *Id.* at 5.
[18] *Civil Liberties and Justice*, *supra* note 1.
[19] *Id.* at 42.
[20] *Id.* at 44.
[21] *Id.*
[22] *Id.* at 37.
[23] 504 U.S. 25 (1992).
[24] 501 U.S. 129 (1991).
[25] *Id.* at 131.

of schools to one-race status, Oklahoma City schools could not be subjected to a desegregation decree after being declared "unitary."[27] Likewise, in *Freeman v. Pitts*,[28] Roberts argued, as *amicus curiae*, that a school system whose racial makeup had changed due to demographic shifts in residential patterns unrelated to prior discrimination could not be required to eliminate the racial imbalance in its schools.[29] Third, Roberts's positions in *Rust* and *Bray*,[30] raise serious concerns over his commitment to the constitutional right to privacy.

Although Judge Roberts has stated that he has no recollection of ever being a member of the Federalist Society, he is listed on the Federalist Society Lawyers' Division Leadership Directory for 1997-1998 as a member of the steering committee of that organization's Washington chapter.[31] While Roberts may join that association as it is his right, we question why he would then try to distance himself from the conservative group, whose members and leaders include Supreme Court Justices Antonin Scalia and Clarence Thomas. His denial of membership may suggest a character issue that should be explored at hearings while confirming Roberts's general legal views in areas such as civil rights and the right to choose. NASW calls for a thorough confirmation process that includes questions concerning Roberts's commitment to the Constitutional right to privacy and civil rights legislation.

**Conclusion**

In conclusion, because of NASW's support for the appointment of judges who more accurately reflect the demographic diversity of the United States, as well as NASW's concern for Judge Roberts's commitment to the Constitutional right of privacy and the significant advances

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[26] 498 U.S. 237 (1990).
[27] *Id.* at 251-52.
[28] 503 U.S. 467 (1992).
[29] *Id.*; *see also* Alliance for Justice, *Report of the Alliance for Justice: Opposition to the Confirmation of John G. Roberts to the U.S. Court of Appeals for the D.C. Circuit, at* http://www.independentjudiciary.com/resources/docs/John_Roberts_Report.pdf.
[30] *See supra* text accompanying notes 9-15.

made in civil rights and liberties over the past half-century, NASW is opposed to the nomination of Judge John G. Roberts to the Supreme Court of the United States. NASW calls for a thorough and deliberative confirmation process where Judge Roberts can demonstrate his commitment to the aforementioned issues.

[31] Charles Lane, *Roberts Listed in Federalist Society '97-98 Directory*, Wash. Post, July 35, 2005, at AO1.

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September 1, 2005

**Via Facsimile**

Senator Arlen Specter and Members of the Senate Judiciary Committee
United States Senate
Washington, DC 20510

**Re: Hearings on Nomination of Judge John G. Roberts, Jr., for Associate Justice of the United States Supreme Court**

Dear Senator Specter and Members of the Senate Judiciary Committee:

The National Association of Women Lawyers ("NAWL"), Committee for the Evaluation of Supreme Court Nominees, respectfully submits questions (enclosed), which it urges the Committee to ask Judge John G. Roberts, Jr. in the public hearings on Judge Roberts's nomination for the position of Associate Justice of the United States Supreme Court. This list follows an initial review of Judge Roberts's writings and public statements (see attached NAWL Statement of August 30, 2005).

Very truly yours,

Stephanie Scharf

Stephanie A. Scharf, Chair
Committee for Evaluation of Supreme Court Nominees

SAS:kp
Enclosures

cc: The White House
Judge John G. Roberts, Jr.

National Association of Women Lawyers®
September 1, 2005

**Proposed Questions For Judge John G. Roberts, Jr.**
**Nominee For Associate Justice, United States Supreme Court**

**Fundamental Rights**

1. Your opinion in *Tracey v. Hedgepeth* (386 F.3d 1148) (2004) refers to a fundamental right as one that is "'deeply rooted in this Nation's history and tradition,'" (*quoting Washington v. Glucksberg,* 521 U.S. 702(1997)). Does this represent your judicial view?

2. Do you favor an approach to constitutional interpretation that allows for the existence of some fundamental rights (whether it be through the 14th amendment due process or liberty clauses; the 9th amendment; the penumbras; history/tradition; universal principles or some other approach) i.e., is there some methodology that leaves open the possibility of constitutionally-protected rights that may not be closely tied to specific textual phrases in the Constitution?

   If so, how are such fundamental rights ascertained and are they absolute or balanced against legislative encroachments?

3. We suggest a series of questions regarding nine cases (listed below) that had a substantial impact on women's rights, all of which were decided by the U.S. Supreme Court. Questioning for each of the cases:

   - With which opinion would you have been most closely allied if you had been sitting on the U. S. Supreme Court at the time it was decided? Please explain why you would have most closely allied with that opinion.

   - Alternative question: how would you have decided this case if you had been sitting on the Supreme Court at the time it was decided? Please explain why.

The nine cases are:

*Gonzales v. Castle Rock, Colorado* (2005) (deciding there is no property interest under Due Process Clause in enforcement of domestic violence civil protection order).

*Jackson v. Birmingham Board of Education* (2005) (deciding that Title IX included protection from retaliation for a third party reporting violation).

*Stenberg v. Carhart* (2000) (deciding that a statute criminalizing the performance of partial birth abortion violates the Constitution because it lacks the requisite exception for preservation of the health of the mother).

*Davis v. Monroe County Board of Education* (1999) (deciding that Title IX protects students from sexual harassment by other students).

*U.S. v. Virginia* (1996) (deciding that it is improper under the Equal Protection Clause to exclude all women from citizen-soldier training at a state-run university).

*J.E.B. v. Alabama ex rel. T.B,* (1994) (deciding that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender).

*Bray v. Alexandria Women's Health Clinic* (1993) (deciding there is no federal cause of action against persons obstructing access to abortion clinics).

*Planned Parenthood v. Casey* (1992) (deciding that principles of institutional integrity and the rule of *stare decisis* require that *Roe v. Wade*'s essential holding be retained).

*Mississippi University for Women v. Hogan* (1982) (deciding that the single-sex admissions policy of a state-supported professional school violates the Equal Protection Clause).

**Strict Scrutiny**

4. An article that appeared in the American Bar Association Journal (68 ABA Journal 59, Jan. 1982) under the name of William French Smith has been attributed to you. The article has been quoted as stating, "Classifications based on race are suspect and do merit careful scrutiny, in light of the historic purpose of the Fourteen Amendment. Extension of heightened scrutiny to other 'insular and discrete' groups, however, represents an unjustified intrusion into legislative affairs."

   - Did you have any role in drafting this article in whole or in part?
   - Does the statement represent your current judicial view?
   - Are there any justifications for going beyond the specific race-based purposes of the post-Civil War amendments to provide for any heightened scrutiny for gender-based classifications?

**Congressional Authority**

5. The following 1999 quote has been attributed to you: "We have gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law, whether it is VAWA or anything else. The fact of the matter is: conditions are different in different states and state laws can be more relevant."

   - Do you acknowledge the accuracy of this quotation?
   - If not, what was the actual statement made by you?

6. You supported Congress' attempt to pass legislation prohibiting busing as a remedy, yet you did not approve of VAWA as an appropriate remedy to assist states in addressing issues of domestic violence. How do you reconcile your support of Congress' authority to address appropriate remedies in the one instance yet consider VAWA to have been a misuse of Congress' authority to address appropriate remedies?

7. Do you favor Congress' passing legislation to enact remedies for long standing social inequities when the states have failed to address the issues by implementing effective remedies despite adequate time to do so?

8. How would you describe your views on the following: statutory interpretation, strict reading of language and carrying out legislative purpose?

9. To what extent does Congress have the power to legislate in areas in which women have historically been discriminated against?

10. When, in your view, is cost a legitimate basis for continuing discrimination?

11. Does Congress, in your view, have responsibility for enforcing guarantees of due process and equal protection?

12. Should courts defer to legislative efforts to enforce the guarantees referred to in 11?

13. How would you describe your views on the need (if any) for deference to the legislature?

**Stare Decisis**

14. What value do you place in the principles of stare decisis?

15. When is it appropriate, in your view, for a court to reverse a long standing precedent?

16. Some years ago, you wrote an article expressing "extreme doubt" on right to privacy. Is that still your view given that there is precedent establishing right to privacy?

**Women in Law**

17. During your years as a practicing lawyer did you observe discrimination against women in your private practice or in the government? If so, what actions did you take to stop it?

18. Since your judicial appointment:

    - How many women have you interviewed for the position of judicial law clerk?

    - We understand that you have hired only one female law clerk in three classes of clerks. Why have you hired so few female law clerks?

FOR IMMEDIATE RELEASE
August 25, 2005

**Contact**:
**Kate Kendell**, Executive Director 415.595.2233 kendell@nclrights.org

**NCLR, THE TASK FORCE, HRC AND PFLAG ANNOUNCE OPPOSITION TO ROBERTS NOMINATION**

(Washington, August 25, 2005) The National Center for Lesbian Rights, Human Rights Campaign, National Gay and Lesbian Task Force, and Parents, Families and Friends of Lesbians and Gays put out a united statement today to announce opposition to the nomination of John G. Roberts to the Supreme Court.

"Judge Roberts has such a narrow view of what the courts can and should do, it's a wonder he wants the job at all," said Joe Solmonese, president of the Human Rights Campaign. "Ultimately, this is about an individual's right to privacy. From women's rights to religious freedom to civil rights, there is powerful evidence that Judge Roberts would rule against equality."

"For his entire adult life, John Roberts has been a disciple of and promoted a political and legal ideology that is antithetical to an America that embraces all, including lesbian, gay, bisexual and transgender people," said Matt Foreman, executive director of the National Gay and Lesbian Task Force. "He has denigrated the nature and scope of the constitutional rights to privacy, equal protection and due process as well as federal government's role in confronting injustice. I have no doubt he's an accomplished lawyer and an affable dinner companion, but that doesn't make him any less a mortal danger to equal rights for gay people, reproductive freedom and affirmation action."

"There is nothing in Roberts' history as a lawyer, policymaker or judge to indicate that he would be anything other than hostile to the claims of those seeking to preserve affirmative action, reproductive freedom and fundamental rights, or for those seeking to ensure that the emerging protections expressed in Romer v. Evans and Lawrence v. Texas become truly meaningful in the lives of lesbian, gay, bisexual and transgender Americans," said Kate Kendell, executive director of the National Center for Lesbian Rights.

"The stakes for gay, lesbian, bisexual and transgender Americans are too high," said Jody Huckaby, executive director of Parents, Families and Friends of Lesbians and Gays. "We cannot sit back and allow a man with a demonstrated record of hostility towards privacy and minority rights to make decisions on our nation's highest court that will affect this nation for generations to come. After a thorough review of the selective documents released by the White House, PFLAG is convinced that nominee John Roberts should not be trusted to protect the fundamental rights and freedoms of all Americans."

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**Joint Statement of Human Rights Campaign, National Gay and Lesbian Task Force, National Center for Lesbian Rights, and Parents Families and Friends of Lesbians and Gays in Opposition to Nomination of John G. Roberts, Jr. to the United States Supreme Court**

As organizations working to advance civil rights for lesbian, gay, bisexual and transgender ("LGBT") people, we work in varied spheres - in Congress, in the courts, before our state legislatures, and within our families. In the realm of civil rights, we know of no more significant event than the appointment of a Supreme Court justice. Together, because of our shared commitment to LGBT rights, we announce our opposition to the nomination of John G. Roberts, Jr. to the Supreme Court of the United States.

History has shown us that the Supreme Court is a bulwark of protection for minorities from the tyranny of sometimes misguided majorities. That was true in 2003 when the court ruled that mere disapproval was not a rational reason to brand us as criminals, just as it was true in 1968 when the court struck down bans on interracial marriage - although 72% of Americans disagreed. Since President Bush nominated John Roberts on July 19, disturbing evidence has emerged about the kind of justice that he would be. His writings as a lawyer, his rulings as a judge, and his statements as a policymaker all lead us to the unfortunate conclusion that Judge Roberts would not vote to protect our civil rights from those who are, at this moment, fighting so hard to take them away. Instead, his record indicates that Judge Roberts would vote to roll back the constitutional protections upon which our community - and all Americans - rely.

**The impediments to the Senate's thorough review of Roberts' record.** We are particularly troubled that the Senate has had no access to relevant documents relating to Judge Roberts' service as principal deputy solicitor general from 1989 to 1993. These documents include Roberts' writings about cases involving voting rights, choice, the separation of church and state, and many other subjects of critical importance. The Senate's constitutional duty of "advice and consent" depends upon full disclosure of the nominee's record - something that the American people deserve, especially in light of the troubling record revealed thus far. The administration's claim that these documents are shielded by attorney-client privilege is without basis. The American people, not the White House, were Roberts' true client when he was in the Solicitor General's office.

Although our groups, the Senate, and the American people have been denied full access to Roberts' record, the evidence before us is sufficient to lead to the following conclusions:

**Roberts and fundamental rights.** Just two years ago, the court finally recognized that the constitutional guarantee of liberty protects our community and our relationships. The basis for the landmark case of Lawrence v. Texas was the idea that the Constitution draws a line beyond which the government cannot go. Roberts' writings clearly

indicate that he does not agree with the cases and constitutional foundations of Lawrence. He has criticized the court for what he claims is an intrusion into areas belonging to legislatures and dismissed what he calls the "so-called right to privacy." His record indicates that Roberts would not vote to safeguard our liberties, but instead join Justices Scalia and Thomas in upholding limitations on our freedoms.

**Roberts and equal protection.** Roberts has taken a similarly narrow view of the Equal Protection Clause, which provided the basis for its decision in Romer v. Evans. As a Reagan administration lawyer, Roberts wrote that by reading the Equal Protection Clause to cover classifications other than race, the court had imposed "values which do not have their source in that document." We are concerned that his narrow view would likely have led Roberts, had he been on the court when Romer v. Evans was decided, to conclude that Colorado's discriminatory law was constitutional.

**A note on Roberts and *Romer v. Evans*.** We are mindful that Judge Roberts provided a few hours of pro bono help to the attorneys in Romer v. Evans - a landmark case for our community. Some have said that this work - which consisted mostly of playing the role of a conservative justice - demonstrates that Roberts is not personally anti-gay. This theory is not relevant to the important issue for our community: how Roberts would vote as a Supreme Court justice. Roberts has repeatedly written that the court should not stand up for civil rights, but rather allow legislatures to enact such laws as they wish - even those that deny the rights that Americans understand to be fundamental.

**Roberts and "court stripping."** Our concern that Judge Roberts would not enforce constitutional protections is reinforced by his writings on "court stripping" statutes. Last year, the House of Representatives passed the so-called Marriage Protection Act, which would have prevented the courts from even hearing challenges to the federal Defense of Marriage Act ("DOMA"). Roberts' writings indicate that he believes such statutes are constitutional, a view that undermines the court's constitutional function as it has been understood for over 200 years. Should such a measure pass the Congress, Roberts would likely vote to uphold it and effectively block our community at the courthouse door.

**Roberts and sound science.** In spite of the clear consensus among social science, psychiatric, psychological and medical associations in favor of LGBT equality, courts are frequently presented with unfounded assertions that there is conflicting evidence. The way that a judge regards research findings before the Court can affect a case's outcome. In short, it can mean the difference between Goodridge, in which the Massachusetts court ruled that there was no rational basis for excluding same-sex couples from marriage, and Lofton, in which the Eleventh Circuit upheld Florida's anti-gay adoption law even though every credible social science and child advocacy group opposed it.

We were troubled to learn that Roberts, as a Reagan administration attorney, seemed to disregard mainstream scientific evidence about how HIV is transmitted. In September 1985, Roberts cautioned President

Reagan against stating that the AIDS virus could not be spread through casual contact among schoolchildren, claiming that this conclusion was in dispute. In fact, August 1985 Centers for Disease Control guidelines clearly stated that "Casual person-to-person contact, as among schoolchildren, appears to pose no risk."

Our community needs to know whether, as a justice, Roberts would look to the sound and tested science about our community. This is an issue that we believe the Senate should examine thoroughly.

**Roberts and Congress's power to protect our community.** Because the LGBT community is particularly vulnerable to hate violence and discrimination, Congress's authority to prevent these problems is of vital importance to us. Roberts' record shows that he holds a very limited view of Congress's authority, and would likely vote with the court's most conservative justices in cases challenging civil rights statutes, workplace protections and hate crimes legislation.

**Roberts as a replacement for Justice Sandra Day O'Connor.** Justice O'Connor, who announced her retirement on July 1, 2005, has often been a critical swing vote in favor of equality. In Romer v. Evans, she joined a 6-3 majority to strike down an anti-gay law. In Lawrence v. Texas, she wrote a concurring opinion that Texas' sodomy law violated the Equal Protection Clause. In Planned Parenthood v. Casey, she voted to uphold Roe v. Wade - four justices dissented in that case. In two closely divided cases about public displays of the 10 commandments handed down June 27, she voted to protect the separation of church and state. On all of these areas critical to our civil rights, Judge Roberts has stated that he holds the opposite position. His elevation to the court would be a shift away from equality.

We, and all Americans, deserve better. Our process for arriving at this opposition has been rigorous. Throughout our careful review of Roberts' record, we have been focused on one goal: learning whether his lifetime appointment to the nation's highest court would be in the interest of this community. The evidence indicates that it would not.

As LGBT Americans, we deserve no less than a justice who will uphold our freedoms and protect our rights. By announcing our opposition today, we do not conclude our work but rather commence a new stage in our efforts, engaging the community we represent in this important issue. The confirmation hearings are still ahead, and it is crucial that the Senate Judiciary Committee make clear that our lives, our liberty, and our equality are on the line.

We acknowledge that our task is not an easy one. But we know that it is the right thing to do.

NCLR is a national legal resource center with a primary commitment to advancing the rights and safety of lesbian, gay, bisexual, and transgender people and their families through a program of litigation, public policy advocacy, and public education. We can be reached through our website at www.nclrights.org.

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**Click here for the NCLR Website: www.nclrights.org**

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## Media Release

**National Council of Women's Organizations**
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# National Council of Women's Organizations Opposes Roberts Confirmation

(September 1, 2005, Washington, DC) The National Council of Women's Organizations (NCWO), the oldest and largest coalition of the nation's women's groups, representing 200 groups and 10 million women, called on the U.S. Senate today to reject the nomination of Judge John Roberts to the Supreme Court.

"It has become clear in the past few weeks that Judge Roberts has throughout his career consistently urged narrow interpretations of the law that would undermine women's rights to equal opportunity" said Martha Burk, NCWO Chair. "It is now well known that Judge Roberts is opposed to abortion rights and would weaken or eliminate Title IX. But we are hearing less about his record of siding with employers against the interests of employees -- a point of view that could be devastating to working women."

"Judge Roberts has argued that cost alone is justification for denying women equal treatment in job training and employment. It is not in the best interests of American women to have a judge on the Supreme Court who has argued that sex discrimination is acceptable if the discriminating organization is operating on a 'tight budget'" said Burk.

Leaders of prominent NCWO member groups joined Burk in denouncing Roberts. "The nation has a right to expect that confirmation of the next person to fill a seat on the Supreme Court will be contingent on a demonstrated commitment to protecting the rights and freedoms of every American," said Phyllis Snyder, President of the National Council of Jewish Women (NCJW). "Unfortunately, Judge Roberts has chosen in his career to erode fundamental rights, rather than defend them, and NCJW believes he should not be confirmed to a lifetime seat on the highest court in the land."

"Everything we know about Judge Roberts' record indicates that he will be a solid vote against women's rights, civil rights, and *Roe v. Wade*," said Eleanor Smeal, president of the Feminist Majority. "His appointment has the potential to undo 40 years of progress. That is why the Feminist Majority is opposing Roberts for the Supreme Court."

Dr. Dorothy Height, Chair and President Emerita of the National Council of Negro Women declared: "Historically, and until passage of the Civil Rights Act of 1957, the advancement of women and minorities came largely through the courts. Our country cannot afford to lose these gains. Judge Roberts' record undermines the confidence that all citizens need to have in the nation's highest court."

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*The National Council of Women's Organizations (NCWO) is a nonpartisan, nonprofit coalition of more than 200 women's organizations across the nation collectively representing over ten million women. For years, NCWO has convened the leadership of major women's organizations dedicated to focusing on national issues and public policy agendas affecting women.*

*Visit our web site: www.womensorganizations.org*

## NCWO Member Organizations*

9to5 Nat. Assc. of Working Women
AAUW Legal Advocacy Fund
African-American Women's Clergy
Alexandria Commission For Women
Alhaji Kemokoh Foundation on African and American Women
AIDS Awareness Campaign
Alice Paul Institute, Inc.
American Assc. of University Women
American College Of Nurse-Midwives
American Medical Women's Assc.
American Physical Therapy Assc., Women's Initiatives
American Women In Radio and Television
Ariadne Institute for the Study of Myth and Ritual
Assc. For Women In Science
Assc. of Academic Women's Health Programs
Assc. Of Reproductive Health Professionals
Black Women United For Action
Black Women's Agenda, Inc.
Break the Chain Campaign
Business & Professional Women/USA
Catholics For A Free Choice
Center For Advancement Of Public Policy
Center for Health and Gender Equity
Center For Policy Alternatives
Center for Reproductive Rights
Center For The Childcare Workforce
Center for Women Policy Studies
Child Care Action Campaign
Choice USA
Christian Women Of Elegance
Church Women United
Circle of Women United For All Concerns
Clearinghouse on Women's Issues
Coalition Of Labor Union Women
CodePINK:Women for Peace
CommonWell Institute InterNat.
Cornell University Institute for Women & Work
DC Rape Crisis Center
Department For Professional Employees, AFL-CIO
Dialogue on Diversity, Inc.
Digital Sisters, Inc.
Eating Disorders Coaltion for Research, Policy, and Action
Economist's Policy Group on Women's Issues
Equal Rights Advocates
Equality Now
ERA Campaign Network
ERA Summit
FAIR Fund
Federally Employed Women
Females United Network
Feminist Majority Foundation
Financial Women InterNat.
Friends of the Missouri Women's Council
Gender Action
Gender Public Advocacy Coalition
GenderWatchers
Girls Incorporated
HADASSAH, The Women's Zionist Organization of America
HealthonStage
Inclusive Security: Women Waging Peace
Institute For Health & Aging
Institute For Women's Policy Research
InterAction-Commission On The Advancement Of Women
International Black Women for Wages for Housework
International Center For Research On Women
International Women's Media Foundation
International Women's Democracy Center
Jewish Women International
Jewish Women's Coalition, Inc.
Law Students for Choice
Legal Momentum
Low-Income Families
Empowerment Through Education - LIFETIME
MANA, A National Latina Organization
Manasota Women's Roundtable
McAuley Institute
Million Mom March United with the Brady Campaign
Ms. Foundation For Women
NARAL
National Council Of Jewish Women
National Council Of Women of the United States, Inc.
National Hook-up Of Black Women
National Abortion Federation
National Alliance For Caregiving
National Asian Women's Health Organization
National Asian-Pacific American Women's Forum
National Association for Female Executives
National Association of Commissions for Women
National Association of Nurse Practitioners in Women's Health
National Association of Orthopaedic Nurses
National Association of Women Business Owners
National Coalition for Women with Heart Disease
National Committee of Women for a Democratic Iran
National Committee on Pay Equity
National Congress of Black Women
National Council for Research on Women
National Council of Negro Women
National Family Planning and Reproductive Health Association
National Foundation for Women Legislators
National Hispana Leadership Institute
National Latina Institute for Reproductive Health
National Network of Abortion Funds
National Organization for Women
National Partnership for Women & Families
National Research Center (NRC) for Women & Families
National Woman's Party
National Women's Health Network
National Women's History Museum
National Women's Studies Association
National Women's Hall of Fame
National Women's History Project
National Women's Law Center
National Women's Political Caucus
NETWORK
Network Of East-West Women
New Life Ministeries
Nontraditional Employment for Women
Organization of Chinese-American Women, Inc.
ORUWOCA, Inc.
OWL: The Voice of Midlife and Older Women
Planned Parenthood Federation of America, Inc.
Project Kid Smart
Public Leadership Education Network
Religious Coalition for Reproductive Choice
Sister to Sister: Everyone Has a Heart Foundation, Inc.
Sisters Supporting Sisters, Inc.
Society for Women's Health Research
Start Smart America
The Stories Center
The WAGE Project
The Women's Center
The Women's Museum: An Institute for the Future
Third Wave Foundation
U.S. Committee For UNIFEM
U.S. Women Connect
United American Nurses, AFL-CIO
Utah Women's Alliance for Building Community (UWABC)
Veteran Feminists of America
Vital Voices Global Partnership
Voters for Choice
Wages for Housework Campaign
Washington Area Women's Foundation
Westside Women's Organization
White House Project
Wider Opportunities For Women
WINTER
WISER
Woman Activist Fund
Women & Philanthropy
Women & Politics Institute
Women Employed
Women Executives in State Government
Women for Women International
Women in Government
Women in Military Service for America Memorial Foundation, Inc.
Women Leaders ONLINE
Women, Men, and Media
WOMEN SEEN AND HEARD
Women Soaring ... A Forum Empowering Women
Women Studies Welfare Assc.
Women Work! The National Network for Women's Employment
Women's Action for New Directions/Women Legislators' Lobby
Women's Business Development Center
Women's Caucus for Political Science
Women's Campaign Fund
Women's Center for Ethics
Women's Committee of 100
Women's Division of the General Board of Global Ministries
Women's Ecommerce Association, International
Women's Edge Coalition
Women's Environment and Development Organization
Women's Housing & Economic Development Corp. (WHEDCO)
Women's Information Network
Women's Institute for a Secure Retirement
Women's Institute for Freedom of the Press
Women's International League for Peace and Freedom
Women's International Public Health Network
Women's Opportunity Link of Delaware, Inc.
Women's Ordination Conference
Women's Sports Foundation
Women's Studies SDSU
Women's Transportation Seminar
YWCA USA

***Not all groups take positions on nominees**

*Moving the people of God to embrace, live out and defend the biblical truth of sexuality*

NATIONAL COALITION
FOR THE PROTECTION OF
CHILDREN & FAMILIES

800 Compton Road, Suite 9224 • Cincinnati, Ohio 45231
(513) 521-6227 • Fax (513) 521-6337 • HelpLine: (800) 583-2964 • www.nationalcoalition.org

August 18, 2005

Dear Senator,

For many years I have been disappointed in numerous decisions of the United States Supreme Court and other judicial components of our government. Too often, I see justices legislating from the bench and finding new interpretations and applications of our founding documents such as the Constitution. This has produced an environment of judicial activism and a rulership of our nation by unelected judges.

Recently, President Bush has nominated John G. Roberts to the United States Supreme Court. I have studied Judge Roberts' personal and professional background and find that he is a brilliant jurist, a man of integrity and stands firmly against judicial activism and tyranny. Judge Roberts seems to be a strict constructionist who will interpret the Constitution and the laws of our land rather than legislate from the bench. I urge you to support the nomination of Judge Roberts to the Supreme Court, to demand an up-or-down vote by the end of September and to stand with President Bush in seeing that Roberts not only receives a just and fair hearing before the full Senate, but also is confirmed to the U.S. Supreme Court.

Sincerely,

Rick Schatz
President and CEO
National Coalition for the Protection of Children & Families

CC:

Majority Leader Bill Frist
Judiciary Chairman Arlen Specter
Senate Republican Conference Chairman Rick Santorum
Senate Majority Whip Mitch McConnell
Republican Policy Committee Chairman Jon Kyl

**National Coalition for the Protection of Children & Families**

**NATIONAL COALITION COMMENTS ON PRESIDENT BUSH'S SUPREME COURT NOMINEE**

**July 20, 2005**
**For Immediate Release**
Contact: Francesca Jensen
Director of Communications
National Coalition for the Protection of Children & Families
513/521-6227, ext. 111

Cincinnati – The National Coalition for the Protection of Children & Families is encouraged by President Bush's recent U.S. Supreme Court nomination of U.S. Circuit Court Judge John Roberts.

"Judge Roberts possesses not only the intellectual aptitude to fill the Supreme Court role, but also the commitment to strictly interpret the Constitution and not legislate from the bench," said Rick Schatz, president and CEO of the National Coalition.

Judge Roberts, if elected by the Senate to the U.S. Supreme Court, will assume the position of retiring Justice Sandra Day O'Connor.

"It is in the best interest of our country to fill Justice O'Connor's vacancy as quickly as possible," added Schatz. "With Roberts' credentials as a D.C. Circuit Court Judge and previous clerk for chief justice Rehnquist, there is no reason for the Senate to prolong the confirmation process."

Judge Roberts' final remarks last night at the nomination were especially encouraging: "I also want to acknowledge my children, my daughter Josie, my son Jack, who remind me every day why it's so important for us to work to preserve the institutions of our democracy."

"Judge Roberts has a clear commitment to his children and family. I believe he will continue to protect the foundations and institutions of the Constitution by carrying this conviction with him to the Supreme Court," said Schatz.

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**Testimony of Phyllis Snyder,**

**President of the National Council Jewish Women**

**On the Nomination of Judge John G. Roberts, Jr., to be**

**Chief Justice of the United States**

**September 14, 2005**

We appreciate the opportunity to submit written testimony to the Senate Judiciary Committee on behalf of 90,000 members and supporters of the National Council of Jewish Women (NCJW). NCJW is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through his network of 90,000 members, supporters, and volunteers nationwide.

NCJW opposes the confirmation of Judge John G. Roberts, Jr. as Chief Justice of the United States. We have done so because we believe that only those nominees with a proven commitment to fundamental freedoms, including a woman's right to choose, should be confirmed to a lifetime seat on the federal bench. As Jews, we understand what it means to have fundamental rights and liberties stripped away. As women, we are also especially cognizant of the mandate to treat women equally under the law and to preserve their ability to make critical decisions about their own lives and bodies.

We have decided to oppose Judge Roberts for many reasons, most notably because of his past record concerning the right to privacy and reproductive rights, his views on civil rights and women's equality, and his support for weakening the wall of separation between religion and

state. Judge Roberts' testimony before the Judiciary Committee has provided few moments of clarity. In fact, it has reinforced the impression that Judge Roberts has put his considerable talent to work parsing the law to explain why an injustice cannot be corrected, rather than seeking to use the law to preserve the values embodied in our Constitution and its Bill of Rights.

We did not take this position lightly. Much of Roberts' record is still shrouded in mystery because the White House refuses to release documents that would provide insight into the later years of Roberts' public career. But what we have learned to date causes us to believe that our basic rights may well be threatened by his views, however sincerely held or articulately expressed.

As a political appointee in the Reagan Administration, Judge Roberts allied himself with efforts to overturn *Roe v. Wade* outright. While serving as Deputy Solicitor General in the Bush Administration, Roberts argued in *Rust v. Sullivan* (1991) to allow the federal government to bar doctors working in federally funded family planning programs from even discussing abortion options with patients. The brief he authored also argued that *Roe v. Wade* was wrongly decided -- a question not even posed in the case.

As Deputy Solicitor General, Roberts also argued in an amicus curiae brief filed in *Bray v. Alexandria Women's Health Clinic* (1993) that protesters from Operation Rescue and six other individuals who blocked access to reproductive health care clinics did not discriminate against women, even though only women could exercise the right to seek an abortion.

Judge Roberts' personal opinions are of a piece with his legal advocacy. In documents released by the Reagan Presidential Library, Judge Roberts referred dismissively to the "so-called 'right to privacy;'" derided the conclusion in *Griswold v. Connecticut* that privacy is a fundamental constitutional right; and expressed approval of the idea of a mass funeral for fetal remains as "an entirely appropriate means of calling attention to the abortion tragedy." Not surprisingly, Judge Roberts refused to affirm a constitutional right to privacy during his confirmation hearing for the DC Court of Appeals.

Now Judge Roberts has testified that he does find a right to privacy in the Constitution, but he still refuses to assert that it extends to the right to choose abortion or provide any information on his views on the scope of this right. While some will argue that a reversal of *Roe v. Wade* is highly unlikely, we believe that it would die a death of thousand cuts at the hands of a Chief Justice Roberts. Unfortunately, the history of litigation on *Roe* is one of regression, not progress or steadfastness, and there is every reason to believe that a Chief Justice Roberts would side with those seeking to narrow it further.

But it is not only the right to choose that concerns us. Throughout his career, Judge Roberts has revealed a bias in favor of allowing government to sponsor and endorse religious expression. For example, he approved a 1985 speech by then-Secretary of Education William J. Bennett who opined that "[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh, blood of the blood," and that "our history has . . . deepened the intimate relationship between the Judeo-Christian tradition and the American

political order." Roberts had no legal objection to the remarks, believing they would "stir things up," despite an affirmation by the Supreme Court three years earlier that above all else the government cannot favor one religion over another.

While working in the Solicitor General's office, Roberts argued that government-sponsored prayers are permissible at a public school graduation, because they "merely respect the religious heritage of the community" and are "an expression of civic tolerance and accommodation to all citizens." Whether those with minority religious views or no religious views at all feel accommodated did not concern Roberts in his brief, he contended: they can simply choose "not to be present for [the] graduation."

Roberts advocated replacing the test used by the Supreme Court in *Lemon v. Kurtzman* to measure whether government action breached the constitutional mandate separating religion and state. Instead, he advocated a "coercion" test that would only evaluate whether government action coerced participation. Justice O'Connor called this view "abandoning our settled law." Recent cases have shown only a 5-4 majority in favor of Justice O'Connor's view. Here again we can reasonably expect a Chief Justice Roberts to join those who would allow government to incorporate explicit religious expression in its activities – expression that necessarily endorses a religious view.

In his testimony, Judge Roberts readily agreed with President John F. Kennedy when the president said in effect that he did not speak for his church on public policy and it did not speak for him. But when asked if he agreed with President Kennedy's assertion that he was proud to

live in country where "the separation of church and state is absolute," he demurred.

Finally, the views with which Judge Roberts has associated himself on civil rights and gender equality are equally disturbing. He opposed strengthening the Voting Rights Act. He favored limiting the application of Title IX. He referred with disdain to the "the purported gender gap" and even opposed initiatives on behalf of women taken by senior Reagan Administration officials.

As disturbing as this record is, it is incomplete. Documents on key cases generated by Judge Roberts while he served as Deputy Solicitor General in the administration of President George H.W. Bush have been withheld by the White House. Thus the Senate and the general public are deprived of information that would illuminate Judge Roberts' more recent government career – a liability the President does not share.

Judge Roberts has been nominated to serve, in effect, as the symbol of American justice as well as the highest official in our judicial system. Yet when it comes to issues and cases in which the expansion of justice is in question, his is a cramped view of the law. His testimony before this Committee has reinforced this view of his career and his commitments. The National Council of Jewish Women urges that his nomination be rejected.

Founder
Paul H. Tobias

President
Janet E. Hill

Executive Director
Terisa E. Chaw

August 25, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510-3802

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Senators Specter and Leahy,

On behalf of the National Employment Lawyers Association (NELA)[1], I am writing to urge the Senate Judiciary Committee to conduct a thorough and independent review of Judge John G. Roberts' qualifications, background, and constitutional philosophy. In nominating Judge Roberts to the Supreme Court of the United States, President Bush has stated that Judge Roberts "has profound respect for the rule of law and for the liberties guaranteed to every citizen. He will strictly apply the Constitution and laws, not legislate from the bench."[2] However, Judge Roberts cannot be confirmed based on President Bush's guarantees alone. Rather, all Senators must be given the opportunity to conduct a thorough and independent review of John Roberts' record. This includes not only reviewing his rulings from the D.C. Circuit, but also questioning him about his judicial philosophy and gaining access to the briefs, memoranda and other documents he prepared as a litigator for two Republican administrations and in private practice.

NELA is especially concerned about his commitment to and respect for workers' rights. Though Judge Roberts' pre-judicial advocacy on behalf of corporations does not necessarily demonstrate an aversion to workers' rights, it is not indicative of a judicial philosophy that embraces workplace fairness. Unfortunately, his rulings do not shed light on this issue. During his two years on the D.C. Circuit bench, Judge Roberts has authored the majority, concurring or dissenting opinions in less than ten labor or employment cases. As such, NELA strongly believes that the public is entitled to know whether Judge Roberts will place the interest of employers over the rights of employees.

In light of the dearth of Judge Roberts' employment rulings, NELA urges the Senate Judiciary Committee to ask Judge Roberts to critique past significant Supreme Court employment decisions. As Professor Vikram Amar points out, "Asking the nominee to critique past cases is as legitimate as asking a job candidate to imagine how he or she would have handled situations

[1] NELA is the country's only professional organization exclusively comprised of attorneys who represent plaintiffs in employment discrimination and other employment-related claims. NELA and its 67 state and local affiliates have over 3,000 members.
[2] President George W. Bush's Radio Address, July 23, 2005.

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that faced employees in the past. After all, a justice's job is to decide and explain cases, while a nominee's job is to give senators information about the kind of justice he will most likely be."[3]

Thus, American workers need to know:

*Does John Roberts have a demonstrated commitment to the enforcement of Congressional intent with respect to the laws protecting employees' rights?*

To answer this question, Judge Roberts should provide his analysis of significant employment and civil rights cases which have shaped the landscape of employment and anti-discrimination law. These cases include:

- *Jackson v. Birmingham Bd. Of Educ.*, 351 F.3d 183 (2005): In a 5-4 decision delivered by Justice Sandra Day O'Connor, the Court ruled that federal law protects against retaliation against someone for complaining about illegal sex discrimination in federally assisted education programs.
- *Grutter v. Bollinger*, 539 U.S. 309 (2003): Here, the Court held that the Equal Protection Clause does not prohibit the University of Michigan Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Justice O'Connor delivered the 5-4 opinion.
- *Circuit City v. Adams*, 532 U.S. 105 (2001): In a 5-4 decision, the Court ruled that employers can require employees, as a condition of employment, to agree that they will submit all employment disputes, including discrimination claims under state or federal law, to binding arbitration before an arbitrator, rather than a judge or jury in a court of law.
- *Reeves v. Sanderson*, 530 U.S. 133 (2000): In a unanimous opinion delivered by Justice O'Connor, the Court held that held that while independent evidence showing that the employer acted with the intent to discriminate may strengthen an age discrimination case, it is not required for a plaintiff to prevail. Thus, an employer is liable to a former employee under the Age Discrimination in Employment Act if a reasonable jury can find that the employer's explanation for the employee's dismissal was pretext for discrimination.
- *Davis v. Monroe County Board of Educ.*, 526 U.S. 629 (1999): The Court ruled that it is a violation of federal law for school districts to be deliberately indifferent towards severe and pervasive student-on-student sexual harassment. Justice O'Connor was the deciding fifth vote.
- *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998): In these companion cases, the Court held that an employer can avoid liability for a hostile work environment where (a) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (b) "the plaintiff employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer or to avoid harm otherwise."
- *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995): The Court ruled 5-4 that a federal affirmative action program can consider race as a factor by demonstrating that it serves a compelling government interest and is narrowly tailored to achieve that interest.

[3] Vikram Amar, "Casing John Roberts," *The New York Times*, July 27, 2005.

The Senate Judiciary Committee can further elicit Judge Roberts' views on workers' rights by asking him the following questions:

- How do you reconcile the Seventh Amendment right to a jury trial with federal courts' enforcement of employers' pre-dispute arbitration clauses that employees are required to sign as a condition of employment?
- What is the relationship between the Contracts Clause and pre-dispute, mandatory arbitration agreements?
- What is your view about whether and to what extent employers can use pre-dispute, mandatory arbitration agreements to limit discovery or remedies for claims under federal or state anti-discrimination laws?
- Can employers prohibit class actions in arbitration? Why or why not?
- Does an arbitration agreement between private parties materially change a state agency's statutory function or the remedies otherwise available? Why or why not?
- Can state employees sue their employers for violation of federal anti-discrimination laws? Why or why not?
- What is your view of the ability of Congress to waive states' Eleventh Amendment immunity for violation of federal anti-discrimination laws?
- What is the proper role of the federal government in enacting laws to protect the rights of the disabled?
- Do you believe that an employee should be covered by the Americans with Disabilities Act if that employee is substantially limited in the major life activity of working?
- Can Congress regulate labor standards for states and cities under its Commerce Clause power? Why or why not?
- Can Congress condition grants of federal funds, under its Spending Clause powers, to states, cities or educational institutions on the grounds that those entities do not violate anti-discrimination laws? Why or why not?
- Are employers immune from liability under the Age Discrimination in Employment Act unless plaintiffs can prove actual intent to discriminate on the basis of age? Why or why not?
- In a memorandum you wrote on January 17, 1983, you referred to the "Fifty States Project" as addressing "perceived problems of gender discrimination." Is it your view today that there are only "perceived" problems of gender discrimination in employment? If not, what do you believe are the problems of actual sex discrimination on the job that continue to need to be addressed in the courts?
- In that same memorandum, you stated that "many of the reported proposals and efforts are themselves highly objectionable." One example you gave was a California proposal for "passage of a law requiring the order of layoff to reflect affirmative action programs and not merely seniority." Do you believe today that a law that provides that persons who have been historically excluded from certain jobs shall not be laid off from those jobs in strict order of seniority would be "highly objectionable" and possibly unconstitutional?
- What do you believe to be the proper role of the courts in reviewing Congressional waivers of the states' Eleventh Amendment immunity? Do you believe that the courts always should defer to those Congressional waivers? If not, when do you believe that the federal courts should refuse to recognize those waivers?

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- Disabled employees are finding it increasingly difficult to prevail in Americans with Disabilities Act (ADA) cases. They often have to be severely disabled in order to satisfy stringent requirements imposed by the courts to be covered by the ADA, but still cannot be so disabled that they are unable to work with or without an accommodation. What are your views on how severely disabled employees must and can be for an employer to be required to offer them a reasonable accommodation?
- The Employment Retirement Security Income Act (ERISA) provides plan participants and beneficiaries with the right to remedy fiduciary breaches, whether those participants were covered by defined benefit plans or defined contribution plans (e.g., 401(k) plans). Can a plan participant bring a lawsuit when a fiduciary imprudently selects an investment option or manages some of the plan's assets imprudently, even if only a percentage of the plan participants are affected? Why or why not?

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. NELA urges the Committee to ask these questions, and many others, of Judge Roberts to determine whether he is committed to the rights of and protections afforded to American workers.

Thank you for your consideration. If you have any questions, please feel free to contact NELA Program Director Marissa Tirona at (415) 296.7629.

Sincerely,

Janet E. Hill
President
National Employment Lawyers Association

cc: Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin

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FOR IMMEDIATE RELEASE: August 29, 2005

CONTACT: Paul Gattone, NLG Judicial Nominations Committee, 520-631-6385
Michael Avery, NLG President 617-573-8551
Heidi Boghosian, NLG Executive Director, 212-679-5100, ext. 11

**NATIONAL LAWYERS GUILD OPPOSES NOMINATION OF JOHN ROBERTS TO UNITED STATES SUPREME COURT**

New York. The National Lawyers Guild announces its opposition to the nomination of John Roberts to the United States Supreme Court. Despite repeated attempts by the Bush Administration to prevent the public disclosure of many of the nominee's positions on critical issues, sufficient information is known upon which we base our opposition.

During his career Judge Roberts has taken ultra-conservative positions on issues that are of importance to the National Lawyers Guild and to the constituents that our members represent. Opinions expressed by Judge Roberts as a lawyer in the Reagan Justice Department and White House Counsel's Office advocated for the reduction of the role of government and courts in enforcing civil and constitutional rights. During this period Judge Roberts argued for:

• Weakening proposed Voting Rights Act protections.
• Opposition to attempt to fortify the Fair Housing Act.
• Legislation that would have stripped the federal courts of their authority to remedy school desegregation with busing.
• Increased government opposition to affirmative action programs.

Later, as a Principal Deputy Solicitor General in the administration of George H.W. Bush, Judge Roberts continued to advocate for the restriction of civil rights protections when he argued for:

• The overturning of the Roe v Wade decision.
• An expansion of the role of religion in public schools.
• The position that federal civil rights law did not protect women from harassment by violent anti-abortion demonstrators at family planning clinics.
• An interpretation of a 1972 law banning sex discrimination in schools that would deny the ability of a young woman who was repeatedly harassed by her teacher to sue for compensatory damages.

Judge Roberts has continued to argue for the limitation of individual rights in the face of government abuse since being appointed to sit on the D.C. Circuit Court of Appeals. Particularly troubling is his decision supporting the Bush Administration's position that accused enemy combatants may be tried for war crimes before military commissions lacking basic procedural safeguards, and holding that the Geneva Convention is unenforceable in U.S. Courts (*Hamdan v Rumsfeld*, Civil Action No. 04-1519, US District Court D.C.). At the time that this case was being argued before the D.C. Court, Judge Roberts was already being interviewed by the White House regarding nomination to an anticipated opening on the Supreme Court. He failed to disclose this potential conflict of interest to the lawyers arguing the Hamdan case.

In all of the above instances, and in many others, John Roberts has shown that he holds viewpoints that are hostile to civil rights and individual liberties. NLG President Michael Avery has recently commented that: "Despite saying he is opposed to judicial activism, the President has sought to remake the law in this country by appointing to the federal bench a cadre of judges who will rule against regulation of industry by the federal government, in favor of state's rights, against civil rights and remedies for discrimination, against the rights of workers and consumers and against a woman's right to choose to terminate a pregnancy. Judge John Roberts brings a career advocating this vision on behalf of Presidents Reagan and Bush Sr. to the Supreme Court".

The National Lawyers Guild will be working to mobilize it members in opposition to the Roberts nomination, and calls on all people who believe in the rights of women, working people, racial minorities, people with disabilities, and in civil rights for all people, to take immediate action in opposition to this nomination.

The National Lawyers Guild, founded in 1937, comprises over 6,000 members and activists in the service of the people. Its national office is headquartered in New York City and it has chapters in nearly every state, as well as over 100 law school chapters. ###

# National Organization for Women

Kim Gandy
President

Olga Vives
Executive Vice President

Melody Drnach
Action Vice President

Latifa Lyles
Membership Vice President

September 15, 2005

Dear Senator,

The National Organization for Women is very clear in our opposition to the nomination of John G. Roberts to the office of Chief Justice for the United States Supreme Court. On behalf of our more than 500,000 contributing members across the country and especially the NOW chapters and members in your state, I strongly urge you to vote against this nominee. If he is seated and his votes on the Supreme Court match his long record of writings and opinions, women's and civil rights will be set back decades.

NOW's opposition to Judge Roberts was originally based on his statements and record on a number of issues related to women's equality, disability rights, civil rights, affirmative action and privacy rights. His recent reluctance during the Judiciary Committee hearings to commit to upholding full Constitutional equality for women, especially in the area of health and employment rights, causes us additional dismay. To confirm John G. Roberts as the head of our third branch of government - for his lifetime - will install as our leading jurist someone who has a written record of disdain and hostility for many aspects of our nation's commitment to civil rights and equal justice.

NOW does not come to this opposition lightly. There are numerous and disturbing facts that have led to NOW's opposition to this nominee. Roberts' comments on pay equity, homemakers-turned-lawyers, and many others indicate a cavalier attitude toward economic justice for women. During his career Roberts has argued to restrict Title IX, the equal education law for women and girls, and to limit the protections of the Americans with Disabilities Act. He has objected strenuously to federal affirmative action programs; he has disparaged the landmark Violence Against Women Act; and he has been an active proponent of "states' rights" over basic federal civil rights and protections.

His responses to questions during the hearings should concern all Senators who support equality for women and respect for women's integrity and autonomy. While he notes that *Roe v. Wade* is "settled law," this is true of every Supreme Court case.....right up to the moment it is reversed. He refused to recognize any right to privacy that would protect women's right to abortion. Women's full options for health, education and economic opportunities will be truly at risk under his stewardship.

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NOW members and supporters live, work, and raise families as well as advocate, educate and organize for women's equality in every state. We demand a balanced and just Supreme Court, and the women of this country deserve no less. The hard won rights of so many disenfranchised communities, including women and people of color, lesbians and disabled individuals, young and old, hang in the balance. John G. Roberts' testimony further illustrates that he is no moderate, nor is he an advocate for fairness and justice. We urge you to vote no on this nominee for the sake of women, children, families, democracy and the future of our nation.

I look forward to hearing from you and hope that you will call me if you have any questions or need more information.

Sincerely,

President

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**TESTIMONY**
**OF**
**DEBRA L. NESS,**
**PRESIDENT OF**
**THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,**
**TO THE UNITED STATES SENATE JUDICIARY COMMITTEE**
**ON THE**
**NOMINATION OF JUDGE JOHN G. ROBERTS, JR.**
**TO BECOME CHIEF JUSTICE**
**OF THE**
**UNITED STATES SUPREME COURT**

September 16, 2005

I am Debra L. Ness, President of the National Partnership for Women & Families, and I submit this testimony on behalf of the National Partnership in opposition to the nomination of Judge John G. Roberts, Jr. to become Chief Justice of the United States Supreme Court. The National Partnership is a national advocacy organization that has been working since 1971 to advance women's rights, with a particular focus on employment opportunity, work-family policy, and health care policy. From working to outlaw sexual harassment, to fighting to prohibit pregnancy discrimination, to leading the effort to ensure family and medical leave for over 50 million Americans, the National Partnership has fought for every major policy advance for women and families in the last three decades. The National Partnership also has monitored every Supreme Court nomination that has occurred since our inception, extensively researching and analyzing the records of pending nominees. Our work has been driven by our commitment to the core values of fairness, equality, opportunity, and justice – and it is these values that underlie the principles, policies, and initiatives we have pursued throughout our history.

The record of Judge John Roberts is extensive, revealing, and deeply troubling. He has expressed narrow and restrictive views of laws protecting women's and civil rights; he consistently has taken positions that would undermine women's access to jobs, education, and fair pay; and he has questioned whether the Constitution can be interpreted to protect critical fundamental rights such as the right to privacy and our freedom from government intrusion into private family decisions.

Based on our careful consideration of his available record, the National Partnership for Women & Families concluded that John Roberts should not be elevated to the nation's highest court. Our comprehensive report, *John Roberts' Record on Issues Important to Women & Families*, which is attached, documents our findings.

At the time our report was released, Judge Roberts was the nominee to fill the seat of retiring Justice Sandra Day O'Connor. That nomination was withdrawn after the

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unfortunate passing of Chief Justice William Rehnquist, and Judge Roberts was quickly re-nominated for the Chief Justice's seat. His re-nomination only deepened our concerns and opposition. As Chief Justice, he will become the most powerful judge in the nation, with even greater ability to shape the direction of our courts, our laws, and our lives. He will decide which justices are assigned to write the opinion in each case before the Court; he will serve as the lead policy maker for the federal judiciary; and he will stand as the public face of our courts.

During his confirmation hearing, Judge Roberts had the opportunity to address the serious questions raised by his record, but he repeatedly failed to do so in critical areas:

**Equal Protection for Women**

- In memoranda and other writings, Judge Roberts questioned whether courts should use a special, heightened legal standard when evaluating rules or practices that treat women and men differently. He took this position despite Supreme Court precedent that clearly had established this heightened review as the proper legal standard. This high standard set by the Court was particularly important because it raises the bar, making it more difficult to justify rules that apply to men in one way and women in another. But when asked about his past positions during his hearing, Judge Roberts remarkably argued that, notwithstanding his writings, he never opposed the use of this heightened legal standard in gender cases. Instead, he asserted that he really was questioning the use of a different standard – strict scrutiny – although that standard was never mentioned in his relevant writings. Rather than confront his past statements head on and disavow them, Judge Roberts simply tried to revise the plain meaning of his words.

- While serving as a Special Assistant at the Department of Justice, Judge Roberts urged the Attorney General not to approve a request from the Department of Justice's Civil Rights Division to intervene in a case alleging discriminatory treatment of female prisoners in Kentucky state prisons. Female prisoners were denied access to the same types of vocational education programs as male prisoners, thus severely impairing their future educational and employment opportunities. In his memorandum to then-Attorney General William French Smith, Judge Roberts rationalized that such discrimination could be justified because it was too expensive for states to provide equal programs for women – even though similar "cost" defenses had been rejected by the Supreme Court in other cases. But when asked about this statement during his hearing, he had no explanation. Instead, he said that he could not recall the issue.

**Equal Employment Opportunity**

- While working in the Reagan Administration, Judge Roberts repeatedly urged policy changes to curb the use of affirmative action to expand hiring and promotional opportunities for women and people of color. During his hearing, however, he glossed over his past positions, claiming that he only opposed quotas and not affirmative action. But his record reveals that he resisted the adoption of

lawful affirmative action goals and timetables used to promote and measure actual progress in expanding job opportunities. Rather than acknowledge – and more importantly distance himself from – his past statements, he simply tried to revise their actual meaning.

**Pay Discrimination**

- Judge Roberts' record includes disdainful statements about reported pay disparities between men and women, ignoring the possibility that discrimination accounts for part of the wage gap. He dismissed out-of-hand measures designed to prevent wage discrimination and ensure that women's jobs are fairly valued and fairly compensated. When asked during his hearing about his comments, he simply retreated to a cursory statement about supporting equal pay for equal work. But he never acknowledged the role of discrimination in depressing women's wages.

**Reproductive Rights and the Right to Privacy**

- Judge Roberts' record revealed that he has questioned the existence of a constitutional right to privacy. He wrote that courts had gone beyond their proper role to create "fundamental rights" with no constitutional basis, and he identified the "so-called" right to privacy as one such right. His arguments demonstrate a narrow view of the Constitution's guarantees, and they have important implications for women who have relied on the Court's recognition of a right to privacy to gain greater control over their reproductive health care decisions. When asked about his prior writings and statements during his hearing, Judge Roberts argued that many of these previous positions were simply the positions of Administration that employed him. Further, while he stated that he believed the right to privacy was protected by the liberty interest in the Due Process Clause of the 14th Amendment, he refused to say whether he believed the right to privacy protected a woman's right to seek an abortion, and he refused to say that he would uphold the core principles established in the landmark case of *Roe v. Wade*. Moreover, his carefully calibrated words about respect for precedent ultimately shed no light on whether he would protect our fundamental right to privacy, or let government intrude in our most private family decisions.

**Sex Discrimination in Education**

- Judge Roberts' record revealed that he had interpreted Title IX, the groundbreaking law prohibiting sex discrimination in education programs or activities, very narrowly. He had supported proposals to limit Title IX's application in ways that would have curtailed many of the gains made by women in schools and universities in recent decades, and made it harder to hold schools accountable for failing to comply with the law. When asked about his previous writings and positions, Judge Roberts argued that he was simply advancing the position of the Administration for which he worked – a position sustained by the Supreme Court and later overturned by Congress. But he refused to acknowledge

his support for a proposal ultimately never advanced by the Reagan Administration, namely to change existing regulations so that student federal aid would no longer be sufficient to trigger Title IX coverage of an institution. Judge Roberts' failure to acknowledge or refute his past positions and provide fulsome explanations was evasive and troubling.

- While serving in the Bush Administration, Judge Roberts filed a brief arguing that a student who had been subjected to egregious sexual harassment by her teacher should not be able to obtain money damages under Title IX. When asked about his position during his hearing, Judge Roberts stated that he was simply arguing about the proper remedy that should be available to the student plaintiff, mentioning the availability of other remedies such as back pay and injunctive relief. He never acknowledged that, as a student, the plaintiff would not be able to make use of a back pay remedy. Nor did he acknowledge that his failure to support a meaningful remedy for the student would have severely undercut the law's effectiveness. During later questioning, Judge Roberts stated that he had no quarrel with Court's ultimate decision in the case unanimously rejecting his argument – but he never stated that he supported the outcome, or the reasoning, in the case.

The position of Chief Justice is a critical appointment. The Court is closely divided at a time when our nation continues to struggle with how best to confront and resolve issues involving gender, race, class, and privacy. America has yet to make the promise of equality real, concrete, and tangible for every citizen. The next Supreme Court appointment will, in great measure, determine whether we continue the progress toward equality, or turn back the clock.

The National Partnership believes that John Roberts has not demonstrated his commitment to uphold rights and protections of critical importance to women and people of color – and we urge the Senate to reject his nomination to the Supreme Court.

"Choose Justice: Protect Our Rights; Oppose John Roberts' Nomination"

Testimony Presented by

Nancy Keenan
President
NARAL Pro-Choice America

U.S. Senate
Committee on the Judiciary

September 15, 2005

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Chairman Specter and members of the committee: I thank you for the opportunity to submit this testimony for the record.

You have before you the nomination of John Roberts to the position of Chief Justice of the United States. Your constitutional responsibility to evaluate this nomination is a considerable one – made all the more important by the times in which we live. Our nation is constantly faced with novel legal questions and remains severely divided over the scope of constitutional protections and the role of each branch of government. As has always been the case, the Supreme Court will be the final arbiter of our Constitution and will be trusted with the final say on decisions affecting the daily lives of all Americans.

Without question, John Roberts is smart, accomplished, and affable – but those qualities alone do not qualify him for life tenure on the highest court in the land. Regrettably, his record of opposition to the right to privacy, reproductive choice, and the right to access reproductive-health clinics demonstrates that the American people cannot depend on him to protect our civil rights and civil liberties.

It is clear from John Roberts' own words, legal writings, and substantive work product as a lawyer in the Reagan and Bush I administrations that Roberts possesses a cramped view of the law and a regressive judicial philosophy – a philosophy created and advanced by conservative jurists and politicians who, when advantageous for their causes, view the law as stagnant text isolated from its broad purpose, anticipated application, and practical effect. If confirmed, John Roberts could have a dramatic effect on the right to privacy and the right to choose.

Each of the Supreme Court's nine Justices has extensive discretion to determine the breadth of our fundamental rights, the constitutionality of a wide spectrum of legislation and executive actions, and the scope of the rule of law and constitutional governance for decades.[1] Moreover, the Chief Justice has additional responsibilities; among other things, he or she plays a leading role in shaping the Court's agenda and has significant opportunities to direct and control the discussion of cases. For example, when the Chief Justice votes with the majority in a case, he decides who will draft the opinion; the power to select the author of an opinion enables the Chief Justice to influence the breadth of an opinion, which can determine how the precedent is applied to future cases.

Excluding Justice Sandra Day O'Connor, only five current Supreme Court Justices, a bare majority, support the central holding of *Roe v. Wade*, that the Constitution's right to privacy encompasses the right to terminate a pregnancy. Three of the four oldest members of the Court are part of this narrow five-Justice majority. Two Justices argue that the Constitution does not protect a woman's right to choose, a position which has been held by only four of the 17 Justices having served on the Court since *Roe*. Three Justices – Kennedy, Scalia, and Thomas – already have voted to uphold onerous restrictions on abortion and to ignore or eliminate the longstanding doctrine that the Constitution forbids politicians from endangering women's

health.[2] With the addition of John Roberts, increasingly onerous restrictions will likely be upheld.

This coming term the Supreme Court will decide two cases that could drastically alter women's reproductive rights. In *Ayotte v. Planned Parenthood of Northern New England*, the Court will decide whether a restriction on the right to choose can endanger women's health and what the standard of review is for abortion cases. Under current law, the standard of review is whether the law creates an undue burden for a large fraction of the women for whom the law is relevant. If the Court adopts the standard of review proposed in *Ayotte*, the standard of review will be whether the law would be unconstitutional in *every* application – that is, the law would have to be an undue burden for *each individual* woman seeking to exercise her right to choose, or it could not be struck down entirely. This change of the standard of review would force many, many more women to go to court to get permission to exercise a fundamental right and could effectively eliminate the right to choose for millions of women.

In *Scheidler v. National Organization for Women*, the Court will decide the validity of a permanent nationwide injunction that prohibits anti-choice demonstrators from obstructing access to clinics, trespassing, damaging property, or using violence or threats of violence against clinics, their employees, or their patients.

With a slim pro-choice majority on the Court and two seminal Supreme Court cases on reproductive rights scheduled this fall, we cannot afford to confirm a Justice – much less a Chief Justice of the United States – to the Court unless he or she is committed to protecting basic rights of privacy and choice. Regrettably, John Roberts is not.

***John Roberts and the Right to Privacy***

In *Roe v. Wade*, a seven-Justice majority held that "Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."[3] Freedom as we know it today – the right to choose, right to contraception, right to have children, right to marry, right to refuse medical treatment, and right to engage in consensual sexual intimacy – depends in large measure on our constitutional right to privacy. The constitutional right to privacy is a well-established legal doctrine and an essential component of the freedoms Americans enjoy. However, as a young lawyer in the Reagan administration, Supreme Court Chief Justice nominee John Roberts dismissed the right to privacy and expressed the view that the right to privacy is not found in the Constitution.

In one instance, then-Special Assistant to the Attorney General John Roberts wrote a memorandum to then-Attorney General William French Smith dated December 11, 1981. The memo was in reference to a letter sent to the attorney general's office by Erwin N. Griswold, then an attorney at Jones, Day, Reavis, and Pogue in Washington D.C. Griswold had sent the letter and a copy of his 1976 lecture given at Washington and Lee University entitled "Equal

Justice Under Law." Griswold's letter suggested that the Smith might find "a measure of resonance" with his lecture. In his memo summarizing Griswold's views, John Roberts wrote, "The second part of the piece is devoted to the same judicial policymaking themes which you have recently been addressing. . . . He devotes a section to the *so-called 'right to privacy,'* arguing *as we have* that such an amorphous right is not to be found in the Constitution. He specifically criticizes *Roe v. Wade*."[4] (emphases added). Roberts expresses his derisory attitude for legal doctrine on privacy when he tags the phrase "so-called" to the right to privacy and puts the right in quotes.

In another instance, John Roberts apparently drafted an article on behalf of Attorney General Smith on judicial restraint that accused courts of inappropriately laying claim to functions reserved to Congress or the states through "so-called 'fundamental rights'" analyses. Roberts wrote:

> All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution, arbitrarily elevate it over other constitutional rights and powers by attaching the label "fundamental," and then resort to it as, in the words of one of Justice Black's dissents, "a loose, flexible, uncontrolled standard for holding laws unconstitutional."[5]

Over the last several decades, the Supreme Court has decided and reaffirmed a series of significant cases in which it has recognized and relied upon a constitutional right to privacy to protect important and deeply personal decisions concerning bodily integrity, identity, dignity, and destiny from undue governmental interference.[6] However, John Roberts' record on the right to privacy is one of ideological opposition, doubt, and criticism. If, as his record suggests, Roberts does not believe that the Constitution's right to privacy fully protects our fundamental rights as we know them today, then our most cherished freedoms are in grave danger of being taken away.

***John Roberts and a Woman's Right to Choose***

Before *Roe v. Wade* was decided in January 1973, abortion, except to save a woman's life, was illegal in nearly two-thirds of the states.[7] Laws in most of the remaining states contained only a few additional exceptions.[8] Throughout the past 32 years, the Supreme Court has consistently reaffirmed *Roe*'s central holding,[9] noting that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society"[10] and that "[t]he soundness of this . . . analysis is apparent from a consideration of the alternative."[11] Nevertheless, John Roberts' record on *Roe v. Wade* shows that he cannot be trusted to uphold this landmark decision and the moral vision it represents: that women are capable of making the most important personal decisions about their reproductive lives, their health, and their families without politicians imposing criminal penalties on the doctors who assist them.

As the principal deputy solicitor general in the first Bush administration, John Roberts co-authored and supervised the preparation for a Supreme Court brief that asked the Court to overturn *Roe v. Wade*.[12] In *Rust v. Sullivan*, the Supreme Court was asked to decide whether federal regulations that prohibited federally funded Title X projects from providing abortion counseling or giving referrals for abortion services were permissible under the regulation's authorizing legislation and whether they violated the First or Fifth Amendment.[13] The opening argument of the solicitor general's brief advocated overturning *Roe*:

> We continue to believe that Roe was wrongly decided and should be overruled. . . . [T]he Court's conclusions in Roe that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution.[14]

The brief went on to defend the "gag rule," which barred doctors and clinic counselors from providing women with the full range of information and options regarding their reproductive health.[15] Ultimately, a closely divided Court (5-4) decided – over two strong dissents joined by four Justices, including Sandra Day O'Connor – that the regulations were permissible.[16]

The Court's decision in *Rust*, following the lines of Roberts' brief with respect to the "gag rule," drew immediate fire from Congress, which voted to overturn it, narrowly missing the two-thirds marks necessary to override the President's veto. One of Bill Clinton's first executive actions in January 1993 was to suspend the rule and return to the prior policy of providing women full options counseling regarding their pregnancies. The "gag rule" was formally repealed in 2000.[17]

Roberts' supporters have unpersuasively suggested that his role in *Rust* was simply that of a lawyer representing the views of his client. However, this characterization fundamentally misconstrues both the Office of the Solicitor General and the nature of Roberts' position as principal deputy solicitor general. In this key position, John Roberts was a powerful and influential political appointee and advisor to the solicitor general, whose office wielded vast powers to shape and carry out the legal policies of the administration under which he served. In this role, Roberts was a dedicated architect of the anti-choice legal agenda of that administration.

Neither Roberts nor the Office of the Solicitor General was required to argue for the overturning of *Roe*.[18] At the time, Harvard Law School Professor Laurence Tribe, who argued the case before the Supreme Court on behalf of those challenging the "gag rule," termed the argument to overrule *Roe* "gratuitous."[19] He added that the case would be a "clearly irresponsible occasion" for the Court to reconsider *Roe*.[20] The argument was discretionary and seems highly predictive of the position Roberts would take as Chief Justice of the United States.[21]

*John Roberts and the Right to Access Reproductive-Health Clinics*

At a time when clinic violence was sweeping the nation, John Roberts, as principal deputy solicitor general, took a narrow view of a broad civil rights law and brought the prestige and power of the U.S. government into two cases in which the government was not a party in support of the notorious anti-choice group Operation Rescue and other anti-choice extremists. In *Bray v. Alexandria Women's Health Clinic* and *Women's Health Care Services v. Operation Rescue-National*, Roberts' position was that the civil rights law and the remedy it provides should not apply to stop escalating conflicts at health-care facilities and to protect women's right to access to reproductive-health services.

*Bray v. Alexandria Women's Health Clinic*

In 1989 in *Bray*, reproductive-health clinics and pro-choice organizations sued Operation Rescue and six anti-choice extremists under a civil rights law (42 U.S.C. § 1985(3) also known as the "Ku Klux Klan Act") and asked the court to prohibit them from conducting blockades that prevented women, doctors, and others from entering clinics.[22] The case reached the U.S. Supreme Court first in 1991 and was re-argued in 1992. Rather than arguing in support of women, doctors, and the rule of law,[23] John Roberts argued for a narrow interpretation of the civil rights law on the side of Operation Rescue and other notorious anti-choice defendants, including:

- **Michael Bray:** Bray, also known as the Chaplain of the Army of God, is most infamous for his conviction for his involvement in ten bombings at reproductive-health clinics and advocacy organizations in Washington, D.C., Delaware, Virginia, and Maryland in the mid-1980s.[24] Bray is also the author of a book called *A Time to Kill*, which offers supposed biblical justifications for the use of violence against abortion providers.[25] When a *Baltimore Sun* reporter asked Bray if he would ever shoot an abortion provider, Bray said: "I could . . . As to whether I would – I may."[26]

- **Randall Terry:** Terry, founder of the violent anti-choice group Operation Rescue, has been arrested at least 30 times and jailed repeatedly for his anti-choice activities. He has blocked access to clinics, harassed clinic employees, and even locked himself inside a clinic. In 1992, Terry was sentenced to a year in jail because he violated a restraining order that prohibited him from coming within 100 feet of a reproductive-health clinic in Houston, Texas. That same year, Terry sent a human fetus to Bill Clinton during the presidential campaign.[27]

- **Patrick Mahoney:** Mahoney was a retained consultant for Operation Rescue and has been a long-time anti-choice activist. By way of example, after a court issued an injunction prohibiting him from going within 20 feet of a reproductive-health clinic in Washington, D.C., Mahoney publicly boasted of his intentions to violate it – "I'm going to pray and read scripture 25 feet [away] on the public sidewalk. I am then going to

> move within 10 feet . . ."[28] In 2000, Mahoney – like Randall Terry – attempted to hand President Clinton a dead fetus.[29]

John Roberts not only co-authored the *amicus* brief for the United States, but also twice argued the case in front of the U.S. Supreme Court.[30] He maintained that Operation Rescue's unlawful behavior and "military-style tactics"[31] used to block women from accessing reproductive-health clinics did not amount to discrimination against women and that a civil rights remedy – the only federal remedy available to clinics at the time – was inappropriate.[32]

The wholly discretionary decision to become involved in *Bray* was made when clinic violence was widespread and out of control; reproductive-health clinics were under siege, and in many cases, state law enforcement proved inadequate despite their best efforts. In fact, from the time *Bray* was filed in federal district court (1989) to the time John Roberts argued the case in front of the Supreme Court (1992), clinics experienced hundreds of acts of violence and thousands of acts of disruption that resulted in an incalculable loss of health-care services to women and communities along with millions of dollars of destruction.[33]

Neither the Solicitor General's office in particular nor the federal government at large was required to side with the anti-choice extremists. The two lead staff members at the solicitor general's office – Kenneth Starr and John Roberts – had three options in this case: (1) stay out of the case; (2) enter the case and support applying a federal civil rights law to protect women and their doctors; or (3) enter the case and urge the Court to prevent this protection. They chose the last option.

In stark contrast, the state attorneys general of Virginia and New York filed an *amicus* brief in *Bray* pleading with the Supreme Court to make the federal civil rights law's remedies available to reproductive-health clinics and other victims of Operation Rescue's lawlessness. They insisted that "[n]o state, or group of states, is equipped alone to deal with and redress the deprivations of federal rights caused by the nationwide activity of Operation Rescue."[34] They explained in the brief:

> At the heart of Operation Rescue's purpose and method is obstruction and hindrance of prompt, effective, and equal enforcement of state law. Through a panoply of tactics which overwhelm the police, shut down health care clinics, hinder police efforts to reopen them, and delay arrest or arraignment, Operation Rescue hinders state authorities from securing to citizens the equal protection of state laws. . .[35]

Similarly, the City of Falls Church – home to one of the *Bray* plaintiffs, the Commonwealth Women's Clinic, which experienced blockades almost weekly for five years – declared in its *amicus* brief that it could not effectively contend with Operation Rescue's "military-style tactics":

> The police force (even as supplemented at considerable cost by county and state law enforcement officers) was unable to ensure access to the clinic for many hours, during which several patients were unable to have scheduled abortions or receive even the simplest of gynecological services. Some suffered physical injury, locked captive in cars that could not move through the parking lot, or bunkered inside the clinic from which medical personnel seeking to treat them had been denied access. . . . It was only when the federal court in this case entered its injunction under § 1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased.[36]

Ultimately, a closely divided Court held – over forceful dissents from Justice Sandra Day O'Connor and other Justices – that Operation Rescue's activities did not amount to discrimination against women and that Operation Rescue had not sufficiently interfered with women's constitutionally protected rights for purposes of the civil rights law.[37]

To be sure, John Roberts in his Supreme Court argument claimed that the Department of Justice was not defending Operation Rescue's unlawful conduct but rather was defending what it viewed as the appropriate interpretation of the civil rights law. Yet one wonders why the lawlessness of Operation Rescue and other blockade leaders was not disavowed in the brief, too, and whether, to the clinic protestors, the government's brief gave their harassing, blockading, and threatening actions the imprimatur of government endorsement at the highest levels. Moreover, after leaving the solicitor general's office, Roberts himself admitted the significance of the office's decision to file an amicus brief in a particular case and the impact it can have on the outcome of a case.[38] As Deborah Ellis, the attorney who represented the reproductive-health clinics in *Bray*, recently wrote "no courtroom caveat can erase the impact of the federal government's lending its weight on the side of the mob intent on stopping women from exercising a constitutional right. It was a devastating blow."[39]

The error of the decision to intervene in *Bray* is illuminated by the rapid response from Congress to restore federal civil rights protection to women and their doctors. In the year after the *Bray* decision, Congress responded to the Court's and the Department of Justice's narrow interpretation of the civil rights law at issue. It enacted the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), which imposes civil and criminal penalties upon those using or threatening to use violence to prevent access to clinics and prohibiting blockades. FACE upholds the rule of law and recognizes that state and local law enforcement are often unwilling or unable to address clinic violence. It empowers women and clinics to initiate civil suits against clinic violence perpetrators. Notably, even many members of Congress who oppose abortion itself supported FACE – that is, they understood that it was untenable for lawlessness to be essentially unredressable under our civil rights laws.

***Women's Health Care Services v. Operation Rescue-National***

In the summer of 1991, the same summer the Supreme Court was considering *Bray*, hundreds of

anti-choice clinic blockaders descended upon Wichita, Kansas in an orchestrated effort to shut down three reproductive-health clinics.[40] During the so-called "Summer of Mercy," Operation Rescue's tactics were twofold: (1) to engage in "sidewalk counseling" during which protestors would "abuse, harass, or intimidate women patients . . . so that they do not enter the [doctors'] clinics" and (2) to "physically blockade the driveways and doors of the clinics, thereby preventing anyone from entering."[41]

Operation Rescue's blockades resulted in a complete shutdown of the clinics during the first week and more than 2,600 arrests over the course of six weeks.[42] Left with no other choice, the clinics went to federal court and obtained an injunction prohibiting Operation Rescue and some of its most notorious headliners, including Randall Terry and Patrick Mahoney, from blocking access to the clinics.[43]

*After* the court issued the injunction and *after* the court ordered federal marshals to enforce the injunction because local law enforcement proved inadequate,[44] the U.S. Department of Justice (DOJ) filed an *amicus* brief in support of Operation Rescue. Supporting the same legal arguments put forth by Operation Rescue and the other blockaders, DOJ argued that federal law should not be applied and requested the court to lift the injunction during the appeals process of the case – *even though there were ongoing attempts to continue blockading*.[45]

John Roberts acknowledged that he participated in the decision on whether the Department of Justice would get involved in the case.[46] Indeed, he was a leader in the United States' intervention in opposition to the district court's actions.[47] In the district court's published opinion, the federal judge admonished DOJ for even getting involved in the case:

> This court has expressed its profound disappointment at the United States for its entry into the present dispute. The issues addressed herein doubtless will be resolved at a higher level than this court. It is the purpose and obligation of this court to uphold the laws of the United States and the State of Kansas, and to protect the persons, property, and liberties of the individuals within its jurisdiction. This court will fulfill that obligation and that purpose, though in doing so it is ill-served by the action of the United States.[48]

The judge explained that an injunction was absolutely necessary in this case to ensure patients' health and safety and to maintain the rule of law. He wrote:

> Denying the injunction, the court finds, would imperil the health and safety of plaintiffs' patients, injure the legitimate economic rights of the plaintiffs, cause further expense and harassment for the police forces of the City of Wichita, yet do nothing to further the legitimate First Amendment rights of Operation Rescue.[49]

> The court finds that, given the lawlessness of Operation Rescue and the willingness of its leaders to disregard as well the orders of this court, that significant injunctive relief, with accompanying sanctions of similar gravity, must issue. To do otherwise would imperil the rule of law.[50]

Roberts' role in *Women's Health Care Services* was far from that of a simple bureaucrat or functionary. In fact, when the first Bush administration was called upon by the media to defend its position in the case, it designated John Roberts as its spokesperson. On national television, Roberts defended the DOJ's actions, stating "[W]e filed a brief with the court sending him a copy of a brief we filed in April, in the Supreme Court in a related case . . . explaining that the law under which the abortion clinic providers and patients were suing the demonstrators did not apply in this case . . ."[51] Roberts even characterized his department's actions as having *helped* the volatile situation in Wichita, noting "We think what the Department did in Kansas has had a calming effect. It has made clear that the orders of the court must be obeyed and it has made clear that the marshals will enforce them . . ."[52]

In contrast, when renowned Harvard Law School Professor Laurence Tribe appeared on national television with Roberts during the Wichita blockades, he explained "I think Mr. Roberts is doing a pretty good job of making the government's position sound fairly reasonable, but . . . I'm afraid Mr. Roberts is, is not being really candid. It's true that the government is not positively approving of the blockade by Operation Rescue, but it's made no doubt at all about the fact that it is urging immediate lifting of this injunction on the ground that, just as Mr. Roberts said, they don't think that the Ku Klux Klan Act gives the federal courts any jurisdiction here."[53]

Tribe further explained that "the suggestion that one shouldn't make a federal case out of it, just go to state court, is not nearly as simple as it sounds. This is exactly the argument -- the argument about going to state court -- that was made in Little Rock, Arkansas, in 1957, when federal courts were taking the locally unpopular position of enforcing desegregation orders and when the argument was made that the federal courts had no business doing exactly that. That took a while but President Eisenhower finally saw the light and exerted the legal and moral leadership in saying that because federal rights were at stake, this did, indeed, belong in federal court."[54]

The federal government's decision to intervene in *Women's Health Care Services*, in support of anti-choice clinic blockaders once again, is unusual, inappropriate,[55] and very troubling. With the exception of the blockaders themselves, virtually everyone else seemed ill-served by the United States' intervention. John Roberts must take responsibility for the efforts he made in *Women's Health Care Services* as well in *Bray*. In a climate of widespread clinic violence and pleas from women and state law enforcement for help, he felt it necessary or desirable to bring the weight of the federal government to assist clinic blockaders instead of women, doctors, and law enforcement.[56] Our nation needs a Chief Justice upon whom we can depend to understand that the nation's civil rights laws protect women and their doctors, communities, and the rule of

law against the intimidation and obstructionism of those who disagree with the constitutional freedom to choose.

***Conclusion***

The American people deserve a Supreme Court made up of independent and fair-minded Justices who will respect and preserve our fundamental rights, including the right to privacy and a woman's right to choose. John Roberts' record demonstrates that the American people cannot depend on him to protect our most basic rights and freedoms. If John Roberts is confirmed as Chief Justice of the United States, he will almost surely provide a vote necessary to further dismantle the protections of *Roe v. Wade,* and he may even vote to overturn the decision altogether, erasing 32 years of life-saving constitutional law, law which has been a bedrock of women's privacy, freedom, and equality. At the very least, as Chief Justice, he will have great influence over how broad or narrow women's fundamental rights are for decades to come.

Before *Roe*, as many as 1.2 million women each year resorted to illegal abortion,[57] despite its known hazards, including: frightening trips to dangerous locations in strange parts of town, whiskey as an anesthetic, doctors who were often marginal or unlicensed practitioners, unsanitary conditions, incompetent treatment, infection, hemorrhage, disfiguration, and death.[58] Even without explicitly overturning *Roe*, the Court could uphold such a complicated array of restrictions, coupled with various procedural hurdles to bar women and their doctors from the courthouse door, that the right to choose will be illusory for millions of women.

The U.S. Supreme Court's ultimate responsibility is to fulfill the American promise of equal justice under law.[59] Given John Roberts' record, we cannot trust him with this lifetime appointment.

**Notes**

[1] U.S. Supreme Court, *The Court and Constitutional Interpretation, available at* http://www.supremecourtus.gov/about/constitutional.pdf (last visited Aug. 28, 2005).

[2] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

[3] *Roe v. Wade*, 410 U.S. 113, 153 (1973).

[4] Memorandum from John Roberts, Special Assistant to the Attorney General, to William French Smith, Attorney General (Dec. 11, 1981) (National Archives & Records Administration, Record Group 60, #60-89-372).

[5] Draft Article on Judicial Restraint, National Archives & Records Administration, Record Group 60, #60-89-372.

[6] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-927 (1992) (Blackmun, J., concurring and dissenting); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

[7] *Roe*, 410 U.S. at 118 n.2.

[8] *See, e.g.*, DEL. CODE ANN., tit. 24, §§ 1790-1793 (Supp. 1972).

[9] *See, e.g., Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Casey*, 505 U.S. 833 (1992), *cf. Lawrence v. Texas*, 539 U.S. 558 (2003).

[10] *Casey*, 505 U.S. at 860.

[11] *Casey*, 505 U.S. at 859.

[12] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392); Robin Toner, *Cold Paper Trail Leads Some to Scrutinize Nominee's Past Words on Abortion*, N.Y. TIMES, July 20, 2005, at A22.

[13] *Rust v. Sullivan*, 500 U.S. 173 (1991).

[14] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).

[15] Brief for the Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).

[16] *Rust v. Sullivan*, 500 U.S. 173 (1991).

[17] The Alan Guttmacher Institute, *Title X 'Gag Rule' Is Formally Repealed*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2000.

[18] When asked to comment on the brief, Roberts stated, "We'll let the brief speak for itself." *Bush Administration Asks Supreme Court to Reject Roe vs. Wade*, PITTSBURGH POST-GAZETTE, Sept. 8, 1990, at A8. *See generally* NARAL Pro-Choice America, *What Roberts' Actions as Deputy Solicitor General Say About His Own Ideology* (Aug. 26, 2005).

[19] *Bush Administration Asks Supreme Court to Reject Roe vs. Wade*, PITTSBURGH POST-GAZETTE, Sept. 8, 1990, at A8.

[20] *Bush Administration Asks Supreme Court to Reject Roe vs. Wade*, PITTSBURGH POST-GAZETTE, Sept. 8, 1990, at A8.

[21] NARAL Pro-Choice America, *What Roberts' Actions as Deputy Solicitor General Say About His Own Ideology* (Aug. 26, 2005).

[22] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[23] Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991) ("At the heart of Operation Rescue's purpose and method is obstruction and hindrance of prompt, effective, and equal enforcement of state law. Through a panoply of tactics which overwhelm the police, shut down health care clinics, hinder police efforts to reopen them, and delay arrest or arraignment, Operation Rescue hinders state authorities from securing to citizens the equal protection of state laws. . . ."); Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991) ("In this case, the Falls Church police did all that they were able to do to secure the protection of state law to plaintiffs in this action as they sought to enter Commonwealth Women's Clinic to receive or render services there. Against the forces of Operation Rescue, however, the City's efforts proved inadequate. . . . It was only when the federal court in this case entered its injunction under § 1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased.").

[24] Bray was convicted of two counts of conspiracy and one count of possessing unregistered explosive devices. The court sentenced him to 10 years in prison and ordered him to pay restitution in the amount of $43,782. The U.S. Court of Appeals for the Fourth Circuit overturned his conviction on a technicality relating to jury selection. Before he was retried, Bray entered a plea that resulted in him serving 46 months in prison. Planned Parenthood Federation of America, *Extremist Biography: Michael Bray, at* http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050202-michael-bray.xml (Feb. 2, 2005); National Abortion Federation, *Anti-Abortion Extremists/The Army of God and Justifiable Homicide, at* http://www.prochoice.org/about_abortion/violence/army_god.html (last visited Aug. 1, 2005); National Abortion Federation, *History of Violence/Arsons and Bombings, at* http://www.prochoice.org/about_abortion/violence/arsons.asp (last visited Aug. 3, 2005); Sandy Banisky, *Bowie Family Condones Anti-Abortion Violence*, BALT. SUN, Oct. 9, 1994, at 1A.

[25] National Abortion Federation, *Anti-Abortion Extremists/The Army of God and Justifiable Homicide, at* http://www.prochoice.org/about_abortion/violence/army_god.html (last visited Aug. 1, 2005); Planned Parenthood Federation of America, *Extremist Biography: Michael Bray, at* http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050202-michael-bray.xml (Feb. 2, 2005).

[26] Sandy Banisky, *Bowie Family Condones Anti-Abortion Violence*, BALT. SUN, Oct. 9, 1994, at 1A.

[27] Planned Parenthood Federation of America, *Extremist Biography: Randall Terry, at* http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050329-terry.xml (Mar. 29, 2005); *Who is Randall Terry?*, Media Matters for America, *at* http://mediamatters.org/items/200503220001 (Mar. 21, 2005).

[28] Jim Burns, *Minister Risks Jail Time to Read Scripture in Front of Abortion Clinic*, CNSNEWS.COM, June 19, 2002.

[29] Planned Parenthood Federation of America, *Stalked and Shot: Dr. Douglas Karpen Strikes Back* (Jan. 11, 2005).

[30] Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991); Transcript of Oral Argument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 16, 1991); Transcript of Oral Reargument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 6, 1992).

[31] Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991) (acknowledging that the Falls Church police force could not "combat effectively the military-style tactics of these blockades. . .").

[32] Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991); Transcript of Oral Argument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 16, 1991); Transcript of Oral Reargument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 6, 1992).

[33] Note that the number of actual incidents is probably much higher. The statistics reported herein represent incidents reported to or obtained by the National Abortion Federation (NAF). NAF statistics include incidents from both the United States and Canada. NAF derives most of its statistics from its members, most of whom are in the United States. National Abortion Federation (NAF), *NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada* (Sept. 16, 2004); National Abortion Federation, *History of Violence/Butyric Acid Attacks, at* http://www.prochoice.org/about_abortion/violence/butyric_acid.asp (last visited Aug. 5, 2005).

[34] Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).

[35] Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).

[36] Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).

[37] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[38] John Roberts, *Rule of Law: The New Solicitor General and the Power of the Amicus*, WALL ST. J., May 5, 1993, at A23.

[39] Deborah Ellis, *Questions for John Roberts*, WASH. POST, Aug. 17, 2005, at A13.

[40] Mimi Hall, *'Protest from Hell' Divides, Disrupts Wichita*, USA TODAY, AUG. 5, 1991, at 2A.

[41] *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 261 (D. Kan. 1991); Michael Abramowitz, *The War in Wichita; In a Community Divided, a Judge and Antiabortion Protestors Stand Their Ground*, WASH. POST, Aug. 9, 1991, at D1.

[42] *Judge Orders U.S. Marshals to Prevent Closing of Abortion Clinics*, N.Y. TIMES, July 30, 1991, at 16A; *Antiabortion Arrests Resume in Kansas*, WASH. POST, Sept. 8, 1991, at 7A.

[43] *Women's Health Care Services*, 773 F. Supp. at 258.

[44] *Women's Health Care Services*, 773 F. Supp. at 268; *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[45] Brief of the United States of America as Amicus Curiae in Support of Defendants' Motion for Stay Pending Appeal, *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991) (No. 91-1303-K).

[46] Aaron Epstein, Angelia Herrin, & Ellen Warren, *Thornburgh OKD Abortion-Case Intervention*, PHILA. INQUIRER, Aug. 8, 1991.

[47] Brief of the United States of America as Amicus Curiae in Support of Defendants' Motion for Stay Pending Appeal, *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991)

(No. 91-1303-K); *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991; Alan Bjerga, *Roberts Faces Scrutiny of Role in Wichita Case*, WICHITA EAGLE, Aug. 11, 2005, at 1A.

[48] *Women's Health Care Services*, 773 F. Supp. at 270.

[49] *Women's Health Care Services*, 773 F. Supp. at 263.

[50] *Women's Health Care Services*, 773 F. Supp. at 269.

[51] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[52] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[53] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[54] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[55] Former Deputy Solicitor General Andrew Frey said: "I don't remember it ever happening. I assume that it's purely political. . . . Since they've staked out their position in the Supreme Court [in *Bray*] and the Supreme Court is hearing the case, there's no interest of orderly judicial administration that they are serving by intervening," and DOJ's action "would be taken by many to be an endorsement of disobedience of the court order." Former Deputy Solicitor General Kenneth Geller said: "My sense is that it happened very, very rarely because the government has more important things to do than file amicus briefs in private litigation in the district courts." *U.S. Officials Defend Move in Wichita; Women's Groups Hit Abortion Protest Role*, WASH. POST., Aug. 8, 1991, at 1A.

[56] Roberts' supporters attempt to dismiss the significance of his work in these cases by pointing to a 1986 letter drafted by Roberts on behalf of Deputy Counsel to the President Richard Houser. A response to anti-choice Congressman Romano Mazzoli, the letter reassures a concerned Mazzoli that the Administration would not pardon bombers whose targets were abortion clinics, despite rumors to the contrary. In truth, the draft's minimal expression of adherence to the principle of law and order says little, if anything, about the reasons behind Roberts' later involvement in the cases as Principal Deputy Solicitor General. Memorandum from John Roberts, Associate Counsel to the President, to Nancy J. Risque, Deputy Assistant to the President for Legislative Affairs (Feb. 10, 1986); Letter from Richard A. Hauser, Deputy Counsel to the President, to The Honorable Romano L. Mazzoli (Feb. 10, 1986).

[57] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue*, GUTTMACHER REP. ON PUB. POL'Y, March 2003, at 8.

[58] Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 117 (Nov. 1989).

[59] U.S. Supreme Court, *The Court and Constitutional Interpretation, available at* http://www.supremecourtus.gov/about/constitutional.pdf (last visited Aug. 28, 2005).

August 31, 2005

The Honorable Arlen Spector
Chairman on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Spector and Ranking Member Leahy:

We are writing on behalf of the National Women's Law Center, a nonprofit organization that has been working since 1972 to advance and protect women's legal rights.

Based on our review of the available record on Judge John Roberts, the National Women's Law Center has concluded that he should not be confirmed to the Supreme Court. We enclose the National Women's Law Center's Special Report on the Record of John Roberts on Critical Legal Rights for Women, which forms the basis for this conclusion.

We hope this report is of assistance to the Judiciary Committee.

Sincerely,

Nancy Duff Campbell
Co-President

Marcia D. Greenberger
Co-President

Enclosure

11 Dupont Circle # Suite 800 # Washington, DC 20036 # 202.588.5180 # 202.588.5185 Fax # www.nwlc.org

*The New York Times, August 30, 1985*

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August 30, 1985, Friday, Late City Final Edition

**SECTION:** Section B; Page 2, Column 1; National Desk

**LENGTH:** 493 words

**HEADLINE:** U.S. **SAYS SCHOOLS SHOULDN'T BAR PUPILS WITH AIDS**

**BYLINE:** AP

**DATELINE:** ATLANTA, Aug. 29

**BODY:**
Most children with AIDS should be allowed in the classroom, and school officials should do their best to protect the pupils' privacy, Federal health authorities said today. The statement came amid dispute over letting victims of the ailment, acquired immune deficiency syndome, go into public schools.

"For most infected children, the benefits of an unrestricted setting would outweigh the apparent nonexistent risk of transmission," the national Centers for Disease Control said.

The health agencies, based here, said decisions on the care and education of a child with AIDS virus, designated HTLV3-LAV, should be made on an individual basis, taking into account the child's behavior, development and physical condition and the pupil's expected interaction with other children.

AIDS, which cripples the body's disease-fighting mechanism, is caused by a virus and is generally thought to be transmitted through blood, blood products or body fluids, in intimate contact.

No Risk Seen in School Contacts

"Casual person-to-person contact, as among schoolchildren, appears to pose no risk," the center said in its Morbidity and Mortality Weekly Report. At least 183 people under 18 years old have contracted AIDS, and 2 to 10 times as many are likely to be infected, according to Dr. Martha Rogers, a specialist with the centers' AIDS panel.

No children have ever been found to have contracted AIDS in school, day care, foster care or other casual contact, the agencies said. But as far as their researchers are aware, no public school system in this country has admitted a child with AIDS.

"The reasons I've seen given for keeping them out are not very good reasons," Dr. Rogers said. "We're trying to educate people as to the real transmission modes.

"I don't see any need to keep them out. They have enough suffering without it being made more so by the rest of society.'"

'Much Fear' Is Evoked

The threat of AIDS, which has killed 6,376 of its 12,736 reported victims in this country, the centers said, "evokes much fear from others in contact with the patient."

The ailment, first diagnosed in 1981, occurs most often in homosexual men, intravenous drug abusers and recipients of transfusions and blood products. Some cases have occurred among sexual partners of AIDS patients. Seventy percent of the cases found in children have developed in offspring of parents who had the ailment or were in a high-risk group.

School personnel and others involved with AIDS children "should respect the child's right to privacy, including maintaining confidential records," the center urged.

"A more restricted environment" is recommended for certain children with AIDS, specifically those under school age, who are handicapped and cannot control their body secretions or who might bite other children, the centers said.

But screening of all children for AIDS before they enter school "is not warranted," the agency said.

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Democrats Readying for Judicial Fight

**BYLINE:** By NEIL A. LEWIS

**DATELINE:** WASHINGTON, April 30

**BODY:**

President Bush has yet to make his first nominee to a federal court and no one knows whether anyone will retire from the Supreme Court this summer, an event that would lead to a high-stakes confirmation battle.

Nonetheless, the Senate's Democrats and Republicans are already engaged in close-quarters combat over how to deal with the eventual nominees from the Bush White House. Democrats in particular are trying to show some muscle as they insist that they will not simply stand aside and confirm any nominees they deem right-wing ideologues.

"What we're trying to do is set the stage and make sure that both the White House and the Senate Republicans know that we expect to have significant input in the process," Senator Charles E. Schumer, New York's senior Democrat, said in an interview. "We're simply not going to roll over."

Forty-two of the Senate's 50 Democrats attended a **private retreat** this weekend in Farmington, Pa., where a principal topic was forging a unified party strategy to combat the White House on judicial nominees.

The senators listened to a panel composed of Prof. Laurence H. **Tribe** of Harvard Law School, Prof. **Cass** M. Sunstein of the University of Chicago Law School and **Marcia** R. **Greenberger,** the co-director of the National Women's Law Center, on the need to scrutinize judicial nominees more closely than ever. The panelists argued, said some people who were present, that the nation's courts were at a historic juncture because, they said, a band of conservative lawyers around Mr. Bush was planning to pack the courts with staunch conservatives.

2001

"They said it was important for the Senate to change the ground rules and there was no obligation to confirm someone just because they are scholarly or erudite," a person who attended said.

Senator Tom Daschle of South Dakota, the Democratic leader, then exhorted his colleagues behind closed doors on Saturday morning to refrain from providing snap endorsements of any Bush nominee. One senior Democratic Senate staff aide who spoke on the condition of anonymity said that was because some people still remembered with annoyance the fact that two Democratic senators offered early words of praise for the nomination of Senator John Ashcroft to be attorney general.

Senators Robert G. Torricelli of New Jersey and Joseph R. Biden Jr. of Delaware initially praised the Ashcroft selection, impeding the early campaign against the nomination. Both eventually acceded to pressure and voted against the nomination.

The current partisan battle is over a parliamentary custom that Republicans are considering changing, which governs whether a senator may block or delay a nominee from his home state. Democrats and Republicans on the Judiciary Committee have not resolved their dispute over the "blue-slip policy" that allows senators to block a nominee by filing a blue slip with the committee.

On Friday, Senator Patrick J. Leahy of Vermont, the ranking Democrat on the Judiciary Committee, and Mr. Schumer sent a letter to the White House signed by all committee Democrats insisting on a greater role in selecting judges, especially given that the Senate is divided 50-50 and that the Republicans are the majority only because Vice President Dick Cheney is able to break any tie.

Senator Trent Lott of Mississippi, the Republican leader, told reporters today that he believed "some consideration will be given to Democratic input, but I don't think they should expect to name judges from their state."

Mr. Lott said he expected that Democrats might slow the process but, in the end, would not block any significant number of nominees.

Behind all the small-bore politics is the sweeping issue of the direction of the federal courts, especially the 13 circuit courts that increasingly have the final word on some of the most contentious social issues. How the federal bench is shaped in the next four or eight years, scholars say, could have a profound effect on issues like affirmative action, abortion rights and the lengths to which the government may go in aiding parochial schools.

Mr. Bush is expected to announce his first batch of judicial nominees in the next several days, and it is likely to include several staunch conservatives as well as some women and members of minorities, administration officials have said. Among those Mr. Bush may put forward to important federal appeals court positions are such conservatives as Jeffrey S. Sutton, Peter D. Keisler, Representative Christopher Cox of California and Miguel Estrada.

The first group of nominees, which may number more than two dozen, is part of an effort to fill the 94 vacancies on the federal bench while the Republicans still control the Senate.

But it remains unclear if there will be a Supreme Court vacancy at the end of the court's term in July. Speculation on possible retirements has focused on Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and John Paul Stevens. But in recent days, associates of Justice O'Connor have signaled that she wants it known that she will not retire after this term.

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August 29, 2005

United States Senators
Washington DC

Dear Senators,

On behalf of all the Anglicans and Episcopalians that you serve, thank you for your dedication to this great nation.

It is because of our great national history we write. We are very concerned about what is commonly referred to as "Judicial Activism" and the negative impact it will have on this nation's future. NOEL believes all judges should seek to uphold the Constitution of the United States; **therefore we strongly support the nomination of John Roberts for the U.S. Supreme Court.**

We urge you to help preserve this nation's history and vote yes to confirm Judge Roberts and prevent any type of filibuster.

Again, thank you for serving our country.

Respectfully,

Georgette Forney
President, NOEL

The Rev. D. Lorne Coyle
Chairman of the Board, NOEL

CC: Majority Leader Frist, Judiciary Committee Chairman, Arlene Specter and Republican Conference Chairman, Rick Santorum

**Judge Roberts's Record on Women's Rights**

- Some left-wing groups, including People for the American Way, accuse Judge Roberts of opposing women's rights and being "derisive" towards women.
  - Someone should ask Judge Roberts' three sisters, his Washington, D.C. attorney wife, or his young daughter how they feel about their brother, husband, and father being depicted as against the rights of women.
  - When told of Judge Roberts' nomination as her replacement, Justice Sandra Day O'Connor described him as, "Brilliant legal mind, a straight shooter, articulate, and he should not have trouble being confirmed by October."
  - Linda Chavez, the President of the Center for Equal Opportunity and John Roberts' former colleague said: "I knew Judge Roberts as a brilliant lawyer, as a very nice man, and I can say he doesn't have a sexist bone in his body."
- Judge Roberts' legal career clearly demonstrates his support for protecting women and for advocating equality among men and women.
  - As a private attorney, Judge Roberts successfully defended the state of Alaska's Megan's Law sex-offender registration program before the Supreme Court. Roberts argued that the law protected the public by making truthful information about sex offenders available. In an interview with NPR, Roberts said, "The purpose of the law is not to punish anyone. The purpose of this law is to protect families and particularly the most vulnerable among us, children." The Supreme Court agreed and upheld the law.
  - In his capacity as judge for the D.C. Circuit Court of Appeals, Judge Roberts upheld a FCC program that gave access to interactive video and data licenses to small businesses, which were primarily owned by women and minorities. Judge Roberts concluded that the FCC's consideration of the positive impact "on minority- and women-owned businesses" was not improper, especially in light of the fact that the FCC was providing licenses to "congressionally favored small business[es]."

AG2-00361-264, AG1-01389-92,
AG1-01399, WH2-39586

***Univ. of Richmond v. Bell* (Title IX)**

- Critics have noted that as a young Justice Department lawyer, Judge Roberts recommended that the government should not appeal a case it had lost against a Virginia university.

- The case, *University of Richmond v. Bell,* was about whether the government can force private colleges to provide government investigators with highly detailed reports and information about their athletic programs. The law said, and the trial court had found, that the government only had this power over federally-funded athletic programs. The programs, in this case, did not receive any federal funding.

- Some government lawyers wanted to use the courts to change the law, hoping for a ruling that the government could force virtually any private university to comply with these costly and burdensome requests.

- Judge Roberts objected, arguing that the law only gave government investigators the limited authority to demand information from university programs that were federally funded.

- Judge Roberts pointed out that Congress had specifically chosen to make Title IX applicable only to federally-funded programs, and that the Supreme Court, that very same year, had affirmed that principle in *North Haven Board of Education v. Bell* when it stressed that Title IX was program-specific.

- Judge Roberts was not limiting Title IX's coverage of gender discrimination. He was simply enforcing the law as written by Congress at that time, and advocating that the government not use the Courts to rewrite the law.

AG6-01797-01799

**Title VII and Employment Discrimination**

- Some left-wing interest groups, including the Alliance for Justice and People for the American Way, have based their opposition to Judge Roberts, in part, on a 1981 memo that addressed proposed settlement negotiations with two school districts accused of race and sex discrimination in their hiring process.

- As Special Assistant to Attorney General William French Smith, Judge Roberts was tasked with reviewing a memorandum that overviewed the discrimination suit and the proposed settlement negotiations.

- Judge Roberts voiced concern that the proposed settlement agreements did not accurately reflect Title VII case law. He noted that as the law stood in 1981, a Title VII plaintiff had to prove not only that the applicant was discriminated against based on his or her race or sex, but also that the person was not hired *because of* the race or sex discrimination. In other words, there must be a *causal connection* between the discrimination and the fact that the person was not hired.

- This view of Title VII was entirely reasonable and was correct as a matter of law at the time Judge Roberts drafted the memorandum.

    - For example, only a few months earlier, the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, held that an employer could defend itself against a charge of discrimination under Title VII if it could "articulate some legitimate, nondiscriminatory reason for the employee's rejection" and the plaintiff was unable to prove that the "legitimate reasons offered by the defendant were not its true reasons."

    - It was not until ten years later that Congress enacted the Civil Rights Act of 1991, which changed the law to make it unlawful for race or gender to be used as any "motivating factor" in employment decisions.

Judge Roberts' on Disability Rights

Judge Roberts has a public record of advocating for judicial restraint and treating all litigants fairly. Yet far-left interest groups have attacked Judge Roberts for being hostile to civil rights laws, particularly disability discrimination laws. The facts are otherwise:

- Judge Roberts, while working as a special assistant to Attorney General William French Smith, argued for a broad view of the scope of Congress' power under section 5 of the Fourteenth Amendment. Section 5 grants Congress the power to enforce the Equal Protection Clause and the Due Process Clause, and Congress often invokes section 5 to enact antidiscrimination laws, including disability-discrimination laws.
    - Judge Roberts, in at least two separate memoranda written long before he became a judge, argued that Congress has the authority to enact legislation pursuant to section 5 so long as it "might rationally" conclude or if "the Court can conceive of a basis" for concluding that the law is necessary to safeguarding civil rights. (Busing Legislation, at 1; Note for the Attorney General, at 10 (April 6, 1982)).
    - That broad view of Congress' power to protect civil rights would enable Congress to enact a host of antidiscrimination laws, and is even more expansive than the views of Justice Ruth Bader Ginsburg. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Kennedy, J., for the Court, joined by, among others, Ginsburg, J.); *id.* at 545-46 (O'Connor, J.) (agreeing with the Court's reasoning in relevant part).
- The Bazelon Center for Mental Health law claims that Judge Roberts was hostile to the right to be free from disability discrimination created by section 504 of the Rehabilitation Act.
    - Yet while a Judge on the D.C. Circuit Court of Appeals, he joined the opinion of a Clinton appointee that *upheld* section 504 as a valid exercise of Congress' Spending Power. *See Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1168-70 (D.C. Cir. 2004). Judge Roberts thus allowed a disabled Metro worker who claimed he was fired on account of his mental health to sue his employer.

- In doing so, Judge Roberts rejected the position taken by a conservative judge on the panel, Judge David B. Sentelle, who voted to strike down this law and strongly dissented from Judge Roberts' vote. *Id.* at 1171-77 (Sentelle, J., dissenting).

- Judge Roberts also joined an opinion by another Clinton appointee allowing a suit by a disabled veteran for disability benefits to proceed. *See Thomas v. Principi*, 394 F.3d 970, 973-75 (D.C. Cir. 2005).

- The Bazelon Center also claims that Judge Roberts' decision on whether the federal government can ban economic activity that might affect a specific breed of toad endangers the rights of the disabled:

  - Judge Roberts never questioned that Congress may protect endangered species, or even that it could protect that toad.

  - Judge Roberts said that the court may have reached the correct result, but incorrectly applied Supreme Court precedent. He asked the full court to take time to review the case "to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

  - The question in that case – whether Congress can regulate a toad that never goes more than 1.2 miles from its birth place – is very different from whether Congress can regulate people, who work, travel, and contribute to the nation. In short, it says nothing about Congress' ability to enact antidiscrimination laws.

AG6-01797-99; WH2-39586

**General Civil Rights**
**(FOLLOW-UP)**

- Judge Roberts has been accused of being hostile to minorities and women simply because he advocated President Reagan's interpretation of civil rights statutes.

- As both Counsel to the Attorney General, as well as a White Counsel to President Reagan, it was Judge Roberts' duty to evaluate the law and determine what whether there would be any legal objections to the Reagan Administration's views.

- In fact, Judge Roberts was obligated to advocate the positions supported by President Reagan.

- It does not seem fair that Judge Roberts is being criticized now 20 years later for doing his job.

- I would also like to point out that none of Judge Roberts critics point out that when performing his job he consistently advocated equality for minorities and women.

    - For example, as Special Assistant to Attorney General William French Smith, Judge Roberts drafted an op-ed on behalf of the Attorney General that highlighted the efforts "to vindicate the principle of equal opportunity" and "to ensure that individuals in the workplace are treated on their ability and not their race, creed or sex." *[AG1-01433 to -01438]*

    - Judge Roberts also criticized the Administration when he thought that it was providing special treatment for Hispanic civil right complainants. He argued that this could only mean something less for Black civil rights complaints and that such preferential treatment for Hispanics could not be pursued by the Administration. *[WH2-36945]*

    - Judge Roberts also consistently advocated equality for women. For example, he pointed out in a memo that that women deserve equal pay rather than just the "good pay" that was specified in a White House speech. *[WH2-24460 to -24461]*.

## Judge Roberts on Affirmative Action

**As a young lawyer in the Reagan Justice Department, Judge Roberts advocated President Reagan's view that affirmative action was acceptable as long as it did not involve racial quotas or special treatment.**

- Judge Roberts wrote in support of "affirmative action programs which increase the pool of applicants or compel the employer to consider a wider group with more blacks and women." (AG1-00448-49).

- Judge Roberts also wrote that "race or sex conscious preferences can of course be used in providing remedies to proven victims of discrimination." (AG1-00448-49).

- Judge Roberts further said that President Reagan should "encourage" awarding government contracts to minorities by "actively soliciting bids from qualified minority firms" and engaging in "broader advertising" to minorities. (WH2-29676).

**Public opinion polls show that the American people agree with the position advocated by President Reagan and Judge Roberts.**

- A recent ABC News/Washington Post poll showed that 7 out of 10 Americans, including a majority of Democrats, oppose affirmative action if it involves quotas or special treatment. (January 2003 ABC News/Washington Post poll).

**As an open-minded and fair jurist, Judge Roberts will decide each affirmative action case on its own individual merits.**

- As an attorney in private practice, he was retained by Democrat state attorneys general to defend a race-based policy adopted by the state of Hawaii. (*Rice* v. *Cayetano*).

- As a government lawyer in the first Bush Administration, he advocated the government's position that a racial quota program was wrong because it allowed only minority owners to buy certain TV broadcasting licenses. (*Metro Broadcasting v. FCC*).

- Judge Roberts's ability to see and argue both sides of the issue prepares him well for a seat on Supreme Court.

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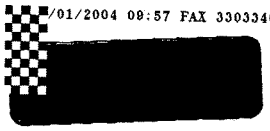

Thursday, July 28, 2005

The Honorable Arlen Specter, Chairman and
The Honorable Patrick Leahy, Ranking Minority Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman and Ranking Member of the Senate Committee on the Judiciary,

Judge Roberts is a fair-minded and compassionate jurist. He has received the highest rating from the American Bar Association and graduated at the top of his class from Harvard Law School. He has argued before the Supreme Court 39 times, and has been called one of the best Supreme Court lawyers in the nation. His legal knowledge and skills are impeccable, and his integrity is unquestionable.

Please vote to confirm this Judge!!!!

Sincerely,

Darlene & Pat

Darlene &. Patrick M. O'Sullivan

## News



### Opposition to Roberts Nomination

**HRC, The TASK FORCE, NCLR and PFLAG Announce Opposition to Roberts Nomination**

Washington D.C. – August 25, 2005 – The Human Rights Campaign, the National Gay and Lesbian Task Force, the National Center for Lesbian Rights and Parents, Families and Friends of Lesbians and Gays put out a united statement today to announce opposition to John G. Roberts' nomination to the Supreme Court.

"Judge Roberts has such a narrow view of what the courts can and should do, it's a wonder he wants the job at all," said Human Rights Campaign President Joe Solmonese. "Ultimately, this is about an individual's right to privacy. From women's rights to religious freedom to civil rights, there is powerful evidence that Judge Roberts would rule against equality."

"For his entire adult life, John Roberts has been a disciple of and promoted a political and legal ideology that is antithetical to an America that embraces all, including lesbian, gay, bisexual and transgender people," said Matt Foreman, executive director of the National Gay and Lesbian Task Force. "He has denigrated the nature and scope of the constitutional rights to privacy, equal protection and due process as well as federal government's role in confronting injustice. I have no doubt he's an accomplished lawyer and an affable dinner companion, but that doesn't make him any less a mortal danger to equal rights for gay people, reproductive freedom and affirmation action."

"There is nothing in Roberts' history as a lawyer, policymaker or judge to indicate that he would be anything other than hostile to the claims of those seeking to preserve affirmative action, reproductive freedom and fundamental rights, or for those seeking to ensure that the emerging protections expressed in Romer v. Evans and Lawrence v. Texas become truly meaningful in the lives of lesbian, gay, bisexual and transgender Americans," said Kate Kendell, executive director of the National Center for Lesbian Rights.

"The stakes for gay, lesbian, bisexual and transgender Americans are too high," said Jody Huckaby, executive director of Parents, Families and Friends of Lesbians and Gays. "We cannot sit back and allow a man with a demonstrated record of hostility towards privacy and minority rights to make decisions on our nation's highest court that will affect this nation for generations to come. After a thorough review of the selective documents released by the White House, PFLAG is convinced that nominee John Roberts should not be trusted to protect the fundamental rights and freedoms of all Americans."

**Joint Statement of Human Rights Campaign, National Gay and Lesbian Task Force, National Center for Lesbian Rights, and Parents Families and Friends of Lesbians and Gays in Opposition to Nomination of John G. Roberts, Jr. to the United States Supreme Court**

As organizations working to advance civil rights for gay, lesbian, bisexual, and transgender ("GLBT") people, we work in varied spheres--in Congress, in the courts, before our state legislatures, and within our families. In the realm of civil rights, we know of no more significant event than the appointment of a Supreme Court justice. Together, because of our shared commitment to GLBT rights, we announce our opposition to the nomination of John G. Roberts, Jr. to the Supreme Court of the United States.

History has shown us that the Supreme Court is a bulwark of protection for minorities from the tyranny of sometimes misguided majorities. That was true in 2003 when the Court ruled that mere disapproval was not a rational reason to brand us as criminals, just as it was true in 1968 when the Court struck down bans on interracial marriage— although 72% of Americans disagreed. Since President Bush nominated John Roberts on July 19, disturbing evidence has emerged about the kind of justice that he would be. His writings as a lawyer, his rulings as a judge, and his statements as a policymaker all lead us to the unfortunate conclusion that Judge Roberts would not vote to protect our civil rights from those who are, at this moment,

fighting so hard to take them away. Instead, his record indicates that Judge Roberts would vote to roll back the Constitutional protections upon which our community—and all Americans—rely.

The impediments to the Senate's thorough review of Roberts's record. We are particularly troubled that the Senate has had no access to relevant documents relating to Judge Roberts's service as Principal Deputy Solicitor General from 1989 to 1993. These documents include Roberts's writings about cases involving voting rights, choice, the separation of church and state, and many other subjects of critical importance. The Senate's constitutional duty of "advice and consent" depends upon full disclosure of the nominee's record—something that the American people deserve, especially in light of the troubling record revealed thus far. The Administration's claim that these documents are shielded by attorney-client privilege is without basis. The American people, not the White House, were Roberts's true client when he was in the Solicitor General's office.

Although our groups, the Senate, and the American people have been denied full access to Roberts's record, the evidence before us is sufficient to lead to the following conclusions:

Roberts and fundamental rights. Just two years ago, the Court finally recognized that the Constitutional guarantee of liberty protects our community and our relationships. The basis for the landmark case of Lawrence v. Texas was the idea that the Constitution draws a line beyond which the government cannot go. Roberts's writings clearly indicate that he does not agree with the cases and constitutional foundations of Lawrence. He has criticized the Court for what he claims is an intrusion into areas belonging to legislatures, and dismissed what he calls the "so-called right to privacy." His record indicates that Roberts would not vote to safeguard our liberties, but instead join Justices Scalia and Thomas in upholding limitations on our freedoms.

Roberts and equal protection. Roberts has taken a similarly narrow view of the Equal Protection Clause, which provided the basis for its decision in Romer v. Evans. As a Reagan Administration lawyer, Roberts wrote that by reading the Equal Protection Clause to cover classifications other than race, the Court had imposed "values which do not have their source in that document." We are concerned that his narrow view would likely have led Roberts, had he been on the Court when Romer v. Evans was decided, to conclude that Colorado's discriminatory law was constitutional.

A note on Roberts and Romer v. Evans. We are mindful that Judge Roberts provided a few hours of pro bono help to the attorneys in Romer v. Evans—a landmark case for our community. Some have said that this work—which consisted mostly of playing the role of a conservative justice—demonstrates that Roberts is not personally anti-gay. This theory is not relevant to the important issue for our community: how Roberts would vote as a Supreme Court justice. Roberts has repeatedly written that the Court should not stand up for civil rights, but rather allow legislatures to enact such laws as they wish—even those that deny the rights that Americans understand to be fundamental.

Roberts and "court stripping." Our concern that Judge Roberts would not enforce constitutional protections is reinforced by his writings on "court stripping" statutes. Last year, the House of Representatives passed the so-called Marriage Protection Act, which would have prevented the courts from even hearing challenges to the federal Defense of Marriage Act ("DOMA"). Roberts's writings indicate that he believes such statutes are constitutional, a view that undermines the Court's constitutional function as it has been understood for over 200 years. Should such a measure pass the Congress, Roberts would likely vote to uphold it and effectively block our community at the courthouse door.

Roberts and sound science. In spite of the clear consensus among social science, psychiatric, psychological, and medical associations in favor of GLBT equality, courts are frequently presented with unfounded assertions that there is conflicting evidence. The way that a judge regards research findings before the Court can affect a case's outcome. In short, it can mean the difference between Goodridge, in which the Massachusetts court ruled that there was no rational basis for excluding same-sex couples from marriage, and Lofton, in which the Eleventh Circuit upheld Florida's anti-gay adoption law even though every credible social science and child advocacy group opposed it.

We were troubled to learn that Roberts, as a Reagan-administration attorney, seemed to disregard mainstream scientific evidence about how HIV is transmitted. In September 1985, Roberts cautioned President Reagan against stating that the AIDS virus could not be spread through casual contact among schoolchildren, claiming that this conclusion was in dispute. In fact, August 1985 Centers for Disease Control guidelines clearly stated that "Casual person-to-person contact, as among schoolchildren, appears to pose no risk."

Our community needs to know whether, as a justice, Roberts would look to the sound and tested science about our community. This is an issue that we believe the Senate should examine thoroughly.

Roberts and Congress's power to protect our community. Because the GLBT community is particularly vulnerable to hate violence and discrimination, Congress's authority to prevent these problems is of vital importance to us. Roberts's record shows that he holds a very limited view of Congress's authority, and would likely vote with the Court's most conservative justices in cases challenging civil rights statutes, workplace protections, and hate crimes legislation.

Roberts as a replacement for Justice Sandra Day O'Connor. Justice O'Connor, who announced her retirement on July 1, 2005, has often been a critical swing vote in favor of equality. In Romer v. Evans, she joined a 6-3 majority to strike down an anti-gay law. In Lawrence v. Texas, she wrote a concurring opinion that Texas's sodomy law violated the Equal Protection Clause. In Planned Parenthood v. Casey, she voted to uphold Roe v. Wade—four justices dissented in that case. In two closely divided cases about public displays of the 10 Commandments handed down June 27, she voted to protect the separation of church and state. On all of these areas critical to our civil rights, Judge Roberts has stated that he holds the opposite position. His elevation to the Court would be a shift away from equality.

We, and all Americans, deserve better. Our process for arriving at this opposition has been rigorous. Throughout our careful review of Roberts's record, we have been focused on one goal: learning whether his lifetime appointment to the nation's highest court would be in the interest of this community. The evidence indicates that it would not.

As GLBT Americans, we deserve no less than a justice who will uphold our freedoms and protect our rights. By announcing our opposition today, we do not conclude our work but rather commence a new stage in our efforts, engaging the community we represent in this important issue. The confirmation hearings are still ahead, and it is crucial that the Senate Judiciary Committee make clear that our lives, our liberty, and our equality are on the line.

We acknowledge that our task is not an easy one. But we know that it is the right thing to do.

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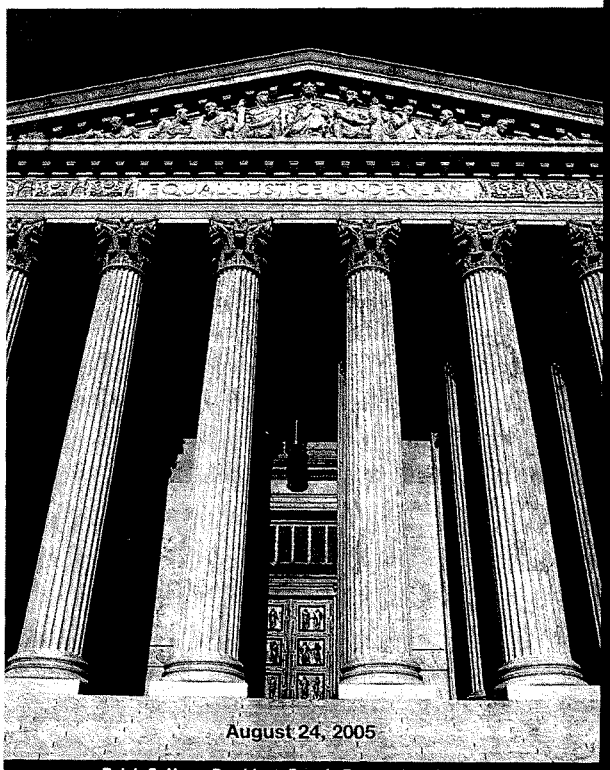
SPECIALREPORT

# People For the American Way Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts



August 24, 2005

Ralph G. Neas, President, People For the American Way
2000 M Street NW, Suite 400 Washington DC 20036 202/467-4999
www.pfaw.org

PEOPLE FOR THE AMERICAN WAY

# People For the American Way Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts

## Executive Summary

The record of Supreme Court nominee John Roberts demonstrates that his confirmation to the nation's highest court would undermine Americans' rights and freedoms and limit the role of the federal courts in upholding them. People For the American Way calls on the Senate to reject John Roberts' nomination.

The opinions he has issued during his short tenure on the federal bench, the documents from his tenure in senior positions in the Reagan Administration, and what we know of Roberts' tenure as principal deputy solicitor general in the first Bush administration combine to make a compelling case against confirmation.

For much of the past 25 years, Roberts worked to impede or undermine progress toward realizing the Constitution's promise of equal justice under law. He has been an active participant in efforts to advance a legal and judicial ideology grounded in a narrow view of constitutional rights and a restricted role for the federal courts in protecting and enforcing them. As a federal judge, he has indicated support for an approach to the Constitution that would undermine the authority of Congress to take action for the common good in areas such as environmental protection.

As special assistant to the Attorney General in the Reagan Administration, and later as a key legal strategist in the Reagan White House counsel's office, Roberts was an aggressive participant in the administration's attempts to restrict fundamental constitutional and civil rights. In fact, Roberts often came down to the right of ultraconservative legal luminaries, including Robert Bork, William Bradford Reynolds, and Ted Olson. He supported the legality of radical proposals to strip the courts of jurisdiction over certain school desegregation remedies, abortion, and school prayer. He denigrated what he referred to as the "so-called" right to privacy, resisted attempts to fully restore the effectiveness of the Voting Rights Act, and worked against measures aimed at increasing gender equity. As the *Washington Post* has reported, at times he was "derisive, using words such as 'purported' and 'perceived' to describe discrimination against women."

When Roberts became top deputy to solicitor general Kenneth W. Starr in 1989, he continued to advance a right-wing agenda. He urged the Court to limit the remedies women could seek when their rights under Title IX were violated. And he asked the Court to overturn *Roe v. Wade*, saying it has "no support in the text, structure or history of the Constitution."

suggested that Congress lacked the power under the Commerce Clause to protect endangered species in this case. The consequences of such a radical view, if held by a Supreme Court majority, would extend far beyond the Endangered Species Act to many areas of Congressional authority, including such longstanding programs as Medicare and Social Security.

- Roberts has written that affirmative action programs were bound to fail because they required "recruiting of inadequately prepared candidates." As deputy Solicitor General he unsuccessfully opposed a federal government agency's affirmative action program designed to diversify media ownership.

The White House has broken with precedent and unfortunately continues to deny the Senate access to key documents from Roberts' time as second-in-command to Ken Starr in the solicitor general's office in the Bush I Administration. In the absence of such documents, we must assume that the views expressed in the briefs Roberts signed during his tenure are in fact his own.

## Conclusion

John Roberts has spent much of the past two decades in political and legal positions of great influence. The public record that has been revealed over recent weeks demonstrates that Roberts has consistently advocated positions that would undermine Americans' fundamental rights and liberties under the Constitution and federal law.

The confirmation of John Roberts to replace Justice Sandra Day O'Connor would bring dramatic change, move the Supreme Court significantly to the right, and shift the balance of the court to the great and lasting detriment of Americans and the constitutional principles and legal safeguards that protect their families and communities. We urge senators to vote against his confirmation.

# John Roberts: The Wrong Choice for Associate Justice, An Even Worse Choice for Chief Justice

The death of Chief Justice William Rehnquist and President Bush's nomination of John Roberts to succeed Rehnquist have raised the stakes for the Court and the American people exponentially. If confirmed, Roberts would not be one among eight Associate Justices, as when he was initially nominated to replace Justice Sandra Day O'Connor. Instead, he would become the nation's highest ranking judicial officer, with unique powers, influence and responsibilities beyond those of the Associate Justices.

Last month, after an exhaustive examination of John Roberts' public record, we concluded that Roberts' confirmation as an Associate Justice should be opposed. As set forth in two lengthy, detailed reports, we based that conclusion in large measure on Roberts' record of disregard for the laws and remedies that protect Americans from discrimination and his longtime efforts to restrict the role of the courts in upholding Americans' rights and legal protections.[1] To an even greater degree, Roberts' record and the nature of the power and responsibilities of the Chief Justice make Roberts the wrong choice for this powerful lifetime position as the 17th Chief Justice in our nation's history.

The Importance of the Chief Justice

The Chief Justice of the United States is one of our nation's most important and influential public officials. Indeed, as Chief Justice Rehnquist frequently noted, his correct title was "Chief Justice of the United States," not merely "Chief Justice of the Supreme Court."[2] Although the Supreme Court is made up of nine Justices, the Chief Justice has formal and informal powers, duties and responsibilities that exceed those of the eight Associate Justices, giving the Chief Justice a significant opportunity to shape the federal judiciary and the course of American law. Thus, the importance of who is confirmed to succeed Chief Justice Rehnquist cannot be overstated.

"The Chief Justice, as presiding officer of the Court, is responsible by statute for its administration, in addition to hearing cases and writing opinions."[3] One of the most important powers wielded by the Chief Justice is the power to assign the writing of the Court's opinion in each case in which the Chief Justice is in the majority. Who writes the Court's opinion in a particular case is critically important, since how the opinion is written — its breadth and scope, its nuances, its reasoning — affects not only the outcome of that case but sets judicial precedent for other cases as well, perhaps for decades to come. John Roberts' disturbing record, as detailed in our reports, now

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[1] See PFAW, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court (Sept. 2005) (hereafter "Final Pre-Hearing Report") and Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts (Aug. 24, 2005), available at <http://media.pfaw.org/stc/PH-report.pdf> and <http://media.pfaw.org/stc/RobertsOppositionReport.pdf>.

[2] 28 U.S.C. § 1.

[3] The Supreme Court Historical Society, "How the Court Works: The Chief Justice's Role," <http://www.supremecourthistory.org/03_how/subs_how/03_a15.html> (visited Sept. 8, 2005).

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takes on even greater importance given that Roberts, if confirmed as Chief Justice, would have the authority to determine who writes the Court's opinion in particular cases.

The Chief Justice also has the power to influence the Court's workload and thus how many and which cases the Court hears. Indeed, according to one report published during Chief Justice Rehnquist's tenure, "[o]ne of Rehnquist's proudest achievements as chief justice has been to pare the court's docket. The Burger court heard oral arguments in 160 or more cases every term. Rehnquist and his colleagues hear half as many cases. . . . Rehnquist has pushed to minimize federal jurisprudence at every level."[4] Clearly, the number of cases the Court hears, and which cases it chooses to hear, are matters of vital importance to the interpretation of federal constitutional and statutory law and thus to the preservation of Americans' rights and freedoms.

Significantly, John Roberts has troubling views about the courts and the ability of Americans to turn to them for redress. He has claimed that the courts frequently engage in "judicial policymaking"[5] and "have been drawn by litigants before them into areas properly and constitutionally belonging to the other branches or to the states."[6] "[T]oo frequently," he has written, courts have "attempted to resolve disputes not properly within their province."[7] In fact, Roberts responded to a suggestion intended to allow the Supreme Court to hear more cases by saying:

> [I]t strikes me as misguided to take action to permit them to do more. There are practical limits on the capacity of the Justices, and those limits are a significant check preventing the Court from usurping even more of the prerogatives of the other branches. The generally-accepted notion that the Court can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the Court in July, when we know that the Constitution is safe for the summer.[8]

Roberts even stated that "there is much to be said for changing life tenure to a term of years" for federal judges, in part because of his view that the federal judiciary "usurps the roles of the political branches."[9] And during his tenure in the Reagan Administration, Roberts took a position to the right of ultraconservative Ted Olson and supported the constitutionality of

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[4] David Plotz, "Chief Justice William Rehnquist: Mr. Efficiency," *Slate* (Jan. 11, 1998), available at <http://slate.msn.com/id/1846> (visited Sept. 8, 2005).

[5] Draft Article on Judicial Restraint for ABA Journal at 2 ("judicial policymaking is also inevitably inadequate or imperfect policymaking"); see also Memorandum from John Roberts to Dean St. Dennis re Judicial Restraint Initiatives (Dec. 7, 1981).

[6] Draft Article on Judicial Restraint at 1.

[7] Suggested Remarks for the Attorney General [before] The American College of Trial Lawyers (2nd draft of March 30, 1982), at 8, delivered by John Roberts to Fred Fielding and Dave Gergen on March 30, 1982.

[8] Memorandum from John Roberts to Fred Fielding, Department of Justice Recommendations on Creation of an Intercircuit Tribunal (Apr. 19, 1983).

[9] Memorandum from John Roberts to Fred Fielding re Department of Justice Proposed Report on S.J. Res. 39 (Oct. 3, 1983). In opposing a Justice Department report that supported life tenure for federal judges, Roberts stated that "the Framers adopted life tenure at a time when people simply did not live as long as they do now." Id. However, in Roberts' view, "the case for insulating the judges from political accountability weakens" when judges "lose all touch with reality through decades of ivory tower existence" and fail to limit their task to "discerning and applying the intent of the Framers or legislators." Id.

proposals to strip the Supreme Court of jurisdiction over cases concerning school desegregation, abortion, and school prayer, as well as proposals to strip lower federal courts of jurisdiction to order busing as a remedy in school segregation cases.[10]

In addition, as we have documented, Roberts has attempted to reduce the ability of Americans to seek justice though the courts. For example, he has worked to make it harder for individuals to enforce rights granted them under federal law, and has advanced arguments that would make it harder for Congress to grant statutory standing to individuals whose rights have been violated. He has argued for strict limits on the nature of injuries the courts can address, making it difficult for plaintiffs to gain standing to bring suit in the public interest. Roberts has been hostile to prisoners' habeas corpus petitions, and has even suggested eliminating the federal rule that prevents illegally obtained evidence from being used against a defendant in court. Throughout his career, Roberts has advocated legal theories that would deprive Americans of access to justice in the federal courts on civil rights, reproductive freedom, environmental protections, religious liberty, and other crucial subjects.[11]

Someone with such a record concerning Americans' ability to seek justice through the courts, and with such an uncharitable view of the courts generally and the Supreme Court specifically, is the wrong choice to be the most important judge in our country. This conclusion is reinforced by the fact that the duties of the Chief Justice "extend far beyond the Court. He is responsible for the administrative leadership of the entire federal judicial system."[12]

Law professors Judith Resnik and Theodore Ruger have recently explained just how much power is wielded by the Chief Justice as a result of these responsibilities, observing that,

> [i]n essence, the chief justice is the chief executive officer of a bureaucracy of some 1,200 life-tenured judges, 850 more magistrate and bankruptcy judges, and a staff of 30,000. He is the chair of the policy-setting body -- the Judicial Conference of the United States -- that establishes the priorities for the federal judiciary, including overseeing its budget, now about $5.43 billion annually. The chief justice appoints the director of the Administrative Office of the United States Courts, and, together, they select the judges who sit on judicial committees focused on topics from technology to international judicial relations.[13]

In addition, the Chief Justice chooses the members of important specialized courts, including the Foreign Intelligence Surveillance Court, which meets in secrecy and which, "since its creation in 1978 has approved over 10,000 government requests for surveillance warrants."[14] The Chief Justice "also picks the 255 people who sit on the 24 committees of the judiciary, including those that make the rules for litigants. Whether a civil litigant, a prosecutor, a criminal defendant or a bankruptcy petitioner, litigants must comply with requirements described in federal rules, all crafted by committees whose members are selected by the chief."[15]

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[10] See Final Pre-Hearing Report, at 10-14.

[11] See Final Pre-Hearing Report, at 8-29.

[12] The Supreme Court Historical Society, "How the Court Works: The Chief Justice's Role," <http://www.supremecourthistory.org/03_how/subs_how/03_a15.html> (visited Sept. 8, 2005).

[13] Judith Resnik and Theodore Ruger, "One Robe, Two Hats," *New York Times* (July 17, 2005).

[14] Id.

[15] Id.

Chief Justice Rehnquist demonstrated how much the judge who holds all these powers can use them off the Court to advance particular ideological beliefs, and to do so in tandem with his decision making on the bench. For example, in his 1994 year-end annual report to Congress on the federal judiciary, Chief Justice Rehnquist claimed that "[t]here is considerable sentiment in the federal judiciary at the present time against further expansion of federal jurisdiction into areas which have been previously the province of state courts enforcing state laws."[16] Then in 1995, Rehnquist wrote the Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995), a 5-4 ruling dramatically reinterpreting the Commerce Clause to hold that Congress had no authority under the Constitution to make gun possession near schools a federal crime and striking down the Gun-Free School Zones Act.

Roberts is simply the wrong person to exercise the enormous powers and unique influence of the Chief Justice, both on and off the bench.

America cannot afford a "Roberts Court"

Following President Bush's September 5 announcement that he intended to nominate John Roberts to succeed Chief Justice Rehnquist rather than Justice O'Connor, some have suggested that Roberts is ideologically similar to Rehnquist (for whom Roberts clerked), so that Roberts' confirmation would not significantly affect the Court. There are several fallacies with these views.

First, every nominee to the Court, no matter who he or she is replacing, must be independently fit and qualified to serve on the Court and must satisfy the important criteria for confirmation. As more than 200 law professors explained in a letter to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, nominees must demonstrate that they meet appropriate criteria for confirmation by the Senate, which is entrusted by the Constitution with the duty to make an independent evaluation of the president's nominees.

According to the law professors' letter, these criteria include not only "an exemplary record in the law," but also a "commitment to protecting the rights of ordinary Americans and [not placing] the interests of the powerful over those of individual citizens," a "record of commitment to the progress made on civil rights, women's rights and individual liberties," and a "respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached."[17] These criteria are even more important in the case of someone nominated to our nation's highest court, and still more important when that person has been nominated to be the Chief Justice.

As we have already demonstrated in our reports examining Roberts' record, he does not satisfy these important criteria for confirmation. In particular, he has not demonstrated a

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[16] William H. Rehnquist, 1994 Year-End Report on the Federal Judiciary, 18 Am. J. Trial Advoc. 499, 502-03.

[17] Letter of Law Professors to Senate Judiciary Committee, July 13, 2001 (copy available from People For the American Way).

commitment to protecting constitutional safeguards, respecting the role of the Congress, and understanding the impact of the law and the Court on the lives of individual Americans. Throughout his career, Roberts has shown a pattern of working from powerful positions to undermine Americans' rights and liberties rather than uphold them.

During the past 25 years, Roberts worked to resist the important progress America has made in realizing the Constitution's promise of equal justice under law. It is clear that his confirmation to the Supreme Court would jeopardize many of the legal and constitutional protections that Americans enjoy and would undermine the nation's hard-won progress in civil rights and equal opportunity, privacy and reproductive choice, environmental protection, and religious liberty. He would strengthen the power of the presidency, already dangerously expanded by President Bush. All of this, which was of great concern when Roberts was nominated to fill Justice O'Connor's seat, is of even greater concern now that he has been nominated to be Chief Justice.

Moreover, there is evidence in Roberts' record indicating that he would be even more conservative than was Chief Justice Rehnquist in a number of significant areas of the law. For example, although the records of both Roberts and Rehnquist have been negative toward women's rights and the laws that protect women from discrimination, Roberts' record is even more troubling.[18] In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), Roberts, then the Principal Deputy Solicitor General, urged the Supreme Court to hold that victims of unlawful sex discrimination under Title IX could not obtain monetary damages, a position that would have left some victims of discrimination, including the plaintiff in that sexual harassment case, without any remedy at all. Roberts' efforts to limit Title IX in this manner were rejected by a unanimous Court that included Chief Justice Rehnquist.[19]

There are other important areas of the law in which Roberts' record indicates that he may well be to the right of Chief Justice Rehnquist. For example, in the religious liberty case of *Locke v. Davey*, 540 U.S. 712 (2004), Chief Justice Rehnquist wrote the Court's opinion holding that the state of Washington was not required to fund the education of a college student studying for the ministry, even though the state subsidized secular education. Roberts, however, has a long record of favoring government endorsement and support of religion that might well have caused him to rule differently than Rehnquist did in *Davey* (as did Justices Scalia and Thomas), and to require a state to fund religious education when it funds secular education, despite a state constitutional prohibition on such funding.[20]

And in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), Chief Justice Rehnquist wrote the Court's opinion holding that state employees have the right to seek monetary damages from their employer for violating the federal Family and Medical Leave Act, rejecting the "states' rights" claim that Congress has no authority to protect the rights of individual Americans in this manner. Roberts' record, however, indicates that he takes a narrow view of congressional power that might well have caused him to rule differently than Rehnquist did in *Hibbs*, and seek to undermine the FMLA.[21]

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[18] See Final Pre-Hearing Report, at 30-52.

[19] See Final Pre-Hearing Report, at 41-45.

[20] See Final Pre-Hearing Report, at 82-93.

[21] See Final Pre-Hearing Report, at 106-110.

But even if Roberts proves to be not appreciably more conservative than was Chief Justice Rehnquist, from the perspective of Americans' rights and interests the prospect of twenty, thirty or more years of a Chief Justice who shares Rehnquist's judicial ideology is not a situation to be desired. To the contrary, several more decades of a "Rehnquist Court" would be significantly harmful to America.

Among other things, Chief Justice Rehnquist was the leader of an activist Court that from 1995 to 2000 alone struck down in whole or in part more than 22 laws passed by Congress, in contrast to the 128 struck down during the first 200 years of the Constitution.[22] Between 1987, shortly after Rehnquist became Chief Justice, and 2002, the Court struck down in whole or in part some 33 federal laws.[23] This assertion of judicial power has been called "one of the most important constitutional shifts in decades."[24] One Supreme Court expert has stated that "[n]ot since before the 1937 constitutional crisis over the court's invalidation of progressive New Deal legislation has a bare majority been so bent on reining in Congress."[25]

In particular, Rehnquist was an architect of the new "federalism" revolution, leading a narrow 5-4 majority of the Court that overturned laws protecting Americans against discrimination and that protected our public well being. These included 5-4 rulings that struck down key parts of the Violence Against Women Act, that held the Gun-Free School Zones Act to be unconstitutional, and that held that state employees cannot sue their employers for money damages for violating the Americans with Disabilities Act or the Age Discrimination in Employment Act. Even if, as some have assumed, Roberts were expected to do no more than continue in Rehnquist's ideological footsteps, that would be sufficiently harmful to this country in and of itself to warrant strong opposition to his confirmation.

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Professor Laurence Tribe has written that "[i]n the twentieth century the changing of the Chiefs has translated into an important difference in the Court's direction."[26] Indeed, the power of the Chief Justice to shape the direction of the law and thus of the rights and freedoms of all Americans is illustrated by the appointment of Earl Warren to replace Chief Justice Vinson. As Professor Tribe describes it,

> most observers believe that Chief Justice Fred Vinson was ambivalent about the constitutionality of school segregation, and uncertain about what position he would take after hearing arguments in a series of cases in 1953. Instead of deciding the cases, the Court

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22 See S. Waxman, "Defending Congress in the Courts," Keynote Address at the 7th Circuit Judicial Conference (May 1, 2000) at 1-2.

23 J. Raskin, *Overruling Democracy* (2003) at 5.

24 E. Palmer, "Supreme Court Favors States in Age Bias, Gender Cases," *Congressional Quarterly* (Jan. 15, 2000) at 80 (*quoting* University of Virginia law professor A. E. Dick Howard).

25 D. O'Brien (University of Virginia government professor), "Justice: Supreme Court Can No Longer Duck the Big Issues," *Los Angeles Times* (Oct. 3, 1999).

26 Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes our History*, at 37 (1985).

> ordered their reargument the following year. In the interim, Vinson died and a new Chief Justice, Earl Warren, took his place. The new Chief not only wrote the Court's precedent-shattering decision in *Brown v. Board of Education*, signaling the end of segregated public schools in this country, but also worked with his Associate Justices to develop an opinion that could be announced unanimously. That the Court spoke with a single, authoritative voice in *Brown* added immeasurably to the ruling's credibility in the face of widespread and bitter resistance.[27]

According to Professor Tribe, "one Chief may make all the difference in the constitutional world."[28]

Chief Justice Rehnquist served on the Court since 1972, and as Chief Justice since 1986. If John Roberts, who is only 50, were to be confirmed as Chief Justice, it is likely that he could serve for thirty years or more. The confirmation of a successor to Chief Justice Rehnquist is of critical importance to this country and to the future of the rights, freedoms and interests of every American for years and most likely decades to come. Based on John Roberts' record, it is clear that he is the wrong choice to serve as this country's most important and powerful judge.

--Sept. 9, 2005

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[27] Id. at 37-38.
[28] Id. at 37.

# Testimony of
# Karen Pearl, Interim President
# Planned Parenthood Federation of America

**before the**

**Senate Judiciary Committee**

**on**

**the Nomination of John G. Roberts**
**to be Chief Justice of the United States Supreme Court**

**September 15, 2005**

Testimony of Karen Pearl
Planned Parenthood Federation of America
September 15, 2005

Mr. Chairman and distinguished Members of the Committee,

I am Karen Pearl, Interim President of Planned Parenthood Federation of America. I am honored to have been invited to testify at these historic hearings.

Planned Parenthood is America's oldest, largest, and most trusted provider of family planning services and education, and reproductive health care. Every year, our 121 affiliates serve five million women, men, and adolescents in over 850 health centers in communities across the nation, providing the information and services people need to stay healthy, plan their families, and make responsible choices about sex and reproduction.

I speak to you today on behalf of the millions of Americans who rely on us now, and on behalf of those who will come to our health centers in the future, seeking honest, medically-accurate information, family planning and contraception, and other reproductive health care including abortion services.

I also speak to you as someone who spent a decade serving clients as president and CEO of a Planned Parenthood affiliate. Many of those who came through the doors of our health centers seeking care were uninsured or underinsured, young or poor. In fact, nationally seventy-four percent of Planned Parenthood clients have incomes at or below 150 percent of the federal poverty level. For many, Planned Parenthood is their only health care provider.

Our clients rely on us to provide confidential, quality care. They trust us to be there for them.

We take that trust seriously. Planned Parenthood was founded on the principle that every person has fundamental human and civil rights to equality, privacy, and dignity. We consider it our most profound responsibility to ensure that all Americans, regardless of their circumstances, have access to the full range of reproductive health care options. We believe it is the right of all Americans to make personal health care decisions free from government intrusion.

The right to use contraception, to get access to the health care we need, and to make our own childbearing decisions form the very fabric of American life – underlying freedoms so basic that many of us take them for granted. Judge Roberts's views on these matters have the very real potential to shape these freedoms for Americans for decades to come, affecting the life of every American, but the lives of women most of all – in particular women who because of poverty, youth, or circumstance are most vulnerable.

This is why we have been so careful and deliberate in our consideration of Judge John Roberts's nomination to serve as Chief Justice of our nation's highest court. The Chief Justice of the Supreme Court holds the highest legal position in our country. If confirmed to become the Chief Justice, John Roberts would be able to influence the direction of the Court and the opinions it renders. We cannot entrust this crucial position to someone

who has demonstrated hostility in the past to women's rights, in particular to the right to reproductive freedom and the right to choose.

Over the past months, we have reviewed thoroughly and thoughtfully those parts of his record that have been made publicly available. As more documents from his work on behalf of the Reagan and George H. Bush administrations were released, and as the evidence of Judge Roberts's hostility to our most cherished freedoms mounted, we grew more and more alarmed.

We discovered that as a government lawyer, in administrations openly hostile to the right to choose, Roberts repeatedly derided and dismissed Americans' settled constitutional right to choose, the fundamental principle articulated in *Roe v. Wade.*

In spite of this history, before deciding to oppose his nomination to the Supreme Court, we wanted to give Judge Roberts an opportunity to speak for himself during these hearings and clarify whether the American people could be confident that he would be a Chief Justice who would protect, not take away, our fundamental freedoms.

Rather than affirming these fundamental rights, however, during these hearings Judge Roberts has consistently evaded the Senators' questions on many of these crucial issues. He steadfastly refused to answer questions relating to whether the right to privacy includes the right to choose and to whether *Roe v. Wade* should be overruled. This leaves us no choice but to conclude that Judge Roberts, if he were to become Chief Justice Roberts, would not uphold this settled constitutional right

We oppose Judge Roberts's nomination to become the next Chief Justice of the United States because of his past record and because of his failure, during these hearings, to affirm that he will protect our constitutional right to privacy as it has been interpreted by the Supreme Court, including a woman's fundamental right to choose abortion. We would oppose any nominee to serve as Chief Justice of the Supreme Court – but particularly a nominee with Judge Roberts' record – who cannot or will not assure the American people that he or she will protect, not take away, our settled constitutional freedoms.

Reproductive liberty in this country has been slowly eroded since the landmark decision of *Roe v. Wade*. More than thirty-three years ago, seven Justices – a clear majority of the Court – ruled the Constitutional right to privacy protects a woman's right to choose abortion. Since that time, the makeup of the court has shifted significantly.

In 1992, when the Court decided *Planned Parenthood v. Casey* only two Justices supported reaffirming *Roe* in its entirety. Three more justices voted to affirm the essential holding of *Roe*, that the Constitution prohibits an outright ban on abortion. Thus the core guarantees of *Roe* survived by a vote of just 5–4.

Five years ago, the Supreme Court passed down its most recent abortion-related ruling in *Stenberg v. Carhart*. Once again, four of the nine justices made it clear that they

supported either overturning *Roe v. Wade* or significantly gutting its promise that the constitution protects women's health and lives against government regulations that threaten them. Justice Kennedy, who in *Casey* sided with the plurality in reaffirming the essential holding of *Roe*, voted against the constitutional protection for women's health in *Stenberg v. Carhart.*

If the Court continues in this perilous direction, we could soon face situations where doctors are prevented from providing emergency care to their patients until they can find a judge to allow it. We may face situations where a woman incurs liver, kidney, or brain damage, or loses her future fertility, because restrictive laws forbid the abortion that could have saved her health.

If confirmed to become Chief Justice, we believe Judge Roberts will lead the Court further in the direction of allowing politicians to be the arbiters of intimate choices and basic medical decisions, rather than women in consultation with their loved ones and doctors. Judge Roberts has failed to demonstrate a commitment to the constitutional protections upon which women have relied for more than a generation.

Prior to these hearings, Planned Parenthood urged the Senate Judiciary Committee to seek Roberts's records from his work on the *Rust, Bray* and *Casey* cases so that the American people could see for themselves what Judge Roberts's role was in these cases. Despite the efforts of some members of this Committee, and our repeated calls for the Administration to make documents that would shed light on Roberts's role in the Solicitor General's office available to the Committee and to the public, the Administration refused. The Senate should not be asked to reach this enormous decision which will have an impact on the direction of the courts and the nation without information about Judge Roberts's views on fundamental constitutional rights. Particularly because the public has been denied access to these critical documents, the burden was upon Judge Roberts to be fully forthcoming with the Committee. He has repeatedly failed to meet this burden.

Although many documents from Judge Roberts's records were withheld, many of the documents which were produced revealed that Judge Roberts had consistently advocated positions that challenged the legitimacy of a woman's right to choose, and construed civil rights law narrowly at the expense of women's health and safety. He has also demonstrated a restrictive view of the role of the federal courts that poses a substantial risk for women who rely on the courts to protect them from laws that could cause them harm. Thus, what we do know of Judge Roberts's judicial philosophy from this record raises grave concerns about his support of a woman's right to choose abortion and of constitutional protections for women's health and safety.

**Roberts's views on *Roe v. Wade***

A number of documents Judge Roberts authored while serving as an attorney for the government called into question his support for the fundamental principles articulated in *Roe v. Wade.*

While serving in the Solicitor General's office in 1990, Judge Roberts co-authored a brief filed on behalf of the government in the case of *Rust v. Sullivan* that stated "*Roe v. Wade* was wrongly decided and should be overruled." The brief further states that the right articulated in *Roe* "find[s] no support in the text, structure, or history of the Constitution." The Solicitor General's office, and John Roberts, included these arguments in its brief despite the fact that the case did not involve a challenge to *Roe* or the right to choose, but rather concerned federal regulations that prohibited family planning programs which received federal aid from providing abortion-related counseling.

Years earlier, in 1981, in a lengthy memorandum Roberts drafted while serving in the office of the Attorney General on proposals to divest the Supreme Court of appellate jurisdiction, Roberts wrote *Roe v. Wade* "is broadly perceived to be . . . unprincipled jurisprudence."

Judge Roberts failed to assuage our fears that the views reflected in these documents are his own. He refused to assure us that he does not believe that *Roe* should be narrowed or overruled altogether. He steadfastly refused to say whether he believed, under principles of *stare decisis*, the question of whether *Roe* should be overruled had been settled by *Planned Parenthood v. Casey,* where the Court extensively discussed this question and reaffirmed the central holding of *Roe*. When asked by Senator Biden whether he agreed with the statement of Justice Ginsburg during her 1993 confirmation hearings that a state law banning abortion would be unconstitutional, he refused to respond. Yet, when pressed by Senator Sessions about whether he would commit to remain open to evaluating whether *Roe* should be overruled he responded, unequivocally, "Absolutely, Senator." We are left with no alternative but to surmise that he shares the view, articulated in his past writings, that *Roe* should be overruled.

**Roberts's involvement in clinic violence cases**

Roberts's involvement in a number of cases involving violence against reproductive health centers, health care providers, and patients is also deeply troubling.

We at Planned Parenthood are faced with violence and intimidation directed at our employees and patients everyday. In fact, on the first day that I started as an affiliate CEO at Planned Parenthood of Nassau County in January 1995, I was greeted by a sign on the front door that read: "This is a murder zone. Anyone who enters will be killed." Later, while still serving as the CEO of my local Planned Parenthood, I volunteered as a clinic escort, working to ensure the safety of the patients who needed our services. One day, the protesters were edgy because we were enforcing the law and not letting them trespass on our private property. In retaliation, they stormed onto the parking lot, screaming at me and my fellow escort, and eventually hitting us with their signs. The only thing that stopped them from further violence was the police.

Such actions are unacceptable. No one should have to endure intimidation or violence to gain access to family planning, contraception or any reproductive health service.

Unfortunately, my stories are not unique. Planned Parenthood health centers throughout the nation continue to face intimidation to this day.

For this reason, Judge Roberts's involvement in the case of *Bray v. Alexandria Women's Health Center* raises deep concerns. Judge Roberts was one of the authors of an *amicus* brief filed on behalf of the United States arguing in support of the legal position of violent anti-clinic demonstrators and urging a narrow reading of a civil rights law. Nowhere in the brief did the government disavow the actions or tactics of the violent demonstrators – not even in a footnote.

Perhaps even more disturbing than the brief in *Bray* is that as Deputy Solicitor General, Roberts was involved in the decision to intervene in a district court proceeding during the blockades of women's health centers in Wichita, Kansas in the summer of 1991. For two months, thousands of protestors descended upon three Wichita women's health centers and terrorized women, health center staff, and healthcare workers. To keep the peace and protect women who were attempting to enter these women's health centers, the district court issued an injunction against the protestors and brought in federal marshals. In a highly unusual intervention, the Department of Justice sought to have this injunction lifted, even though the legal issue at stake was already pending before the Supreme Court.

Not only is it extremely rare for the Department of Justice to intervene in the district court, it is even more rare to ask the court to do what was asked here – lift an injunction that was stopping violence that was paralyzing a city while a legal issue was on appeal. The Justice Department's request was far more aggressive than was necessary to accomplish their stated goal of resolving a disputed legal question. The decision by the Solicitor General's office to weigh in on the Wichita case and urge that the injunction be lifted would have meant, had this argument prevailed, that the federal marshals would have been removed from this violent, volatile situation, putting patients and health care providers at enormous risk of physical harm.

Roberts's actions in these cases show a willingness to take a narrow, rigid, ideological approach to the law, even at the peril of women. They raise grave concerns and real questions about Roberts's attitude towards women's health and right to choose.

Finally, Roberts's writings reveal his extremely cramped view of the role federal courts, including the Supreme Court, should play in protecting the basic freedoms and rights of Americans. This view of the role of the courts could lead Judge Roberts, particularly in the leadership role of Chief Justice, to restrict access to federal courts to remedy violations of constitutional rights.

**Conclusion**

On June 27, the last day of the prior Term, I stood on the steps of the Supreme Court alongside Planned Parenthood staff and supporters from Washington, DC to emphasize the crucial role of the Court in all our lives.

Joining with us was Sarah Weddington, the brave attorney who changed the course of history by arguing and winning *Roe v. Wade*, making it possible for women to have a truly equal place at life's table.

Standing with her, I felt the enormous responsibility that all of who us cherish reproductive freedom share to uphold her legacy. Before *Roe* affirmed the right of every woman to control her own fertility and determine her own reproductive destiny, women were not truly equal in society. More than 30 years later, the progress that *Roe* set in motion – and the freedoms it guaranteed – have become a part of the very fabric of American life. For many Americans, it is as difficult to imagine what life was like before *Roe* as it is to imagine life before *Brown v. Board of Education* outlawed segregated education. The promise of true equality that *Roe* represents for every American woman is essential to our lives – whether or not we ever face the choice to have an abortion.

Right now, we stand at a crossroads. Will we continue to live in an America where reproductive freedoms are defended, where privacy is protected, and where women are respected as equals under the law? Or will we see an America where barriers keep women from getting the health care they need, where the government intrudes upon personal reproductive choices, and where restrictive laws prevent doctors from fulfilling their ethical obligation to preserve the health and safety of women?

Planned Parenthood Federation of America opposes the confirmation of Judge John Roberts to serve as Chief Justice of the United States Supreme Court. We urge you to do the same. The vote you cast to confirm or oppose Judge Roberts's nomination to the position of Chief Justice of the Supreme Court will be among the most important votes you cast as Senators. It is your duty to ensure that every Justice that serves on the Court, and in particular the Chief Justice, promises to uphold and defend the constitutional rights and freedoms we treasure.

Statement of Rabbi Dale Polakoff,

President

Rabbinical Council of America

Mr. Chairman, Ranking Minority Member Leahy and other distinguished members of the Committee, good afternoon and thank you for inviting me to participate in this hearing. I represent before you the Rabbinical Council of America, an organization established in 1935 to advance the cause and the voice of Orthodox Judaism and the rabbinic tradition. Membership in the RCA is held by close to 1000 ordained rabbis, and includes congregational rabbis, teachers and academicians, military chaplains (some of whom serve today in Iraq, Afghanistan and other areas of the world), health-care chaplains, organizational professionals, and others.

I am here this afternoon to offer a statement of support for the nomination of Judge John G. Roberts to be Chief Justice of the United States. From everything of which the Rabbinical Council of America is currently aware, Judge Roberts has exemplary intellectual skills and superb legal training. He was a widely acclaimed appellate litigator and as a judge on the United States Court of Appeals for the District of Columbia Circuit has demonstrated a judicial temperament that is both thoughtful and principled. He has both a strong background and extensive experience in adjudicating cases before the Supreme Court. He has garnered the respect of his colleagues and the legal profession in general and possesses a fine moral character.

My remarks about Judge Roberts begin this afternoon with broad brushstrokes because the desired qualities of judges within the Jewish tradition are defined in just such broad brushstrokes. We are enjoined to choose principled judges who refrain from showing favoritism to individuals or causes. We seek Judges who are people of truth, whose words and decisions inspire confidence in those who rely upon them. Our tradition recognizes the tremendous responsibility borne by those who judge others, and sees in their dispensing of truth and justice a Divine partnership insuring the continuation of a moral society.

At a time in which many in society seek moral moorings and spiritual strength, I am certain that these broad values are also the values embraced by this great country in which we are privileged to live. Values of principles, truth and responsibility are part of the foundation of religious ethics upon which our nation has been built, and I am confident that Judge Roberts represents the embodiment of such values.

Within the broad brushstrokes, though, are many hues of color, and it is the responsibility of this Judiciary committee to try to determine how Judge Roberts sees those colors. As a representative of the clergy of a minority faith community, I and my colleagues are also interested in an area of seminal importance to us, namely the relationship between religion and state in society. In an effort to gain insight into Judge Roberts understanding of that relationship, as defined by the Free Exercise and Establishment Clauses of the First Amendment, we were encouraged by a memorandum written to Counsel Fred

Fielding on August 20th, 1984. Regarding remarks to be made by President Reagan to an ecumenical prayer breakfast, then-counsel Roberts suggested that the references to "the Church or churches be changed to references to religion or religions." He noted that "many of our citizens do not worship in churches, but in temples and mosques." We believe that this comment demonstrates a sensitivity and appreciation for the diversity of religious faith in America, and, we hope, is a harbinger of Judge Roberts' views in this crucial area.

There are those who suggest that Mr. Robert's subsequent participation in presenting the view of the United States in several religion clause cases should be of concern. In this matter, the Rabbinical Council of America relies on the guidance of the Institute of Public Affairs of the Union of Orthodox Jewish Congregations of America, a sister non-partisan religious organization. Their research indicates that in each of the cases the positions advocated by the United States were neither extreme nor even unreasonable interpretations of the religion clauses' requirements.

As members of this committee are well aware, the contours of religious liberty in this nation are still being shaped by the Supreme Court. Should the Senate confirm Judge Roberts, he will be on the Court this term when, in the case of Gonzales v. O Centro Espirita, it will again examine the extent to which minority religions will have their religious liberty protected against government interference and Congress' ability to protect that liberty through laws like the Religious Freedom Restoration Act which many

of you championed a decade ago. While we cannot be certain, we are optimistic that a Justice Roberts will be supportive and solicitous of religious liberty in America.

The Rabbinical Council of America has taken this public position of support for the nomination of Judge Roberts in the spirit of this year's celebration of 350 years of American Jewish history. The Jewish community, like so many other faith communities, has greatly benefited from the religious liberty guaranteed by our Constitution. We have been able to build Houses of Worship and Study, and to create communities reflective of our values and traditions. We believe it thus appropriate, through our active participation in this process, that we acknowledge our debt of gratitude to America, to a nation that has pledged to uphold the conviction that liberty and justice are for all.

**FOR IMMEDIATE RELEASE**
7/19/2005

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**Rev. Jesse Jackson Opposes President Bush's Nominee for the U.S. Supreme Court**

***John G. Roberts, No Friend to Civil Rights***

CHICAGO – (July 19, 2005) – *The Rev. Jesse L. Jackson, Sr., founder and president of the Rainbow PUSH Coalition, issued the following statement concerning President Bush's nomination of John G. Roberts to the Supreme Court:*

"With President Bush's nomination of John G. Roberts, the Supreme Court would have one less woman and one less vote to protect women's constitutional rights to self determination. A Supreme Court with just one out of nine justices a female and no Hispanic does not look like America. It is an insult.

President Bush is a master of wolves in sheep clothing politics. He gives the impression of moderation, but deep within he is the leader of the radical right wing in our nation. With his nomination of Judge Roberts, Bush strikes another blow to America's public policy position, and he sets off a new phrase of our struggle for an independent court which upholds the Constitution and protects civil rights and civil liberties.

While Sandra Day O'Connor was a swing vote in dozens of cases that came before the court, Bush's nominee demonstrates his desire to swing the court in the most radical rightwing direction the nation has seen in over 50 years. Bush's legacy will be one of turning back the clock to the pre-1954 Supreme Court that gave us Brown vs. Board of Education, Roe vs. Wade, and other landmark cases involving the protection of civil rights and liberties.

If confirmed, women everywhere will have even greater reason to be alarmed. Judge Roberts clearly is a vote to overturn Roe v. Wade.

While working under both Reagan and Bush, Roberts was a radical opponent of affirmative action, supporting hard line policies that opposed affirmative action and efforts to desegregate America's public schools. If confirmed, people of color and civil rights will have plenty to fear.

Judge Roberts' law firm was heavily involved in the fight over Florida's vote count and played a major role in the "appointment" of Bush in 2000. Supporters of voting rights, fair elections

and judicial independence have much to fear.

The civil rights gains and the progress this country has made over the past 55 years are under attack. With his nomination of Judge Roberts, President Bush signals his desire to stack the courts with justices who are anti- civil rights and anti-workers' rights.

As the radical rightwing rejoices, there is no good news for those who live in America's margins. There is no good news for advocates of women's right to self-determination, for workers and civil rights.

America cannot withstand a radical rightwing conservative appointment to the Supreme Court. We want a Supreme Court justice who is fair, upholds the Constitution and defends civil rights and workers rights. We want a Supreme Court that models the leadership demonstrated by the Supreme Court of 1954. I call on Americans of conscience to join us in resisting Judge Roberts' confirmation and bring forth a Justice who will take America forward not backwards."

*The Rainbow/PUSH Coalition is a progressive organization, which seeks to protect, defend and gain civil rights, even the economic and educational playing fields in all aspects of American life and bring peace to the world. The organization is headquartered at 930 E. 50th St. in Chicago. For more information about the Rainbow/PUSH Coalition, please visit the organization's website, www.rainbowpush.org, or telephone (773) 373-3366. To interview Rev. Jackson about this topic, please call the numbers listed above.*

-30-

John C. Randall
775 Sunridge Road
Fairlawn, Ohio 44333

August 22, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Specter,

This is a letter of support for the nomination of Judge John Roberts to the Supreme Court of the United States. Judge Roberts has an outstanding education background, has substantial experience in private practice, with the Solicitor General's office and as a Federal Appeals Court Judge, and an unparalleled record of arguing before the High Court. Judge Roberts has solid conservative credentials, having clerked for Chief Justice William H. Rehnquist and successfully argued many cases, both for the government and as a private lawyer.

Judge Roberts' education background includes receiving a Bachelor of Arts Degree from Harvard College, graduating *summa cum laude* and a Law Degree from Harvard Law School, graduating *magna cum laude.*

Judge Roberts earned solid conservative credentials serving as Associate Counsel to President Ronald Reagan and as Principal Deputy Solicitor General appointed by President George H.W. Bush.

Mr. Roberts was a partner in the Washington D.C. office of Hogan & Hartson LLP, where he headed the firm's appellate practice. He has argued 39 cases before the Supreme Court on behalf of Hogan & Hartson clients and as Principal Deputy Solicitor General on behalf of the United States. He is one of the most respected members of the Supreme Court bar. Mr. Roberts has received the Edmond J. Randolf award for outstanding service to the Department of Justice.

Mr. Roberts has been called the nation's best appellate lawyer not only by Justice Antonin Scalia but also by Clinton administration Acting Solicitor General Walter Dellinger. Roberts and Dellinger are members in high standing of the bar of the Supreme Court. The solicitor general's office has a tradition of institutional excellence that has been maintained during administrations of both parties, and no one seems more respected than John Roberts.

When he was nominated to his current position on the D.C. Circuit, the American Bar Association rated him "well-qualified", it's highest rating.

In support of the confirmation, distinguished constitutional law scholar Kenneth Karst of the UCLA School of Law, a self described liberal law academic, offered "I believe the Senate should confirm Judge Roberts's nomination. By all accounts, he is a first-rate lawyer, who listens carefully to arguments, even when they go against his initial inclinations."

Please support the confirmation of Judge John G. Roberts to the Supreme Court of the United States.

Very truly yours,

John C. Randall

John C. Randall

Testimony of Robert B. Reich[1]

U.S. Senate Judiciary Committee

Hearings on the Nomination of John Roberts to be Chief Justice of the Supreme Court

September 15, 2005

How Justices of the Supreme Court interpret the Constitution and federal and state laws is not merely a question of judicial philosophy – of whether they seek out the "original intent" of the Framers or lawmakers, defer to legislatures and agencies, or meticulously follow Court precedents. It also depends on their values – their understanding where the nation is at a point in historic time and how it needs to progress. If it were nothing more than judicial competence and philosophy of interpretation – if moral values weren't directly at stake here – the President's short list for Chief Justice might have included Harvard's Lawrence Tribe and other eminent scholars and jurists who presumably share a view of America different from that of John Roberts. Roberts was nominated by the President because he shares the President's values. It is the President's prerogative to make such a nomination, of course, but it also the Senate's prerogative to examine those values and to accept or reject a nominee based on them.

Social or religious values have been given much emphasis in these proceedings. I want to suggest that economic values are also at stake. It may seem strange to talk about the economy in moral terms but that's only because we often don't recognize that moral choices are involved.

A central moral problem for the American economy today is that, although it has been growing at a good clip and corporate profits rising nicely, most American paychecks have been going nowhere. Last year, the Census Bureau tells us, the economy grew a solid 3.8 percent. Yet median household income barely grew at all. That's the fifth straight year of stagnant household earnings, the longest on record. Meanwhile, another 1.1 million Americans fell into poverty, bringing the ranks of the poor to 37 million. And an additional 800,000 workers found themselves without health insurance. Only the top 5 percent of households enjoyed real income gains. These trends are not new. They began thirty years ago but are now reaching the point where they threaten the social fabric. Not since the Gilded Age of the 1890s has this nation experienced anything like the inequality of income, wealth, and opportunity we are witnessing today.

A central moral choice, then, is whether America should seek to reverse this trend. Those who view our society as a group of self-seeking individuals for whom government's major purpose is to protect their property and ensure their freedom of contract would probably say no. Those who view us as a national community of with responsibilities to promote the well-being of one

[1] University Professor, Brandeis University, and Hexter Professor of Social and Economic Policy, Brandeis's Heller School of Social Policy and Management. Former U.S. Secretary of Labor, 1993-1997.

another would likely say yes. Is the well-being of our society the sum of our individual goods, or is there a common good that must be addressed? The answer will shape the American economy and society of the twenty-first century.

Over the next decades, the Supreme Court will play important role in helping us make this choice. Under the guise of many doctrines and rationales – interpretations of the takings and due process clause of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, the Commerce Clause, the doctrine of federal preemption, the doctrine involving improper delegations of legislative or judicial powers to regulatory agencies, and so on – the Court will favor either property or community, depending on the economic values of a majority of the Justices.

The balance in the Court is quite close. In one recently decided case,[2] for example, a majority of the Court said government can take private property from one owner, compensate him at fair market value, and then turn the property over to someone else – but only if the transaction is part of an economic development plan for the community and it doesn't benefit a particular class of identifiable individuals. In other words, it can't be a political payoff or money grab. This reasoning raises value-laden questions, with which the next Chief Justice and the future Court will have to grapple: What constitutes valid economic development, and how can you tell whether certain people are getting a disproportionate benefit from it? The answers will depend largely on how the Justices balance property and community.

On the other hand, several years ago a closely-divided Court found that a ruling by the California Coastal Commission that conditioned a building permit on the owner granting public access to the ocean was an unconstitutional "taking" because it didn't substantially further the public purposes of California's coastal land-use law.[3] In this instance, the Court ruled in favor of property and against community but left unanswered the larger question of how the Court should determine the public purposes of particular laws and whether regulations substantially furthers them. These questions are also likely to arise more frequently. The Court will be called on to determine the constitutionality of many regulations under the takings clause, since regulations almost inevitably affect the value of property being regulated.

As inequality continues to widen, the Court's choice between property and community will have larger consequences. Americans are segregating by income into cities and towns that are ever more uniformly rich, middle class, or poor. Hence, questions will be raised about equitable provision of public services. Do our poor and working-class children have the right, under the Equal Protection Clause, to as good an education as the children of our wealthier citizens? A future Court that says yes presumably would deem unconstitutional much of our present system of primary and secondary education, in which spending per child largely is based largely on local property taxes that vary enormously depending on whether the locale is rich or poor.

The wages and benefits of women and minorities continue to lag substantially behind those of white men in our society. And blacks and Latinos comprise a substantial portion of the nation's

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[2] Kelo v City of New London, announced June 23, 2005.
[3] Nollan v California Coastal Commission, 483 US 825 (1987).

poor. As overall inequality widens, inequities based on gender, race and ethnicity are becoming more visible. The link between poverty and race was never more evident than it was weeks ago in the hurricane-ravaged tragedy of New Orleans and its surrounds. A future Supreme Court will almost certainly be faced with issues of equal protection for women and minorities in public safety, public health, employment, law enforcement, housing, and health care. How it balances the values of property and community will affect the moral cohesion of the nation.

The same balance underlies how the Court decides whether rules and regulations are authorized by law. Many such laws reflect the nation's intent to protect people who cannot protect themselves on their own, and to establish minimally decent living standards for all. The National Labor Relations Act of 1935 established the right to bargain collectively, the Social Security Act of 1935 provided us with a guaranteed pension in old age and unemployment insurance if we lost our job, and the Fair Labor Standards Act of 1938 established a national minimum wage. The Civil Rights Act of 1964 protects us against discrimination based on race or gender and the Age Discrimination in Employment Act of 1967, against discrimination because of our age. The Medicare Act of 1965 provides health care to older Americans, and the Occupational Safety and Health Act of 1970 protects our health and safety at work. The Clean Air Act of 1970 protects the air we breath, and the Clean Water Act of 1977 protects the water we drink. The Employee Retirement and Income Security Act of 1974 protects our pensions. The Americans with Disabilities Act of 1990 provides accommodation for disabled workers, and the Family and Medical Leave Act of 1993 allows employees to take time off for a home or health emergency.

Each of these laws represented at the time of its enactment America's moral conviction about how we should treat one another as members of the same society – thereby offsetting inequities in wealth and power. And as such inequities have widened, each set of protections has become that much more critical. Each has and can be enlarged or whittled down by a Supreme Court, intent either on strengthening our national community or protecting property.

As Secretary of Labor, it was my job to implement the Family and Medical Leave Act. We came up with what I considered common-sense regulations that reflected the unequal power of employers and employees. Among them was a rule that even if an employer didn't tell employees they were eligible for it, eligible employees could take the 12 weeks of unpaid leave anyway. In a 5-4 decision, the Supreme Court struck down that rule, saying it was inconsistent with the Act and, besides, it discouraged employers from providing more generous leave.[4] I've read the case several times, and I must say the logic escapes me. I don't believe it was a matter of pure logic. It was a matter of values, and in this instance, property won over community.

Antitrust laws also regulate the balance of economic power in our society, as do laws and rules affecting the financing of political campaigns. As wealth becomes more concentrated in fewer hands, both will become increasingly salient. As America continues to merge with the global economy, immigration laws and constitutional claims involving the rights of immigrants, both documented and undocumented, will arise with greater frequency. Hence, Justices will be grappling with the very meaning of a national community.

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[4] Ragsdale et al. vs. Wolverine World Wide Inc, 122 S Ct. 1155 (2000).

The moral economic values of a single Justice can therefore affect the lives of millions of Americans. One example is Justice Owen Roberts – no relation, I believe, to the current nominee – who in March of 1937 decided to join with four justices in upholding the minimum wage law of the state of Washington.[5] Up until then, Roberts had been on the other side – joining his four other brethren in striking down laws setting minimum wages and maximum hours, barring child labor, protecting workers from unsafe conditions, and establishing codes for worker standards in various industries. They had defended their opinions in property terms: To them, due process was mostly about freedom to contract, liberty was a matter of accumulating personal wealth and doing whatever one wished with it, and the Commerce Clause sharply limited the reach of the federal government. But after Roberts' switch, these justifications mostly vanished from Supreme Court majority opinions.

It's commonly believed that Owen Roberts switched sides because of Franklin D. Roosevelt's threat to "pack" the Court by expanding its membership unless it upheld New Deal legislation. But in fact, Roberts' switch happened before any of the Justices knew of Roosevelt's plan.[6] The more likely explanation is that Justice Roberts switched because the realities of the Depression finally caught up with him. Community values were simply more compelling than property values. As the Court's new majority put it in the opinion Roberts joined:

> "[T]he liberty safeguarded [in the Constitution] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.... The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community ... .We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land."

The challenge now facing America is different from what we faced in the 1930s, of course. But the rapidly-widening inequalities of wealth, income, and opportunity confronting us pose no less a risk to the social fabric and moral integrity of the nation. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land.

For all these reasons, the moral values John Roberts brings to bear on the economy are crucial for determining his fitness to be the next Chief Justice of the Supreme Court, as will be the economic values of nominees for other Supreme Court vacancies. What are Roberts' economic values? The record is thin. We do know that in 2003, shortly after joining the U.S. Court of Appeals for the District of Columbia circuit, he voted to rehear Rancho Viejo vs. Norton, which a three-judge panel had decided under the Endangered Species Act. The panel found that the federal government could, consistent with the commerce clause, regulate a housing project that

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[5] West Coast Hotel vs. Parish, 300 U.S. 379 (1937).

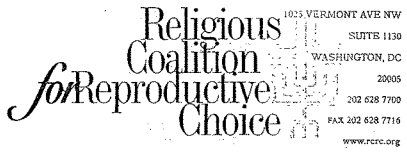
[6] See, for example, Barry Cushman, Constitutional Revolution, New York: Oxford University Press, 1998.

would otherwise encroach on the endangered arroyo southwestern toad. In Roberts' unsuccessful opinion urging reconsideration en banc, he noted that the decision "seems inconsistent" with the Supreme Court's approach in other recent cases in which the Court held that the Commerce Clause did not authorize such broad federal reach.

We also know that as Special Assistant to the Attorney General in the Reagan Justice Department, Roberts argued that affirmative action was bound to fail because it required the "recruiting of inadequately prepared candidates." He also complained to the Attorney General that the Department of Labor and its Office of Federal Contract Compliance were promoting "offensive preferences" based on race and gender, and questioned the executive order on which the Office of Contract Compliance was based. (Memorandum from John Roberts to the Attorney General re Meeting with Secretary Donovan on affirmative action, December 2, 1981.) He criticized a Supreme Court decision barring states from eliminating public education for children of undocumented immigrants.( Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re Plyler v. Doe- The Texas Illegal Aliens Case, June 15, 1982.) And he supported a narrow "program specific" interpretation of Title IX of the Civil Rights Act of 1964. (Memorandum from John Roberts to the Attorney General regarding University of Richmond v. Bell, August 31, 1982.) Later, while in the White House, Roberts sought to slow progress on combating discrimination in housing, arguing that the administration should "go slowly" on proposed fair housing legislation, claiming that such legislation represented "government intrusion." (Memorandum from John Roberts to Fred Fielding re Fair Housing, January 31, 1983.) He also indicated it was time to "reconsider the existence" of independent regulatory agencies, such as the FCC and the FTC, and instead place such power exclusively in the President's hands.

Viewed as a whole, the record suggests that Roberts is likely to place a higher value on property than on community, and is likely to view the Commerce Clause as hobbling the effective reach of the federal law and regulation. As such, John Roberts may have more in common with his namesake before Justice Roberts switched sides in 1937 than after that historic switch.

MEMBER ORGANIZATIONS
CHRISTIAN
EPISCOPAL CHURCH
PRESBYTERIAN CHURCH (USA)
WASHINGTON OFFICE
WOMEN'S MINISTRIES
UNITED CHURCH OF CHRIST
JUSTICE AND WITNESS MINISTRIES
UNITED METHODIST CHURCH
GENERAL BOARD OF CHURCH AND SOCIETY
GENERAL BOARD OF GLOBAL MINISTRIES, WOMEN'S DIVISION
CAUCUSES/ORGANIZATIONS
CATHOLICS FOR A FREE CHOICE
CHURCH OF THE BRETHREN WOMAEN'S CAUCUS
DISCIPLES FOR CHOICE
EPISCOPAL URBAN CAUCUS
EPISCOPAL WOMEN'S CAUCUS
LUTHERAN WOMEN'S CAUCUS
METHODIST FEDERATION FOR SOCIAL ACTION
PRESBYTERIANS AFFIRMING REPRODUCTIVE OPTIONS
YWCA OF THE USA
JEWISH
CONSERVATIVE JUDAISM
RABBINICAL ASSEMBLY
UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM
WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
HUMANIST JUDAISM
SOCIETY FOR HUMANISTIC JUDAISM
RECONSTRUCTIONIST JUDAISM
JEWISH RECONSTRUCTIONIST FEDERATION
REFORM JUDAISM
CENTRAL CONFERENCE OF AMERICAN RABBIS
NORTH AMERICAN FEDERATION OF TEMPLE YOUTH
UNION OF REFORM JUDAISM
WOMEN OF REFORM JUDAISM, THE FEDERATION OF TEMPLE SISTERHOODS
WOMEN'S RABBINIC NETWORK OF THE CENTRAL CONFERENCE OF AMERICAN RABBIS
CAUCUSES/ORGANIZATIONS
AMERICAN JEWISH COMMITTEE
AMERICAN JEWISH CONGRESS
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
HADASSAH, WZOA
JEWISH WOMEN INTERNATIONAL
NA'AMAT USA
NATIONAL COUNCIL OF JEWISH WOMEN
WOMEN'S AMERICAN ORT
AMERICAN HUMANIST ASSOCIATION
ETHICAL CULTURE
AMERICAN ETHICAL UNION
NATIONAL SERVICE CONFERENCE OF THE AMERICAN ETHICAL UNION
UNITARIAN UNIVERSALIST
UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS
UNITARIAN UNIVERSALIST WOMEN'S FEDERATION
YOUNG RELIGIOUS UNITARIAN UNIVERSALISTS

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Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

July 26, 2005

Dear Senator Leahy:

On behalf of the 39 national religious organizations that are members of the Religious Coalition for Reproductive Choice, I am writing to express concern regarding the lack of information about the views of U.S. Supreme Court nominee Judge John G. Roberts on the issue of abortion rights. We urge you as a member of the Senate Judiciary Committee to ensure that there is a thorough, independent review of Judge Roberts' constitutional philosophy to determine his views on this issue. While it is inappropriate to ask any nominee to discuss future cases, legal authorities and others agree it is appropriate to question a nominee about the philosophical views he may hold on underlying issues such as privacy rights.

Our primary concern is the conflicting statements made by Judge Roberts about the *Roe v Wade* decision. In 1991, while serving as deputy solicitor general, Judge Roberts argued in *Rust v. Sullivan* for the constitutionality of the regulation that prohibits doctors and counselors at federally funded family planning clinics from providing abortion-related counseling and appropriate referrals. Although *Roe v. Wade* was not at issue in this case, Judge Roberts nevertheless commented that *the case* was "wrongly decided," did not have support "in the text, structure or history of the Constitution," and should be overturned. During his 2003 confirmation hearings for the U.S. Court of Appeals, Judge Roberts testified that he made the statement only as part of making a case for the administration and also said that the decision in *Roe* is "the settled law of the land." He further testified that there was nothing in his personal views that would prevent him "from fully and faithfully applying that precedent."

Given the polarization around the abortion issue, it is essential that Judge Roberts' philosophical views on this subject be clarified to strengthen confidence that the Court will protect the rights of all Americans. The following questions may help clarify his views:

*Do you believe that there is a constitutional right to privacy that encompasses a woman's right to have an abortion?*

*If Roe v. Wade is settled law, what type of restrictions on abortion would be acceptable and constitutional under Roe v. Wade as it currently stands?*

*Will you be able to put aside your personal beliefs on the permissibility of abortion in determining cases dealing with abortion?*

In addition, we are also concerned about the 1992 brief Roberts co-authored in the case *of Bray v. Alexandria Women's Health Clinic.* The brief argued against preventing protestors (including the leadership of the group Operation Rescue) from blocking entrances to women's clinics and said that the violent blockades were merely expressions of opposition to abortion. In 1993 and 1994, violence at women's

clinics escalated; five individuals were murdered in those two years. In May 1995, President Bill Clinton signed the Freedom of Access to Clinic Entrances (FACE) Act. In this context, I urge you to ask the nominee:

*Do you support federal protections for clinics at which abortions are provided?*

The Supreme Court will hear two cases that will impact abortion rights in its next term (*Ayotte v. Planned Parenthood of Northern New England* and *NOW v. Scheidler*). A potential case —on the so-called "Partial Birth Abortion Ban" Act of 2003—is working its way through appeals courts. Even if the *Roe v. Wade* decision is not scaled back again, it is possible that additional restrictions on access to reproductive health services will be imposed, including restrictions on abortion in medical emergencies. Given these issues, it would be appropriate to ask the following:

*Will you apply Roe v. Wade as written and interpreted?*

*Will you consider cases dealing with privacy issues on a pragmatic rather than ideological basis?*

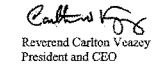
*Do you think that religious freedom—that is, the freedom to worship as one chooses and to live according to one's religious beliefs—and abortion rights are compatible?*

Again, I stress that it is essential to determine Judge Roberts' views on this issue before confirming him to a lifetime position on the U.S. Supreme Court in which he will have the authority to set precedent.

In conclusion, members of the Coalition firmly support the constitutional right of individuals to make reproductive decisions on the basis of their religious views and conscience. We urge you to ensure that the American public knows whether Judge Roberts, if confirmed to the Supreme Court, intends to stand by his statement that *Roe v. Wade* is "settled law" and what restrictions, if any he thinks may be allowed.

Thank you for your attention. If you would like additional information or have questions, please contact my office at 202-628-7700 ext. 12.

Sincerely,



Reverend Carlton Veazey
President and CEO

RELIGIOUS FREEDOM ACTION COALITION SAYS

# YES TO ROBERTS

There are many examples in the world in recent years, of governments that are lawless criminal enterprises, murdering their own citizens, perverting justice and succumbing to bribes and corruption. The United States, while not perfect, has remained a haven of freedom and the rule of law for over two hundred years because our founders wisely established limits and boundaries. First, they declared that it is not within the authority of government to arbitrarily take away the inalienable human rights given by our Creator. Secondly, they established a Constitution to provide guidelines and limits, and a Supreme Court to interpret the Constitution.

Since the 1960's however, many on the Supreme Court have imagined their role to be that of lawgiver rather than interpreter of the law as it stands. The Constitution is a changing document, they say, and must keep evolving. That is true only in a sense that it can be changed by the process of constitutional amendment, by vote of the Congress and of the people in their respective states. Changes to our Constitution were never intended to be made by the Supreme Court justices themselves. And what is worse, some justices have admitted that when making decisions about a case, instead of looking only to the U.S. Constitution, they take into consideration the laws of foreign governments and the public opinion of foreign nations. This is an extremely dangerous trend, and leads to nothing but confusion, contradictions, and a lessening respect for the rule of law among the people.

The Religious Freedom Action Coalition believes that Judge John G. Roberts will interpret the Constitution of the United States rather than to change it. Roberts believes in the rule of law and understands the rightful jurisdiction of the Court. He is a man of proven integrity who by his words and actions has demonstrated respect for God and for the Constitution.

Highly acclaimed by his fellow jurists, Judge John G. Roberts deserves a swift hearing and a proper up and down vote without partisan philosophical condemnations. Judge Roberts should take his rightful seat on the Court before its next term begins

(Statement release date August 24, 2005 - Washington, DC)

RFAC media contacts:

William J. Murray, Chairman
Peggy S. Birchfield, Executive Director
(202) 543-0300

William J. Murray and Peggy S. Birchfield are also principles of the Religious Freedom Coalition. For more information www.rfcnet.org

Religious Freedom Action Coalition, PO Box 77237, Washington, DC 20013

**Religious Freedom Coalition**
717 Second Street NE ✞ Washington, DC 20002
(202) 543-0300 Fax (202) 543-8447

***** NEWS RELEASE *****

September 2005

Clips and Note worthy Statements of William J. Murray, Chairman

*"President George W. Bush's nominee for the Supreme Court, Judge John G. Roberts is an honorable man, a man virtually no one can find fault with".*

*"Judge Roberts is a man who believes the duty of a judge is to interpret existing law, not legislate from the bench."*

*"Judge Roberts is such a solid pick for the Supreme Court position."*

*"Judge John Roberts has everything necessary to become a Supreme Court justice. Americans want a judge to interpret the law, not make it."*

*"Judge Roberts is a mainstream judge who believes the Constitution should be interpreted as written."*

We care about the kind of Justice that sits on the Supreme Court! President George W. Bush nominated an extremely qualified judicial candidate. It is critical that we have men and women on the Supreme Court that will honor God and the Constitution. The concept of religious freedom was important to the Founders because they did indeed believe that it was the "first liberty" and without it no freedom, no liberty could exist at all. Where there is religious liberty there is genuine freedom. Where there is religious liberty the concept of democracy rises up as the sunshine of day.

The *Religious Freedom Coalition* wants Judge John Roberts to be given a fair and balanced hearing!

**Media Contact:**
**Peggy Birchfield, Executive Director**
Phone: (202) 543-0300

September 12, 2005

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
United States Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

As the confirmation hearings of Judge John G. Roberts as Chief Justice of the Supreme Court begins, the Religious Institute on Sexual Morality, Justice, and Healing calls on you to carefully examine his commitment to upholding the constitutional rights of privacy as well as our core American principles of religious liberty and the separation of church and state.

As people of faith and as religious leaders across the political and denominational spectrum, we turn to you to examine how Judge Robert's religious and philosophical beliefs will affect his understanding and interpretation of the Constitution, including his beliefs about sexual justice issues. Supreme Court decisions over the past 40 years have affirmed the right to privacy in sexual matters, and they must be upheld. Our traditions celebrate that sexuality is God's life-giving and life-fulfilling gift, and we pray for the time when all people will be able to celebrate their sexuality with holiness and integrity, free from ignorance, discrimination, and violence.

The Religious Institute includes more than 2400 religious leaders from more than 40 religious traditions in the United States. They have endorsed the Religious Declaration on Sexual Morality, Justice, and Healing, which in part calls for a faith based commitment to abortion rights and full inclusion of sexual minorities in society and

The Reverend Debra W. Haffner, Director
304 Main Ave., #335
Norwalk, CT 06851
TEL: 203-840-1148
haffner@religiousinstitute.org
www.religiousinstitute.org

congregational life. We affirm that life and love are sacred, that women must have the legal right to exercise their moral agency about pregnancy-related decisions without governmental interference, and that there is no justification for discrimination on the basis of sexual orientation or gender identity, including marriage equality.

We have attached copies of theological frameworks supporting marriage equality and abortion rights for your information.

We join with people of faith from diverse faith traditions throughout America to ask for and pray for the most thorough confirmation hearings so that Senators are able to vote with full information about Judge John Roberts. We will hold you in our prayers and thoughts in this most important work in the days ahead.

Sincerely,

The Reverend Debra W. Haffner

cc: Senator Joseph R. Biden, Jr.
Senator Sam Brownback
Senator Tom Coburn
Senator John Cornyn
Senator Mike DeWine
Senator Richard J. Durbin
Senator Russ Feingold
Senator Dianne Feinstein
Senator Lindsey O. Graham
Senator Charles E. Grassley
Senator Orrin G. Hatch
Senator Edward M. Kennedy
Senator Herbert H. Kohl
Senator John L. Kyl
Senator Charles E. Schumer
Senator Jeff Sessions

Enclosures: Open Letter to Religious Leaders on Abortion as a Moral Decision
Open Letter to Religious Leaders on Marriage Equality

STATEMENT OF JUDITH RESNIK

PREPARED FOR THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

# HEARING: JUDICIAL NOMINATION:

# JOHN G. ROBERTS, JR. OF MARYLAND

TO BE

# CHIEF JUSTICE OF THE UNITED STATES

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Submitted September 9, 2005

## I. THE OPPORTUNITIES PRESENTED BY THE CONFIRMATION PROCESS

The consideration of a nominee to the Supreme Court is a unique occasion in American political life -- in part because it is a rare event and in part because the Supreme Court plays a central role in our nation. This hearing, convened by virtue of the Constitution's decision to locate the authority for selection of life-tenured federal judges in the two political branches of government, invites open discussion of the American legal system, of the purposes and scope of constitutional rights, and of the obligations and responsibilities of public and private actors under the rule of law.

While focused on a particular nominee, each hearing is a testament to this constitutional democracy's deep commitments to justice under the rule of law. Each hearing is also a moment to focus not only on the many accomplishments of the person under consideration but also on why we care about courts, what the constitutional creation of life-tenured judgeships entails, and what purposes are served by judicial independence.

These propositions are all the more important when a person is nominated to be the Chief Justice of the United States. As Senator Strom Thurmond explained when William Rehnquist (whose untimely death prompts this hearing) was being considered, the Chief Justice is the "symbol of the Court."[1] At that time, Senator Kennedy offered a parallel comment, that the Chief Justice "symbolizes the rule of law in our society; he speaks for the aspirations and beliefs of America as a Nation."[2]

As I will detail below, given the evolution of the role of the Chief Justice, the person holding that office wears many hats. As Senators Thurmond and Kennedy have described, as the senior jurist of nine rendering decisions on America's highest court, the Chief Justice serves as America's symbol of justice. In addition, the Chief Justice is the chief executive officer of the entire federal judicial system, devoted to responding to thousands of cases through decisions rendered by hundreds of lower court judges. As the spokesperson and agenda-setter for the Third Branch of government, the Chief Justice has enormous discretionary powers.

In recent years, with some difficult confirmation hearings, the process has been criticized as too contentious. Under-appreciated by these critics are the purposes for and the history of disagreements over nominations. Controversy about individuals to serve as jurists is both a longstanding feature of American politics and fairly reflective of the role that law itself plays in American politics. Conflict is *not* a recent artifact of televised Senate hearings or the disagreements resulting from the nominations of Robert Bork and Clarence Thomas. Rather, from the nomination of John Rutledge in 1795 to that of Melville Fuller in 1888 and then through the twentieth century to the debates during the last several years, participants have used

individual nominations to make arguments about what they hope United States law is and will be.[3]

Since this country's founding, the institution of the federal courts has been recognized as a means of shaping the rights of the people and the powers of the national and state governments.[4] Further, after the creation of new judgeships by the Federalists and the conflict ending with the 1803 decision of *Marbury v. Madison*[5] that established the principle of judicial review, Americans have understood that the legal philosophies, the party affiliations, and the ideological commitments of individuals serving as federal judges affect the content of legal doctrine.[6] Then, as now, people in the United States have disagreed about the scope of national powers and about the desirability of an expansive role for federal adjudication. One of the many ways in which those debates occur is through the prism of discussing a given individual's record and qualifications to serve as a life-tenured jurist.[7]

Not only is debate about the nomination of John Roberts constitutionally appropriate and consistent with longstanding practices, it provides an opportunity for all Americans to reflect on our aspirations for this nation and for the role of government in our lives. This is a "constitutional moment,"[8] and one we should proudly use to demonstrate our commitment to the panoply of American constitutional values. Now is the time to celebrate the protection of individual liberties and rights in a system in which independent jurists provide justice under the rule of law.

The confirmation process itself has also served, repeatedly, as a means of developing or clarifying legal norms. At hearings in the eighteenth century, conflicts emerged about the Jay Treaty. During the nineteenth century, debate was had on issues relating to railroads and unions. During the twentieth century, hearings addressed the constitutional rights of women and men of all colors, as questions of racial and gender equality came to the fore. Now, in the twenty-first century , the topics include rights to sexual privacy, to reproductive choice, religion and the public sphere, the legally appropriate responses to threats of terrorism, and the scope of Executive and congressional powers. Through discussions about individual nominees, certain of these issues will be identified as powerfully divisive and others as so settled as to not even appear to have "political" implications.

When attitudes are widely shared, they are not perceived as constituting an "ideology." Only when norms and values are contested do we think of a set of questions as touching on ideology. For example, were a nominee to suggest that the Supreme Court in *Brown v. Board of Education* ought not have ruled against state-created segregation, that person could not be confirmed. Other issues of equality remain contested, as can be seen when a nominee refuses to acknowledge that a particular precedent is so bedrock a principle of the American polity that it cannot be revisited.

What are the questions and the issues that should be at the center of these hearings -- the first in more than a decade on the nomination of a Supreme Court justice and the first since 1986 on the Chief Justiceship? Given that, as is detailed below, the office of the Chief Justice has grown in scope in the last thirty years, this occasion requires new articulation of the particular

qualifications requisite for the leader of the entire federal judiciary. One cannot answer the question of whether this particular person is the right individual to be both the symbolic and the actual leader of America's great federal judiciary without asking: What *are* the symbolic and the actual purposes of the courts that he would lead? Why do we care so passionately about courts?

This nominee's attitudes toward adjudication and the role of the Third Branch matter so much because an intense struggle is underway about the role of courts. The United States Constitution has a complex structure both separating the powers of government but also rendering the branches of government interdependent. The fact that the two political branches must work together to appoint judges to the Third Branch is but one of many examples in which the branches interact and rely upon each other. Another is that the federal judiciary -- an icon of independence -- must in practice rely on Congress to enable it to do much of its work. Although the Constitution guarantees life-tenure for judges whose salaries cannot be diminished,[9] the Constitution does not expressly require that budgets be provided for the courts. Members of Congress, like the Executive, must share in giving substance to the constitutional promise that federal judges be protected from incursion so as to provide due process of law.

Many in this nation (as well as around the world) celebrate courts as central to the well-being of an economically sound democracy. A robust judiciary enables stability, predictability, and security because both institutional and individual actors understand that their grievances will be heard in regular processes that are transparent, rule-based, and precedent bound. Further, courts offer opportunities for independent and impartial third parties to assess the validity of claims. Moreover, courts in democracies serve as deliberate checks on majoritarian power by constraining inappropriate exercises of executive, congressional, and more generally, of sovereign authority. Courts are an especially critical resource for the less powerful who, through adjudication, are given the opportunity to get a fair hearing even when they lack the resources to lobby Congress or to obtain attention from the media.

Some, however, do not embrace this conception of adjudication. Rather, they seek to limit the legal obligations and the liabilities of public and private sector actors. One means by which to achieve those goals is to cut back on the jurisdiction of judges to respond to claims of rights, on the remedies available, on the discretion of judges to decide the merits of cases, on the ability of ordinary people to access legal processes, and on the resources made available to courts. Another is to license the power of the state by immunizing its officials from challenge, by ruling that they have unchecked authority, or by concluding that judicial review is unavailable.

Of course, as the vast literature about "the federal courts" makes plain, hard questions exist about how to allocate federal judicial resources and about what role those courts should play in the American polity. Given this deep conflict about the proper place for judging, I urge Senators to learn more about what this nominee believes courts are for, about who should have access to them and for what claims, and about how he understands the role judges should play in checking the power of government, in interpreting constitutional and statutory rights, and in holding accountable those responsible for injury.

These words may be abstract, but the principles that they reflect are not. During the last two hundred years, the Congress, the Executive, and the federal judiciary, working in concert and encouraged by many private organizations, have done a remarkable job in creating a substantial, important federal judicial system. Through hundreds of different statutes, Congress has repeatedly turned to the federal courts by vesting authority in the judiciary to enforce new rights aimed at safeguarding consumers, at protecting the environment, and at ensuring fair treatment of all people.

To serve the American populace, Congress has also endowed the federal judiciary with significant resources. The import of the nation's constitutional commitment to judicial independence and authority can be seen in the more than 750 federal courthouse facilities at which the 1200 life-tenured jurists and the hundreds of magistrate and bankruptcy judges (aided by 30,000 in staff) work in response to the 350,000 civil and criminal cases and 1.6 million bankruptcy petitions filed annually. More profoundly, the evidence of the importance of the American commitment to courts can be found in the faith Americans have placed in the federal judiciary -- to listen to their claims and adjudicate them fairly, to insist on the human dignity of all persons and recognize their equality before the law, to acknowledge the challenge of enabling equal access in a world of disputants with very unequal resources, and to restrain undue exercises of power.

The nomination of a person to serve as the Chief Justice of the United States is thus a critical occasion upon which to insist on the promotion of a culture that cherishes judging, respects individual judgments when rendered after deliberation, obliges judges to take responsibility for their decisions through explanation and publication, and appreciates judges for protecting constitutional liberties and rights. To do so, we need a Chief Justice committed to a judiciary that is an independent and vibrant branch of government. We need a Chief Justice prepared to serve as the advocate for access to justice -- ready to press Congress to provide the resources necessary for courts to discharge their constitutional obligations to render judgment. We need a Chief Justice who reminds Congress and the Executive to respect and to promote decisionmaking by independent judges. We need a Chief Justice who understands that law must be a source of strength for those in need as well as a source of strength for those already well-resourced. Those are the "litmus tests" of which we should all be proud.

## II. THE ROLE OF THE CHIEF JUSTICE OF THE UNITED STATES

My contribution to these hearings stems from my work as a scholar of the federal courts. I teach and write about adjudication, the role of judges, the procedural system that guides their decisionmaking, and those parts of the Constitution that address the relationships among the courts, Congress, and the presidency and between the state and federal systems.[10] Further, I have focused on the changing role of federal judges at both the trial and appellate levels and the development of the judicial branch over the course of the twentieth century.[11] As a consequence, I have learned about the breadth of authority of the Chief Justice of the United States and how much that position has expanded in the last three decades.[12]

Many Americans are familiar with the role that the Chief Justice plays on the Supreme Court. The Chief Justice presides at both the public and the private sessions of the Court. When

voting with the majority, the Chief Justice has the power to select which justice writes the opinion for the Court. Further, aided by special staff, the Chief Justice is the senior official in charge of the Supreme Court itself. That institution, housed in one of Washington's most beautiful buildings, is supported by a budget of about $60 million and employs more than 300 people. The Court hosts both lawyers (practicing before the Court under special rules made by the Court) and the American public (watching its proceedings). As television cameras recorded last week during the mourning of the death of Chief Justice William Rehnquist, the Court itself is an icon of justice in America. And, commenting on that loss, Associate Justice Ruth Bader Ginsburg captured the many aspects of the Chief Justice's role by describing him as the "fairest, most efficient boss" whom she had ever had.[13]

Americans may be less familiar, however, with the several other roles of the Chief Justice who is, in essence, the Chief Executive Officer for the entire federal judicial system. The "Chief" serves as the spokesperson for the American judiciary, as the chair of the Judicial Conference of the United States (which, as detailed below, has evolved into a major policymaking body that opines regularly to Congress about the desirability of enacting various kinds of legislation), as the person charged with appointing judges to certain specialized courts, as the person who authorizes certain judges to "sit by designation" on other courts, and as the person given a host of other, more minor, functions such as service on many boards.

None of these roles are constitutionally mandated. Indeed, the part of the Constitution devoted to establishing the judicial branch makes no mention of a Chief Justice at all.[14] Rather, the one reference that can be found is in the Constitution's discussion of presidential impeachments -- vesting sole power for trying impeachments in the Senate and specifying that "the Chief Justice shall preside" when a president is tried.[15]

The tasks and parameters of the role of Chief Justice -- including the very question of whether to commit such broad authority to one person -- stem not from the Constitution but from dozens of statutes enacted in an ad hoc fashion over many decades, as well as from customs and from the decisions and ambitions of those who hold the office of the Chief Justice.[16] The current scope of this position is itself a tribute to the impressive leadership of Chief Justice Rehnquist.

A brief historical reminder makes plain how much the Chief Justiceship has changed. At the turn of the twentieth century, about one hundred life-tenured federal judges were dispersed across the nation. Dealing with a total of some 30,000 cases in a year, these judges were mostly left to their own devices, with few shared practices and little means of communicating with each other except through the publication of opinions. This situation prompted Chief Justice William Howard Taft to complain in 1922 that each judge had "to paddle his own canoe."[17]

In contrast today, some 2000 life-tenured and non-life tenured judges work in the hundreds of facilities around the United States that deal annually with the thousands of filings at the trial level and the 60,000 appeals.[18] No longer solo actors, judges are linked together through the Administrative Office (AO) of the United States Courts, created in 1939, and they are supported with educational programs and research provided by the Federal Judicial Center (FJC), chartered in 1967.[19] Their central headquarters is in one of Washington's major new

buildings, named after Justice Thurgood Marshall and located across from Union Station. The day-to-day management of the entire judicial enterprise and its $5.4 billion budget falls to the Director of the AO.[20]

But it is the Chief Justice of the United States who has the power to appoint and to remove the Director of the AO,[21] who serves as the permanent chair of the Board of the Federal Judicial Center,[22] who presides at the meetings of the Judicial Conference, who (upon consultation with others) selects the 250 people who sit on the twenty-four committees of the Judicial Conference, and who gives annual addresses to the nation about the administration of justice. This charter to the Chief Justice began to take shape through congressional responsiveness to the concerns of Chief Justice Taft. In 1922, Congress created the forerunner of what is now called the Judicial Conference of the United States,[23] the policymaking body of the federal judiciary.

Because it may be hard to grasp the import of the role played by the administrative apparatus of the federal court system, a bit more detail about its evolution is in order. Initially, the group of the then-eight senior circuit judges were asked to "advise" the Chief Justice about the "needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved."[24] From my reading of the transcripts (stored in the National Archives) of the yearly meetings during the early years, I learned that the Conference discussion consisted of oral reports from the senior circuit judges. They described how the individual judges with whom they worked were (or were not) managing to stay abreast of the work, as well as whether to request more judgeships. Topics ranged from better salaries, facilities, and supplies to concerns about rules of procedure, sentencing laws, and the need to provide indigent defenders with lawyers.

By mid-century, the Judicial Conference took on its current form, with district court judges included.[25] Today, with the Chief Justice presiding, the Conference has twenty-seven members. By statute, each circuit sends the chief judge of its appellate court, as does the Court of International Trade, and each circuit elects a district judge for a term.[26] Over the decades and influenced by the various Chief Justices, the Conference has enlarged its own agenda. While it often used to decline to comment on matters related to pending legislation by noting that certain issues were "legislative policy" and therefore inappropriate for judicial input, the Conference now takes positions regularly on an array of proposals. Beginning during the tenure of Chief Justice Earl Warren and then expanding significantly under Warren Burger and William Rehnquist, the Conference has become an important force.

As may be familiar to those who work on the Hill but less obvious to the American public, the judiciary functions in many respects like an administrative agency, seeking to equip itself with the resources needed to provide the service -- adjudication -- that the Constitution and Congress requires. Further, during the last half century, the federal courts have also become an educational institution teaching judges about how to do their job, a research center on the administration of justice, and an agenda-setting organization -- articulating future goals and plans. In addition to an Executive Committee, the Conference's committees cover topics that

range from technology to criminal justice. The Conference opines on legislation from security and court construction to proposed new civil and criminal jurisdiction for the federal courts.

The Chief Justice is the presiding officer of this entire apparatus and has the ability, through a host of discretionary judgments, to shape the institutional decisions of "the federal courts." For example, in 1991, under Chief Justice Rehnquist, the judiciary created its own Office of Judicial Impact Assessment to undertake the difficult task of anticipating the effects of proposed legislation.[27] In 1995, after convening a special committee on Long Range Planning, the Conference issued a *Long Range Plan for the Federal Courts*, a first-ever monograph making ninety-three recommendations about the relationship among state, federal, and administrative adjudication and about the civil and criminal dockets of the federal courts.[28] The *Long Range Plan's* recommendations included asking Congress to have a presumption against enacting any new rights for civil litigants, if those actions were to be enforced in federal court, as well as a presumption against prosecuting more crimes in federal courts.[29]

Further, under the leadership of the Chief Justice, the Judicial Conference may decide to offer its views on pending legislation even though, if enacted, judges may be required to preside on cases calling the legality of a particular provision into question. For example, in the early 1990s, when an initial version of the Violence Against Women Act (VAWA) was introduced, the Judicial Conference created an Ad Hoc Committee on Gender-Based Violence. Appointed by the Chief Justice, the Committee studied the proposed statute, which included that a new civil rights remedy be made available in federal court to victims of violence. The judiciary's Ad Hoc Committee recommended opposition -- which became official federal judicial policy as reported by the Chief Justice in the early 1990s.[30]

After the proposed legislation was modified (in part in response to the concerns raised by judges) and its scope narrowed, the Conference took no position on the propriety of enacting the civil rights remedy but supported other aspects of the legislation including educational efforts.[31] In 1994, at the behest of some forty state attorneys general and many others, Congress enacted the Violence Against Women Act, including its provision of federal jurisdiction (supplemental to that available in state courts) giving civil remedies to victims of gender-motivated violence. Thereafter, and again exercising his discretionary authority, the Chief Justice continued his criticism of VAWA. In 1998, the Chief Justice commented in a speech before the American Law Institute that the legislation raised grave problems of federalism. He cited VAWA (as well as other recent statutes) as inappropriate expansions of federal jurisdiction. In his view, "traditional principles of federalism that have guided this country throughout its existence" should have relegated these issues to state court.[32] In 2000, the Chief Justice wrote the majority opinion that ruled, five to four, that Congress lacked the power under the Commerce Clause to confer that form of jurisdiction on the federal courts.[33]

In addition to guiding the Judicial Conference, which adopts formal policy through voting, the Chief Justice has an independent platform from which to speak. William Howard Taft and his successors went regularly to the American Bar Association and to the American Law Institute to give major addresses on their views of the judiciary's needs and priorities. That tradition continues.

In the 1980s, Warren Burger initiated another practice -- providing annual "state of the judiciary" speeches that are released to the nation. Chief Justice Rehnquist followed suit, beginning each new year by setting out agendas and themes. In that capacity, Chief Justice Rehnquist regularly spoke about the values of judicial independence. Upon occasion, he criticized the Congress or the Executive for engaging in behavior that, he believed, suggested that the coordinate branches of government did not sufficiently appreciate the centrality of an independent judiciary to a thriving democracy.

Yet another aspect of the powers of the Chief Justice is important: He has the authority to select individual judges to serve on specific courts. Rather than using a system of random assignment (for example, staffing a court by assigning sitting judges whose names are drawn by lot), Congress has endowed the Chief Justice with the power to pick individual judges to sit on specialized tribunals.

For example, the Chief Justice appoints the seven judges on the Judicial Panel on Multidistrict Litigation[34] (with authority to decide whether to consolidate cases pending around the country and to centralize pretrial decisionmaking in a judge selected by that panel). The Chief Justice also selects the eleven judges who sit for seven-year terms on the Foreign Intelligence Surveillance Act Court (FISA) which, since 1978, has approved of more than 10,000 government requests for surveillance warrants.[35] The Chief Justice also has the power to select the five judges who comprise the Alien Terrorist Removal Court, chartered in 1996 to respond when the Department of Justice files cases seeking to deport legal aliens suspected of aiding terrorists.[36] As a result of these various statutes, according to Professor Theodore Ruger, Chief Justice Rehnquist made "over fifty such special court appointments, filling more federal judicial seats than did every individual United States President before Ulysses S. Grant."[37]

In sum, the Chief Justice is not only the symbolic leader of the federal judiciary. He also has a number of specific powers and a good deal of practical authority. He is the most powerful person in the entire federal judicial apparatus. Time and again, individual Chief Justices have proven to be the judiciary's most effective lobbyist, the judiciary's most visible spokesperson, and the nation's most important judicial leader.

Such a repertoire of powers is stunning -- and anomalous -- for a democracy. That role entails authority significantly different from that of either other judges or justices who sit on courts. Judges on appellate courts work collectively; they must persuade others of the correctness of their views in order to prevail. Both constitutional and common law traditions mandate openness in courts. Most decisions are explained by reasons that are available to public scrutiny and then revisited as new cases arise. In contrast, the administrative powers of the Chief Justice are neither officially shared nor constrained by obligations of accounting.

Further, these many grants of power contrast sharply with the authority of other executive officials. Presidents have term limits. Heads of independent agencies generally do as well. Currently, however, the Chief Justice has life-time consolidated authority over the administration

of both the Supreme Court and the lower federal courts and does not have legal obligations to share that power with other jurists nor to explain the decisions made.

On the occasion when we must reflect on the role of the Chief Justice, I would be remiss not to add that because the current structure is a creature of Congress and custom, it could be altered. A new Chief Justice could decide to depart from many of the practices that I have described by, for example, asking other judges to take on various tasks or by going to Congress to seek revision of some of the statutory charters that run to that office. The assignment of chairing the Judicial Conference could rotate from one Chief Circuit Judge to another, just as the position of chief judge of a lower court is gained through seniority and is term-limited.[38] Indeed, the Office of Chief Justice itself could be a rotating position, held by different members of the Court for a period of four years.

Given the current configuration of authority, however, too much power is at stake for the office to change hands without intensive inquiry -- detailed below.

**III. THE SENATE'S ROLE**

As is familiar, the United States Constitution charges the two political branches with the job of selecting federal judges. The President is instructed to present nominations to the Senate, which has a constitutional mandate to provide its advice and to give or to withhold its consent.[39] Professor Charles Black explained several decades ago that, in light of the text, history, and structure of the Constitution, its words "Advice and Consent" should be understood as authorizing members of the Senate to take an active role in selecting the individuals who shape the meaning of federal judiciary.[40]

The confirmation of a federal judge is unlike that of the other positions over which the Senate also has the powers of advice and consent. Cabinet members, for example, serve only as long as a President is in office. Congressional deference flows from the sense that the Executive ought to have the ability to pick its "own" people to run the government. Judges, however, are not supposed to be "the President's men." Rather, through life tenure and salary protection, they are given the independence that enables them to sit in judgment of those who have appointed them and, when appropriate, to rule against their own employer, the United States.[41]

America's life-tenured jurists (described in Article III and nicknamed "Article III judges"[42]) are unique in another respect. Unlike jurists in many states and in other democracies, Article III judges have no mandatory age for retirement nor a fixed, non-renewable term of office.[43] Further, as many scholars have recently discussed,[44] Article III judges serve for very long periods of time. While the sixteen justices appointed to the Supreme Court during the first twenty years of this nation's history averaged fourteen years on the bench, those appointed to serve between 1983 and 2003 averaged twenty-four years.[45] As we were reminded this past week when the nation mourned the death of Chief Justice Rehnquist, some justices serve for more than thirty years.

Thus, the decision to approve a Presidential nominee to sit as Chief Justice is one of the most important a Senator can make, for it gives an individual a charter to hold power long after the appointing President has relinquished office. Given that a life tenured appointment is a rare event in any democracy, those selected and confirmed must be individuals in whom confidence is shared.[46] No apologies are needed from Senators who take seriously their obligation to be confident that a particular nominee -- for any level of the life tenured judiciary, let alone the Chief Justiceship -- is the appropriate person in light of the country's needs and the composition of a particular court at a particular time.

When introducing these comments, I argued that rather than complain about confirmation hearings, we should see them as opportunities for a national "teach-in" about the values of American law. Although awkward and sometimes uncomfortable (and, at times, inappropriately so for an individual nominee), the discussion of whether the Senate ought to confirm a given person is one way to understand what American law is -- or ought to be -- and to understand what we believe the job of judging entails.[47]

One illustration of the role nomination hearings have played in articulating concerns comes from the area of women rights. Until the 1970s, the Senate did not even inquire into nominees' attitudes about the protection afforded women under the Constitution. Specifically, the first question about attitudes of a nominee towards women emerged in 1970, when George Harrold Carswell was questioned.[48] Congresswoman Patsy Mink from Hawaii raised concerns about that nomination, which she described as "an affront to the women of America" because of Judge Carswell's role in a case upholding the refusal of an employer to permit women with children of pre-school age to be hired, although men with children of pre-school age were so employed.[49] At the confirmation hearing, Senator Birch Bayh of Indiana asked Judge Carswell to address "the impression that [Carswell was] not in favor of equal rights for women." Carswell responded that he was committed to the enforcement of the "law of the land."[50]

The Carswell nomination was rejected but not because of Carswell's views on women's roles in society.[51] The following year, when William Rehnquist and Lewis Powell were nominated to be associate justices, several witnesses objected to both nominees' attitudes towards women's rights.[52] While such testimony prompted Senator Bayh to ask William Rehnquist about his views on equal rights for women,[53] no such questions were addressed to Lewis Powell.[54] Thereafter and up until 1987, a nominee's attitudes toward women's rights were not a focus of discussion.[55]

The hearings on the nomination of Robert Bork, in 1987, were the first in which women's issues moved to center stage and became relevant to the outcome.[56] Several witnesses questioned Judge Bork's interpretations of constitutional doctrine to exclude women from heightened protection under the Fourteenth Amendment,[57] as well as his decisions in non-constitutional cases. While many factors contributed to Judge Bork's rejection, his belief that discrimination against women was not directly prohibited by the Equal Protection Clause of the Fourteenth Amendment,[58] his opposition to the Equal Rights Amendment,[59] and his narrow construction of statutory rights for women played an important part.[60] In short, nomination

hearings were one of the ways in which the Senate highlighted the struggle for women to become equal rightsholders under the United States Constitution.[61]

**IV. THE HARD QUESTIONS AT THE HEART OF THESE HEARINGS**

To be confirmed to serve as the Chief Justice of the United States, a nominee should demonstrate a prior commitment to advancing a positive role for the judiciary and a longstanding appreciation of the contributions that a robust judiciary makes to American law. Because no person is entitled to a judgeship, a nominee needs to establish that he or she is the appropriate person for the particular position in the offing. As detailed above, the office of Chief Justice of the United States has three dimensions -- the chief justice of the Supreme Court, the chief administrator of the federal judicial system, and the central symbol of justice in America.

Given my view that the Chief Justice needs to be a devoted advocate of access to justice and of an independent judiciary, I reviewed written materials made public to date to learn about the nominee's approach to these questions. I limited my consideration to decisions made by Judge Roberts on the D.C. Circuit, to memoranda that he authored when, as a policymaking lawyer serving between 1981 and 1986 for the Reagan Administration, he gave advice on whether the government ought to take particular positions. I also reviewed published essays and transcripts of commentary in radio interviews. Unlike his work as a retained lawyer in private practice (upon which I do not rely), Judge Roberts' positions in government gave him many occasions to make his own views plain.[62] Further, since joining the federal bench in 2003, Judge Roberts has written about fifty opinions, including dissents, and he has sat on many more panels. Thus, a good deal of information is available.

I regret to report that, at least on this record, Judge Roberts has not regularly expressed enthusiasm for adjudication or for ready access by members of the public to the federal courts. In the hundreds of pages that I have reviewed, I have not found sustained discussion of why courts are institutions to be treasured or about how courts are necessary to enable individuals or groups to bring claims of right into the public sphere for decision.

Instead, when given an occasion to opine on why courts should remain accessible, on why the Department of Justice should lend its hand to help needy Americans get into court, on why judges should be available to respond to claims for redress, on why a range of remedies should be available, and on why the Constitution's vision of equal protection and due process protected through adjudication should embrace us all, the nominee has generally argued against the use of courts. Further, Judge Roberts has been solicitous of the power of the Executive Branch, often at the expense of individual rights and judicial review. Because the record available in advance of these hearings provides little assurance that this person is the one to be charged with protecting judicial independence and the values of judging and because his nomination for this position was an abrupt change of course, I urge the Senate to undertake a thorough review of the many instances in which Judge Roberts advocated narrowing access to justice and then to consider how those judgments would affect or forecast his work, were he confirmed as Chief Justice, the symbolic center of America's courts.

A few examples of the positions he advocated or the decisions he rendered explain the concerns. Return first to my analysis of the complex structure of the Constitution, with interdependent branches. Rather than approaching separation of powers as a vibrant principle of American constitutional law that enables nuanced, interactive dialogues among the branches, Judge Roberts has described separation of powers as a "zero-sum game," with actions of one branch coming at the "expense of the other branches."[63]

In practice, in that "zero-sum game," Judge Roberts has often sided with one player: the Executive. The powerful illustration is *Hamdan v. Rumsfeld*,[64] issued in July of this year. Judge Roberts joined the judgment, written by Judge Raymond Randolph of the D.C. Circuit, that gives enormous latitude to the President to label individuals "enemy combatants" and that bar such persons from access to life-tenured judges to adjudicate their claims.[65] Further, rather than turning to the military courts operating under congressional authorization with detailed procedures, reflecting the due process requirements of the United States Constitution, the *Hamdan* decision relegates individuals to the decisions of an ad hoc tribunal comprised of "three colonels."[66] Indeed, the decision concludes that violations of the Geneva Convention -- the 1949 agreement governing the treatment of war prisoners to which the United States is a party -- are not "judicially enforceable."[67] If this decision stands, then the President has the judicially-unreviewable power to consign individuals to such tribunals, which lack one of America's great contributions to world political thought: the insistence that truly independent jurists have the power to sit in judgment of the Executive.

Several of the memoranda by Judge Roberts when he served as an advisor to the government in the 1980s underscore how longstanding is the commitment to Executive power displayed in the 2005 *Hamdan* decision. Most troubling is the assumption in one memorandum that, once in judicial office, judges appointed by a particular president will remain loyal to that president's political stances. At issue was a proposal (raised by then-Chief Justice Warren Burger among others) to create a new court -- an Intercircuit Tribunal to resolve disputes among the circuits and thereby to ease the workload burden from the Supreme Court. The Department of Justice recommended supporting the proposal on an experimental basis for five years.

John Roberts objected on the grounds that an Intercircuit Tribunal would give courts more opportunities to render judgments and would give the President less control over the judges making those decisions. One ground for objection, Roberts stated, was that the idea seemed to conflict with President Reagan's "long campaign[] against government bureaucracy and the excessive role of the federal courts."[68] But he added that "it strikes me as misguided to take action to permit" the Supreme Court to do more than it was doing.

> Creating a tribunal to relieve the Court of some cases -- with the result that the Court will have the opportunity to fill the gap with new cases -- augments the power of the judicial branch, ineluctably at the expense of the executive branch.[69]

Further Roberts found the idea of giving the Chief Justice the ability to assign sitting judges to the new court a problem for the President. As he explained,

> the new court will assuredly *not* represent the President's judicial philosophy - and will have the authority to reverse decisions from courts to which the President has been able to make several appointments that *do* reflect his judicial philosophy. Under the committee proposal a Carter-appointed judge (there definitely will have to be some on the new court) could write a nationally-binding opinion reversing an opinion by Bork, Winter, Posner, or Scalia -- something that cannot happen now.[70]

In other words, sitting judges -- whether nominated by a President of either party -- were not viewed, once in office, as independent jurists but rather expected to "reflect" the President's positions.

Other memoranda also show a deep commitment to Executive power. As an attorney-advisor in the White House, Mr. Roberts worried that a resolution in "Opposition to Torture" was "mildly objectionable" because it could affect "the Executive's conduct of foreign relations;" he also noted (referring to a point made by the Department of State) that the resolution was not at odds with the current policy.[71] In another memorandum, Mr. Roberts commented that a bill to permit the President to "declare an immigration emergency" under certain criteria and then to have the power to "prohibit vessels from traveling to designated areas" is a "broad grant of emergency powers" but not "too broad" given the experience of efforts by Cubans who had been jailed in Cuba to escape to the United States.[72] And yet other memoranda follow the leitmotif of opposition to ready access to the federal courts. For example in one advisory opinion, Mr. Roberts bemoaned the Supreme Court's reading of Section 1983 as permitting filings for violation of federal statutory rights.[73]

A critical issue today is whether we can hold government accountable. For a judge on the D.C. Circuit, the issues arise primarily in the context of federal executive power. But on the Supreme Court, the question often comes up in terms of whether states are immune from suit. The legal parameters of this relatively arcane doctrine of federal law are complex. In a series of decisions since the 1990s that involve different facets of the problem, the United States Supreme Court has, in five-to-four decisions, found states to be immune from damages when individuals seek to protect their rights under federal labor standards,[74] federal patent law,[75] and federal provisions protecting the aged and the disabled.[76] The majority has held that Congress lacks the power to authorize private parties to seek damages from states for such violations unless Congress created the underlying rights pursuant to its powers under the Fourteenth Amendment and did so in a method that shaped a remedy both congruent and proportionate to the violation found.[77]

Judge Roberts' views of these issues can be found in a 1999 radio interview in which he joined others, including Professor Akhil Amar, to discuss one of the major sovereign immunity decisions, *Alden v. Maine*,[78] rendered by the Supreme Court just days earlier. Professor Amar noted that the expansion of the doctrine of sovereign immunity and the constriction of congressional remedial powers ran against "a very deep principle in our constitutional system" that individuals can seek remedies for violations of rights in courts.[79] Judge Roberts took a different tack -- praising the decision as recognizing that the "states are co-equal sovereigns

[with] their own sovereign powers and that includes, as everyone at the time of the Constitutional Convention understood, sovereign immunity."[80] What is troubling about his statement is not simply the conclusion that states are immune from suit and that states are "co-equal sovereigns" -- both problematic stances given the nature of the federal system.[81] Of equal concern is his assertion that "everyone at the time of the Constitutional Convention understood" those principles to be so enshrined.

This approach to constitutional law is problematic in two respects. First, the historical record does not support that claim. Insulation of government from challenge by ordinary citizens was not so obviously a feature of the early days of America. Rather, as a host of scholars have demonstrated[82] and as Justice David Souter so carefully detailed in his dissent in the *Alden* decision itself, the "notion of sovereign immunity . . . was not an immediate subject of debate [at the time of the framing of the Constitution], and the sovereignty of a State in its own courts seems not to have been mentioned" at all at the Convention.[83] Second, the too-ready claim that the issue had been decided two hundred years later avoids acknowledging the very challenging aspect of constitutional adjudication: the obligation to assess nuanced and conflicting evidence and then to take responsibility for making a difficult judgment. The answer to the many hard (and contentious) questions of American law should not be reduced to an erroneous and oversimplified claim about what "everyone understood" in 1789.

Returning to Judge Roberts' rulings on the D.C. Circuit, another decision that gives me pause involves a cutting edge issue affecting the rights of ordinary Americans in civil litigation: enforcement of contracts that send employees, consumers, and purchasers of various services away from the courts by mandating arbitration. Writing the decision for the D.C. Circuit, Judge Roberts did not give evidence of a deep appreciation for the importance of adjudication in independent, public courts or of the effects of inequality on the capacity to bargain.

A word of explanation about the legal doctrine that forms the background to the case is in order. In decades past, the federal courts had taken the position that, because of unequal bargaining powers and the importance of enforcing federal rights, the courts would not enforce contracts waiving rights of access to courts if the parties made those agreements before a dispute had arisen. In 1953, for example, the United States Supreme Court refused to hold a buyer of a security to terms mandating arbitration in a securities case. The Court held that because the federal securities statute was "drafted with an eye to the disadvantages under which buyers [of securities] labor," and because arbitration was a private and flexible process that did not offer the same remedies as did adjudication, the agreement was unenforceable.[84]

But, through a series of decisions beginning in the 1991, the Court (often ruling five to four) has enforced such contracts, even when consumers or employees make arguments that their rights under federal law have been breached. The touchstone for enforcement, however, is that the alternative to the judicial processes provide an "effective" means of "vindicating" the statutory rights and that the private, alternative dispute program provide remedies comparable to those available under law by courts.[85]

In light of those holdings, lower courts are now involved in developing the law about when arbitral remedies are effective and when to enforce or refuse to enforce mandatory arbitration clauses.[86] To assess whether a particular arbitration program suffices to enable vindication of legal rights, courts compare the procedural rights (such as discovery), the remedies, and the costs of the arbitration program with the rights provided in court.

One such opportunity presented itself to Judge Roberts, confronted with the question of what to do when part of an arbitration agreement was plainly unenforceable. That case is *Booker v. Robert Half International, Inc.*,[87] a decision issued in July of this year. The underlying dispute involved a claim of discrimination based on race. When taking a job for a company with reported revenues in 2004 of about 2.7 billion dollars,[88] Timothy Booker signed a contract; paragraph 18 stated that the parties agreed to arbitrate any dispute and that they agreed that punitive damages would not be available.[89]

I do not know how carefully Mr. Booker looked at all the terms of that contract. (I do know that many of us who have cell phones and credit cards have not read all the provisions -- including the waivers of rights of access to court.) What I do know from Judge Roberts' opinion as well as from the website of the Equal Employment Opportunities Commission (the EEOC) is that the EEOC filed a brief, amicus curiae, on Mr. Booker's behalf. The EEOC argued that the arbitration clause did not permit Mr. Booker to vindicate his statutory rights as he could have, were he permitted to go to court. Because the District of Columbia's Human Rights Act authorized punitive damages for wrongful discrimination and the contract proffered by the employer barred that remedy, the EEOC urged the D.C.Circuit to decline to enforce arbitration.[90]

Moreover, as the briefs before the Court on behalf of Mr. Booker argued, judicial refusal to enforce arbitral contracts that include problematic clauses is an important means of constraining the institutions that draft form contracts. If courts were routinely to redraft contracts by severing objectionable clauses, then the party proffering the contract might be encouraged to put in provisions otherwise unlawful. Uninformed consumers or employees would not know of these defects unless and until they challenged the enforceability of the arbitration clauses in courts -- assuming that they had the resources to get to court. Thus, the less knowledgeable parties would be stuck with contracts that unfairly -- and illegally -- disadvantaged them.

These kinds of concerns did not, however, persuade Judge Roberts to permit the litigation to proceed in court. Rather, on behalf of the panel, he severed the objectionable bar on punitive damages and sent Mr. Booker away from adjudication to make his discrimination claim in the arbitration program provided by his employer. What to me is particularly disturbing about this conclusion is the opinion's emphasis on the "mutual assent" of Mr. Booker and his employer and the focus on the "intent of the contracting parties."[91]

As a great many analysts of the burgeoning practice of using arbitration clauses have noted, these contracts are generally proffered by institutions, which also author the form contracts.[92] Indeed, in some of reported cases, mandatory waivers of arbitration appear on the

applications for jobs.[93] Negotiating the terms is not often available, as I can attest to personally, having failed in my own effort to renegotiate a cell phone contract. Professor Jean Sternlight recently explained the many problems with such mandatory arbitration programs which, she concluded, were "unjust" not only because they lacked the public features of adjudication but also because they enabled one private party to impose this procedural mechanism on another.[94]

In short, awareness of the problems of unequal access ought to frame judicial inquiry into form contracts that waive rights to court. Those concerns have, more generally, produced important constitutional jurisprudence, as the Supreme Court articulated the constitutional rights of access to courts. In 1971, in *Boddie v. Connecticut*,[95] Justice Harlan explained that the Due Process and Equal Protection Clauses required the state not to put up barriers to poor individuals, unable to pay for the costs of filing a petition for divorce. These concerns again shaped the majority in *M.L.B. v. S.L.J.*,[96] holding in 1996 that, when an indigent litigant cannot afford a transcript required for an appellate court to review the termination of parental rights, the state must lend a hand.

But attentiveness to such problems is not much in evidence in Judge Roberts' work. A very troubling example comes from an exchange as an advisor to the Attorney General in a debate about whether the Department of Justice should enter a case filed by women prisoners who faced a host of discriminatory practices while incarcerated in Kentucky. The case, *Canterino v. Wilson*,[97] involved a whole panoply of ways in which women prisoners were disadvantaged.

William Bradford Reynolds, then the head of the Civil Rights Division of the Department of Justice, sought permission to intervene in this "sex discrimination case against the Kentucky state prison system."[98] Reynolds wanted the Department to become involved in a narrow aspect of the case. Based on its own investigation, the Division of Civil Rights had learned that

> male inmates have access to a much greater variety of vocational courses, to training for more highly-paid fields, to full-time training rather than part-time training, and to training for longer periods of time in each field than do female inmates. Most female inmates are being prepared only for low-paid traditional female office jobs, or for unpaid housework and childcare.[99]

Specifically, while women learned about "business office education and upholstery," men were trained in "auto body and repair, auto mechanics, carpentry, drafting, electricity, masonry, meatcutting, printing, radio and TV repair, small engine repair, upholstery, and welding."[100]

Reynolds explained that federal statutes provided the Attorney General with the power to intervene and that federal law gave those women rights that were being violated. Further, he argued that intervention was needed because of the "unique role" the Department could play in "informing the court of the experience of the Bureau of Prisons," which was a "leader in upgrading the vocational opportunities of female prisoners in the federal system" (citing women apprenticeships as "auto mechanics, electricians, plumbers, painters, and bricklayers.")[101] In addition, according to Reynolds, the trial judge had sought the Department's help in another

related case and praised its contributions. Further, the "available documentation" constituted a "very strong record . . . to assert women's rights to equal vocational training," as was required by federal statutes and the federal government's own prison policies. And "[f]inally, the discrimination at issue is particularly counter-productive" because it deprived women of the ability to prepare for "productive and useful work" upon release.[102]

But John Roberts urged the Attorney General to deny permission to intervene on behalf of the United States government.[103] In Roberts' view, the fact that the "private plaintiffs" had already filed suit meant that there was "no need for involvement of the Civil Rights Division."[104] In making that judgment, he referred negatively to another case, involving terrible conditions in the Texas prison system; there, the Department of Justice had intervened, augmenting the litigating resources of the prisoners so much in need of basic sanitation, medical care, and safety.[105] What for some of us is an example of the useful role that government can and should take was for him a minus.

Further, Roberts argued that development of "the equal protection claim . . . based on semi-suspect treatment of gender classifications" would not be appropriate, given that the Attorney General had "publicly opposed such approaches outside the area of race," and, in addition, had opposed federal involvement with state prison programs.[106] Finally, Roberts suggested that "economies of scale" might justify having "certain programs for the male prisoners but not for the many fewer female prisoners," and given "tight prison budgets," one result could be no programs at all.[107]

These examples are but some of many instances in which the written record shows a person devoted to the authority of the Executive Branch and of the states at the expense of individual access to courts. While Judge Roberts has often complained about too much access to or too many remedies from courts, he has said little about the need for courts. Not readily available from the many memoranda and opinions is an affirmative vision that the federal courts play a vital role in delivering justice to individuals, in safeguarding their rights, in protecting their human dignity, and in making government transparent, accountable, and responsive to the people.

The Chief Justice of the United States is a leader of all Americans. The person who occupies that office must embody the principle of judicial independence and should proudly assert the unique contributions courts make to the American polity. Given the information available to date, the question is whether the deep skepticism about the role of courts and the ready license to the President -- lacing Judge Roberts' written work -- will give way, were he confirmed to serve as the Chief Justice. Whether he meets the qualifications for the Chief Justiceship is a judgment reserved for each Senator who must discharge the constitutional obligation of deciding whether to consent to this nomination.

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[1] *See Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 12 THE SUPREME COURT OF THE UNITED STATES: HEARING AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS at 312 (eds. Roy M. Mersky & J. Myron Jacobstein, 1989) (Opening Statement of Chairman Strom Thurmond).

[2] *See Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 12A THE SUPREME COURT OF THE UNITED STATES: HEARING AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS at 1549 (eds. Roy M. Mersky & J. Myron Jacobstein, 1989).

[3] Indeed, as I have written elsewhere, my concern is that the Senate often does too little rather than too much. *See* Judith Resnik, *Supermajority Rule*, N.Y. TIMES, June 11, 2003 at A34. Most persons considered by the Senate to be Article III judges are confirmed by large majorities. I have also suggested that, as a means of expressing how unique life-tenured jobs are in democracies and how deep the political consensus about the propriety of appointing persons to such positions ought to be, the Senate should rely on a practice of requiring sixty votes for approval. Knowing that most confirmation votes currently exceed that number, I do not imagine that this form of structural intervention would have great impact but rather that it would underscore the normative peculiarity of life tenure and make plain that widespread consensus in the Senate should be the basis for confirmation.

[4] *See generally* Maeva Marcus, *Is the Supreme Court a Political Institution?*, 72 GEO. WASH. L. REV. 95 (2003).

[5] 5 U.S. (1 Cranch) 137 (1803). Given that decision's recent two hundredth anniversary, new discussions have addressed the holding. *See, e.g.*, Philip Hamberger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003) (arguing that judicial review was a feature of English, colonial, and state law before *Marbury* was decided).

[6] *See, e.g.*, Marcus, *supra* note 4, at 99-100 (describing the rationales for President Washington's appointment of particular men from state judiciaries in an effort to "lessen any jealousy the state judiciaries would feel for the new national . . . system" and commenting on the awareness of federal jurists of the "political repercussions" of some of their decisions). A growing academic literature addresses the relationship between party affiliation, race, gender, and religion to examine correlations and voting patterns of judges. *See, e.g.*, Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making*, 20 J. L. AND ECON. ORG 299, 321 (2004) (summarizing studies and concluding that in addition to an individual judge's gender, race, and ideological position, the gender composition of a panel of judges influences how judges rule); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 492 (2004) (concluding that the most "prominent, salient, and consistent influence on judicial decisionmaking was religion" in cases involving that issue); David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J. L. AND ECON. ORG. 438, 438 (2004) (analyzing nominees to executive agencies and concluding that the ideology of that set of nominees is affected by the "ideological tilt in Congress"); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (concluding that, depending on the kind of case, the political party of the appointing president is a fairly good predicator of an individual judge's vote as is the political party of the president appointing the other judges on a panel); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1459 (2003) (arguing that "legal and political factors" more than "strategic and litigant-driven factors" have greater impact). *See generally* Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 743 (2005).

[7] As political scientists Charles Cameron and Jeffrey Segal detail, battles over appointments predate the practice of holding open hearings on individual nominees. According to an 1888 *New York Times* article discussing the nomination of Melville Fuller to be Chief Justice, "[t]he Judiciary Committee . . . began a rousing search into all the dark abodes of scandal and tattle, to hunt for something against the character of the President's nominee." Charles M. Cameron & Jeffrey A. Segal, *The Politics of Scandals: The Case of Supreme Court Nominations, 1877-1994* at

1, 2004 manuscript distributed and made available at http://www.yale.edu/isps/seminars/american_pol/cameron.pdf (also on file with the author). Cameron and Segal survey the eighty nominations made to the Supreme Court between 1877 and 1994. *Id.* at 2. They picked those dates to permit time for the reemergence of partisan politics after the Civil War. They report that seventy nominations succeeded and that twenty-four were, under their definition, "controversial." To make that assessment, they read all discussion of nominees in articles published in the *New York Times* during the time period they studied. *Id.* at 10.

[8] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991).

[9] *See* U.S. CONST., ART. III, § 1.

[10] *See, e.g.*, Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life-Tenure* 26 CARDOZO L. REV. 597 (2005); Judith Resnik, *Federalism's Options, Afterword to the Symposium Constructing a New Federalism*, YALE J. OF LAW AND POLICY/YALE JOURNAL ON REGULATION 465 (1996).

[11] *See, e.g.*, JUDITH RESNIK, PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES (2004); Judith Resnik, *Civil Processes*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 248-272 (eds. Peter Cane & Mark Tushnet, 2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 INDIANA LAW J. 223 (2003); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[12] A short summary is provided in a recent op-ed, *One Robe, Two Hats*, that I co-authored with Professor Theodore Ruger of the University of Pennsylvania and which can be found in the Week in Review of the *New York Times* of July 17, 2005 at page 13. Many scholars have examined these issues. *See, e.g.*, Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004); ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT (1986); PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973).

[13] The Honorable Ruth Bader Ginsburg's comments can be found in *Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist* (Sept. 4, 2005), *available at* http:///www.supremecourtus.gov/publicinfo/press/pr_09-04-05.html.

[14] U.S. CONST., ART. III. Although the constitutional text is sparse on this subject, many federal statutes advert to the position of the Chief Justice. *See, e.g.*, 28 U.S.C. § 1 (describing the Supreme Court as comprised of eight associate justices and a "Chief Justice of the United States"). That usage began in the First Judiciary Act. *See* Act of Sept. 24, 1789, § 1 (describing the Supreme Court as consisting of "a chief justice and five associate justices").

[15] U.S. CONST., ART. I, cl. 6. The Constitution also does not use either the terms "Chief Justice of Supreme Court" or "Chief Justice of the United States." The later title, now in use, can be found by the second half of the nineteenth century. *See* Hon. William A. Richardson, *Chief Justice of the United States, or Chief Justice of the Supreme Court of the United States?* (a brief essay by the then Chief Justice of the Court of Claims and reprinted in the N.E. Historical and Genealogical Register, July 1895). Richardson reported that in 1888, Chief Justice Fuller was nominated and commissioned as the "Chief Justice of the United States." The usage also appears in The Judiciary Act of 1869, ch.22, 16 Stat. 44, Apr. 10, 1869. Its opening provision states that "the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices . . . ."

[16] As Justice Ginsburg noted, *supra* note 13, "William H. Rehnquist used to great effect the tools Congress and tradition entrusted to him," in his role as the leader of the United States judiciary and of the Supreme Court.

[17] William Howard Taft, *The Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922).

[18] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION TO JUDGES AND JUDICIAL ADMINISTRATION IN OTHER COUNTRIES 42 (2d ed. 2001); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004: CASELOAD HIGHLIGHTS at 10 (2004).

[19] *See* Act of Dec. 20, 1967, Pub. L. No. 90-219, ch. 42, § 620, 81 Stat. 664 (1967); Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 L. & CONTEMPORARY PROBS. 31 (1988), and *"Baby Judges School" Jump Starts Learning Process*, 37 THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS 1 (Aug. 2005).

[20] *See* 28 U.S.C. § 601.

[21] *See id.* (stating that the AO is to be "supervised by a Director and a Deputy Director appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference.")

[22] *See* 28 U.S.C. § 621 (providing that the Chief Justice "shall be the permanent Chairman of the Board").

[23] *See* Act of Sept. 14, 1922, Ch. 306, § 2, 42 Stat. 837, 836 (creating a Conference of Senior Circuit Judges "to advise [the Chief Justice] as to the needs of [each] circuit . . . and the administration of justice"). In 1937, the Act was amended to include participation by the chief judge of the United States Court of Appeals for the District of Columbia, and in 1948, the Conference of Senior Circuit Judges was renamed the Judicial Conference of the United States. *See* Act of June 25, 1948, ch. 646, 62 Stat. 902, now codified at 28 U.S.C. § 331 (2000).

[24] Act of Sept, 14, 1922, § 2, *supra* note 23.

[25] District judges became a part of the Conference in 1957. *See* Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified at 28 U.S.C. § 331 (2000).

[26] *See* 28 U.S.C. § 331.

[27] That process proved complex and controversial in light of the challenges of estimating effects of not-yet enacted laws and of assessing how to count the costs and benefits afforded by enhancing access to the courts. *See generally* CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS (A. Fletcher Mangum, ed. 1995).

[28] JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (Dec. 1995), reprinted in 166 F.R.D. 49 (1995). The Conference formally adopted the ninety-three recommendations but did not specifically approve that commentary of the drafting committee.

[29] *See id.* at 83 (Recommendation 1); *id.* at 88 (Recommendation 6); *id.* (Recommendation 2).

[30] *See* William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, 24 THIRD BRANCH 1 (Jan. 1991) (objecting that the proposed private right of action was too "sweeping").

[31] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICAL CONFERENCE OF THE UNITED STATES 28 (1993).

[32] *See* William H. Rehnquist, *Remarks at Monday Afternoon Session*, in AM. LAW INST., 75TH ANNUAL MEETING: REMARKS AND ADDRESSES, May 11-14, 1998 at 13, 17-18 (1998) (also citing bills on juvenile crime, the Anti-Car

Theft Act of 1992, the Freedom of Access to Clinic Entrances Act of 1994, and the Child Support Recovery Act of 1992).

[33] *See* United States v. Morrison, 529 U.S. 598 (2000).

[34] *See* 28 U.S.C. § 1407(d).

[35] *See* 18 U.S.C. § 1803(a),(b),(d) (2004) and Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* note 12, at 365-68.

[36] *See* The Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, Apr. 24, 1996, 110 Stat. 1214, codified at various parts of Titles 8, 18, 28, 42.

[37] Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* note 12, at 343 (footnote omitted).

[38] *See* 28 U.S.C. § 45 (chief judges of the court of appeals); §136 (chief judges of district courts).

[39] *U.S. Const. Art. II*, § 2.

[40] *See* Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L. J. 657, 664 (1970); *see generally* PAUL SIMON, ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT NOMINATION BATTLES (National Press, 1992); David R. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 YALE L. J. 1491 (1992); Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858 (1990); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

[41] Robert M. Cover, *Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 1791 (1984). *See generally* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen Burbank & Barry Friedman, eds., 2002).

[42] Article III of the United States Constitution states in part that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[43] Both Australia and Canada require retirement at seventy whereas in Canada, mandatory retirement comes at age seventy-five. In Germany, the judges on its constitutional court sit for twelve-year, non-renewable terms. See Aust. Const., Ch. III, § 72; Israel Basic Law: The Judicature, Courts Law [consolidated version] 5744-1984 §§ 1-24; Supreme Court, Act. R.S.C., ch. S-26, § 9(2) (1985) (Canada); Article Four, Law of the Federal Constitutional Court of Germany (as amended 1998), *available at* http://www.iuscomp.org/gla/index.html. Similarly, the new International Criminal Court provides for a nine-year, non-renewable term. *See* Rome Statute of the International Criminal Court, U.N.Doc. A/Conf. 183/9, Art. 36, para. 9(a) (1998), *available at* http://wwww.un.org/law/icc/statute/romefra htm. Coming back inside the United States, Massachusetts, Vermont, and New Hampshire authorize lifetime judgeships yet also require retirement at age seventy. *See* Mass. Const., pt. 2, Ch. 3, art. 1 (1780), as amended by Art. XCVIII, 1973 (2003); N.H. Const., Art. 73, 78 (1792); Vt. Const., § 35.

[44] Steven G. Calabresi & James Lindgren, *Life Tenure, Reconsidered: Term Limits for the Supreme Court* (manuscript of April 7, 2005), *available at* http://ssrn.com/abstract=701121; Paul Carrington & Roger C. Cramton, The Supreme Court Renewal Act: A Return to Basic Principles (Jan. 2, 2005) (on file with the author).

[45] *See* Resnik, *Judicial Selection and Democratic Theory*, *supra* note 10, 26 CARDOZO L. REV. at 616.

[46] As Charles Geyh has pointed out, given how few judges are impeached, the selection process is the only point at which the populace can affect the composition of the judiciary. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 220 (2003).

[47] Reflecting the possibility that hearings can play this kind of productive role and concerned that too much attention had shifted to a search for a nominee's idiosyncratic imperfections, Senator Charles Schumer, when chairing the relevant subcommittee in the fall of 2001, convened a series of hearings that were focused on what criteria were appropriate for evaluation of nominees for judgeships. *See The Senate's Role in the Nomination and Confirmation Process: Whose Burden?, Hearings before the Subcomm. on Admin. Oversight and the Courts, Sen. Comm. on the Judiciary*, 107th Cong.(Sept. 4, 2001); *Should Ideology Matter?: Judicial Nominations 2001, Hearings before the Subcomm. on Admin. Oversight and the Courts, Sen. Comm. on the Judiciary*, 107th Cong. (June 26, 2001). A repeated theme was that, in addition to considering whether an individual met the basic requirements of competency, ability, integrity, and knowledge, Senators ought also inquire into that individual's understanding of the meaning and role of law, the function of courts, the job of judging, and the role of government in our lives.

[48] *See Nomination of George Harrold Carswell of Florida, to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 91st Cong. (January 27, 28, 29, February 2 and 3, 1970) [hereinafter *Carswell Hearings*]. One caveat: according to Mersky and Jacobstein, *supra* note 1, in their Preface to Volume I of their series, not all of the Senate Judiciary Committee proceedings during that era have been made public.

[49] *Carswell Hearings*, *supra* note 48, at 81-82. Carswell's role in that case was to serve as a member of an en banc panel that denied rehearing in Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969) (en banc), in which Ida Phillips claimed that the company had violated her Title VII rights by declining to give her, a mother of pre-school age children, a job not denied to men with pre-school age children. The Fifth Circuit concluded that the policy did not discriminate against women but was based upon "the differences between the normal relationships of working fathers and working mothers to their pre-school age children." Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969). That decision was vacated and remanded by the Supreme Court. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

[50] *Carswell Hearings, supra* note 48, at 40-41.

[51] According to one historian of the proceeding, criticism of Carswell centered on his general lack of distinction as well as his 1948 pro-segregation stance, later repudiated. *See* JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 103-106 (1991). Frank noted Congresswoman Mink's opposition, but in his view, the "real sticking points were civil rights and competence." *Id.* at 113. Frank also discussed the political context, a democratically-controlled Senate distressed at the forced resignation of Abe Fortas, which animated the unsuccessful nomination of Clement Haynsworth (in Frank's view, unfortunately rejected) as well as that of Carswell (in Frank's view, appropriately rejected). *Id.* at xiv, 19, 28, 44, 94-95, 102-03.

In May 1970, the Senate approved, with ninety-four affirmative votes (and six absentees), the nomination of Harry Blackmun as an associate justice. *Id.* at 124. No questions were addressed to Blackmun about his views on women's rights during the brief one-day hearing. *Nomination of Harry A. Blackmun to be an Associate Justice of*

*the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 91st Cong. (Apr. 29, 1970).

[52] *See Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 92d Cong. (November 3, 4, 8, 9, and 10, 1971) [hereinafter *Rehnquist and Powell Hearings*]. Objections were raised about William Rehnquist's testimony while he was in the Justice Department on the Equal Rights Amendment (ERA) and the Women's Equality Act (*id.* at 428-29) and about Lewis Powell's failure, as a leader of the American Bar Association, to take stands on issues affecting women. *Id.* at 423-25, 428-36; *see also* testimony of Catherine G. Roraback, President of the National Lawyers' Guild, *id.* at 457-60 (testifying that, under Powell's leadership, the ABA was silent on the question of equal rights for women). Barbara Greene Kilberg of the National Women's Political Caucus testified not about the nominees but about the absence of a female nominee (*id.* at 421-23), a topic that had been in the news, prompted in part because of President Nixon's statements that "qualified women" should be considered for the two vacancies. James M. Naughton, *Harlan Retires*, N.Y. TIMES, Sept. 24, 1971, at 1.

[53] *See Rehnquist and Powell Hearings, supra* note 52, at 163 (responding that, if women can be called a "minority," then the Fourteenth Amendment would protect them "just as it protects other discrete minorities").

[54] According to a biography of Justice Powell, when confronted by "a group of women's rights activists," he responded: "Ladies, I've been married for thirty-five years and have three daughters. I've got to be for you." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 233 (1994). As Professor Jeffries describes it, the "crucial issue was not gender but race." *Id.* While Justice Powell had resigned his memberships in all-white clubs, concern was raised about his role in the "(non)desegregation of the Richmond schools." *Id.* at 233-34. Justice Powell's defense was to rely on endorsements by a variety of individuals attesting to his efforts to respond calmly to the complex problems of school integration, his work with the all-black National Bar Association, and his commitment to fairness. *Id.* at 235-236.

[55] *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT, 20-22 (3d ed. 1992) (discussing the hearings without mention of women's rights); *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearings before the Senate Comm. on the Judiciary*, 94th Cong. (Dec. 8, 9, 10, 1975); *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 99th Cong., (Aug. 5, 6, 1986) [hereinafter *Scalia Hearings*]; *Nomination of Justice William Hubbs Rehnquist to Be Confirmed as Chief Justice of the U.S. Supreme Court: Hearings before the Senate Comm. on the Judiciary*, 99th Cong. at 114 (July 29, 30, 31, Aug. 1, 1986). Justice Scalia defended his membership in an all-male club on the grounds that although the club did discriminate by excluding women, that form of discrimination was not "invidious." *See Scalia Hearings* at 91 (also commenting that a judge should not belong to a club that "practices invidious discrimination"). Justice Scalia resigned his membership in that club; he explained that several factors influenced his decision, including that "I was uncomfortable at doing something which, although I thought it was perfectly OK, was offensive to friends whose feelings I am concerned about." *Id.* at 105.

[56] *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (Norton, 1989); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990).

[57] *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong. 160-161 (Sept. 15-30, 1987) [hereinafter *Bork Hearings*]. One case that received attention was Griswold v. Connecticut, 381 U.S. 479 (1965), which involved a challenge to a statute making it a crime to prescribe contraceptives. Robert Bork had called the statute a "nutty law," and then, at the hearings, described the case as an "academic exercise." *Bork Hearings* at 114, 240-243; Stuart Taylor, Jr., *The Bork Hearings: Bork Tells Panel He Is Not Liberal, Not Conservative*, N.Y. TIMES, Sept. 16, 1987, at A1; *see generally* Andi Rierdon, *Griswold v. Connecticut: Landmark Case Remembered*, N.Y. TIMES, May 28, 1989, at 12CN, p.6, (describing the efforts of Estelle Griswold and Charles Lee Buxton to lobby the Connecticut legislature

to repeal that law and their subsequent arrest for operating a clinic that openly dispensed contraceptives to poor women; Yale Law School professor Thomas Emerson, who had argued the case, explained its import as one of the early recognitions of a constitutionally based right to privacy).

[58] Judge Bork argued that the Fourteenth Amendment was addressed to race and ethnicity, not to gender, and that rules relating to race should not and could not be transposed to gender, because "our society feels very strongly that relevant differences exist and should be respected by government" (referring to single-sex bathrooms and women in combat). *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 328-331 (1990).

[59] *Bork Hearings*, *supra* note 57, at 161-162 (Bork explained that his opposition was not heated; he had not "campaigned" against the ERA, but he did believe it would be inappropriate to "put all the relationships between the sexes in the hands of judges.").

[60] Nominations thereafter took a different turn and so has the constitutional law, at least somewhat. Discussions in Justices Kennedy, Scalia, and Souter's hearings address specifically the topic of women's rights. *See Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 23, 104-111 (1987); *Scalia Hearings*, *supra* note 55, at 168-185, 207-223, 250-275: *Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 53-57, 362-406, 569-604, 684-701 (1990). Justice Ginsburg was praised for her role as a women's rights advocate, *See Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Congress, 10-11, 27, 40, 228 (1993). Justice Breyer expressed his support for women's equality. *See Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 103d Cong. 178, 269 (1994). And, as is familiar, attitudes toward women more generally played a role in Justice Thomas's nomination hearings. *See Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102nd Cong. 5-26, 157-189 (testimony of Clarence Thomas); 31-157 (testimony of Anita Hill) (Oct. 11, 1991).

[61] Of course, that work intersected with important legislative efforts -- including the Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000); Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. § 2601-2654 (2000 & Supp. 2002); the Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 , 1903 (1994) (codified in various sections of Titles 18, 28, and 42 (2000)).

[62] *See, e.g.*, Memorandum from John G. Roberts to Fred F. Fielding, the subject of which was "Proposed Justice Report on S. 139 (Anti-Busing Bill)," dated February 15, 1984. Roberts there commented that he "spent several months . . . disputing Ted Olson's approach" to the issues and that the letter from the Attorney General "signalled Olson's victory in the extended internal debate." At issue was whether busing was ever constitutionally required, a position espoused by Mr. Olsen but not by Mr. Roberts.

[63] *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1230 (1993).

[64] 415 F.3d 33 (D.C. Cir. 2005), *cert. pending*, 74 U.S.L.W. 3108 (Aug. 8, 2005). I should note that, as a law professor who teaches about relevant aspects of the Constitution, I joined a group of some fifteen law professors who, with David Vladack of Georgetown Law School as Counsel of Record, filed an amicus brief in December of 2004 in the Circuit on behalf of Mr. Hamdan. In addition to the judgment in this case, Judge Roberts also specially concurred in another decision, Acree v. Republic of Iraq, 370 F. 3d 41 (D.C. Cir. 41), *cert. denied*, 125 S.Ct. 1928 (2005), that underscores his openness to presidential authority. In *Acree*, he disagreed with the majority's judgment that the Emergency War Supplemental Appropriations Act "should not be read to authorize the President to restrike

this previously-fixed balance between the interests of a newly non-terrorist state and those of victims of terrorism." *Id.* at 61.

[65] To do so, the panel reasoned that the Joint Resolution of Congress which authorized military force in response to 9/11 also permitted the President to detain and designate Salim Ahmed Hamdan, captured in Afganistan, and to subject him to decisionmaking by a military commission. 415 F. 3d at 37-39.

[66] *Id.* at 43.

[67] 415 F.3d at 40. Judge Williams specially concurred, noting his agreement with the majority's holding that "the Geneva Convention is not enforceable in courts of the United States." *Id.* at 44. He went on, however, to conclude that Article 3's "modest requirements of `human [ ] treatment'," as well as "the judicial guarantees which are recognized as indispensable by civilized peoples" did apply to the conflict with al Qaeda. *Id.*

[68] Memorandum from John G. Roberts to Fred F. Fielding, entitled "Department of Justice Recommendation on Creation of an Intercircuit Tribunal," dated August 19, 1983.

[69] *Id.* at 2.

[70] *Id.* at 3 (emphasis in the original). In another memorandum on this subject, Mr. Roberts noted that others have argued that the creation of such a court could also "undermine the morale of circuit judges." He added that it might be a disincentive, in addition to "low salaries," to "attract the ablest candidates." Memorandum from John G. Roberts to Fred F. Fielding of February 10, 1983 at 2. In that memorandum, Mr. Roberts also commented that the Court was at fault for taking on too many issues and resolving them in an unclear fashion. *Id.*

[71] Memorandum from John G. Roberts to Fred F. Fielding, entitled "H.R. Res. 605-- U.S. Policy in Opposition to Torture," dated Oct. 3, 1984.

[72] Memorandum from John G. Roberts to Fred F. Fielding, entitled "Justice Draft Bill, Immigration Emergency Act," dated August 4, 1983.

[73] *See* Memorandum from John Roberts to Steven Brogan, Office of Legal Policy, entitled "Development of Legislative Changes to 42 U.S.C. § 1983" (discussing the "damage created by Maine v. Thiboutot," a Supreme Court decision holding that Section 1983 claims could be predicated upon federal statutory rights), dated Aug. 9, 1982.

[74] Alden v. Maine, 527 U.S. 706 (1999).

[75] Florida Prepaid Postsecondary Educ. Expense Bd. v. College Saving Bank, 527 U.S. 627 (1999).

[76] Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

[77] *See generally* Robert Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003); Robert Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

[78] 527 U.S. 706 (1999).

[79] National Public Radio, Interview of June 26, 1999.

[80] *Id.* The decision in *Alden v. Maine* was announced on June 23, 1999.

[81] A lively debate surrounds the issue of what role Congress may play -- through which powers -- in authorizing suits against states by individuals for damages. *See generally* JOHN T. NOONAN, JR. NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

[82] *See, e.g.*, John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2002); Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

[83] Alden v. Maine, 527 U.S. 706, 760, 772 (1999) (Souter, J. dissenting, joined by Justices Stevens, Ginsburg, and Breyer). Further. "[a]round the time of the Constitutional Convention, . . . there existed among the States some diversity of practice with respect to sovereign immunity," which, to the extent that it existed, appeared to have been an English common law doctrine imported by some but not all of the states. From Justice Souter's "canvass of this spectrum of opinion expressed at the ratifying conventions, one thing is certain, no one was espousing an indefeasible, natural law view of sovereign immunity." *Id.* at 778. In fact, in 1793 -- only a few years after ratification of the Constitution -- the United States Supreme Court held that a state was liable for monetary damages to a private party. As Justice Souter explained, in that decision (*Chisolm v. Georgia*, 2 Dall. 419 (1793)), "two Justices (Jay and Wilson), one of whom had been present at the Constitutional Convention, took a position suggesting that States should not enjoy sovereign immunity (however conceived) even in their own courts." 527 U.S. at 789. After detailing the position of the other three justices sitting on this case, Justice Souter concluded that "[n]ot a single Justice suggested that sovereign immunity was an inherent and indefeasible right of statehood." *Id.*

[84] Wilko v. Swan, 346 U.S. 427, 435-36 (1953).

[85] *See* Gilmore v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Green Tree Financial Corp. Alabama v. Randolph, 531 U.S. 79 (2000). *See generally* Paul D. Carrington & Paul Y. Castle, *Mandatory Arbitration: The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROB. 207 (2004).

[86] *See generally* Lee H. Rosenthal, *Competing and Complementary Rule Systems: Civil Procedure and ADR: One Judge's Perspective on Procedure as Contract*, 80 NOTRE DAME L. REV. 669 (2005).

[87] 413 F. 3d 77 (D.C. Cir. 2005). The panel also included Judges Randolph and Williams and Judge Roberts wrote the decision.

[88] *See* Robert Half International Inc, Fact Sheet, *available at* http:///www.rhi.com/portal/site/rhi-us (fact sheet).

[89] The clause stated that

> Any dispute or claim arising out of or relating to Employee's employment or any provision of this Agreement, whether based on contract or tort or otherwise . . . shall be submitted to arbitration pursuant to the commercial arbitration rules of the American Arbitration Association. . . . The parties agree that punitive damages may not be awarded in an arbitration proceeding required by this Agreement."

*See* Booker v. Robert Half International, Inc., 315 F. Supp. 94, 96 (D.D.C. 2004).

[90] See Booker v. Robert Half International, Inc., discussed at httpL///www.eeoc.gov/litigation/02/annrpt.html. In that discussion, the EEOC also noted that an offer by the employer to amend the contract ought not be relied on, or one party could "unilaterally agree to modifications in the agreement as a way of securing its enforcement."

[91] 413 F. 3d at 83, 84.

[92] *See generally* Linda J. Demaine & Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004).

[93] One example comes from EEOC v. Waffle House Inc., 534 U.S. 279, 282-83 (2002) (describing the requirement that all prospective employees sign an application that includes a mandatory arbitration agreement).

[94] Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* 57 STAN. L. REV. 1631 (2005).

[95] 401 U.S. 371 (1971).

[96] 519 U.S. 102 (1996).

[97] Several opinions were issued. Lower court decisions described the problems as they were in the early 1980s. *See* Canterino v. Wilson, 562 F. Supp. 106 (D.Ky. 1983); 546 F. Supp. 174 (D. Ky. 1982). A more recent holding can be found at Canterino v. Wilson, 875 F.2d 862 (6th Cir. 1989).

[98] Memorandum for the Attorney General from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, "Proposed Intervention in Canterino v. Wilson (Decision Needed on Expedited Basis)," dated Feb. 5 1982 at 1.

[99] *Id.* at 1.

[100] *Id.* at note 1.

[101] *Id.* at 2-3.

[102] *Id.* at 3.

[103] Memorandum from John Roberts to the Attorney General, Proposed Intervention in Canterino v. Wilson, Feb. 12, 1982 [hereinafter Roberts' Canterino Intervention Memo]. So did Bruce Fein, Associate Deputy Attorney General, in a memorandum for Edward C. Schmults, Deputy Attorney General, dated Feb. 10, 1982.

[104] *Id.* at 1.

[105] *See, e.g.*, William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1 (1990).

[106] Id.

[107] Roberts' Canterino Intervention Memo, supra note 103, at 1.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 29, 1982

MEMORANDUM

TO: Deputy Attorney General, Bruce Fein,
John Roberts, James P. Turner,
J. Harvie Wilkinson, Charles Cooper,
Judith L. Hammerschmidt, Frank Atkinson

FROM: Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division WBR

SUBJECT: Civil Rights Meeting, 2:30 p.m.,
Wednesday, September 29, 1982, Room 4111

The agenda for our meeting will be as follows:

1. Attorney hiring PAUL VAKIN CARL HORN
2. Response to Lawyer's Council Report
3. Busing decrees
4. Iron Arrow U. RICHMOND Vote in light of N. HAVEN
5. Bob Jones → for reply ?
6. Indonesian indictments

TILL AFTER ELECTION ← 4.

Till w/ C.A.

**PRESS RELEASE**

**FOR IMMEDIATE RELEASE**

**August 24, 2005**

**CONTACT: William Greene**

**PHONE: 678-714-2471**

# RIGHTMARCH: WE SUPPORT JOHN ROBERTS

*Nominee Deserves Fair Treatment; Up or Down Vote*

WASHINGTON, DC - William Greene, President of the conservative on-line activist organization RightMarch.com, has announced his organizations support for John Robert's nomination to succeed Justice Sandra Day O'Connor on the U.S. Supreme Court. Greene's group will be leading demonstrations in support of Roberts during the Senate confirmation hearings in Washington, D.C.

"Judge Robert's experience to date makes him a fine choice to serve on the U.S. Supreme Court," says William Greene. "The Senate unanimously sent Roberts to the DC Court of Appeals with the Senate Judiciary Committee voting 16-3 in favor of his nomination - we expect another fair hearing followed by an up or down vote," continued Greene.

John Roberts was nominated to replace retiring Justice Sandra Day O'Connor by President Bush last month. A graduate of Harvard Law School, Roberts clerked for then Associate Justice William Rehnquist, served President Reagan as an Associate Counsel to the President advising on constitutional powers and responsibilities and as Principal Deputy Solicitor General for President George H.W. Bush. He is a former attorney with Hogan & Hartson and is currently a Federal Judge with the DC Circuit Court of Appeals. Roberts has argued 39 cases before the Supreme Court making him one in a handful of attorneys with such experience before the court. "He deserves our support," says Greene "and we intend to show it."

RightMarch.com is a web based, conservative organization, dedicated to giving hundreds of thousands of hardworking, patriotic Americans across the country a strong collective voice in the political process. For more information, visit www.RightMarch.com.

-30-

| Subject | Date |
|---|---|
| Development of Legislative Changes to 42 U.S.C. § 1983 | August 9, 1982 |

To Steve Brogan
Office of Legal Policy

From John Roberts

I am in receipt of the memorandum dated August 6 from Jon Rose to the Deputy Attorney General on this topic, and am looking forward to the contemplated meeting to discuss it. I did, however, want to convey some comments immediately on one particular aspect of the § 1983 problem which I did not feel was adequately addressed in the memorandum.

The memorandum, in its discussion of current law (p. 8) and legislative proposals to limit statutory claims (p. 11), assumes that the Supreme Court held, in Maine v. Thiboutot, 448 U.S. 1 (1980), that the coverage of § 1983 extends to "all statutory rights." While there is certainly broad dicta in Thiboutot to support this conclusion, more recent Supreme Court opinions -- and one significant appellate case -- call it into question.

In Pennhurst State School v. Halderman, 451 U.S. 1 (1981), the Court remanded claims based on § 1983 for a determination whether the statute on which the claim was based secured individual rights within the meaning of § 1983 and whether the underlying statute provided an exclusive remedy, precluding suit under § 1983. The first question represents a highly significant retrenchment on the broad dicta of Thiboutot. At issue was a federal law requiring state plans to contain certain assurances, and the Court, through Justice Rehnquist, noted that "It is at least an open question whether an individual's interest in having a state provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." Id., at 28.

Both of the limits on the scope of § 1983 briefly discussed in Pennhurst resurfaced in Justice Powell's opinion for the Court in Middlesex Cty. Sewerage Authority v. Sea Clammers, 453 U.S. 1 (1981). There the Court noted: "In Pennhurst, we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights'

under § 1983" Id., at 19. The Court in fact held that the statute at issue in Sea Clammers provided exclusive remedies barring suit under § 1983. What may be more significant, however, is the recognition that certain statutory claims may not fall within § 1983 because they cannot be considered to create "rights". Thiboutot involved a welfare statute, clearly creating rights for the recipients, so its holding -- as opposed to its dicta -- does not require extension of § 1983 coverage to statutes other than those clearly securing individual rights.

In First National Bank of Omaha v. The Marquette National Bank of Minneapolis, 636 F.2d 195 (8 Cir. 1980), cert. denied, 450 U.S. 1042 (1981), the court distinguished Thiboutot and held that a claimed violation of the National Bank Act did not give rise to a § 1983 claim. The court recognized that under Thiboutot § 1983 covered statutory claims, but reasoned that it should be limited to statutes securing "personal rights akin to fundamental rights protected by the Fourteenth Amendment." The opinion merits lengthy quotation:

> "The Supreme Court decision in Thiboutot makes clear that § 1983 does protect rights established by statutes enacted pursuant to authority other than the Fourteenth Amendment. The opinion, however, does not change the type of statutory rights protected by § 1983. Thiboutot involved the rights of individuals pursuant to a federally-created welfare program. These rights of beneficiaries to receive minimal subsistence and support under the AFDC program so as to be able to obtain food and shelter represent important personal rights akin to fundamental rights protected by the Fourteenth Amendment. . . . . On the other hand, rights incidental to the National Bank Act are qualitatively different and not within the contemplation of § 1983.
>
> . . . . The Supreme Court's holding that § 1983 provides a cause of action for interference with rights under the Social Security Act does not represent a significant departure from prior case law or expansion into areas unrelated to the interests protected by the Fourteenth Amendment. A holding by this court, establishing a cause of action for interference with rights pursuant to the National Bank Act, would represent a dramatic and unwarranted extension of the Civil Rights Act. We do not believe that such a departure is mandated by the opinion in Thiboutot or that such a cause of action was within the intent of the Congress that enacted the civil rights statutes." 636 F.2d, at 198-199.

The court recognized that the language of Thiboutot "suggests that § 1983 actions should be broadly permitted, even in areas outside welfare, First Amendment, and social security cases." The court noted, however, that the Supreme Court "fails to say this explicitly. In light of the narrow holding in the case concerning social security cases, the general language in the opinion, and the major ramifications of such a holding, we do not think such an expansion of § 1983 is justified."

This reasoning could also apply to constitutional claims under § 1983. The Commerce Clause, for example, does not secure individual rights but rather allocates governmental authority between state and federal government. Commerce Clause claims therefore should not be recognized as § 1983 claims, and attorneys fees should not be available in such cases.

I do not, of course, suggest that we rely on this incipient judicial effort to undo the damage created by Thiboutot. The understanding of the broad reach of § 1983 conveyed by the August 6 memorandum is the generally accepted view. I do think, however, that we should recognize limits of the sort suggested in the Eighth Circuit case as possible ones in our analyses, and not necessarily accept the broadest reading of Thiboutot as the only one. Our legislative proposals could perhaps even be cast as efforts to "clarify" rather than "overturn" that decision.

cc: Ken Starr
Bruce Fein

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THE WHITE HOUSE

WASHINGTON

February 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Chief Justice's Proposals

The Chief Justice devoted his Annual Report on the State of the Judiciary to the problem of the caseload of the Supreme Court, a problem highlighted by several of the Justices over the course of last year. The Chief Justice proposed two steps to address and redress this problem: creation of "an independent Congressionally authorized body appointed by the three Branches of Government" to develop long-term remedies, and the immediate creation of a special temporary panel of Circuit Judges to hear cases referred to it by the Supreme Court -- typically cases involving conflicts between the Courts of Appeals.

It is difficult to develop compelling arguments either for or against the proposal to create another commission to study problems of the judiciary. The Freund and Bruska committees are generally recognized to have made valuable contributions to the study of our judicial system -- but few of their recommendations have been adopted. I suspect that there has been enough study of judicial problems and possible remedies, but certainly would not want to oppose a modest proposal for more study emanating from the Chief Justice.

The more significant afflatus from the Chief Justice is his proposal for immediate creation of a temporary court between the Courts of Appeals and the Supreme Court, to decide cases involving inter-circuit conflicts referred to it by the Supreme Court. The Chief would appoint 26 circuit judges -- two from each circuit -- to sit on the court in panels of seven or nine. The Chief estimates that this would relieve the Supreme Court of 35 to 50 of its roughly 140 cases argued each term. The Supreme Court would retain certiorari review of decisions of the new court.

It is not at all clear, however, that the new court would actually reduce the Court's workload as envisioned by the Chief. The initial review of cases from the Courts of Appeals would become more complicated and time-consuming. Justices would have to decide not simply whether to grant or

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deny certiorari, but whether to grant, deny, or refer to the new court. Cases on certiorari from the new court would be an entirely new burden, and a significant one, since denials of certiorari of decisions from the new court will be far more significant as a precedential matter than denials of cases from the various circuits. The existence of a new opportunity for review can also be expected to have the perverse effect of increasing Supreme Court filings: lawyers who now recognize that they have little chance for Supreme Court review may file for the opportunity of review by the new court.

Judge Henry Friendly has argued that any sort of new court between the Courts of Appeals and the Supreme Court would undermine the morale of circuit judges. At a time when low salaries make it difficult to attract the ablest candidates for the circuit bench, I do not think this objection should be lightly dismissed. Others have argued that conflict in the circuits is not really a pressing problem, but rather a healthy means by which the law develops. A new court might even increase conflict by adding another voice to the discordant chorus of judicial interpretation, in the course of resolving precise questions.

The proposal to have the Chief Justice select the members of the new court is also problematic. While the Chief can be expected to choose judges generally acceptable to us, liberal members of Congress, the courts, and the bar are likely to object. In addition, as lawyers for the Executive, we should scrupulously guard the President's appointment powers. While the Chief routinely appoints sitting judges to specialized panels, the new court would be qualitatively different than those panels, and its members would have significantly greater powers than regular circuit judges.

My own view is that creation of a new tier of judicial review is a terrible idea. The Supreme Court to a large extent (and, if mandatory jurisdiction is abolished, as proposed by the Chief and the Administration, completely) controls its own workload, in terms of arguments and opinions. The fault lies with the Justices themselves, who unnecessarily take too many cases and issue opinions so confusing that they often do not even resolve the question presented. If the Justices truly think they are overworked, the cure lies close at hand. For example, giving coherence to Fourth Amendment jurisprudence by adopting the "good faith" standard, and abdicating the role of fourth or fifth guesser in death penalty cases, would eliminate about a half-dozen argued cases from the Court's docket each term.

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So long as the Court views itself as ultimately responsible for governing all aspects of our society, it will, understandably, be overworked. A new court will not solve this problem.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 7, 1983

COPY - Reagan Presidential Record

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Correspondence from [redacted] His EEOC Case

b6

[redacted] the President to advise him that the EEOC has ruled in his favor, after a fourteen month delay. [redacted] The letter states that [redacted] wrote the President about the case "some time ago." Central Files has no record of such a letter, although [redacted] writes the President frequently about whatever is on his mind. In his current letter, [redacted] states that the EEOC is "un-American" and that he will hold the President to his promise to get rid of it.

b6

Rick Neal sent [redacted] an interim response and forwarded the incoming to Mike Uhlmann, who adroitly passed it to us. I see no reason to bother the EEOC about this matter. According to [redacted] the matter was resolved in his favor in 14 months -- not at all a lengthly period for an EEOC complaint. I have been unable to confirm that the President promised to abolish the EEOC. We should ignore that assertion in any event, as well as the assertion that the EEOC is "un-American," the truth of the matter notwithstanding. I have drafted a deliberately bland response for your signature.

b6

Attachment

THE WHITE HOUSE

WASHINGTON

June 7, 1983

COPY – Reagan Presidential Record

Dear [redacted] b6

Thank you for your letter to the President concerning your case before the Equal Employment Opportunity Commission. In that letter you noted that you obtained a favorable decision, but only after a delay of fourteen months.

As a general matter, the White House adheres to a policy of not becoming involved in or commenting upon particular matters before an agency that performs regulatory or adjudicative functions, such as the EEOC. This policy preserves the independence and integrity of the Commission's processes. I trust you will appreciate the need for us to adhere to this policy, and to refrain from comment upon your specific case.

We do, however, appreciate having the benefit of your more general views on the EEOC. They will be given every appropriate consideration.

Sincerely,

Fred F. Fielding
Counsel to the President

[redacted] b6

FFF:JGR:aw 6/7/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

February 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: War Powers Problem

The difficulty with the attached is that it recognizes a role for Congress in terminating the Lebanon operation, by granting veterans preference to those serving in Lebanon between August 20, 1982 and the date the operation ends, set either by Presidential proclamation or concurrent resolution of Congress. As drafted the bill is unconstitutional, since giving legal effect to a concurrent resolution of Congress would violate INS v. Chadha. Changing "concurrent" to "joint" would solve the legislative veto problem but not the broader war powers issue, since I do not think we would want to concede any definitive role for Congress in terminating the Lebanon operation, even by joint resolution presented to the President. (A veto of such a resolution could be overridden.)

In light of the imminence of the submission of this bill, I telephoned John Cooney with the above concerns. Cooney is waiting to hear from Justice, and will keep us posted. I noted that I saw no reason to fix beginning and termination dates in the bill at all. Conditioning the preference on the award of a campaign badge should suffice, since the badge will only be awarded for service within the pertinent time frames. Cooney will keep us posted.

THE WHITE HOUSE

WASHINGTON

September 13, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS
DEBORAH K. OWEN (for Bridges)

SUBJECT: Domestic Briefing Materials for Press Conference

David Chew has asked that comments on the above-referenced briefing materials be sent directly to Tom Gibson by 2:00 p.m. today. The materials discuss tax reform, the budget, trade, agriculture, AIDS, judicial selection, revisions to E.O. 11246 (affirmative action), comparable worth, Hispanic poverty, the supposed lack of women appointees, immigration reform, congressional relations, and bank failures.

The AIDS briefing points consider the dispute over admitting AIDS-afflicted children into the public schools. The third bullet item contains the statement that "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact." I do not think we should have the President taking a position on a disputed scientific issue of this sort. He has no way of knowing the underlying validity of the scientific "conclusion," which has been attacked by numerous commentators. I would not like to see the President reassuring the public on this point, only to find out he was wrong later. There is much to commend the view that we should assume AIDS can be transmitted through casual or routine contact, as is true with many viruses, until it is demonstrated that it cannot be, and no scientist has said AIDS definitely cannot be so transmitted. I would simply delete the third bullet item.

I would also drop the last bullet item, stating that the President does not view this issue as "a strictly civil rights issue." The previous points state how the President sees the issue, and it should be left at that, without introducing possibly confusing references to civil rights. Certainly civil rights concerns are implicated, and this is in that sense a "civil rights issue," but that does not mean countervailing concerns do not outweigh any civil rights claims.

Federal Judge Selection/Too Political?:

The briefing materials in this area make five points: (1) charges of abuses are "moot"; (2) the President's nominees have received "extremely high" ABA ratings; (3) judicial appointment is a "Constitutional right and responsibility of the Chief Executive"; (4) it has been the practice of this President and his predecessors to appoint judges "who share similar attitudes concerning the role of the judiciary"; and (5) it "sounds like some folks are finally getting around to harvesting sour grapes from last November." (Emphasis in original.)

Point 1 is unclear and should be deleted, in my view. The description of abuse charges as "moot" suggests that there possibly may be substance to them. As an alternative, the first point would more appropriately be the one you made in the National Public Radio interview: "This Administration looks for nominees who are intelligent and very well-qualified." Point 2, relating to the ABA ratings, supports this.

I have no objection to Point 3 or Point 4. However, the latter would be strengthened if it were followed by a Point similar to one you made in the NPR interview: "There is no 'litmus test.' This Administration is attempting to restore a balance on the Federal judiciary that does not exist now with the judicial activism we see. Judges should interpret the law, not make it or execute it."

Point 5 should also be deleted, even though it is probably true to a certain degree. It implies that politics may be involved, a position we are trying to disclaim in the earlier Points.

Finally, since questions about the Administration's appointment of women and minorities to the bench are frequently raised in the press, and might be the focus of an initial, or follow-up, question, it might be advisable for Mr. Gibson to provide the President with back-up materials describing the Administration's achievements in this area.

The E.O. 11246 points are noncommital, simply noting that the President hopes for a color-blind society and would support changes to the extent they would further this goal.

The comparable worth points are incomplete in that they contain no reference to the recent Ninth Circuit decision. I would add the following between the current third and fourth bullets: "The U.S. Court of Appeals for the Ninth Circuit recently rejected a comparable worth suit brought by

state and local government workers against the State of Washington. That court decision reaffirms what we have been saying."

The attached draft response to Tom Gibson makes the foregoing recommendations.

Attachment

ID # _____ CU

**WHITE HOUSE**
**CORRESPONDENCE TRACKING WORKSHEET**

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: D. Chew

☐ MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Domestic Briefing materials for Press Conference

| ROUTE TO: Office/Agency (Staff Name) | ACTION: Action Code | Tracking Date YY/MM/DD | DISPOSITION: Type of Response | Code | Completion Date YY/MM/DD |
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| Cuirell | ORIGINATOR | 85,09,13 | | | / / |
| | Referral Note: | | | | |
| Cwat 18 | D | 85,09,13 | | S | 85,09,13 |
| | Referral Note: | see below | | | 2pm |
| CWAT21 | D | 85109113 | | S | 85109113 |
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
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Comments: Deborah - Pls look at plan on judges.

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WH2-26634

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# WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/13/85 ACTION/CONCURRENCE/COMMENT DUE BY: 2:00 p.m. today

SUBJECT: Domestic Briefing Materials for Press Conference

| | ACTION | FYI | | ACTION | FYI |
|---|---|---|---|---|---|
| VICE PRESIDENT | ☐ | ☑ | LACY | ☐ | ☐ |
| REGAN | ☐ | ☑ | McFARLANE | ☐ | ☐ |
| WRIGHT | ☑ | ☐ | OGLESBY | ☑ | ☐ |
| BUCHANAN | ☑ | ☐ | ROLLINS | ☑ | ☐ |
| CHAVEZ | ☑ | ☐ | RYAN | ☐ | ☐ |
| CHEW | ☐P | ☑SS | SPEAKES | ☐ | ☑ |
| DANIELS | ☐ | ☐ | SPRINKEL | ☑ | ☐ |
| FIELDING | ☑ | ☐ | SVAHN | ☑ | ☐ |
| FRIEDERSDORF | ☑ | ☐ | THOMAS | ☑ | ☐ |
| HENKEL | ☐ | ☐ | TUTTLE | ☑ | ☐ |
| HICKEY | ☐ | ☐ | GIBSON | ☐ | ☑ |
| HICKS | ☐ | ☐ | _____ | ☐ | ☐ |
| KINGON | ☑ | ☐ | _____ | ☐ | ☐ |

REMARKS: Please give your recommendations/comments directly to Tom Gibson, with an info copy to my office by 2:00 p.m. today. Thanks.

RESPONSE:

David L. Chew
Staff Secretary
Ext. 2702

WH2-26635

THE WHITE HOUSE

WASHINGTON

September 13, 1985

MEMORANDUM FOR DAVID CHEW

FROM: TOM GIBSON

SUBJECT: Briefing Materials for the September 17 Press Conference

Attached for staffing are draft Presidential briefing materials for the September 17 press conference.

BRIEFING MATERIALS ON DOMESTIC ISSUES
FOR THE PRESIDENT'S SEPT. 17 PRESS CONFERENCE

FAIR SHARE TAX REFORM

Central Points:

- o American people shouldn't lose sight of big picture:
  - -- Specific features of our tax proposal are important, but may lead American people to miss the forest for the trees.
  - -- Loopholes are being closed and special exemptions are being ended -- while tax rates are being cut across the board. The plan is revenue neutral.
  - -- RR wants to clear the tangle of rules that confuse most people and provide cover for others to avoid paying taxes -- Simplicity and Fairness.
  - -- Fairness -- this plan will help restore the confidence of the American people that the costs of government are being shared equitably.

Broad Support for Tax Reform:

- o Polls show that the American people want taxation that is fair.
- o Everyone that's ever hassled with tax forms ought to have some interest in tax-simplification.
- o Everyone that's ever wondered why the fellow next door making about the same income, with the same responsibilities, but pays less tax, has also wondered about fairness.

Other more important issues?

- o Recall the benefits that resulted from the last time we lowered tax rates -- which we propose to do again.
- o It proved to be the best anti-poverty program launched in over 16 years.
- o Since 1983, when the impact of those tax cuts began to take effect, the growth in poverty, growing since 1979, was halted. In 1984 poverty dropped by 1.8 million people.
- o Last month unemployment dropped to its lowest level in 5½ years.
- o Job creation, reductions in poverty, raised standards of living, more freedom for the American people -- rather important issues.

Tax Reform Timing:

- o RR believes we'll avoid playing politics and get a Fair Share Tax Reform proposal passed. Democrats and Republicans alike, House and Senate; this is truly a bi-partisan effort.

- o Dan Rostenkowski, Tip O'Neill, Bob Packwood, Bob Dole and many others have stated their commitments to tax reform and will all share in the credit for giving the American people tax fairness and simplicity.

Tax Reform/Some Non-negotiable items:

- o $2,000 personal exemption; President Truman stood for a bigger personal exemption, and RR hopes the Democrats in Congress will remember his example.

- o Top rate of 35%; IRS will never take more than 1 of 3 additional dollars you earn, compared to 1 of 2 now.

- o Focus of reductions kept to benefit those at lowest income levels.

Tax Reform/Middle class and Families:

- o About two-thirds of middleclass families can expect a net tax cut.

- o Those households earning between $20,000 and $50,000 will average a federal tax reduction of 7% -- hundreds of dollars, saved each and every year.

- o Families at the lower end of the income scales would even benefit more:

  -- incomes of between $20,000 and $30,000 will pay an average of 8.7% less in taxes.

  -- incomes of between $15,000 and $20,000 will pay an average of 13.5% less in taxes.

- o For families, RR has established the so-called "Homemaker IRA," where we're allowing non-income earning spouses, both husband and wife, to each put $2,000 in a tax-deferred savings account for retirement.

- o A Congressional committee, with Democrats in the majority -- the House Select Committee on Children, Youth and Families -- said our plan was the best of all those before Congress.

Tax Reform/Recent Proposal to Exclude Breaks for those with Pension Plans

- Look at the whole pension landscape. The 401(k) tax break was put in before RR's administration expanded IRA's in 1981 -- and plans to expand them again.

- The IRA is a fairer way to help people save for retirement; anyone can start an IRA, but 401(k) arrangements are available to only a portion of the private sector workforce.

- By repealing 401(k) tax exemption, started under last administration, RR's tax proposal will remain revenue neutral -- while still bringing tax rates down.

BUDGET

$2 trillion Debt Ceiling will soon need to be passed:

- "Congress makes the budget, the President doesn't."

  - Jim Wright, Congressional Record 9/22/83

- In January, RR sent up a budget with 17 program terminations, worth what would have been $60 billion in savings for FY '86.

- Unfortunately for all Americans, the Congressional budget process has not delivered on any of those program cuts, and spending just keeps rolling along.

1981 Tax Cuts -- lower revenue -- responsible debt runup?

- Overall, revenues have grown almost 23% under RR.

- OMB estimates by end fiscal year 1985:

  1985 Revenues will have increased $69.5 billion over 1984.
  1985 Spending will have increased $95.5 billion over 1984.

- RR has best record of trying to cut federal spending -- root of the deficit problem.

Vetoes on Appropriations Bills:

- We are working with Congressional leadership and are communicating acceptable limits on individual appropriation bills -- if bills exceed these limits there will be vetoes.

- The fiscal year ends at the end of this month. Congress has had plenty of time to pass funding bills to keep the federal government running.

- RR hopes that we don't have a repeat of last year, where Congress' failure to pass acceptable spending legislation forced the closing of many government offices.

TRADE

Proposed Administration Legislation:

- o Being developed together with Congressional leaders to provide RR with greater ability to address unfair trade practices.
- o Cannot have Free Trade without Fair Trade.

Fair Trade Enforcement/initiation of 301 cases:

- o Japan -- restrictions on selling U.S. leather goods
  -- restrictions on selling U.S. tobacco products
- o South Korea -- restriction on U.S. insurance sales
- o E.C. -- unfair subsidies of canned fruits in foreign markets
- o Brazil -- restrictions on selling U.S. computer equipment

Protectionist Pressures:

- o RR shares the concern that certain jobs are being lost to overseas workers. However, there has been a net increase of almost 8 million jobs since the recovery began -- 330,000 jobs were created last month.
- o Unemployment has dropped to the lowest level in 5½ years.
- o You can't use declining numbers of jobs to justify protectionism -- Fact is, we are creating jobs at a record pace.
- o Protectionism is a boomerang. It always hurts the country which imposes it.

Shoes:

- o $1 billion worth of protection would have cost American consumers $3 billion.
- o Displaced workers to be retrained under targeted JTPA programs.

Textiles:

- o Administration has strengthened Customs enforcement of trade laws -- 800 textile seizures in last two years.
- o Proposed legislation conflicts with Multifiber Arrangement (which governs international textile trade) -- might mean abrogation of bilateral agreements with 34 other countries.

AGRICULTURE

Farm Credit Crisis:

- o Problems are severe. $74 billion in loans; $11 billion of which are problem loans.
- o However, there are sufficient resources within Farm Credit Administraion for the problems to be addressed without a federal bailout.

Farm Legislation:

- o We need to get the government out of the business of farming. There appears to be agreement on that issue.
- o The unaltered spending of billions of dollars over the last two decades has brought no lasting improvements to America's farmers.
- o Movement toward a market-oriented farm policy, open access to foreign markets, increased exports, and a growing economy with a lid on inflation offer farmers the best solutions to their problems.
- o The Farm Bill currently in favor in the House appears to exceed its budget limits. RR has sent a letter to Congress outlining the acceptable features of a farm bill. As I have said before, I will veto budget-busting legislation whatever the sort. If its the farm bill, so be it.

"Farm Aid" Train/Concert:

- o RR welcomes the efforts of Merle Haggard and other Country Music stars in highlighting the plight of America's farmer.
- o Indeed, officials in the Administration have helped make the trip possible -- AMTRACK train at cost and cut red tape.
- o There is no denying there are acute financial problems for farmers in many parts of the country -- in many cases a product of the inflation expections of the late 70's.

AIDS

Federal Efforts to Find a Cure:

- o AIDS education and research has been a top priority of the Department of Health and Human Services for over four years.
- o Over $100 million is being spent on AIDS research and education in 1985.
- o RR recently approved revisions to my 1986 budget, increasing initial requests for AIDS research and education by $41 million, for a total of $126 million.
- o Leading scientists have stated that never before in history has so much progress toward understanding and combating a disease been made in so short a time.

AIDS/Afflicted Children Being Allowed to Attend Public Schools: ?

- o I have deep sympathy for the child and the parents of a child who is afflicted with this horrible disease.
- o I can understand the concerns of parents who are fearful of their child contracting the disease in public places.
- o However, as far as our best scientist have been able to determine, AIDS virus is not transmitted through casual or routine contact.
- o There is the need for greater research and answers.
- o And there is the need for rational consideration of the problems posed by AIDS -- considerations that balance public health concerns with those of afflicted children in critical stages of social development. We must not make them into modern day lepers.
- o I do not see this issue as some have framed it -- a strictly civil rights issue.

FEDERAL JUDGE SELECTION/TOO POLITICAL?

- Charges of abuses in the selection process are moot.
- RR's selections for judgeships have received extremely high ratings from the American Bar Association.
- It is the Constitutional right and responsibility of the Chief Executive to appoint judges to the federal bench.
- It has been RR's practice, as it has been the practice of ALL prior occupants of the Oval Office, to appoint judges who share similar attitudes concerning the role of the judiciary.
- Sounds like some folks are finally getting around to harvesting sour grapes from last November.

AFFIRMATIVE ACTION/PROPOSED REVISIONS TO EXECUTIVE ORDER 11246

- It is my hope that America will someday be color-blind, and that discrimination of any sort will be a thing of the past.
- To the extent that revisions in Administration policies, regarding numerical goals and timetables would further this goal, I would support them.

COMPARABLE WORTH

- It is not equal pay for equal work.
- Equal pay for equal work is the current law and we have aggressively enforced the provisions of Title VII that protect against wage discrimination based on sex.
- Comparable worth is a system where bureaucrats or judges would arbitrarily decide what people ought to earn.
- It would deny the rights of collective bargaining, and it would ultimately mean the loss of an untold number of jobs.
- Any time you punch the marketplace, it punches back.
- Today, women and men are freed of former sterotypes and may enter any field of work they choose.

POVERTY RATES AND HISPANICS

- True, poverty rates for hispanics did not see the same dramatic declines as other segments of the population in 1984.
- That was the only disappointment in an otherwise terrific batch of news -- the sharpest overall decline in poverty in 16 years.
- However, there were dramatic increases reported for hispanic family income -- up 6.8% in one year -- the highest of any population group.
- We are studying that apparent contradiction.

LACK OF WOMEN APPOINTEES?

- RR's new Director of Public Liaison, Linda Chavez, probably doesn't share that view.
- Connie Horner the first woman to ever head OPM or it's predecessor, the Civil Service Commission probably doesn't share that view either.
- There are others in the Cabinet and on the Supreme Court you could check with as well.
- Meanwhile, 5 of 7 Associate Directors in the Office of Presidential Personnel are women. They're filling a lot of senior slots in our Administration, and they're looking to fill them with qualified men and women.

IMMIGRATION

Do you back the current attempt at Immigration reform sponsored by Senator Simpson and Representatives Mazzoli and Rodino?

- Since 1981, when we first submitted comprehensive reform legislation, we've been firmly in support of fair, workable and non-discriminatory immigration reform.
- We have recently gone on record in support of Senator Simpson's bill, S.1200, urging only a few minor modifications having to do with farm workers.

CONGRESSIONAL RELATIONS

- o Very positive GOP Congressional Leadership meeting last week.
- o Identified issues for joint action -- Trade for instance.
- o Made clear my strong desires to see Tax Reform passed this Fall.

RECORD NUMBER OF BANK FAILURES -- 80 SO FAR IN 1985

- o The problems are being handled quietly efficently by federal banking agencies -- FDIC for federally insured banks; FSLIC for federally issured Savings and Loans.
- o Reforms in interstate banking laws have allowed many failed or troubled financial institutions to be aqquired by other stronger banks -- this has brought a greater degree of stability to the entire banking system.

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# ARTICLE III LIMITS ON STATUTORY STANDING

JOHN G. ROBERTS, JR.†

Henry James wrote that "[w]e must grant the artist his subject, his idea, his *donee*: our criticism is applied only to what he makes of it."[1] Dean Nichol and Professor Pierce lose sight of this principle in their criticism of Justice Scalia's opinion for the majority in *Lujan v. Defenders of Wildlife*.[2] One of the "*donees*"—the givens—in *Defenders* was that injury in fact is required for standing under Article III. The Court's precedents so hold,[3] and none of the parties before the Court disputed the proposition. It certainly is fair to challenge this premise, and also fair to challenge the reasoning of the opinion in light of the premise. What strikes me as a bit above the odds, however, is challenging the reasoning of the opinion in light of a different premise—the premise that injury is not an Article III requirement. The result is somewhat like criticizing a person for speaking awful French, only to discover that he was in fact speaking fluent Spanish. *Defenders* is a sound and straightforward decision applying the Article III injury requirement. The fact that it fails as



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The Office of the Solicitor General represented Secretary of the Interior Manuel Lujan before the U.S. Supreme Court in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), and the author argued Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990), on his behalf.

This Comment is based on remarks presented at a symposium on *Lujan v. Defenders of Wildlife* held at Duke University School of Law on January 21, 1993.

1. Henry James, *The Art of Fiction*, *in* THE PORTABLE HENRY JAMES 387, 402–03 (Morton D. Zabel ed., 1968).

2. 112 S. Ct. 2130 (1992).

3. *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) ("To establish an Art. III case or controversy, a litigant must first clearly demonstrate that he has suffered an 'injury in fact.' "); Allen v. Wright, 468 U.S. 737, 750–51 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471–76 (1982).

an application of some other, non-constitutional concept of injury Dean Nichol prefers should come as no surprise.

Before considering whether *Defenders* is "a transformation in the law of standing"[4] that is "inconsistent with the principle of judicial restraint,"[5] it may be worthwhile to recall that the Supreme Court for some time has recognized standing as a constitutionally based doctrine designed to implement the Framers' concept of "the proper—and properly limited—role of the courts in a democratic society."[6] The legitimacy of an unelected, life-tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary's power in Article III to actual "cases" and "controversies." The need to resolve such an actual case or controversy provides the justification not only for judicial review over the popularly elected and accountable branches of the federal government,[7] but also for the exercise of judicial power itself, "which can so profoundly affect the lives, liberty, and property of those to whom it extends."[8] This is nothing new; the Court explained a century ago that the exercise of federal judicial power was legitimate only "as a necessity in the determination of real, earnest, and vital controversy."[9]

One way federal courts ensure that they have a "real, earnest, and vital controversy" before them is by testing the plaintiff's standing to bring suit. The plaintiff must allege at the pleading stage,[10] and later prove,[11] an injury that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought.[12] If the plaintiff cannot do so, the court must dismiss the case as beyond its power to decide—no matter

4. Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J 1141, 1142 (1993).

5. Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1200 (1993).

6. *Allen*, 468 U.S. at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)); *see Valley Forge*, 454 U.S. at 471–76.

7. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

8. *Valley Forge*, 454 U.S. at 473.

9. Chicago & Grand Trunk R.R. v. Wellman, 143 U.S. 339, 345 (1892), *quoted in Valley Forge*, 454 U.S. at 471.

10. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 7 (1988); *Warth*, 422 U.S. at 501.

11. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990); *Warth*, 422 U.S. at 501; United States v. SCRAP, 412 U.S. 669, 689 (1973).

12. Allen v. Wright, 468 U.S. 737, 751 (1984); *Valley Forge*, 454 U.S. at 472.



when in the litigation the flaw is discovered or arises.[13] A dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant. Standing is thus properly regarded as a doctrine of judicial self-restraint.[14]

The *Defenders* Court engaged in just such an exercise of judicial self-restraint, soundly based on precedent. The Court concluded that the plaintiff had failed to prove injury in fact[15]—hardly a surprising result under the Court's standing precedents, given the vague and amorphous nature of the plaintiff's claims of injury. The Court then concluded that Congress nonetheless intended the plaintiff to have a right to sue under the statute in question.[16] Although I regard this ruling as more problematic,[17] the conclusion that so surprises Dean Nichol and Professor Pierce—that the Endangered Species Act is therefore unconstitutional as applied to this particular plaintiff in this particular lawsuit—follows inexorably, and is no less an act of judicial self-restraint than any other dismissal on the basis of standing.

Dean Nichol first faults the Court for failing to overturn established precedent and rule that injury in fact is not, after all, a requirement of Article III. According to Dean Nichol, James Madison's statement that the federal courts would be limited to matters of "a Judiciary nature"[18] was "obviously circular," and historical scholarship has shown that the injury requirement is not constitutionally based.[19] A response to the historical scholarship is beyond the scope of this Comment.[20] The Framers recognized

13. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546 (1986); *cf.* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 66–67 (1987) (analyzing development of lack of standing during pendency of case in terms of mootness).

14. *See* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("Relaxation of standing requirements is directly related to the expansion of judicial power."). This point is true whether or not the standing decision is correct in any particular case. If a court errs in its standing dismissal and should have reached the merits, that court is wrong—not activist.

15. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992).

16. *Id.* at 2145.

17. *See infra* text accompanying notes 49–53.

18. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1966).

19. Nichol, *supra* note 4, at 1150–52.

20. I would note, however, that Dean Nichol's confidence in the constitutionality of *qui tam* actions is not universally shared. The question is currently pending before the

that legislative, executive, and judicial functions were not divided into hard and fast categories, but, as Justice Scalia noted in *Defenders*, the "landmarks" defining the tasks of the judiciary are "less uncertain" than those delimiting the responsibilities of the other branches.[21] There are landmarks—the inquiry is not circular.

In any event, the objection to the Court's refusal to abandon injury as an Article III element of standing is a curious one in a discussion otherwise critical of supposed judicial activism. The Court has recognized the constitutional nature of the injury requirement for some time, certainly before Justice Scalia's appointment to the Supreme Court.[22] As Dean Nichol notes, the academic community is less convinced,[23] but the Court is firmly committed. No party before the Court in *Defenders* suggested

U.S. Court of Appeals for the Ninth Circuit, United States *ex rel.* Madden v. General Dynamics, No. CV-88-05352-WMB (C.D. Cal. filed Sept. 6, 1988), *petition for permission to appeal granted*, No. 92-56042 (9th Cir. Aug. 26, 1992); United States *ex rel.* Kelly v. The Boeing Co., No. CV-89-1732-R (W.D. Wash. filed Nov. 30, 1989), *petition for permission to appeal granted*, No. 92-3660 (9th Cir. Sept. 11, 1992). The Office of Legal Counsel of the U.S. Department of Justice has formally opined that such actions are unconstitutional. *See* Constitutionality of the *Qui Tam* Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 249 (1989) (preliminary print). In any event, reliance on "the business of the Colonial courts and the courts of Westminster when the Constitution was framed," Nichol, *supra* note 4, at 1151 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring)), must be tempered with a recognition that the Framers were moving from a unitary system of government to one of separated powers, a move with consequences for the judiciary as well as for the other branches of government. Practice prior to the framing of the Constitution—and perhaps constitutionally dubious remnants persisting thereafter—thus is not an infallible guide to the scope of judicial power under Article III. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982) ("The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.").

21. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

22. *See* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 123 (3d ed. 1988) ("The cases have long accepted the principle that Article III itself requires the plaintiff to show that he was injured by the conduct under challenge.").

23. Nichol, *supra* note 4, at 1151-52; *see, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 839 (1969); Louis L. Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1044 (1968); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474-80 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395-96 (1988).



abandoning the requirement. It certainly would have been an extraordinary adventure in judicial activism for the Court suddenly to change directions, overrule numerous precedents, and announce, uninvited, that it no longer regarded the injury requirement as an Article III restriction.

Dean Nichol's next criticism is, like the foregoing one, more a criticism of the Court's standing jurisprudence in general than of the *Defenders* opinion in particular. Invoking Hindu philosophy and Nietzsche, he notes that the task of defining injury is "amorphous, complex, and value-laden."[24] Although it is easier to define injury in some cases than in others, the occasional difficulty of the enterprise is hardly reason to abandon it altogether—to throw up one's hands and announce that an injury standard "can have no ascertainable meaning."[25] As the Court has explained, "[t]he absence of precise definitions . . . hardly leaves courts at sea in applying the law of standing."[26] As is the case whenever the Court defines a legal requirement, "the standing concepts have gained considerable definition from developing case law."[27] A lawyer looking at that caselaw will learn that the injury must be "distinct and palpable,"[28] "concrete,"[29] "certainly impending,"[30] "real and immediate,"[31] and "actual or imminent, not 'conjectural' or 'hypothetical.'"[32] To be sure, these are not objectively verifiable, self-defining terms in some philosophical sense. They are, however, reasonably precise guidelines of the sort common to the lawyer's craft.

As the Court has explained, any effort to flesh out the concept of injury and other standing principles must be based on "reference to the Art. III notion that federal courts may exercise power 'only in the last resort, and as a necessity,' and only when

24. Nichol, *supra* note 4, at 1154-55, 1157.

25. *Id.* at 1157-58.

26. Allen v. Wright, 468 U.S. 737, 751 (1984).

27. *Id.*

28. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

29. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 166, 176-78 (1974).

30. Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979).

31. City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

32. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting *Lyons*, 461 U.S. at 101-02).

adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'"[33] Dean Nichol greets this enterprise with skepticism, but that is to be expected given his view that the injury requirement is not found in Article III in the first place. The need to insist upon meaningful limitations on what constitutes injury for standing purposes—regardless of what the Hindus or Nietzsche have to say about it—flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government.[34] If you do not recognize that role—if you think, as Dean Nichol does, that the Framers were being "obviously circular" when they "generally supposed" that the jurisdiction of the federal courts "was constructively limited to cases of a Judiciary nature"[35]—then you will fail to understand why the concept of injury must be delimited and therefore not appreciate the principle guiding the Court's developing caselaw.

The conclusion that the plaintiff in *Defenders* failed to satisfy the basic Article III requirement of showing injury in fact followed from the Court's prior precedents.[36] The only concrete and specific showing of injury made by Defenders of Wildlife was that, years before, two of its members had visited areas—specifically, the habitats of the Nile crocodile and Asian leopard—allegedly affected by funded projects. Since the plaintiff sought prospective relief, not damages, any past injury arising from these visits was insufficient to establish standing.[37] As to the future injury, the affiants could claim no more than that they desired to revisit the areas at some point and were concerned that

33. Allen v. Wright, 468 U.S. 737, 752 (1984) (citations omitted).

34. *See* Center for Auto Safety v. Thomas, 847 F.2d 843, 883 (D.C. Cir.) (en banc) (Silberman, J.) ("[W]e must be careful to delineate the 'distinct and palpable' injury suffered lest we turn the injury component of Article III into a paper barrier and thereby convert the federal judiciary into a referee of political disputes."), *reh'g granted and opinion vacated*, 856 F.2d 1557 (D.C. Cir. 1988).

35. 2 RECORDS, *supra* note 18, at 430; *see* Nichol, *supra* note 4, at 1150.

36. I agree with Professor Pierce's discussion of the treatment of standing based on "procedural injury" in the majority opinion. Pierce, *supra* note 5, at 1184–86. Indeed, the plaintiff in *Defenders* did not even press a claim of standing based solely on such an injury, 'apart from the claimed injury in fact. *See* Respondent's Brief at 35 n.10, Petitioners' Reply Brief at 2, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (No. 90–1424).

37. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 106 n.7 (1983).



if the pertinent federal agencies failed to consult as required by the Endangered Species Act, they might suffer harm—that is, an absence of Nile crocodiles or Asian leopards—were they to return. This is precisely the sort of "conjectural" or "hypothetical" harm the Court has held to be insufficient to establish standing.[38] As the Court has explained, "[a]llegations of possible future injury do not satisfy the requirements of Art. III."[39]

Perhaps recognizing this difficulty, Professor Pierce argues that "the Court should not require evidentiary proof of particularized injury as a prerequisite to judicial review of all agency actions,"[40] and surmises that "[a]t any given point in time, many people have specific plans to visit the habitat of the Nile crocodile and the Asian leopard, and most would be happy to submit an affidavit as a member of Defenders of Wildlife."[41] I am not as sure about the latter point as Professor Pierce is; if there really are "many people" with such specific plans who are members of the plaintiff's organization, it is not unreasonable to wonder why the organization relied on such weak affidavits. More importantly, the Supreme Court has emphasized that "[i]t will not do to 'presume' the missing facts" needed to establish standing.[42] As the Court has frequently reiterated, standing allegations "must be true and capable of proof at trial;"[43] it is not enough to rest on the pleadings.[44] "It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' . . . but rather 'must affirmatively appear in the record.'"[45] Standing is, after all, a constitutional requirement. Assuming standing on the basis of the pleadings would be tantamount to assuming Article III jurisdiction. The proper approach is just the

38. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

39. *Id.* at 158.

40. Pierce, *supra* note 5, at 1175–76.

41. *Id.* at 1177.

42. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

43. United States v. SCRAP, 412 U.S. 669, 689 (1973).

44. *See National Wildlife Fed'n*, 497 U.S. at 889; Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 66 (1987); Warth v. Seldin, 422 U.S. 490, 501–02 (1975); *see also* Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) ("When a question of the District Court's jurisdiction is raised, . . . the court may inquire, by affidavits or otherwise, into the facts as they exist.").

45. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (quoting Grace v. American Central Ins. Co., 109 U.S. 278, 284 (1883); Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

opposite—to "presume that federal courts lack jurisdiction 'unless "the contrary appears affirmatively from the record."' "[46]

Dean Nichol's proposed solution to the occasional difficulties in defining injury—that is, leaving it to Congress—could only come from one who, like Dean Nichol, does not regard this as a constitutional problem in the first place. If, as the Court has repeatedly reiterated, the standing requirement is a constitutional limitation on the jurisdiction of the federal courts, it is a limitation that Congress as well as the courts must respect. The Court has said so in the plainest possible terms:

> Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered "a distinct and palpable injury to himself," that is likely to be redressed if the requested relief is granted.[47]

If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional. *Defenders* is apparently the first Supreme Court case to so hold because of lack of Article III standing,[48] but the conclusion that Article III limits congressional power can hardly be regarded as remarkable.

46. Renne v. Geary, 111 S. Ct. 2331, 2336 (1991) (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546 (1986); King Bridge Co. v. Otoe County, 120 U.S. 225, 226 (1887)).

47. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting *Warth*, 422 U.S. at 501); *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 488 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

48. At least *Defenders* is the first holding to be accompanied by an opinion. The three-judge district court in McClure v. Carter, 513 F. Supp. 265 (D. Idaho), *aff'd*, 454 U.S. 1025 (1981), rejected on standing grounds a U.S. senator's challenge to a judicial appointment, even though an Act of Congress specifically gave "[a]ny Member of Congress" the right to bring such a suit challenging the particular appointment. *Id.* at 266 n.1. After concluding that the plaintiff lacked standing because of lack of injury, the court held that the language of the statute could not alter that conclusion: "It is difficult to see how this statute may, consistent with article III, confer upon a senator or member of the House of Representatives a 'right' to seek a decision from a federal court that such a senator or member of the House would otherwise be powerless to procure." *Id.* at 271.



On the other hand, a holding that Congress may override the injury limitation of Article III would have been both remarkable and particularly unfortunate in *Defenders*, because there is no indication that Congress embarked on such an ambitious undertaking when it enacted the Endangered Species Act. The citizen suit provision does indeed authorize "any person" to bring suit and defines "person" in a manner that includes organizations such as the plaintiff in *Defenders*.[49] Under normal principles of statutory interpretation, however, such a broad statutory grant should be construed in a manner consistent with constitutional limitations, including the Article III limitation that only those who suffer actual injury have standing to sue.[50] Congress made this limitation explicit in other citizen suit provisions, which is why—contrary to the concerns Professor Pierce expresses[51]—those other provisions do not even pose the conceptual problem presented here.[52] Although the citizen suit provision in the Act lacks such an explicit limitation, there is no indication that Congress thought it was departing from the usual citizen suit pattern to test the limits of its constitutional powers.[53]

49. 16 U.S.C. § 1540(g)(1) (1988); 16 U.S.C.A. § 1532(13) (West Supp. 1993).

50. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499–501 (1979).

51. Pierce, *supra* note 5, at 1188–89.

52. For example, the citizen suit provision in the Clean Water Act authorizes "any citizen" to bring suit and defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (1988). As the Court explained in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), "[i]t is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in Sierra Club v. Morton, 405 U.S. 727 (1972)." *Id.* at 16; *see* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 70–71 (1987) (Scalia, J., concurring in part and concurring in the judgment) (finding citizen suit provision of Clean Water Act embodies constitutional requirement of injury).

53. *See* Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1045 (8th Cir. 1988) (Bowman, J., dissenting) (declining "to attribute to Congress the unexpressed intent to dispense with standing requirements entirely . . . . Surely Congress did not intend this provision to be read in a vacuum, without regard to constitutional limitations"), *rev'd sub nom.* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). In *Defenders*, the government argued that the case did not even arise under the citizen suit provision. That provision authorizes suits against those "alleged to be in violation" of the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(A) (1988), and an erroneous interpretation of the Act—the gravamen of the plaintiff's complaint in *Defenders*—is not itself a "violation" of the Act. The suit is instead properly viewed as arising under the Administrative Procedure Act, which limits suit to those who are "adversely affected or aggrieved" by the action in

The Court has recognized that the requisite Article III injury "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[54] The Court in *Defenders* explained that its prior cases applying this principle were consistent with the injury in fact requirement, because in those cases the statutes in question elevated injuries that were not previously legally cognizable to the status of legally enforceable rights.[55] The Endangered Species Act, however, is not a "statute[] creating legal rights."[56] The substantive provision at issue in *Defenders* simply requires consultation among federal agencies; it does not by its terms confer legal rights on private persons.[57] Nor does the citizen suit provision[58] create rights the invasion of which creates standing; it simply authorizes suit to vindicate rights which must be found elsewhere.[59] As stated above, the consultation provisions which the plaintiff in *Defenders* invoked create no such rights.[60]

question—i.e., those whose injury "falls within the 'zone of interests' sought to be protected by statutory provisions whose violation forms the legal basis for his complaint." 5 U.S.C. § 702 (1988); *see* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990).

54. *Defenders*, 112 S. Ct. at 2145 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)); *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

55. *See Defenders*, 112 S. Ct. at 2145–46 (discussing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) and Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968)).

56. *See id.* at 2145 (quoting *Warth*, 422 U.S. at 500 (quoting *Linda R.S.*, 410 U.S. at 617 n.3)).

57. 16 U.S.C. § 1536(a)(2) (1988).

58. *Id.* § 1540(g).

59. *See Defenders*, 112 S. Ct. at 2147 (Kennedy and Souter, JJ., concurring in part and concurring in the judgment) (stating that citizen suit provision "does not of its own force establish that there is an injury in 'any person' by virtue of 'any violation'"); *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 488 n.24 (1982) (noting that Administrative Procedure Act provision authorizing any person "adversely affected or aggrieved" by agency action to bring suit does not create legal rights).

60. Contrary to Professor Pierce's concern, nothing in *Defenders* casts doubt on the constitutionality of the Freedom of Information Act (FOIA). Pierce, *supra* note 5, at 1189–90. Under FOIA, every person is given a right of access to nonexempt government documents. When an agency wrongfully denies an individual's FOIA request, that particular individual has suffered injury in fact under Article III and has standing to sue in federal court to redress that injury. FOIA authorizes just such a suit. Another individual who has not made a disclosure request, and therefore has not suffered a wrongful denial, has not been injured and does not have standing to sue, even if he would like to have access to the same documents. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 449–50 (1989) (Parties establish standing under FOIA by showing that "they sought and were denied specific agency records . . . . The . . . fact that numerous other citizens might request the same information . . . [does not mean] that those who have been denied access do not possess a sufficient basis to sue.").



Recognizing that Article III is a constraint on Congress's power to assign matters to the federal courts is not the assault on "legislative supremacy" that Professor Pierce bemoans.[61] In the first place, the legislature is not supreme in our system of government—the Constitution is. Holding a statute unconstitutional because it transgresses Article III is nothing more than a recognition of that principle—a principle the Supreme Court has felt obligated to defend since the first case holding an Act of Congress unconstitutional under Article III. That case was, of course, *Marbury v. Madison*,[62] and although at the time some regarded Chief Justice Marshall's opinion as an assault on legislative supremacy, it since has been recognized as the cornerstone of the constitutional rule of law.

More specifically, it is worth noting that a standing decision such as *Defenders* in no way inhibits Congress from pursuing substantive objectives. When a court finds that an Act of Congress violates, for example, the First Amendment, "legislative supremacy" is indeed restricted, for Congress cannot do what it sought to do. A standing decision simply means that Congress cannot enlist the federal courts in its enterprise—and even then, it cannot do so only because the specific plaintiff invoking the courts' authority lacks the requisite injury. Congress is perfectly free to cut off funding for the Aswan Dam or Mahaweli River projects if it concludes those projects threaten endangered species. It also can exercise its oversight power if it believes agencies are not consulting adequately about such effects. The one thing it may not do is ask the courts in effect to exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue.

Viewed in this light, standing—like other doctrines of judicial self-restraint—compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution. By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution. Far from an assault on the other branches, this is an in-

61. Pierce, *supra* note 5, at 1201.

62. 5 U.S. (1 Cranch) 137 (1803).

sistence that they are supreme within their respective spheres, protected from intrusion—however welcome or invited—of the judiciary.

Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. Dean Nichol loses sight of this reality in criticizing Justice Scalia's invocation of the "take Care" clause of Article II. According to Dean Nichol, "a challenged legislative or judicial action either unconstitutionally abrogates executive power or it does not. It should make little difference what sort of plaintiff seeks to trigger the incursion."[63] The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed. We accept the judiciary's displacement of the democratically elected branches when necessary to decide an actual case; Dean Nichol would seem to make a virtue of this necessity by jettisoning the injury in fact requirement for Article III standing.

Standing is an apolitical limitation on judicial power. It restricts the right of conservative public interest groups to challenge liberal agency action or inaction, just as it restricts the right of liberal public interest groups to challenge conservative agency action or inaction.[64] It precludes Congress from assigning a right to sue to those without injury whether the statutory interest sought to be judicially enforced is perceived as liberal or conservative. The relatively recent growth of conservative public interest groups, and the even more recent change in presidential administrations, should set the stage for rethinking the facile assumption that standing cloaks a political agenda. It does derive from and promote a conception that judicial power is properly limited in a democratic society. That leaves greater responsibility to the political branches of government—however they are inclined. To the extent that is a political agenda, it is the one the Framers enshrined in the Constitution.

63. *See* Nichol, *supra* note 4, at 1163–64.

64. As one commentator has noted, "courts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention. Such doctrines were used enthusiastically by judges associated with the progressive movement and the New Deal, most prominently Justices Brandeis and Frankfurter . . . . This view has enjoyed a kind of renaissance in recent years, though from judges with a quite different political orientation." Sunstein, *supra* note 23, at 1437–38.



Professor Pierce makes a subtler point. He argues that the Court's standing jurisprudence favors regulated entities over those who benefit from regulation, because the former can readily show concrete injury while the latter will have a more difficult time doing so.[65] The extent to which this may distort judicial intervention in the administrative process, however, should not be exaggerated.[66] The Court has not revisited the proposition that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[67]

What the Court *has* done is rule, for example, that a plaintiff who alleges only that she uses land "in the vicinity of" a 2,000,000-acre area—only 4500 acres of which are affected by the challenged action—has not adequately shown that she is among those injured by the action,[68] and that a plaintiff who alleges she might visit certain areas sometime in the future has not shown injury from an agency's failure to consult about possible effects of funding decisions on endangered species in that area.[69] Far from indicating "a transformation in the law of standing,"[70] such decisions are a natural response to efforts to render the standing limitations meaningless.

The consequences of accepting the proposition that injury in fact is not an Article III limitation on federal court jurisdiction

65. Pierce, *supra* note 5, at 1194–95.

66. *See* Sunstein, *supra* note 23, at 1478 (noting "any such limitations [on congressional power to grant standing] should come up infrequently even if they exist").

67. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Relying on "liberal federal pleading standards," the Court also has allowed plaintiffs to amend complaints found to contain inadequate allegations of injury. Havens Realty Corp. v. Coleman, 455 U.S. 363, 377–78 (1982). This is not to say that plaintiffs may continually reformulate their theory of standing. *See* Center for Auto Safety v. Thomas, 847 F.2d 843, 877 n.2 (D.C. Cir.) (en banc) (Silberman, J.) ("A lawsuit is not a continuing dialogue with the judiciary in which a party may try different theories of standing until one succeeds."), *reh'g granted and opinion vacated*, 856 F.2d 1557 (D.C. Cir. 1988).

68. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 886–87, 889 (1990).

69. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992).

70. Nichol, *supra* note 4, at 1142.

ought to give one pause. Under such a view, Congress would be free to pass a statute conferring certain responsibilities on an agency with no more guidance than that which the extremely broad delegation doctrine requires.[71] Congress also could specify that any person who wants to sue the agency in federal court may do so if he believes the agency is not living up to its mandate. Such a state of affairs would transform the courts into ombudsmen of the administrative bureaucracy, a role for which they are ill-suited both institutionally and as a matter of democratic theory. The Court's recognition that injury in fact is a requirement of Article III ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, "of a Judiciary nature."[72]

71. The Court has explained that Congress need do no more than lay down an "intelligible principle" to satisfy the nondelegation doctrine. *See* Touby v. United States, 111 S. Ct. 1752, 1756 (1991); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-19 (1989); *see also* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 246-47.

72. 2 RECORDS, *supra* note 18, at 430.

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22 August 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

*Re*: PROPRIETY OF JUDGE ROBERTS' FAILURE TO RECUSE HIMSELF *SUA SPONTE*

Dear Chairman Specter:

**Introduction**

You have asked me about the propriety of Judge John Roberts' failure to recuse himself in the case of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). Judge Roberts was a member of the three-judge panel that decided this case, although he wrote no opinion.[1] Judge Randolph, speaking for the court, wrote the opinion, holding that the President's designation of a military commission to try an enemy combatant alleged to have fought for al-Qaeda does not violate the separation of powers doctrine; the Geneva Convention of 1949 does not give an enemy combatant any right to enforce its provisions in a federal court; and even if the Geneva Convention were enforceable in court, no rights of any enemy combatant are violated when a military commission tries the combatant.

Last month, Professor Stephen Gillers, who teaches legal ethics at New York University, opined that he "saw no problem" with the fact that President Bush met with Judge Roberts about the vacancy in the U.S. Supreme Court on July 15, "the same day the D.C. court ruled 3-0 in Bush's favor in Hamdan." However, "Gillers told Newsday yesterday [August 17] he changed his mind after Roberts disclosed the White House interviews in his Senate questionnaire Aug. 2."[2] The significant difference, Gillers said, is that Roberts said that Attorney General Alberto

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[1] Judge Williams, the third member, filed a concurring opinion.

[2] Tom Brune, *Roberts Meeting "Illegal": Legal Ethicists Say White House Interview Jeopardized Judge's Impartiality in a Case on Military Tribunals*, NEWSDAY, Aug. 18, 2005,

(continued...)

Gonzales spoke to him on April 1, six days before oral arguments in the *Hamdan* case, instead of a few days after.

Professor Gillers and two other professors now argue[3] that Judge Roberts violated a federal statute ethics rules because he should have disqualified himself from participating in the *Hamdan* case when it turned out that the Attorney General met with him on April 1, six days before oral argument. This change in dates, the argument goes, created the "appearance of impropriety." The conversation that the Attorney General had with Judge Roberts about a possible upcoming vacancy, is a conversation that the Attorney General had with other people too, because we know that the President interviewed other candidates and did not make his final decision as to whom to appoint until shortly before (a day or two before) he announced the nomination on July 19th. The vacancy did not even occur until July 1st.

Oddly enough, this change in dates that Professor Gillers claimed caused him to change his mind occurred only because counsel for Hamdan, on March 1, asked for a delay in the oral argument.[4] But for that delay, which they requested and the court granted on March 2, the interview with the Attorney General would have occurred about a month *after* oral argument instead of six days *before* oral argument.

This change in the dates, Professor Gillers and others now argue, created "an appearance of impropriety" that required Judge Roberts to recuse himself, *sua sponte* (*i.e.*, on his own motion, because no party has asked for his recusal). You have asked me to evaluate this issue.

**"Impartiality Might Reasonably Be Questioned"**

Before turning to the specific facts of this case, we should first look at 28 U.S.C. § 455. Subsection (b) lists a host of specific situations that require the recusal of a federal judge. No one, including Professor Gillers, et al., suggests that Judge Roberts has violated any provision of

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[2] (...continued)
http://www.newsday.com/news/nationworld/nation/ny-uscort184388315aug18,0,5829402.story .

> "*The White House broke the law* when it interviewed D.C. Circuit Judge John G. Roberts last spring for the Supreme Court as he heard a challenge to the president's military tribunals, three legal ethicists said yesterday." *Id.* (emphasis added).

[3] Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs with the Judge out of Court*, SLATE (Online Magazine) (posted Wednesday, Aug. 17, 2005), http://slate.msn.com/id/2124603/?nav=tap3 .

[4] Order, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Mar. 2, 2005); Motion to Postpone Oral Argument, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. filed Mar. 1, 2005). Professor Luban is a faculty colleague of one of Hamdan's lawyers, Neal K. Katyal, who was the lawyer who requested the delay in oral argument.

§455(b). Instead, the concern relates to §455(a), which is a catch-all provision that provides:

> "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned."

In addition to the language found in the federal statute, Professor Gillers also uses another test, *even more vague*, the "requirement of an *appearance* of impartiality."[5] One must be very cautious in relying on vague standards such as "appearance of impropriety," because they easily lend themselves to ad hoc and ex post facto analysis. Any allegation that a judge violated the ethics rules is a very serious matter, for it attacks his integrity and bona fides.

The statutory test, "impartiality might *reasonably* be questioned," is the law and we must follow it, but we also must not read the language overly broadly, for the ABA, the commentators, and the cases advise otherwise.

For example, consider the ABA MODEL RULES OF PROFESSIONAL CONDUCT. This model law governs lawyers (not judges), but its cautions are still relevant. The ethics rules, in the past, used the "appearance of impropriety" standard (which Gillers adopts), but no longer. The ABA has called it "question-begging,"[6] and rejected it in 1983. Even before that date, the ABA warned, if the "appearance of impropriety" language had been made a disciplinary rule, "it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, or even *ad hominem* basis."[7] Commentators, such as Professor Geoffrey C. Hazard, Jr., the reporter for the original ABA Model Rules, referred to the old "appearance of impropriety" standard as "garbage."[8] The Second Circuit generally advised, over a quarter of a century ago:

> "When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked. [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and the precise application of precedent." *Fund of Funds,*

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[5] http://slate.msn.com/id/2124603/?nav=tap3 (emphasis added).

[6] ABA MODEL RULES, RULE 1.9, Comment 5 (pre-2002 version), *reprinted in* MORGAN & ROTUNDA, 2005 SELECTED NATIONAL STANDARDS ON PROFESSIONAL RESPONSIBILITY 193 (Foundation Press 2005). The 2002 revisions to the ABA Model Rules eliminated this language as no longer necessary.

[7] ABA FORMAL OPINION 342 (1975), *discussed in* RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 2 (West Pub. Co., Black Letter Series, 7th ed. 2004).

[8] ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, 13 CURRENT REPORTS 31-32 (Feb. 19, 1997).

*Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 (2d Cir. 1977).[9]

The Restatement of the Law Governing Lawyers, Third (A.L.I. 2000), has also cautioned us not to read too much into vague phrases like "appearance of impropriety":

> "[T]he breadth [of vague, 'catch-all' provisions] provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that *subjective and idiosyncratic considerations* could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the 'appearance of impropriety' principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). *Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.*" §5, Comment C (emphasis added; internal citation omitted).

While Professor Gillers and his colleagues embrace the "appearance of impropriety" standard, 28 U.S.C. § 455(a) does not. Instead, it requires the judge to disqualify himself in any proceeding where his "impartiality might *reasonably* be questioned." Hence, I will analyze that the factual scenario in light of that standard.

When we apply that standard, it is appropriate to bear in mind that it must be used with care. The statute asks us to look at the perspective of a "reasonable" observer. We should not prohibit

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[9] Quoting *United States v. Standard Oil Co.*, 136 F.Supp. 345, 367 (S.D.N.Y.1955), and citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975). This case is no judicial orphan. *See also, e.g.*, *In re Powell*, 533 N.E.2d 831 (Ill.1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989), holding that the canon on avoiding even the appearance of impropriety is not an independent basis to impose discipline on a lawyer. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir.1977) (court refuses to disqualify under "appearance of impropriety" standard that existed in the legal ethics rules as the time because the "appearance of impropriety" is an "eye of the beholder" standard that gives us no way to determine what "a member of the public, or of the bar" would consider improper); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir.1976) ("It does not follow ... that an attorney's conduct must be governed by [appearance of impropriety] standards which can be imputed only to the most cynical members of the public."); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246-47 (2d Cir.1979) ("appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases"); *Sherrod v. Berry*, 589 F.Supp. 433 (N.D.Ill.1984) (no disqualification based on mere appearance of impropriety).

conduct "that might appear improper to an uninformed observer or even an interested party."[10]

In short, the ABA, various commentators, the courts, and the American Law Institute have all advised us not to read language like the "appearance of impropriety" too broadly. We sometimes think, loosely, that ethics is good and that therefore more is better than less. But "more" is not better if the "more" exacts higher costs, measured in terms of vague rules that imposes unnecessary disqualifications. That levies costs on the judicial system and the litigants, which we all must consider when determining whether "impartiality might *reasonably* be questioned." Hence, we must consider the issue from the perspective of a reasonable, objective lawyer fully informed of the facts.

**The Chronology Regarding Judge Roberts's Eventual Nomination**

Let us summarize the major events that led to Professor Gillers changing his mind so that he now accuses Judge Roberts of engaging in unethical conduct.

| | | |
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| ❑ | 12/1/2004 | The D.C. Circuit announces the panel that will hear the *Hamdan* appeal. Judge Roberts is part of that panel. |
| ❑ | 12/11/2004 | *National Journal* lists Judge Roberts as the first of a short list of 10 for a vacancy, "based on conversations with former White House officials and others." (This example from the press is just one of many and it is used for illustrative purposes only.) |
| ❑ | 3/8/2005 | The original date scheduled for oral argument in |

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[10] RESTATEMENT OF THE LAW GOVERNING LAWYERS, THIRD, § 121, Comment *c(iv)*. The Restatement is speaking about lawyers' ethical violations but the principle applies to § 455(a) because that statute focuses on what is "reasonable" to the judge; its perspective is a person trained in the law, not a layperson who cynically assumes the worst.

*See also, Baker v. City of Detroit,* 458 F.Supp. 374, 376 (D. Mich.1978)(Keith, Circuit Judge, sitting by designation):

> "Section 455 was designed to substitute the *objective reasonable factual basis* or reasonable person test in determining disqualification for the subjective test employed prior to the 1974 amendment of Section 455. The issue committed to *sound judicial discretion*, therefore, is whether a reasonable person would infer, from all the circumstances, that the judge's impartiality is subject to question." (emphasis added)(internal citation omitted)).

*Simonson v. General Motors Corp.*, 425 F.Supp. 574 (E.D.Pa.1976), noting that there is an obligation *not to recuse* without valid reasons because of the burden that recusals place on colleagues.

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| | | *Hamdan.* |
| ❑ | 4/1/2005 | Roberts meets with Attorney General Gonzales. |
| ❑ | 4/7/2005 | Argument in *Hamdan*. Under usual D.C. Circuit practice, each of the judges would cast his initial votes at the conference that day, following oral argument, but any judge is free to change his vote until after the draft opinion circulates and is finally approved. |
| ❑ | 5/3/2005 | Roberts meets with the Vice President and White House officials. |
| ❑ | 5/23/2005 | Roberts meets with the White House counsel and her deputy. |
| ❑ | 7/1/2005 | Justice O'Connor announces her retirement, which creates the first vacancy in the U.S. Supreme Court since President Clinton appointed Justice Breyer in 1994. |
| ❑ | 7/8/2005 | Roberts speaks, by phone from England, with the deputy White House counsel. |
| ❑ | 7/15/2005 | The D.C. Circuit releases the *Hamdan* opinion. Under usual D.C. Circuit practice, the opinion would have been approved by the panel members and circulated to the full D.C. Circuit days or weeks before. |
| ❑ | 7/15/2005 | Roberts interviews with the President. |
| ❑ | 7/19/2005 | The President offers Roberts the job and announces the nomination. |

**The Proposed Gillers Rule That Would Disqualify Judge Roberts**

The reason why ethics codes include "catch-all" provisions is "to cover a wide array" of offensive conduct and to prevent attempted technical manipulation of a rule stated more narrowly."[11] If this conduct — although unforeseen by the drafters of 28 U.S.C. § 455(a) — really is a technical manipulation of a rule, or if the conduct is so offensive that a specific rule should prohibit it, it should not be difficult to draft that rule. In other words, if the statutory standard of "*impartiality might reasonably be questioned*" really required Judge Roberts' recusal in the circumstances of this case, we should be able to draft a workable rule to cover this type of conduct.

Professor Gillers, et al. argue that Roberts violated the federal statute, § 455(a), in not recusing himself, *sua sponte*. For convenience, let us call this rule the proposed Gillers Rule. How would that rule read? Recall that Professor Gillers, et al., argue that Judge Roberts should have

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[11] RESTATEMENT, THIRD, § 5, Comment *c*.

withdrawn from further participation in the case because he had a conversation with the Attorney General to talk about a possible opening on the U.S. Supreme Court that would occur at some point in the future, and this meeting (as well as others) occurred shortly before the date of the delayed oral argument in *Hamdan*. The Government was a party to the case and, as Gillers says, that case was "hotly contested."[12]

Hence, the hypothetical Gillers Rule would require a judge who learns that he is being considered for an appointment to the U.S. Supreme Court to recuse himself from cases where the Government represents one side and that case is, in Gillers' words, "hotly contested."

However, all litigation is "hotly contested," by definition. Parties do not involve themselves in time-consuming and expensive litigation, appeal the case, and then contest the case "mildly," or "half-heartedly." No case is ever "coldly contested." Just as a light switch is either on or off, the parties contest a case either hotly or not at all.

Hence our hypothetical Gillers Rule would provide that a judge who learns that he is being considered for an appointment to the U.S. Supreme Court must recuse himself from cases where the Government represents one side. If that were the rule, it would apply to a host of cases for each federal judge who is being considered for a position to the U.S. Supreme Court — a position that did not yet exist because Justice O'Connor did not announce her retirement until July 1, 2005.

Recall that the news widely reported that *ten* candidates, including Roberts, were being considered for a possible seat on the Court in early December, 2004. So, the Gillers Rule would have to provide that when a judge is being considered for an appointment to the U.S. Supreme Court, even though there is yet no opening, he or she must recuse himself or herself in every case where the Government is on one side. The Government might be the "United States," as in a typical criminal case, or an agency, like the Department of the Treasury, or Department of Energy, or the NLRB, or the FCC, etc.

It is not unusual for a case to be *sub judice* (under consideration, before the judge) for six months to a year. Each judge being considered will be exposed to scores of cases or more where the Government is a party. Consider, for example, when President Clinton considered Judge

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[12] Gillers admits that it is not enough that the Government is a party. This case, Gillers tells, is special:

> "Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position. The government litigates too many cases for that to make any sense. But Hamdan was not merely suing the government. He was suing the president, who had authorized the military commissions and who had personally designated Hamdan for a commission trial, explaining that 'there is reason to believe that [Hamdan] was ... involved in terrorism.'" http://slate.msn.com/id/2124603/?nav=tap3

Stephen Breyer but then nominated Judge Ruth Bader Ginsburg to the U.S. Supreme Court. Justice Byron White announced his resignation in March, 1993. President Clinton announced his nomination of Judge Ginsburg almost three months later, on June 14, 1993. During this short time period, when there was an actual vacancy on the Court and not merely speculation about a future vacancy, she participated in nearly 50 civil cases involving the U.S. Government or one of its agencies — including the Department of Defense or Department of the Army — and more than 25 additional criminal cases where the United States was a party. As far as we can tell from the records, in none of them did she recuse herself because the media reported that she was being considered for elevation to the U.S. Supreme Court.

The President, at that time, also interviewed Judge Breyer of the First Circuit. The President did not choose Judge Breyer until the following year. During that entire period of time — well over a year — Judge Breyer did not recuse himself from any case involving the U.S. Government even though he had had conversations with the Administration about his possible elevation to the U.S. Supreme Court.[13] In no case during a period over a year did he recuse himself after he was interviewed for the Supreme Court. In none did he recuse himself because the President told him that he was being considered for the Supreme Court. In none did he recuse himself because the President had nominated him to the Supreme Court. In none did any litigant move to disqualify him because he was being considered for the Supreme Court.

The news reports said that at least ten judges, including Judge Roberts, were on the short list in December of 2004. When Roberts had a conversation with the Attorney General in early April of 2005 (before there was any opening on the Court), it is common knowledge that he was not the only judge being considered for possible elevation to the Supreme Court. Even the day before (and the morning of) the final announcement on July 19, news reports told us who they thought the nominee would be, and the various names that were published were hardly limited to Roberts. The Gillers Rule would have to apply to all of these judges and require them to *sua sponte* recuse themselves from cases where the United States or one of its agencies or officials was a party.

This proposed Gillers Rule on disqualification would have to apply to ten or more judges during the time period before there is actually any opening on the Supreme Court but when the White House and Department of Justice are likely to be considering prospective candidates; this new Gillers Rule would also have to apply to the three or four final candidates for the time period just before the President makes his final choice. People on the longer list may not know that they are missing from the short list, so a half dozen candidates may think they are in the final four. If the average number of cases per judge is 40, then (for the time period when the President is considering about 10 candidates), we have 400 cases where judges will have to recuse themselves, even if oral argument has already occurred. Even if we limit the Gillers Rule to the final four, we are still

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[13] A new opening on the Court was certainly expected. Justice Blackmun had announced in June, 1992: "I am 83 years old. I cannot remain on this Court forever." *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992)(Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting).

talking about 160 cases. Of course, my assumption that the average number of cases is 40 is on the low side.

Whether the number is 40 or 70 or more, under the Gillers Rule, even if the case had been *sub judice* for six to 10 months, the judge must withdraw and the parties may have to reargue their case before a new panel. Both parties, after all, are entitled to a three-judge panel, but one or more of these judges would be required to recuse themselves under the proposed Gillers Rule.

I have been assuming that the issue involved appointment to the U.S. Supreme Court, but that need not be the case. It might involve the appointment of a Supreme Court Justice to another position. For example, there came a time when Justice Arthur Goldberg became U.N. Ambassador Goldberg. Oddly enough, he did not withdraw from Supreme Court cases involving the U.S. Government during the time period when he was being considered for the position until the time the President narrowed his choice and then finally made that choice public.

The Gillers Rule would also have to apply when the judge moves from the federal trial court to the Court of Appeals. Or the judge might move from the state courts to the federal district court or U.S. Court of Appeals. Or, a lower court federal judge might leave the bench and accept a federal position outside the judicial branch. Judges have left the bench to become Director of the FBI, or to become head of another agency, like the Department of Education. The Secretary of the Department of Homeland Security was a federal judge this time last year. These are the cases we know about, where the Government actually offered the position to a particular federal judge. There have to be other cases where the President or his designee talked with a federal judge about a possible position that would eventually occur in the future but did not eventually make an official offer. The Gillers Rule would apply to all of these cases.

I can find no evidence that any of these prospective judicial nominees (Supreme Court to UN Ambassador; federal judge to Cabinet Secretary; state court judge or federal trial judge to federal appellate judge) recused themselves in the cases I have described. If we consider all judges who have had *discussions* with an administration official about a position that is not even available yet (recall that Judge Roberts's first discussion with an administration official occurred *before* there was any Supreme Court opening), even more people will be covered by the Gillers Rule.

The President and the Attorney General are not the only people who interview potential judicial nominees. U.S. Senators interview candidates for possible judgeships. In some states there are "Judicial Selection Panels" who interview candidates for federal judgeships, particularly federal district judgeships. Some states have created Judicial Selection Panels to recommend qualified candidates for openings on the state courts.

Members of these panels include laypeople and lawyers, and both of these groups, especially lawyers, have cases in state or federal court. If the Gillers Rule becomes the law, so that the persons whom these panels interview must recuse themselves from any case, then the number of judges who must recuse themselves increases tremendously. The reason for that is because the lawyers on these judicial selection panels have cases before state and federal judges all the time, and these lawyers

will be interviewing state and federal judges who are interested in being nominated to the federal bench.

One might argue that the proposed Gillers Rule is so important and the appearance of impropriety is so significant that it does not matter that many judges will have to recuse themselves because it is the right thing to do. However, if a judge must recuse himself, that gives a great deal of power to officials in the Administration and the members of the Judicial Selection Panels. Roberts did not meet the President until late in the process, on July 15, just four days before he was offered the position. He met with the Attorney General on April 1. Under the proposed hypothetical Gillers Rule, the President, or the Attorney General, or any of their agents, could require Roberts or any other judge to recuse himself from a decision simply by discussing with the prospective nominee a possible position on the Supreme Court, or at the United Nations, or at the FBI, Homeland Security, etc.

The proposed Gillers Rule, if it became the law, would give Administration officials tremendous power to manipulate who is on the panel of a case by forcing the recusal of one or more of the judges simply by considering them for a position that is not yet open but will open eventually. Our hypothetical Gillers Rule, which is promoted as protecting the litigants opposing the government, is really a rule that undercuts litigants' rights by giving Government officials a power to force recusal at very low cost to itself.

The power that this new Gillers Rule would bestow may not be limited to government officials. Any person on the Judicial Selection Panels might have a similar power. A panel member can invite a state judge or federal trial judge to be interviewed for a position on the federal district court or federal court of appeals. When the interviewee learns that a member of the panel has a case before him or is appearing before him, he will have to recuse himself. Members of the panel can become creative and launder their invitations, so that Panel Member #1, with no case before the prospective nominee, will invite the prospective nominee, who will learn, at the interview, that he has a case before Panel Member #2. The people who engage in such conduct are unscrupulous, but we know that lawyers already manipulate the rules to affect the judges who hear their cases,[14] and they are not always caught.

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[14] *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055–56 (11th Cir.1996), which discusses the district court's suspicion "that in this district the choice of lawyers may sometimes be motivated by a desire to disqualify the trial judge to whom the case has been randomly assigned." *See also, Grievance Administrator v. Fried*, 456 Mich. 234, 570 N.W.2d 262 (Mich.1997). Two judges in a county had close relatives who practiced there. If a client wanted his case to be reassigned from one judge to the other, local lawyers advised the clients to hire the relevant relative as co-counsel to force the recusal of the judge. The Attorney Disciplinary Board dismissed the charges against the lawyers but the Michigan Supreme Court reversed and remanded for further proceedings. The Supreme Court held a lawyer is subject to discipline if that lawyer participates as co-counsel in a suit for the *sole* purpose of recusing a judge because of the lawyer's familial relationship with that judge.

**The Case Law**

Over the last several years, there have to be hundreds of times where judges would have had to recuse themselves from cases where the Government was a party because the judge had had a conversation with an administration official about a new position. As mentioned above, Judge Breyer's discussions that led to his elevation to the U.S. Supreme Court had to implicate a year's worth cases. We should expect to find a lot of case law on the subject. Instead we find a paucity of cases, literally less than a handful. Gillers discusses some of them. They all make careful distinctions. Let us turn to them now.

The case that seems most on point is one that Gillers, et al. does not cite. It is *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich.1978). The judge refused to recuse himself from a reverse discrimination case against defendants, including Mayor Young of Detroit. The plaintiffs, who sought disqualification under 28 U.S.C. § 455(a), complained of bias because Mayor Young was chairing the judicial selection committee that forwarded the judge's name to President Carter for elevation to the Court of Appeals.[15] This case was before the judge when he was a trial judge and while Mayor Young was urging President Carter to appoint him to a higher court; he kept this case, even after he was elevated to the Sixth Circuit.[16] Under the proposed Gillers Rule for recusal, this judge would be violating the federal statute. The court, however, denied the disqualification motion.

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[15] The judge explained:

> "The pertinent allegations of plaintiffs' motion to disqualify are as follows: that Mayor Young and I are friends, that *Mayor Young served as a member of the selection committee which submitted my name*, along with four other nominees, to the President as candidates for appointment to the United States Court of Appeals for the Sixth Circuit, and that Mayor Young was one of several dignitaries who, in his official capacity as Mayor of the City of Detroit, made welcoming remarks to guests and judges of the Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan at my swearing-in ceremony to the Sixth Circuit. From these facts, plaintiffs allege that extra-judicial contact between myself and Mayor Young during the pendency of this litigation is likely and thus creates an appearance of impropriety." 458 F. Supp. at 375-76 (emphasis added).

[16] *See* http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm.

The date of the Judge's commission was October 21, 1977. The case was filed at some point prior to February of 1977, when the plaintiffs filed an amended complaint, a point the judge makes in another of his series of opinions on this case. *Baker v. City of Detroit*, 483 F.Supp. 919, 922 (D. Mich. 1979), *affirmed sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *on rehearing, Bratton v. City of Detroit*, 712 F.2d 222 (6th Cir. 1983), *cert. denied, Bratton v. City of Detroit*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

The Gillers article starts by relying on an opinion by Justice Stevens, *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), where the Court (5 to 4) upheld a lower court decision disqualifying the trial judge in a bench trial. Gillers uses that case to establish what he calls the "appearance of impropriety" standard. The facts, however, simply do not relate to the present situation.[17]

The second case Gillers cites is *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). He describes that case in language that parallels language I use to describe the case in one of my books. He says that the Seventh Circuit —

> "ordered the recusal of a federal judge who, planning to leave the bench, had hired a 'headhunter' to approach law firms in the city. By mistake—and, in fact, contrary to the judge's instructions—the headhunter contacted two opposing firms in a case then pending before the judge. One firm rejected the overture outright. The other was negative but not quite as definitive."[18]

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[17] After a bench trial about who owned a hospital corporation, the loser learned that the trial judge was a trustee of Loyola University. During the time the case was pending, the ultimate winner, Liljeberg, was negotiating with Loyola to buy some land for a hospital and prevailing in the litigation was central to Liljeberg's ability to buy Loyola's land. The judge had ruled for Liljeberg, which thereby benefitted Loyola. Health Services thus moved to vacate the judgment, alleging that the trial judge should have disqualified himself. At a hearing to determine what the trial judge knew, he testified that he knew about the land dealings before the case was filed, but that he had forgotten all about them during the pendency of the matter. He learned again of Loyola's interest after his decision, but before the expiration of the 10 days in which the loser could move for a new trial. Even then, the judge did not recuse himself or tell the parties what he knew.

The Court of Appeals reversed the judgement in favor of Liljeberg in the underlying case and the Supreme Court affirmed. While the trial judge could not have disqualified himself over something about which he was unaware, he was "called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary."

[18] "*Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir.1985), involved a judge who had become eligible to take senior status. He contacted a 'headhunter' who agreed to contact Chicago firms to see if any would want the judge to become affiliated with them. Inadvertently, and contrary to the judge's instructions, the headhunter contacted firms representing both the plaintiff and defendant in a pending antitrust case. Neither expressed an interest in hiring the judge, although the plaintiff's firm left the matter a bit more open than did the other. The judge did not go to work for either firm. Defendants sought a writ of mandamus to disqualify the judge. The Court of Appeals was careful to stress that there was no intentional impropriety committed in the case, but it ordered the judge recused to avoid any 'appearance of partiality' in the matter before him." THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY

(continued...)

The *Pepsico* case, on its facts, is simply different from the facts involving Judge Roberts. While the judge in *Pepsico* did not know that the headhunter had contacted the two law firms, the law firms believed that the headhunter was acting on the judge's behalf. From their perspective, the judge before whom they trying a case was asking each of them for a job. The two firms were asked to bid to see who gave the judge the best job offer — how big should the partnership draw be; how extensive should the fringe benefits be? Negotiating for an adjustable salary with the two private parties appearing before you is different than accepting, or agreeing to be considered for, a Supreme Court appointment. There is no negotiation for that job; the salary is fixed. Moreover, the Seventh Circuit was concerned that the judge *initiated* (through the headhunter) the contacts:

> "The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case *in the role of a suppliant for employment*." 764 F.2d at 461.[19]

Judge Roberts did not apply for a job; he did not negotiate the terms of employment; he did not initiate a meeting; he was no suppliant; he simply accepted the invitation of the Attorney General to meet to discuss a possible Supreme Court vacancy. Recall that Gillers had no problem with the Attorney General meeting with Judge Roberts after the oral argument; one fails to see why the situation is 180 degrees different because the meeting occurred before oral argument.[20]

One can, of course, argue that the case should be read more broadly, and Gillers does that. But he should have noted that the case on which he relies instructs us to the contrary: "Our holding is narrow," the court warned, because "[w]e deal with an unusual case," and the court was unwilling to make any pronouncements that applied to other factual scenarios. 764 F.2d at 461.

The third case, which cites *Pepsico*, is one on which Gillers places special emphasis, *Scott v. United States*, 559 A.2d 745 (D.C. 1989). Here is the way that Gillers, et al. summarize this case:

> "In the fall and winter of 1984, a criminal-trial judge in the District of Columbia was discussing a managerial position with the Department of

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[18] (...continued)
273 (Foundation Press, 8th ed. 2003).

[19] Other cases make this same point: the judge sought a job from each of the law firms appearing before him. As Judge José A. Cabranes said in *McCann v. Communications Design Corp.* 775 F.Supp. 1535, 1544 (D. Conn. 1991) (in the course of refusing to read that case broadly and refusing to motion to disqualify): "Pepsico, as plaintiff himself points out, involved the direct approach of a 'headhunter' seeking to find employment for the judge to the law firms appearing before him."

[20] Tom Brune, *Roberts Meeting "Illegal:" Legal Ethicists Say White House Interview Jeopardized Judge's Impartiality in a Case on Military Tribunals*, NEWSDAY, Aug. 18, 2005, http://www.newsday.com/news/nationworld/nation/ny-uscort184388315aug18,0,5829402.story .

> Justice while the local U.S. attorney's office—which is part of the department—was prosecuting an intent-to-kill case before him. Following the conviction and sentence, the judge was offered the department job and accepted. On appeal, the United States conceded that the judge had acted improperly by presiding at the trial during the employment negotiations. It argued, however, that the conviction should not be overturned. The appeals court disagreed. Relying on [*Pepsico*], as well as the rules of judicial ethics, the court vacated the conviction even though the defendant did not 'claim that his trial was unfair or that the [the judge] was actually biased against him.' The court was 'persuaded that an objective observer might have difficulty understanding that [the judge] did not ... realize ... that others might question his impartiality.'"[21]

One might consider *Scott* to be based on different facts, because the judge there was taking a position in the Department of Justice. The judge was not moving from a position as judge to another position as judge; instead, he was joining the prosecutors and becoming a lawyer in the "Executive Office for United States Attorneys." He would, in fact, be supervising some of the Government lawyers who were appearing before him.

There is another problem with Gillers' reliance on the *Scott* case: there is an important discrepancy between his characterization of that case and what it says:

> "By December 23, 1984, *when he had decided to accept the position* in the Executive Office for United States Attorneys, the judge had a duty to recuse himself from Scott's case. These facts present 'precisely the kind of appearance of impropriety' that Canon 3(C)(1) is designed to prevent." *Scott v. United States*, 559 A.2d 745, 755 (D.C.1989) (emphasis added).

*Scott* does not support Gillers' argument; it *undermines* it. And it also undermines the proposed Gillers Rule. What *Scott* says, at most, is that Judge Roberts had no obligation to withdraw from a case where the Government is a party *before he was offered and decided to accept the position*. That date could not be before the vacancy existed; in fact, it could not be before July 15, when he meets the President for the first time. By that time, the *Hamdan* case had already been decided.

**Conclusion**

Past practice of other judges who have accepted or considered appointment for other offices, including past practice of Judge Roberts' predecessors on the D.C. Circuit, demonstrates that he did not violate 28 U.S.C. § 455(a). If we were to interpret this statute broadly, contrary to the advice of the American Bar Association, the American Law Institute, and the case law — if we were, in effect, to change the historical practice and adopt the Gillers Rule — we would create a new set of

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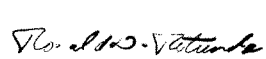
[21] http://slate.msn.com/id/2124603/?nav=tap3 .

problems. In particular, we would be giving members of the Administration the power to manipulate who sits on panels simply by considering one or more judges for other positions.

Instead, in my opinion, we should follow the advice of *Scott v. United States*, 559 A.2d 745 (D.C. 1989), the case on which Gillers purports to rely. *Scott* says, at most, that a recusal obligation arose only after the judge "*had decided to accept the position* in the Executive Office for United States Attorneys." In Judge Roberts' situation, by the time he was offered another judicial position, the *Hamdan* case had been decided.

Sincerely,



Ronald D. Rotunda

Statement
*United States Senate Committee on the Judiciary*
**Nomination of John G. Roberts (Witness List for September 12, 2005)**
September 12, 2005

**The Honorable Charles E. Schumer**
United States Senator , New York

Confirmation Hearing of Judge John G. Roberts, Jr. Opening Statement of Senator Charles E. Schumer

Judge Roberts, welcome to you, Mrs. Roberts and your two beautiful children. I join my colleagues in congratulating you on your nomination to the position of Chief Justice of the United States.

This is indisputably the rarest opportunity in American government. In the entire history of the Republic, we have had but 16 Chief Justices.

But the responsibility is as great as the opportunity is rare.

One need only consider that generations of jurisprudence bear the names of Chief Justices who presided over the Supreme Court - the Marshall Court, the Warren Court, and of course most recently, the Rehnquist Court.

The decisions of the Supreme Court have a fundamental impact on people's lives, and the influence of a Chief Justice far outlasts that of a President.

As the youngest nominee to the High Court's top seat in 204 years, you have the potential to wield more influence over the lives of the citizens of this country than any jurist in history.

I cannot think of a more awesome responsibility – awesome not in the way my teenage daughter would use the word, but in the Biblical sense of the angels trembling in the presence of God.

But before you can assume that responsibility, we Senators – on behalf of the people – have to exercise our own responsibility.

Fundamental to that responsibility is our obligation to ascertain your legal philosophy and judicial ideology.

To me the pivotal question, which will determine my vote is this: Are you within the mainstream – albeit the conservative mainstream – or are you an ideologue who will seek to use the Court to impose your views upon us, as certain judges – past and present, on the left and on the right – have attempted to do.

The American people need to learn a lot more about you before they – and we – can answer that question.

You are without question an impressive, accomplished, and brilliant lawyer. You are a decent and honorable man. You have a remarkable resume.

There are those who say your outstanding and accomplished resume should be enough; that you

should simply promise to be fair, and we should confirm.

I disagree.

To me, the most important function of these hearings – because it is the most important qualification for a nominee to the Supreme Court – is to understand your legal philosophy and judicial ideology.

This is especially true now that judges are largely nominated through an ideological prism by a President who has admitted that he wants to appoint Justices in the "mold" of Antonin Scalia and Clarence Thomas.

I began to argue that a nominee's judicial ideology was crucial four years ago. Then, I was almost alone. Today there is a growing and gathering consensus on the left and on the right that these questions are legitimate, important, and often crucial.

Therefore, I – and others on both sides of the aisle – will ask you about your views.

Here is what the American people need to know beyond your resume:

They need to know who you are and how you think.
They need to assess not only the sharpness of your mind, but also the fullness of your heart.
They need to believe that an overachiever can identify with an underdog who has nothing but the Constitution on his side.
They need to understand that your first-class education and advantaged life will not blind you to the plight of those who need help and who rely on the protections of the Constitution – which is every one of us at one point or another.
They need to be confident that your claim of judicial "modesty" is more than easy rhetoric, that your praise of legal "stability" is more than mere lip-service.
They need to know – above all – that if you take stewardship of the High Court, you will not steer it so far out of the mainstream that it founders in the shallow waters of extremist ideology.
As far as your own views go, however, we have only scratched the surface.

In a sense, we have seen maybe 10 percent of you – just the visible tip of the iceberg, not the 90 percent that is still submerged. And we all know that it is the ice beneath the surface that can sink the ship.

For this reason, it is our obligation to ask – and your obligation to answer – questions about your judicial philosophy and legal ideology.

If you cannot answer these questions, how are we to determine whether you are in the mainstream? A simple resume, no matter how distinguished, cannot answer that question.

This is particularly important for you as compared to other nominees, because you are more of a tabula rasa than many other nominees in terms of your judicial philosophy. You have served only two years on the bench; much of your career has been spent making arguments for others; and we have not received many documents which would reveal your thinking from your days in the Solicitor General's Office.

So, for me, the first criterion upon which I will base my vote is whether you will answer questions fully and forthrightly. I do not want to trick you, badger you, or play a game of "gotcha." That is why

I met with you privately three times; that is why I gave you a list of questions in advance of these hearings.

There is only one purpose here. It rests on the Advise and Consent Clause of the Constitution: to find out what kind of judge you will be and to determine with much greater clarity your judicial philosophy and method of legal reasoning.

Every federal court candidate – who will serve for life – should explain his or her judicial philosophy and method of legal reasoning. That obligation is even more fundamental for a Supreme Court nominee, and most important for one named to lead the entire federal judiciary.

It is not enough to say that you will be fair. If that were enough, we would have no need for a hearing. I have no doubt that you believe you will be a "fair" judge. I also have no doubt that Justice Scalia thinks he is fair and that Justice Ginsburg thinks she is fair.

But in case after case after case, they rule differently; they approach the Constitution differently; and they affect the lives of 280 million Americans differently. That is so, even though both undoubtedly believe that they are fair.

You should be prepared to explain your views of the First Amendment, civil rights, environmental rights, religious liberty, privacy, worker's rights, women's rights, and a host of other issues relevant to the most powerful lifetime post in the nation.

Now, having established that ideology and judicial philosophy are important, what is the best way to go about questioning on those subjects? The best way, I believe, is through understanding your views about particular past cases.

It is not the only way, but it is the best and most straightforward way.

Some have argued that questioning a nominee about his or her personal views of the Constitution or about decided cases indicates prejudgment about a future case.

It does nothing of the sort. Most nominees who have come before us – including Justice Ginsburg, whose precedent you often cite – have answered such questions.

Contrary to popular mythology, when she was a nominee, Justice Ginsburg gave lengthy answers to scores of questions about Constitutional law and decided cases, including individual autonomy, the First Amendment, criminal law, choice, discrimination, and gender equality.

Although there were places where she said she did not want to answer, she spoke about dozens of Supreme Court cases and often gave her unvarnished impressions, suggesting that some were problematic in their reasoning while others were eloquent in their vindication of important Constitutional principles.

Other nominees, from Powell to Thomas to Breyer, answered numerous questions about decided cases, and no one has ever questioned their fitness to hear cases on issues raised during their confirmation hearings.

A large majority of the American people – whose lives will be profoundly affected by the next Chief Justice – believe that they have the right to know where you stand on important legal and

Constitutional issues and on past cases. They have an innate wisdom about these things, and here their views are consistent with those of Senators and scholars.

So, I hope that you will answer questions about decided case, which so many other nominees have done.

If you refuse to talk about already decided cases, the burden is on you – one of the preeminent litigators in America – to figure out a way, in plain English, to help us determine whether you will be a conservative – but mainstream conservative – Chief Justice, or an ideologue.

Here are some of the specifics that we need to know:

For example, you told me in one of our meetings that you believe in judicial "modesty," implying that you deeply respect settled precedent; yet as a younger man you celebrated the late Chief Justice's attempt to "revolutionize" the settled law involving the Establishment Clause and criticized another opinion as "lame" for relying on stare decisis. That raises more questions. What does modesty really mean in terms of respect for precedent?
You gave testimony at your last hearing that you endorsed "the vital role of the federal government in vindicating national interests"; yet in the Reagan Administration you repeatedly fought against federal involvement in various issues of national urgency. That gives rise to a question. What do you really think now?
You told me when we met that you believe that there is a right to privacy that extends to the bedroom; yet in your younger years you referred derisively to the "so-called" right of privacy. That too gives rise to a question. Which view will you take to the bench now that you are no longer bound by precedent?
You told me that you are not ideologue and that you share my "aversion" to ideologues; yet you have been embraced by some of the most extreme ideologues in America, like the leader of Operation Rescue. That gives to rise to a question. What do they know that we don't know?
Let me be clear. I know that you are conservative, and I do not expect your views to mirror mine. After all, President Bush won the election, and everyone understands that he will nominate conservatives to the Court. But while we certainly do not expect the Court to move to the left under this President, it should not move radically to the right.

Let me make one final point: balance on the Supreme Court is also important. It matters a great deal, now more than ever, at a time when the Court is so divided. I have often said that a Supreme Court with one Scalia and one Brennan would be a vibrant and interesting Court; but five of either would be utterly imbalanced.

One factor I will weigh is that you have now been nominated to replace the late Chief Justice Rehnquist – one of the most reliably conservative votes – rather than Justice O'Connor, the Court's most important swing-vote.

But, regardless of whom you have been nominated to replace, it is your burden to prove that you are worthy of confirmation; it is not the Senate's burden to prove that you are unworthy.

Judge Roberts, if you want my vote, you need to meet two criteria. First, you need to answer questions fully so we can ascertain your judicial philosophy. And second, once we have ascertained your philosophy, it must be clear that it is in the broad mainstream.

Judge Roberts, if you answer important questions forthrightly and convince me that you are a jurist in

the broad mainstream, I will be able to vote for you.

And I would like to be able to vote for you.

If you do not, I will not be able to vote for you.

I have high hopes for these hearings. I want – the American people want – a dignified and respectful hearing process – open, fair, thorough, full, and above-board. One that brings not only dignity, but even more importantly, information about your views and ideology to the American people.

I, along with the American people, look forward to hearing your testimony.

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September 9, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

**RE: Nomination of John G. Roberts to be Chief Justice of the United States**

Dear Senators:

We find ourselves at an extraordinary moment of history. A devastating natural disaster has laid bare the disturbing truth that we are still a nation trying to deal with complicated issues of race and economic class.

It is in this context that we are asked to evaluate President Bush's nominee for Chief Justice of the United States. We have grave concerns about this nomination, particularly regarding the impact that Judge Roberts' judicial approach would have on equal opportunity for working people.

On behalf of the 1.7 million members of the Service Employees International Union, I write, first and foremost, to request that you demand President Bush turn over to the American public *the entire record of John Roberts' career.* The stakes are simply too high to make a decision on this nominee without access to all relevant information about his views. Most particularly, a complete review of Roberts' qualifications is impossible without access to the memoranda he wrote while serving as principal deputy solicitor general. These papers will shed great light on Roberts' views on such critical questions as the scope of governmental power and the rights of minorities and workers.

In this letter, I will also outline our concerns regarding John Roberts' record on several issues of importance to our members.

Government Service

As a high-ranking lawyer in the Reagan and George H.W. Bush administrations, John Roberts advocated for a wide range of deeply troubling positions. I review the most egregious examples here:

A. Immigrant Rights

While working in the Reagan administration, Roberts co-wrote an internal memo about a case called *Plyler v. Doe,* which involved a Texas law that closed the schoolhouse doors to the children of undocumented immigrants. In *Plyler,* the Supreme Court held that denying a class of children access to education would create a "permanent caste of undocumented resident aliens" and thus struck down the Texas law as violative of the constitution's Equal Protection Clause. While the Supreme Court understood that the *Plyler case* was about the imposition of a "lifetime of hardship on a discrete class of children," Roberts thought that the Reagan administration should have invoked principles of "judicial restraint" and intervened in the case *on the side of the Texas law that kept kids out of school.* Roberts' memo makes clear that his vision of equal protection is not broad enough to protect the right of all children to attend public school.

**SEIU believes that all workers, and all working families, should have equal access to the American dream regardless of their immigration status. But John Roberts has a view of the Constitution that could deny some immigrants the chance to achieve that dream.**

B. Gender Equality

In 1984, at a time when women earned 57 cents for every dollar earned by a man for comparable work, Judge Roberts denigrated the notion of paying women and men the same wages for work of equal value. In an internal government memo, Roberts called the legal theory of equal pay for comparable work a "radical redistributive concept," and denigrated it by parodying a Marxist slogan. In 1990, as a government advocate, Roberts argued in the *UAW v. Johnson Controls* case that it was legally permissible for an employer to deny certain lead-exposed jobs to fertile women, even if the women were fully qualified to do the work. This employer policy, which Roberts argued did not violate the anti-discrimination laws, *meant that fertile women had to choose between undergoing a sterilization procedure and keeping their jobs.* And, in *Canterino v. Wilson,* Roberts opposed the government's intervention on behalf of female inmates who had been denied equal access to job training and education programs.

**We believe that gender equality is a core American value, and that male and female workers should be treated the same at work. We know that women continue to face discrimination in the workplace, and continue to earn less than men for doing work of equal value. John Roberts does not share our commitment to gender equality.**

C. Access to Healthcare

In the *Rust v. Sullivan* case, Roberts filed a brief for the government that defended the constitutionality of a rule that "gagged" health care providers from discussing abortion with patients.

**We believe that all Americans should have equal access to the full range of available healthcare services. John Roberts argued that the government should be able to tell healthcare workers which services they can discuss with patients and which they cannot.**

D. Access to Public Education

Besides embracing a position that would have excluded undocumented children from school, as a government advocate Roberts pushed legal arguments that would have made it even more difficult to desegregate public schools. And Roberts criticized lower court decisions in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley* that had offered expanded accommodation to a deaf student under the Education for all Handicapped Children Act.

**No right is more central to working Americans than the right to a free public education. But John Roberts has taken positions that would limit rather than facilitate full access to quality education for all Americans.**

E. Voting Rights

While he was in the Reagan Justice Department, Roberts urged the Administration to oppose a bill that would have restored the Voting Rights Act to its full strength. Roberts would have preferred a bill that prohibited only those voting practices where discriminatory intent could be proved. Fortunately, Roberts' view did not prevail.

**SEIU believes that democracy means honoring every American's right to vote. John Roberts' record reflects a narrow view of the Voting Rights Act, the key federal statute designed to ensure that all Americans – regardless of their race – can vote and that every vote counts.**

II. Private Practice

In addition to the troubling positions Roberts advocated during his work in government, he has chosen to represent clients and make arguments in his private practice that advance the interests of corporations at the expense of working people and their unions. I set forth below some of the most relevant examples:

- In 1989, a group of low-wage African American poultry workers attempted to organize with the Teamsters union. The workers involved in the union campaign were known as "live-haul crews:" chicken catchers, fork-lift operators, and drivers. Holly Farms argued that these workers were not entitled to organize under the National Labor Relations Act because they were "agricultural" employees. **John Roberts authored a brief on behalf of a council of poultry companies and argued that these low-wage, primarily African American workers were not entitled to the protection of the labor act.** The Supreme Court rejected Roberts' argument and held that the workers were entitled to protection. *[See Holly Farms Corp. v. NLRB,* 517 U.S. 392 (1996).]

Si. Carpal tunnel syndrome (CTS) is a debilitating condition that forces tens of thousands of U.S. workers to miss work every year. In 2003, for example, the Department of Labor recorded more than 22,000 cases in which CTS led to lost work days. Ella Williams worked with pneumatic tools on the Toyota assembly line in Georgetown, Kentucky, and was diagnosed with CTS. When she was reassigned to a different job, and had to hold her hands and arms up at shoulder length for hours at a time, she developed thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities. When Toyota fired Ella Williams, she sued under the Americans with Disabilities Act, claiming that the company had failed to reasonably accommodate her disability. **John Roberts represented Toyota Motors and argued that Ms. Williams' serious physical impairments did not qualify her for ADA protection.** *[See Toyota Motor Mfg. v. Williams,* 534 U.S. 184 (2002)1

T· The *United Mine Workers v. Bagwell* case grew out of the historic Pittston Coal strike of 1989-90. The strike involved a struggle between the mine workers and Pittston over subcontracting, the introduction of irregular work schedules and Sunday shifts, and the drastic limitation of health and pension benefits for retired and disabled miners and their dependents. A Virginia court imposed $64 million in civil contempt fines against the union, and John Roberts represented the administrator appointed to enforce the contempt sanction. **In the** U.S. **Supreme Court, Roberts argued that the contempt fines were civil and not criminal and that, accordingly, it was permissible for the court to fine the union $64 million without giving the union a trial by jury.** The Supreme Court, in a 9-0 decision, rejected Roberts' argument and held for the union. *[See* 512 U.S. 821 (1994).]

)'. On numerous occasions, Roberts has represented coal companies against the interests of coal miners. In one appellate court case, Roberts took the side of the coal company in a dispute with enormous implications for the job security of miners. At a time when coal mines were attempting to escape their obligations to workers through use of complex corporate restructurings (a phenomenon that continues to hurt workers in a number of industries today), an arbitrator ruled that a group of displaced Ohio miners was entitled to jobs at KenAmerican mines. Roberts, however, argued that the court should reject the arbitrator's decision and leave the miners without employment protection. In his Senate questionnaire, Roberts listed this case as one of the ten most significant cases he has handled. *[See KenAmerican Resources v. UMWA,* 99 F. 3d 1161 (D.C. Cir. 1996).] And in a coal case that came before the Supreme Court, Roberts asked the Court to overturn a private arbitration decision under a collective bargaining agreement that reinstated a discharged worker. The Supreme Court rejected Roberts' argument 9-0. *[See Eastern Associated Coal Corp v. UMWA,* 531 U.S. 57 (2000).]

> As Americans well know, patients' rights are threatened when health maintenance organizations have unchecked power over medical choices. Some states have passed laws designed to protect patients, as Illinois did with its Health Maintenance Organization Act. That law gave patients the right to independent medical review when their HMO denied them certain benefits. **In *Rush Prudential HMO v. Moran,* John Roberts represented the HMO and attacked this important Illinois patients' rights law.** Roberts argued that the state law was preempted by the federal ERISA statute, but the Supreme Court rejected Roberts' argument. *[See* 536 U.S. 355 (2002).]

III. The D.C. Circuit

As a judge on the U.S. Court of Appeals for the D.C. Circuit, John Roberts has heard a number of cases involving unions and employees. The vast majority of these cases were fairly standard disputes that, while important to those involved, do not tell us much about Roberts' views of labor and employment matters. In most decisions, Roberts went along with a unanimous court – sometimes holding for the union or employee, sometimes holding for the employer. Some of his decisions, however, bear mention and – in light of the record already reviewed above – raise further concern:

> Congress depends on its power under the "Commerce Clause" to pass worker protection laws. Roberts expressed an opinion, as a judge on the U.S. Court of Appeals, in the recent *Rancho Viejo case* which may indicate an inclination to adopt of restricted reading of Congress's Commerce Clause power. Such a reading could make it difficult for Congress to offer new, and badly needed, protections to workers involved in union organizing. *[See* 334 F.3d 1158 (D.C. Cir. 2003).]

> In *AFL-CIO v. Chao,* the court of appeals was called on to address new regulations issued by the Department of Labor that placed onerous financial reporting requirements on unions. All three judges on the three-judge panel that reviewed the case rejected the unions' claims and upheld the Department's authority to issue the new "LM-2" regulations, but a two-judge majority accepted the unions' argument and struck down the Department's new "trust reporting" rules. Roberts dissented from the second part of the court's holding, and argued that *all* of the new reporting rules – the LM-2 and trust reporting rules – should be upheld. *[See* 409 F.3d 377 (2005).]

> LeMoyne-Owen College is a historically black college in Memphis, Tennessee. In 2002, the college faculty attempted to unionize, but the College argued that the faculty members were managerial employees and thus not entitled to protection under the National Labor Relations Act. The NLRB rejected the College's argument and ordered the College to recognize and bargain with the faculty's representative. In *LeMoyne-Owen College v. NLRB,* however, Judge Roberts wrote an opinion for the court of appeals that reversed the Board's decision. According to Roberts' opinion, the Board had not provided an adequate

explanation for its holding that the faculty were not managerial employees. The case was sent back to the Board for further proceedings. *[See* 357 F.3d 55 (D.C. Cir. 2004).]

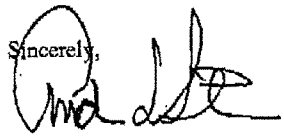
*Stanford Hospital and Clinics v. NLRB,* involved SEIU Local 715's attempt to include in the bargaining unit eleven housekeepers who worked at a new research facility at Stanford. The Board had included the new housekeepers in the pre-existing bargaining unit, but the court of appeals reversed the Board's decision. According to the court, the union's attempt to include these workers in the unit was contrary to the rule that a union can't seek to "clarify" a bargaining unit that is already "clearly defined." Roberts joined in this unanimous three-judge decision. *[See* 370 F.3d 1210 (D.C. Cir. 2004).]

*W* Conclusion

As I stated above, the American public is entitled to the complete Roberts' record. The White House has a duty to turn over to your Committee *all* of Roberts' writings, including the memoranda he wrote as principal deputy solicitor general. If these documents are eventually released, or if we learn more from Roberts' testimony during his Senate confirmation hearings, we will revisit the question of his suitability for confirmation. Based on the record that is before us, we do not know enough to make a final determination regarding John Roberts' qualification to be Chief Justice of the U.S. Supreme Court. And because the remainder of Roberts' record is readily available, it would be inappropriate for the Senate to confirm this nominee without first gaining access to these critical documents.

At this crucial time, we need a nominee who is a sign of hope that our nation might be reunited. Thank you for considering our views.

Sincerely,



Andrew L. Stern
International President

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FOUNDED 1892

September 9, 2005

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC

Re: Supreme Court Nomination of Judge John G. Roberts, Jr.

Dear Senators Specter and Leahy:

Judge John G. Roberts, Jr. has been nominated as the next Chief Justice of the United States. Having conducted a thorough review of Judge Roberts' record, we have very serious concerns about whether he should be confirmed to this position.

Four issues trigger these concerns. The first two are Judge Roberts' suggestion that he might continue the Supreme Court's recent assault on Congressional authority to protect our air, water and treasured natural heritage, and his efforts to limit citizen access to the federal courts to enforce the laws protecting these resources.

The third issue is Judge Roberts' belief that the federal government has little role in addressing the racial divide in America. The burdens of pollution and environmental degradation weigh far heavier on minority communities. All Americans are entitled to breathe clean air and drink clean water, and the prospect that the Chief Justice of the United States does not believe that our laws should be used to remedy this disgraceful imbalance is very troubling.

Last is the issue of secrecy. The Bush Administration's obsession with secrecy has now reached the point where it is interfering with the Senate's Constitutional obligation to provide advice and consent on Judge Roberts' nomination. Half a record is no record upon which the Senate can decide whether Judge Roberts should serve for decades as the next Chief Justice. Moreover, by relying on vague claims of "privilege" and "chilling effects", the Administration's refusal to release information related to Judge Roberts' tenure in the first President Bush's Administration implies that these records are so damaging that even a Republican-controlled Senate would not confirm such a nominee with otherwise impressive credentials.

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## I. Judge Roberts and the Scope of Congressional Authority

Just last month, Chairman Specter characterized the Supreme Court's recent cases eroding Congressional Commerce Clause power as "the hallmark agenda of the judicial activism of the Rehnquist Court."1

Because almost all federal environmental statutes rely on Congress' Commerce Clause authority, the Rehnquist Court's rulings limiting this authority in *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000) provoked a flood of challenges to the cornerstones of environmental protection, including the Clean Water Act, Endangered Species Act, Safe Drinking Water Act and CERCLA.

Judge Roberts' one opinion on this issue as a D.C. Circuit judge creates serious concern over how he might rule in such a case. In *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003) -- the now notorious "hapless toad" case -- a three-judge panel rejected a claim that Congress lacked the Commerce Clause authority to protect the toad, holding that the Endangered Species Act was applicable to commercial development that threatened the toad's survival. In the words of Chief Judge Ginsburg's concurrence, "The large-scale residential development that is the 'take' in this case clearly does affect interstate commerce." *Id. at* 1080.

A petition for rehearing by the entire court was denied 7-2, with Judges Roberts and Sentelle dissenting. *Rancho Viejo, LLC v. Norton,* 334 F.3d 1158, 1160 (D.C. Cir. 2003). In his dissent -- the very first opinion he wrote -- Judge Roberts said that: "the panel's opinion in effect asks whether the challenged regulation substantially affects interstate commerce, rather than whether the *activity* being regulated does so;" and concluded that "[s]uch an approach seems inconsistent with the Supreme Court's holdings . ." *Id.* Judge Roberts' analysis is troubling because the panel's reasoning is arguably the strongest basis for distinguishing the Endangered Species Act from the Guns Free School Zone Act at issue in *Lopez* and the Violence Against Women Act at issue in *Morrison.* As the panel explains, the Endangered Species Act regulates the "taking" of species and such takings are almost always the result of commercial development activities. The Act thus regulates economic activity much more directly than did the laws in *Lopez* and *Morrison,* which regulated gun possession and domestic violence, activities the Court in *Morrison* deemed "non-economic" and "criminal."2

## II. Judge Roberts and Access to Courts

In addition to questioning whether Congress has authority to enact environmental laws, Judge Roberts believes that federal judges must restrict their jurisdiction over these cases, a philosophy that would have effectively eliminated much of the environmental protection afforded

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Letter from Senator Specter to Judge John G. Roberts, Jr. August 8, 2005.

[2] In successfully urging the Supreme Court to deny review of the case, Paul Clement, President Bush's Solicitor General, acknowledged that "Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures. Brief of Respondents in Opposition, *Rancho Viejo LLC v. Norton, No. 03-761, available at* http://www usdoj.gov/osg/briefs/2003/Oresponses/2003-0761.resp.html;

by federal courts over the last 30 years. Early in his career, for example, Roberts wrote a memo to then-Attorney General William French Smith in which he criticized the Carter administration's policy of "not raising standing challenges in the most vigorous fashion ... particularly ... in the environmental area." [3] Roberts urged Smith to inform reporters that "it will be our policy to raise standing and other justiciability challenges to the fullest extent possible."4

Then, as Principal Deputy Solicitor General, Roberts argued (successfully) for restrictions on environmental standing in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990). [5] After leaving the government, he wrote glowingly of the Supreme Court's subsequent decision in *Lujan v. Defenders of Wildlife,* which made it even more difficult for citizens to bring environmental cases; [6] Justices Blackmun and O'Connor strongly dissented in *Defenders* because they could not "join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."' However, Judge Roberts agreed with Justice Scalia's majority opinion, writing that Congress may not ask the Courts to exercise "oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue." [8] While Congress created citizen suits to assist the enforcement of federal laws such as the Clean Water Act, the Clean Air Act and the Safe Drinking Water Act, this tone suggests deep skepticism over the critical role these suits play in enforcing our environmental laws.

Judge Roberts' attitude towards citizen enforcement of environmental laws becomes even more troubling in light of the dissent in the subsequent case of *Friends of the Earth v. Laidlaw,* 528 U.S. 167, 209-210 (2000), where Justices Scalia and Thomas raised the issue whether environmental citizen suits are even Constitutionally permissible, questioning whether such suits run afoul of "exclusive" Executive authority established in Article II. Judge Roberts has argued that courts should rigorously enforce standing requirements in order to avoid infringing upon the Executive's Article II authority, which strongly suggests that he agrees with the position of Justices Scalia and Thomas in *Laidlaw.9*

Moreover, environmental citizen suits are modeled on *"qui tam"* actions (Le., "whistleblower" cases) in which citizens may sue to recover money taken by fraud from the United States Government. Roberts notes approvingly that while he was Principal Deputy Solicitor General, the Justice Department "formally opined that such actions are unconstitutional." [15] He further described *qui tam* actions -- which have resulted in literally billions of stolen taxpayer dollars being returned to the Government" -- as "perhaps constitutionally dubious remnants" left over from the common law. [12] If Judge Roberts believes that something as unequivocally beneficial (and as well-known to the Founding Fathers) as *qui*

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[3] Memorandum from John G. Roberts to William French Smith dated Nov. 21, 1981.
*Id.*
[5] Brief for Petitioners, *Lujan v. National Wildlife Federation,* 1989 U.S. Briefs 640 (1990).
[6] John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219 (1993).
[7] 504 U.S. 555, 606 (1992) (Blackmun, J. dissenting).
[8] *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, 1229 (1993).
[9] *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, 1230 (1993).
[10] *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, fn. 20 (1993).
[11] http://www.usdoj.gov/opa/pr/2002/December/02_civ_720.htm.
[12] *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, fn. 20 (1993).

*tam* actions are unconstitutional, we can predict that he will have no more enlightened view of environmental citizen suits.

III. **Judge Roberts and Environmental Justice**

Judge Roberts has displayed unrelenting hostility to the idea that federal law and federal courts have a role in combating racial discrimination in areas such as voting rights, housing and employment. Unfortunately, being a minority in American also means that you are far more likely to live next to a toxic waste site, to breathe polluted air, and drink polluted water.13

Although America has made great strides in eliminating the most overt forms of racism, we have been far less successful in curing its more subtle and insidious effects. While we no longer see "Whites only" signs, or ads saying "Blacks need not apply," racial discrimination in housing, jobs and voting -- and environmental conditions -- still persists.

Without doubt, the most effective mechanism for revealing and curing such practices is to evaluate whether the adverse consequences flowing from a particular policy or behavior fall disproportionately on minorities. This mechanism -- known as "disparate impacts" or "discriminatory effects" analysis -- lies at the heart of regulations promulgated by federal agencies under Title VI of the Civil Rights Act of 1964, that were designed to ensure that recipients of federal funding do not discriminate on the basis of "race, color or national origin." The Title VI "disproportionate impact" regulations of agencies such as the Environmental Protection Agency, the Department of Transportation, and the Department of the Interior, are critical to ensuring that minorities do not fall victim to the adverse environmental consequences -- dirty air, unclean water, exposure to toxic waste --of thousands of projects and programs overseen by these agencies across the country.

Unfortunately, Judge Roberts has a long history of opposing such "impacts" or "effects" analyses. In 1980, when the Supreme Court reversed more than a decade of settled law that relied on "effects analysis" to establish violations of the Voting Rights Act, Roberts battled furiously against Congress restoring this mechanism. Roberts went so far as to write that "violations of [the Voting Rights Act] should not be made too easy to prove." [14] And, ignoring the actual history of such litigation, he issued "the sky is falling" predictions that any effects analysis presented a "very real danger that elections across the nation, at every level of government, would be disrupted by litigation and thrown into court. Results and district boundaries would be in suspense while courts struggled with the new law. It would be years before the vital electoral process regained stability.'"

Roberts also opposed use of any effects analysis with respect to proposed amendments to the Fair Housing Act and its use in employment discrimination. Discussing the Fair Housing Act, he wrote that, "The Administration should have its positions in order -- and even some proposed reforms ready -- but I do not think there is a need to concede all or many of the controversial

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[13] Luke W. Cole and Sheila Foster From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 167-183.

[14] Memorandum from John Roberts to the Attorney General (Dec. 22, 1981).

is from John Roberts to the Attorney General (Jan. 21, 1982).

points (effects test, national administrative remedy) to preclude political damage." [16] Roberts was equally scornful in using the effects test to combat employment discrimination; in his words, such an approach "would have expanded the effects test in employment cases -- despite the clear philosophical opposition to the effects test by the Department [of Justice], most clearly articulated in the voting rights area."17

Applying Judge Roberts' "clear philosophical opposition" to using an effects analysis would greatly impede our ability to protect minority communities from bearing the brunt of toxic waste, dirty air and polluted water. This apparent insensitivity to racial inequality poses troubling questions as to whether the Senate should confirm him as the nation's next Chief Justice.

**IV. Secrecy**

On the one hand, President Bush has asked the Senate to confirm Judge Roberts as Chief Justice of the United States, a lifetime position of enormous national influence and constitutional importance. Judge Roberts could easily serve in that role for many decades.

On the other hand, based on spurious claims of "privilege", the President has refused to give the Senate a small handful of documents from the former President Bush's Administration when Judge Roberts was the Principal Deputy Solicitor General. Exactly this situation arose in 1986 when President Reagan nominated Justice Rehnquist to the Chief Justice position. President Reagan, however, realized that the importance of the nomination outweighed any possible interest in secrecy, and turned over the documents: "I was sorry to have to release these documents but Supreme Court nominations are so important that I did not want my nominees to enter upon their responsibilities under any cloud."

In contrast to President Reagan's understanding of the Senate's constitutional duties, President Bush's reliance on unfounded assertions of "privilege" and refusal to acknowledge precedent naturally lead to the suspicion that these records contain material so incendiary that, despite Judge Roberts' credentials, the Senate would not confirm him. It is thus doubtful whether the Senate could fulfill its constitutional duty to "advise and consent" on a nominee if they were to confirm a Chief Justice whose record remains -- in President Reagan's words -- "under a cloud".

Sincerely,

S/

Carl Pope

cc: Members, Senate Committee on the Judiciary

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[16] Memorandum from John Roberts to Fred Fielding (Jan. 31, 1983).
[17] Memorandum from John Roberts to the Attorney General (June 16, 1982).

Statement of Catherine E. Stetson
Partner, Hogan & Hartson L.L.P.
before the Senate Committee on the Judiciary

Hearing on the Nomination of John G. Roberts, Jr.
September 15, 2005

Mr. Chairman, Senator Leahy and Members of the Committee. Thank you for the opportunity to testify today. My name is Cate Stetson. I am a partner in the law firm of Hogan & Hartson. And I am here today in support of the nomination of my friend and former colleague, Judge John Roberts, to be the next Chief Justice of the United States.

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I came to Hogan & Hartson as an associate in 1997, after two judicial clerkships. Those clerkships gave me a deep appreciation for good advocacy; but I grew up as a lawyer on Judge Roberts's watch. It was my six years working for him at Hogan & Hartson, first as his associate, and later as his law partner, that taught me how to be an advocate and lawyer. And what a teacher to have.

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Appellate advocacy boils down to two things: writing, and talking. Everyone can do those things; few can do both of them well. Judge Roberts can. I learned how to write like an advocate from Judge Roberts, and I learned it the old-fashioned way: by reading his own work and taking to heart the careful handwritten edits he made to everything I ever wrote for him. Nothing escaped him, on any level; he exposed and tested weaknesses in reasoning, he caught grammatical errors, and in between

those extremes, he suggested subtle and not so subtle changes to a brief's wording, tone, and structure – changes that always unlocked the full potential of the arguments we were making for our clients. And each client could always be assured that the arguments Judge Roberts put forward were the most forceful ones that could be advanced in support of that client's position in that case.

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What I have learned of oral advocacy I also learned from Judge Roberts, by watching his every move. The Judge's preparations for every argument he gave were intense and exacting – sometimes hundreds of hours of solitary work for fifteen minutes of argument. And his arguments were superlative – brilliant, focused, compelling, and delivered in a conversational style that prized substance over drama. This was his rare gift. I remember one case in particular that by some lights would not rate as important, but it shows the measure of his talents. He was appearing in the court of appeals along with a government agency in an attempt to defend the agency's actions. Judge Roberts was given all of two minutes to argue. He took the handoff from an able agency lawyer who had made no headway against a hostile panel of judges. One minute later, the courtroom was his. He identified the issue that had troubled the panel, brought three judges round to our position, and did it all in a span of seconds.

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The Judge was not just a good lawyer and a good teacher; he was a thoughtful mentor and friend. My first oral argument was in Anchorage, Alaska. Within

hours, Judge Roberts, back in Washington, somehow got word on how the argument went and sent me a warm congratulatory message. When I gave my first D.C. Circuit argument several years ago, Judge Roberts was in the audience. After the argument was over, Judge Roberts and I walked back from the courthouse to our office, as we always did after his own oral arguments, and we dissected the panel's questions and answers together. Judge Roberts mentored me in less tangible, but equally important, ways as well. I watched him interact with colleagues and staff, no matter what their title or position, in the same decent, gentlemanly way. His evenhandedness was matched by his eventemperedness. Whether dealing with clients or adversaries, Judge Roberts was unfailingly courteous, never strident, never engaging in the empty bluster that so often passes for discourse among lawyers.

***

Five years ago, Judge Roberts and his wife Jane – who is also a practicing lawyer – adopted two children. That same year, my husband and I had our first child as well. We all learned at the same time, and continue to learn, what a delightful, chaotic, sometimes frustrating and always joyful thing it is to be a parent. When I returned to the firm after maternity leave, I faced the difficult challenge of being a new parent and a law firm associate. The transition back to work is difficult for any working mother, and my experience was no different; but the transition back to working with Judge Roberts was seamless. We just picked up where I had left off several months before. He never questioned the balance I chose to strike between

my obligations to my family and to my colleagues and clients. He supported me in both, quietly and without fanfare; he simply continued to demand from me the same thing he demanded from any associate as well as himself – legal work of the highest caliber.

***

At the end of the year 2001, I was being considered for partnership. I had been on maternity leave for three months out of that year. I was also working part-time. Either one of those facts might have impeded my promotion to partnership at other law firms. But neither my leave of absence nor my part-time status mattered to Judge Roberts, or to my firm; what mattered was that I was a good lawyer. With strong support from Judge Roberts, I became a partner at Hogan & Hartson.

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By the time Judge Roberts left for the D.C. Circuit, we had worked on numerous matters together – on legal topics as diverse and arcane as patent appeals, energy cases, ERISA briefs, preemption challenges. Much of what we worked on together would seem quite unglamorous to people, even lawyers, who lacked a passion for such work. But Judge Roberts has that passion. No one is more dedicated, more devoted to the law than Judge Roberts. It was my honor to work for him for several years, and it is my honor to appear here on his behalf.

I would be pleased to answer any questions you may have.

Testimony
*United States Senate Committee on the Judiciary*
**Nomination of John G Roberts (Witness List for September 15)**
**September 15, 2005**

**David Strauss**
Harry N. Wyatt Professor of Law , University of Chicago Law School

STATEMENT OF
DAVID A. STRAUSS
HARRY N. WYATT PROFESSOR OF LAW, THE UNIVERSITY OF CHICAGO LAW SCHOOL
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARINGS ON THE NOMINATION OF JOHN G. ROBERTS TO BE CHIEF JUSTICE OF THE UNITED STATES
SEPTEMBER 15, 2005

Mr. Chairman and Members of the Committee:
Thank you very much for the opportunity to appear before you in these hearings on the nomination of Judge John Roberts to be Chief Justice of the United States. My name is David Strauss. I teach constitutional law at the University of Chicago, where I have been on the faculty since 1985. Before I joined the faculty at Chicago, I was a lawyer in the Office of the Solicitor General, from 1981 to 1985.
A generation ago, in 1971, when President Nixon announced the appointment of William Rehnquist to the Supreme Court, the President characterized his philosophy as that of a "judicial conservative." Both President Nixon and Justice Rehnquist, in remarks they made at the time, gave a clear idea of what they believed a judicial conservative to be.
The hallmark of judicial conservatives, at that time, was the belief that most controversial issues should not be resolved by judges but should be left to the elected branches of government; and that the judgments of the elected branches should receive the greatest deference from the Court. In his statement introducing Justice Rehnquist, President Nixon identified, as a model of a judicial conservative and what he called a "constitutionalist," the Justice that Justice Rehnquist was replacing—Justice John Marshall Harlan, who had been the most consistent dissenter from the Warren Court's controversial decisions. Justice Harlan's opinions emphasized two themes: deference to the elected branches of government, and the importance of adhering to precedent.
That is what judicial conservatives believed a generation ago. Now, however, judicial conservatism means something else—in fact, something almost diametrically opposite to what it meant in 1971. Increasingly, the hallmark of judicial conservatism is a distrust of the elected branches—particularly a distrust of the federal government and, more specifically, distrust directed toward the Congress of the United States. That view of Congress has been accompanied by a dramatic change in the approach to precedent. Today many self-styled judicial conservatives are quick to assert their eagerness to overturn precedents, even centuries-old precedents.
This change in the nature of judicial conservatism is vividly illustrated by the contrast between what President Nixon said about the Supreme Court when he nominated Justice Rehnquist, on the one hand, and, on the other hand, the ambitions that President George W. Bush—who has nominated Judge Roberts to be Justice Rehnquist's successor—has for the Court. President Bush's ideal justices, as he has identified them, do not include Justice Harlan. Instead, President Bush has singled out Justices Antonin Scalia and Clarence Thomas as his models for judicial appointments.
The brand of judicial conservatism practiced by Justices Scalia and Thomas is far removed from that

of Justice Harlan. The current Supreme Court has been more hostile to legislation enacted by the Congress than any Court in our history, save for the soundly repudiated Court of the pre-New Deal era. And among the current justices, Justices Scalia and Thomas have been the most hostile; Justice Thomas, it is fair to say, is more hostile to the exercise of federal legislative power than any other Supreme Court Justice appointed in the last 75 years.

At the same time, Justices Scalia and Thomas, President Bush's professed models for a Supreme Court appointment, have left no doubt about their willingness to overturn precedent, even long-standing precedent, in order to restore what they believe to be the true meaning of the Constitution. It is hard to imagine a position more antithetical to the conservatism of Justice Harlan.

This evolution in the nature of judicial conservatism is, in my view, one of the most important developments in American constitutional law in the last generation. This development throws into sharp relief what is at stake in these hearings, and more generally in the appointment of new justices to the Supreme Court.

If President Bush is to be taken at his word, he is seeking something very different from what President Nixon sought when he nominated Justice Rehnquist. President Bush is not seeking justices who will be modest and restrained, who will be acutely sensitive to the limited role that courts should play in a democracy. He is seeking justices—whether or not he has found one in Judge Roberts—who will energetically seek to block the exercise of federal legislative power on the basis, not of established precedents, but of their own conceptions of what the Constitution says. And he is seeking justices—again, whether or not he has found one in Judge Roberts—who will show little hesitation in radically changing legal principles even if those principles have a long history of having been accepted by the American people.

Many of the decisions reached by the current Court in recent years help illustrate what is at stake in the appointment of Supreme Court Justices, at this point in our history. In most of these cases, the Supreme Court was closely divided. Many of the principles on which these decisions are based—principles limiting the power of the elected branches, particularly Congress, and principles that draw long-standing precedents into question—are not yet firmly established. Whether they become firmly established will depend in large part on the people who fill Chief Justice Rehnquist's seat and Justice O'Connor's seat.

1. Congress's power under the Commerce Clause. From the mid-1930s to the mid-1990s, the Court did not hold a single Act of Congress unconstitutional on the ground that it exceeded Congress's power to regulate commerce among the states. But in 1995, the current Supreme Court invalidated the Gun-Free School Zones Act, in United States v. Lopez, 514 U.S. 549 (1995); then, in 2000, the Court struck down an even more significant piece of federal legislation, the Violence Against Women Act, in United States v. Morrison, 529 U.S. 598 (2000).

The deference that the Court showed for sixty years before Lopez and Morrison was based on the sound principle that in a nation like ours, in which the web of interstate connections is almost unfathomably complex, it is for Congress—not the courts—to decide whether a particular kind of activity has enough of a connection to interstate commerce to justify federal regulation. The decisions in Lopez and Morrison repudiated that principle and asserted a judicial prerogative against the capacity of Congress to make such judgments. Of course, the repudiation is not complete; it could not possibly be. In more recent decisions, the Court has sometimes deferred to a congressional judgment that might seem subject to attack under Lopez and Morrison. See, e.g., Gonzales v. Raich, 125 S. Ct. 295 (2005); Pierce County v. Guillen, 537 U.S. 129 (2003).

But this important issue remains very much in the balance, and the next few appointments to the Supreme Court are likely to determine how it is resolved. The issue is, to repeat, whether the Congress or the courts will make the crucial judgments about the role that the federal government should play in an extraordinarily interdependent economy and society like that of the twenty-first century United States. For several decades, the nearly unanimous view of Supreme Court justices, including conservative justices, was that such judgments belonged to the Congress. The conservative

judges whom President Bush holds up as models believe that it belongs to the courts.
2. Congress's power under the Fourteenth Amendment. Since the Civil War, one of the cornerstones of our constitutional order has been that Congress has the power to ensure that state governments do not violate the rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments. In a series of decisions, the current Supreme Court—again with the enthusiastic concurrence of the Justices whom President Bush has identified as models of judicial conservatism—has significantly limited this power.
In particular, the Court has vigorously second-guessed Congress's conclusions about when federal legislation is needed to remedy unconstitutional action by state governments. The Court has discarded Congress's conclusions about the need for remedial action in one area after another— the free exercise of religion (City of Boerne v. Flores, 521 U.S. 507 (1997)), discrimination against women (United States v. Morrison, supra), age discrimination (Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)), discrimination on the basis of disability (Board of Trustees v. Garrett, 531 U.S. 356 (2001)), and the protection of property rights (Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)).
A decision by the Congress that legislation is needed to enforce individuals' constitutional rights against the states—based, as it is, on a textually specific and historically validated power of Congress, and involving complex factual judgments—would seem to be especially unsuited for second-guessing by judges. Traditional judicial conservatives, who were acutely sensitive to the institutional limits of courts, would have been especially loath to substitute their own judgment on these matters. But the willingness to second-guess those judgments has been central feature of the new form of judicial conservatism that is practiced today.
Again, the law in this area remains unsettled. More recent decisions have upheld exercises of congressional power under the Fourteenth Amendment. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003); Tennessee v. Lane, 124 S. Ct. 1978 (2004). But the Court in those cases was closely divided, and Justices Scalia and Thomas were in dissent—urging that legislation enacted by Congress be declared unconstitutional and, in Justice Scalia's case, that the power of Congress to enforce individual rights be narrowed to an unprecedented degree. See Tennessee v. Lane, 124 S. Ct. at 2008-13 (dissenting opinion). In this area, as well, the power of Congress remains in the balance. This and future appointments will determine the extent to which Congress will retain the historic and vital power to protect the individual rights that the Constitution guarantees.
3. The regulation of commercial advertising. Well after the Supreme Court began to enforce the First Amendment vigorously to protect political dissent, the Court adhered to the doctrine that commercial advertising was not protected speech. In 1976, the Court overturned that doctrine and held for the first time that commercial advertising was entitled to a measure of First Amendment protection. Justice Rehnquist—then still a relative newcomer on the Court—dissented; he insisted the commercial advertising raised much different issues from the traditionally protected forms of speech, and that legislatures—not courts—were in the best position to determine the degree to which advertising should be regulated. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
In its 1976 decision, the Court was careful to spell out the ways in which commercial advertising presented distinctive issues and to emphasize the need to allow relatively extensive regulation of that form of speech. Beginning in the 1990s, however, the Court began to expand the protection of commercial expression, essentially wielding the First Amendment as a means of economic deregulation. For example, the Court severely limited the power of the states to regulate tobacco advertising. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). The Court also cut back on the power of the federal government to regulate the advertising of drugs. Thompson v. Western States Medical Center, 535 U.S. 357 (2002).
These decisions potentially eliminate any power in either Congress or the state legislatures to regulate nondeceptive advertising. They even draw into question consumer protection laws designed to

prevent deceptive advertising. The new conservatives, notably Justice Thomas, have been the strongest advocates of narrowing the power of elected legislatures to address the problems caused by harmful or deceptive advertising. Here, again, an area on which Congress and the state legislatures are likely to be in the best position to decide what will promote the welfare of the American people is, increasingly, becoming the province of the judges. And it is the supposedly conservative justices who are most aggressive in asserting the power of the Court.

4. Church-state relations. Questions of the relationship between the government and religion—in particular, questions about both material aid from the government to religion and the symbolic endorsement of religious views by the government—have produced some of the most closely-divided Supreme Court decisions in recent years. It is easy to find decisions that draw extremely fine lines between permissible and impermissible aid to religion. Last Term's decisions on the public display of the Ten Commandments are a vivid example.

The principal lesson of these cases, in my view, is that this is an area singularly unsuited to absolutes and simplistic formulas. The question of the relationship between government power and religion has been one of the most divisive in human history. In a nation characterized, as ours is, by a great intensity and diversity of religious belief, it would be very surprising if there were any simple solutions in this area. In that sense, the somewhat wavering, highly fact-specific decisions of the Supreme Court on government aid to religion should not surprise us.

Perhaps the most remarkable development in this sensitive area has been the position taken by Justice Thomas. Justice Thomas has urged that the Establishment Clause of the First Amendment—which has been interpreted to limit the extent to which government may aid religion—simply does not apply to the states. His position would reverse decades of precedent and allow forms of state aid to religion—including the formal establishment of an official state religion—that have been considered off-limits for a century and a half. It is difficult to imagine a position that would be more at odds with the views of traditional judicial conservatives.

5. The right of privacy. The constitutional right to privacy is the basis not just for the Supreme Court's decision in Roe v. Wade, but for many other important decisions as well. The Supreme Court has held, on the basis of this right, that states may not make it a crime for married couples to use contraceptives, in Griswold v. Connecticut, 381 U.S. 479 (1965), or for homosexuals to engage in intimate relations, in Lawrence v. Texas, 539 U.S. 558 (2003). The Court has also suggested that there are constitutional limits on the government's power to find out information about private matters, such as an individual's medical history. See Whalen v. Roe, 429 U.S. 589, 599 (1977).

This constitutional right of privacy has its origin in an opinion written by Justice Harlan. In Poe v. Ullman, 367 U.S. 497, 539-55 (1961) (dissenting opinion), Justice Harlan specifically recognized, and defended, a right to privacy in intimate relationships that, he acknowledged, was not explicitly enumerated in the Constitution. Here again, there is a stark contrast between judicial conservatives like Justice Harlan and the kinds of conservatives that President Bush has said he admires.

Justices Scalia and Thomas have disparaged not just the right to privacy recognized in many precedents, decided over decades, but the very concept of unenumerated rights. Under the approach they have taken, an individual trying to resist the prying eyes of the government, or the government's intrusion into one's intimate relationships, must point to specific language in a particular constitutional provision or to a long-standing and specific practice. Justice Harlan's view of the unenumerated right of privacy was based on a generous and nuanced reading of the traditions of the American people—what used to be regarded as the approach of a judicial conservative. The new kind of judicial conservative, who would severely narrow or even eliminate the constitutional right to privacy, takes a different approach.

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I hope I have been able to convey some sense of what I believe is at stake in the judicial confirmation process at this point in the Supreme Court's history. For the first time since the Great Depression, the Court is seriously challenging the power of the Congress to address problems that Congress believes

to be of national concern. The Court may be poised on the brink of a dramatic change in the constitutional law governing the relationship of church and state. The right to privacy, not only in abortion cases but in many other, less high-profile but crucially important areas, is under sustained attack. All of these areas of the law are, as of now, unsettled; the law could move in any direction. The appointees who come before this Committee will determine the direction in which it will move.

It has not been my purpose, in these remarks, to pass judgment on Judge Roberts, whose extraordinary professional qualifications speak for themselves. I do not know whether, in nominating Judge Roberts, President Bush has carried through on his ambition to try to remake the Supreme Court in the image of Justices Scalia and Thomas. Some of the memoranda Judge Roberts wrote earlier in his career suggest that he would find the views of those Justices congenial. But Judge Roberts has explained that he expressed those earlier views in a different context, and certainly the public statements Judge Roberts has made since his nomination, and in testimony before this Committee, have emphasized the values of traditional judicial conservatives like Justice Harlan—judicial modesty and self-restraint and a due regard for precedent.

But whatever judgment the Committee reaches on Judge Roberts, President Bush will have at least one, and perhaps more, additional opportunities to reshape the Supreme Court. His next appointee will replace not Chief Justice Rehnquist—who, for much of his tenure, voted with Justices Scalia and Thomas on the issues I have discussed—but Justice O'Connor, who took an approach to the Constitution that more closely resembled Justice Harlan's. That appointment, in particular, might dramatically change the balance on the Court.

We can expect President Bush to appoint a judicial conservative. The crucial question is what kind of judicial conservative he will appoint: one who believes in deference to the elected branches of government and in adherence to precedent, or one who is willing to sweep aside the judgments of the Congress and of the state legislatures, and to overturn long-standing precedent, in the pursuit of his or her own vision of what the Constitution requires. In all the important areas I have described—and perhaps others as well—the choice between those starkly contrasting visions of judicial conservatism may determine what kind of nation Americans live in for decades to come.

I would be happy to answer any questions the Committee might have.

**Written Testimony of Ann Marie Tallman,**
**President and General Counsel of MALDEF,**
**Regarding the Nomination of John G. Roberts, Jr.**
**as Chief Justice of the United States of America**

September 15, 2005

Mr. Chairman and Members of the Committee, thank you for the invitation to testify regarding the nomination of John G. Roberts, Jr. to the post of Chief Justice of the United States. I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund.

MALDEF was established in 1968 to advance the civil rights of Latinos. For the past 37 years, as the Latino community has grown to over 40 million people and become the largest ethnic minority group in America, MALDEF has provided legal advocacy on matters such as education, voting rights, immigrant rights, access to justice and fair employment - critical areas in which success leads to Latinos achieving our American dreams.

The Supreme Court's fundamental role within our federal constitutional framework is to protect the constitutional rights of all, including minority groups, against any unconstitutional majoritarian tendencies of the elected legislative and executive branches. After a thorough review of John Roberts's available record, we are not fully assured that he properly respects this crucial function of the Court. Judge Roberts's legal opinions in the areas of MALDEF's core mission often place him in opposition not only to equal justice for Latinos, but opposed to positions taken by bipartisan majorities in Congress and the Reagan Administration that he served. His legal record also raises serious questions about Roberts's willingness to subordinate the protection of fundamental civil rights to the maxim of "judicial restraint."

For example, as Special Assistant to the Attorney General, John Roberts criticized the 1982 U.S. Supreme Court decision in *Plyler v. Doe*. In *Plyler*, the U.S. Supreme Court, following two lower courts, struck down a Texas law that effectively barred undocumented children from the state's public school classrooms. Roberts criticized the U.S. Solicitor General's office for not standing up for what he described as "judicial restraint" and supporting the State of Texas's arguments on the Equal Protection Clause, which, he wrote, "could well have . . . altered the outcome of the case." The nominee, it is apparent from this memorandum, would not have used the constitutional authority of the Supreme Court to vindicate the constitutional rights of these immigrant children.

As Associate White House Counsel, Roberts wrote of his support for national identification cards and derided as "clinging to symbolism" civil liberty and privacy concerns surrounding them. In disagreeing with the Reagan Administration's opposition to a national identifier, he failed to recognize the potential for harmful discrimination in the pretextual singling out of Latinos and African Americans that would likely occur if such a system were in place. Again, Roberts failed to respect the constitutional interests of the minority whom the Court is designed to protect.

Regarding equal access to education, John Roberts wrote in support of curtailing the federal government's ability to investigate and eradicate discrimination by gender and disability in education programs that receive federal funds. Mr. Chairman, you and many members of this Committee led the way to overturning that interpretation in 1988. Further, the nominee was an architect of the Administration's unsuccessful proposals to

strip federal courts of their jurisdiction to establish remedies to end unlawful school segregation.

Regarding voting rights, Roberts mischaracterized the bipartisan efforts of the Chairman and other members of this Committee to restore the "effects test" in voting discrimination cases. He was wrong when he wrote in 1981 that your efforts "would establish essentially a quota system for electoral politics."

John Roberts is out of step with the American public on many issues of fundamental concern to Latinos and all Americans. If just a few of Judge Roberts's written legal views had been adopted and became settled federal law, 1) thousands of undocumented immigrant children may have been barred from American public schools through no fault of their own, left largely illiterate and without hope as members of a permanent American underclass; 2) a national system of identification cards might be in place, representing an unprecedented intrusion into Americans' privacy and placing minorities at a greater risk of racial profiling; and, 3) electoral empowerment of Latinos, African Americans, Asian Americans and Native Americans and election of a record number of minority elected officials that are currently serving the American people at the federal, state, and local level would likely not have been achieved.

This confirmation process is about more than a career record of opposition to important core principles of equality. The next Chief Justice will lead the Court in decisions that will have a lasting impact upon Latino and all American families well into the middle part of this century. We need men and women on the Court who will understand the changing nation. Strikingly, on official White House Counsel and Justice Department memoranda that we have reviewed, Judge Roberts displayed a disturbing pattern of dismissive, derisive, and flippant comments that demonstrate a possible lack of respect for Latinos, women, and Native Americans.

John G. Roberts, Jr. has consistently advanced extreme positions and displayed insensitive attitudes that compel us to oppose his confirmation to be Chief Justice of the United States of America.

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Specific findings from MALDEF's research into the legal record of John G. Roberts, Jr. follow.

## I. Roberts's Reagan-Era Record

### A. Immigrants' Rights

#### 1. *Plyler v. Doe*

The Supreme Court's 1982 ruling in *Plyler v. Doe* affirmed the constitutional right of undocumented immigrant children to participate in K-12 public education programs on an equal basis with other children. In striking down a Texas law that effectively prevented undocumented children from attending the state's public schools, the *Plyler* Court held that the Fourteenth Amendment and its guarantee of "equal protection of the laws" apply to undocumented immigrants. The Court then ruled that Texas had no substantial interest in preventing these children from becoming educated, productive members of society. MALDEF represented the schoolchildren in *Plyler*.

The *Plyler* Court recognized that upholding the Texas statute would, in effect, sanction the creation of a permanent underclass of American residents who are "encouraged by some to remain here as a source of cheap labor, but nevertheless denied benefits that our society makes available to citizens and lawful residents." The Court noted with concern that "[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." Further, the Court noted that the children at issue in *Plyler* bore no responsibility for their immigration status and that to punish them for a condition that is beyond their control offends fundamental American conceptions of justice.

A memorandum co-authored by John Roberts on the day of the *Plyler* decision raises serious questions about his views on the equal protection principle established in *Plyler v. Doe* and the fundamental conception of justice that it reflects. This memorandum expresses regret over the fact that the Solicitor General's Office failed to submit a brief "supporting the State of Texas – and the values of judicial restraint – [that] could well have . . . altered the outcome of the case."

The *Plyler* decision has permitted undocumented children to have a considerable positive impact upon American society. The effect of the landmark ruling in *Plyler* has been to allow undocumented children to earn an education at their local primary and secondary schools, participate more fully in their communities, and contribute more to American society and the national economy than they would have if the discriminatory Texas statute had been upheld. Roberts's evident disappointment at the government's failure to change the outcome in *Plyler* is therefore deeply concerning.

#### 2. National Identification Cards

As Associate White House Counsel, Roberts took the opportunity of a routine Justice Department clearance of INS testimony before a Congressional committee to offer his personal views on immigration. In an October 21, 1983 memorandum, Roberts wrote:

> I recognize that our office is on record in opposition to a secure national identifier, and I will be ever alert to defend that position. I should point out, however, that I personally do not agree with it. I yield to no one in the area of commitment to individual liberty against the spectre of overreaching central authority, but view such concerns as largely symbolic so far as a national I.D. card is concerned. We already have, for all intents and purposes, a national identifier – the social security number – and making it in form what it has become in fact will not suddenly mean Constitutional protections would evaporate and you could be arbitrarily stopped on the street and asked to produce it. And I think we can ill afford to cling to symbolism in the face of the real threat to our social fabric posed by uncontrolled immigration.

The ease with which Roberts dismisses civil liberty and privacy concerns surrounding national identification cards and his failure to credit the valid concerns of Latinos and others regarding discriminatory law enforcement stops is as disturbing as his characterization of "uncontrolled" immigration as a "real threat to our social fabric." Further, while Roberts is often portrayed as supporting a limited role for the federal government, here he endorses an unprecedented intrusion by the federal government in the private sphere of Americans.

### 3. "Illegal amigos"

In a September 30, 1983 memorandum that offers an apparent attempt at ethnic humor, the nominee recommends that written remarks for publication in the periodical "Spanish Today" refer to a legalization program in the pending immigration legislation. Roberts wrote, "I think this audience would be pleased that we are trying to grant legal status to their illegal amigos" (emphasis in original). The nominee's willingness to ascribe a single perspective to all Latinos fails to capture the reality that the Latino community is as rich and varied as any other American community. Further, that Roberts would draft, initial, and circulate within the Justice Department a memorandum containing an apparent ethnic joke about Hispanics is greatly troubling.

## B. Minority Voting Rights

Judge Roberts's record from his service under President Reagan reveals his involvement in Reagan's efforts to prevent Congress from restoring the Voting Rights Act (VRA) following the Supreme Court ruling in *City of Mobile v. Bolden.* In *City of Mobile*, a divided Court held that minority voters must prove racially "discriminatory intent" when litigating cases under Section 2 of the VRA. (Previously, it was sufficient to show "discriminatory effects" to make a claim under Section 2.) Two years later, Congress, by overwhelming majorities in both the House and the Senate, legislatively overturned *City of Mobile's* discriminatory intent requirement and amended Section 2 to make clear that the provision extends to discrimination both in intent and effect. It did so over the prolonged and vociferous objections of the Reagan Administration.

Internal memoranda from this period show that Roberts played a key role in the development of the Reagan Administration's policies on the Voting Rights Act. The Reagan Administration's public strategy, as articulated by Roberts throughout these internal memoranda, was to loudly profess support for the Voting Rights Act "as is" – that is, without Congress' contemplated amendments to Section 2. Roberts – and the Reagan Administration – adopted the position that the Supreme Court had changed nothing when it interpreted Section 2 to require minority voters to show proof of discriminatory intent. As civil rights advocates, legal experts, and the media noted at the time, however, *City of Mobile* had in fact dramatically weakened the protections of the Act by requiring minority voters to meet a virtually insurmountable burden of proof to proceed under Section 2. Congress' legislative reinstatement of the "effects" standard was a restorative measure, and not the dramatic departure that Roberts and the Reagan Administration attempted to portray using deceptive and alarmist rhetoric.

Among the writings authored by Roberts on the Voting Rights Act during this period are:

- A November 17, 1981 memorandum in which Roberts mischaracterizes the proposed Congressional fix to Section 2 as a "radical experiment" rather than a restoration of Congress's original purpose. Roberts also defends the Administration's endorsement of a "bailout" fallback provision.

- A December 22, 1981 memorandum articulating the problems that Roberts perceived with "switching" to an effects test, and containing Roberts's urgent exhortation that "<u>something</u> must be done to educate the Senators on the seriousness of this problem" (emphasis in original). The memorandum endorses the false view that an effects test for Section 2 "would establish essentially a <u>quota system for electoral politics</u> by creating a right to proportional racial representation on elected governmental bodies" (emphasis in original).

- Several January 1982 drafts of talking points on the intent/effects question, again equating an effects test with "quotas."

- January 1982 drafts of a letter to the editor responding to a critical editorial in the *Washington Post*, again refuting that the holding in *Mobile v. Bolden* changed previous understandings of the law, and opining that the proposed fix to Section 2 would introduce "uncertainty and confusion" into the provision.

- Drafts of a February 1982 op-ed piece for submission to the *New York Times*, eventually published under the Attorney General's name. The piece called the reinstatement of the effects test a "dramatic change," again invoking the alarmist "quota" language and endorsing the view that "overruling the *Mobile* decision by statute would be 'an extremely dangerous course of action under our form of government.'"

- March 1982 talking points for Reagan's use on an Alabama trip with Senator Heflin, a "critical vote in the Judiciary Committee," asserting that an effects test in the Act would lead to the invalidation of "any electoral system, no matter how long in place, that is not neatly tailored to achieve proportional representation along racial lines."

It is quite clear from these memoranda and other available documents that Roberts was not on the sidelines during the debate over the Voting Rights Act and the administration's aggressive campaign to roll back minority voting rights; he was a passionate strategist, analyst, and advocate for Reagan's policies on this issue, and one of the architects of the Administration's public relations strategy. If Roberts's view in this area had prevailed, the electoral gains that Latinos and other minority groups have made in the past decades may not have been achieved.

### C. Affirmative Action

Roberts's Reagan-era writings on affirmative action demonstrate apparent opposition to affirmative action programs. Although Roberts's memoranda in this area focus primarily upon affirmative action in government contracts, the views that he espouses in this context raise concerns with respect to his potential views towards affirmative action in higher education and other areas as well. We are concerned that the nominee's legal opinions in this area may be in conflict with Justice O'Connor's majority opinion in *Grutter v. Bollinger*, which held that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the narrowly tailored use of race in university admissions decisions.

Roberts attempts to discredit affirmative action programs and their underlying rationale with a zeal that suggests that these memoranda may well reflect personal views on the subject, not merely the work product of a government attorney/advocate.

Among Roberts's writings on this issue were:

- An August 25, 1981 memorandum regarding a report from Chairman of the U.S. Commission on Civil Rights. Chief among Roberts's critiques of the report was that "[t]he reverse discrimination involved in affirmative action quotas is simply dismissed as 'benign.'" The nominee does not, it seems, distinguish between race-based preference systems developed to remedy past discrimination and invidious forms of racial discrimination based in stereotype.

- A December 22, 1981 memorandum summarizing a U.S. Commission on Civil Rights report on affirmative action. Roberts characterizes the report, which found that structural discrimination continued to affect American society, as "self-serving," and derides the logical basis of affirmative action as "perfectly circular." Roberts argues that the defects of an affirmative action program described in the report are the necessary effect of affirmative action

programs: "There is no recognition of the obvious reason for the failure: the affirmative action program required the recruiting of inadequately prepared candidates" (emphasis in the original). Roberts argues, in effect, that affirmative action programs necessarily fail because the minority candidates who qualify for the programs lack sufficient skills to meet the job requirements. Many well-qualified minorities would disagree with the nominee's position.

### D. Judge Roberts's Support for Limiting Executive Branch Enforcement of Federal Civil Rights Statutes

During his tenure in the Reagan Administration, Roberts authored memoranda that advocated limiting the scope of Title IX, which guarantees gender equity in education programs, and he supported narrow interpretations of disability rights legislation. Roberts's writings in these areas suggest a strong tendency to take an exceedingly narrow view of Congress's authority to pass such protective legislation and an extremely narrow view of the application of the civil rights statutes themselves. In effect, Roberts would have limited executive powers to remedy discrimination.

Roberts drafted the following notable materials in these areas:

- A December 8, 1981 memorandum in which Roberts urges the President to support an amendment to federal regulations severely curtailing the coverage of educational institutions under Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973. The effect of such a revision would have been to limit the scope of executive branch civil rights enforcement.

- A February 12, 1982 memorandum in which Roberts recommends against intervening in a sex discrimination case filed by female prisoners against the Kentucky state prison system to remedy disparities in vocational training programs available to men and women in the prison. In support of his recommendation not to intervene, Roberts notes that private plaintiffs are bringing suit, intervention would be inconsistent with themes in the Administration's "judicial restraint effort," and further notes that guaranteeing rights for female prisoners may curtail the prison's ability to provide programs for men. The expense of providing equal facilities is not, however, a defense to constitutional violations of fundamental civil rights.

- An August 31, 1982 memorandum regarding *University of Richmond v. Bell* in which Roberts argues that the U.S. Department of Education was constrained in its investigations of Title IX violations and could only investigate programs which directly receive federal funds: "I strongly agree with [Assistant Attorney General for Civil Rights Brad Reynolds's] recommendation not to appeal [a lower court ruling that limited the investigations.] Under Title IX federal investigators cannot rummage wil-nily [sic] through institutions, but can only go as far as the federal funds go."

Once again, Roberts supports the most limited definition available for protective civil rights violations.

- A July 24, 1985 memorandum regarding the 1984 Supreme Court decision in *Grove City College v. Bell* in which Roberts offers personal support for limiting the coverage of Title IX to the program that receives federal financial assistance. He wrote: "There is a good deal of intuitive sense to the argument. Triggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions program is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students." Roberts's view on the proper coverage of Title IX was rejected by Congress with enactment of the Civil Rights Restoration Act, which countered the holding of *Grove City College* and ensures that Title IX applies to the entire institution receiving federal aid.

- A July 7, 1982 memorandum regarding *Board of Education v. Rowley*, a disability rights case brought under the Education for All Handicapped Children Act. The issue presented was whether the federal statute required the school board to provide a sign language interpreter for a hearing-impaired child. Roberts notes at the outset that the child "was an excellent lip reader" and writes that the federal district court engaged in "judicial activism [by using] the vague statutory language [of the Act] to overrule the [school] board and substitute their own judgment of appropriate educational policy." Roberts concludes approvingly that "[i]n this case a conservative majority of the Supreme Court turned back an effort by activist lower court judges to impose potentially huge burdens on the states."

- While at the Department of Justice, Roberts drafted memoranda endorsing the dismantling of the U.S. Department of Education or, as a fallback position, a severe limitation upon its power to investigate and remedy discrimination in federally-funded education programs. Roberts urged the Administration to not "abandon our efforts to reduce <u>costly and unnecessary</u> [Department of Education Office for Civil Rights] monitoring and administrative functions. For example, amendments to Title VI (race) and Title IX (gender) regulations to <u>narrow the scope of federal civil rights jurisdiction over educational institutions</u> would reduce these monitoring activities" (emphasis added). This statement raises serious concerns regarding Roberts's commitment to the continued federal role in reducing racial and gender-based discrimination in educational settings.

Roberts's writings in the area of executive branch enforcement of federal civil rights statutes demonstrate a troubling lack of commitment to the federal role in remedying discrimination. Had the nominee's views in this area prevailed, the power of the executive branch to remedy discrimination would be severely curtailed.

### E. Judge Roberts's Support for Limiting Federal Judicial Authority to Remedy Violations of Federal Civil Rights Statutes

In debates over school desegregation and the separation of federal powers under the Constitution, Roberts, as both Special Assistant to Attorney General French and as Associate White House Counsel, advanced ideological positions more extreme than those held by many of his colleagues in the Reagan Administration. Notably, Roberts was a vigorous proponent of legislative proposals to strip lower federal courts of the power to order busing as a remedy, thereby reducing the role of the courts in remedying unlawful discrimination. These memoranda can fairly be described as advocacy pieces in support of his view that busing is not a required remedy for school desegregation. More broadly, these memoranda may be viewed as advocating a reduced role for the federal courts in remedying federal civil rights violations.

Among Roberts's writings on this issue is a February 15, 1984 memorandum in which he describes an "extended internal debate" that took place in the Justice Department over the separation of powers in fashioning remedies for unlawful segregation in the schools. Roberts noted that Ted Olson "reads the early [Supreme Court] busing decisions as holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation." Roberts, however, notes that he advocated the position that "it is within Congress's authority to determine that busing is counterproductive and to prohibit the federal courts from ordering it." If Congress is empowered to strip the Supreme Court of the power to devise remedies for constitutional violations, as Roberts believed, both the independence of the judiciary and the power of federal courts to remedy civil rights violations may be severely threatened.

## II. Judge Roberts's Record as Deputy Solicitor General in the George H.W. Bush Administration

The White House has announced that it intends to withhold records from Roberts's tenure as principal deputy Solicitor General in the first Bush Administration. Many Senate Judiciary Committee members immediately denounced this move and made specific requests for documents related to 16 cases upon which Roberts worked; these cases involved affirmative action, redistricting, equal opportunity in education, the First Amendment, school prayer, and voting rights. The White House continues to refuse to disclose the requested information, arguing that internal deliberations require an assurance of confidentiality in order to be effective. The administration's argument that confidentiality is necessary to allow attorneys to express freely their own legal views runs counter to the Administration's argument that Roberts's memos and filings do not necessarily express his own views but are those of his client alone.

Public reports and publicly-filed briefs indicate that Roberts participated in the following key cases, among others:

- *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), in which Roberts, serving as Acting Solicitor General, submitted an amicus brief in support of a broadcasting company that challenged a federal policy to grant preferences to minority-owned firms in the awarding of broadcast licenses.

  Recent news reports suggest that Roberts played a key role in the Administration's decision to intervene on behalf of the nonminority broadcaster instead of in support of the affirmative action programs. *The Washington Post* reported on September 8, 2005 that "a Jan. 9, 1990 handwritten memo found in the files of Associate White House Counsel Fred Nelson suggested that Roberts was behind the office's refusal to [intervene in support of the FCC]. 'John Roberts at [the Solicitor General's Office] handling. [He is] reluctant to defend [the FCC's] position,' the memo said."

- *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), in which Roberts co-authored an amicus brief that argued against granting relief to African American students challenging segregation in their local schools.

- *Freeman v. Pitts*, 503 U.S. 467 (1992), in which Roberts co-authored an amicus brief arguing that the Court should incrementally release a Georgia school district from its court-imposed desegregation decree because the district had substantially complied with many, but not all, of its terms.

- *Rust v. Sullivan*, in which Roberts co-authored the government brief in support of new regulations preventing family planning programs that receive federal aid from providing education or services related to abortion. Although *Rust v. Sullivan* did not directly implicate *Roe*, Roberts's brief nonetheless specifically notes that "[w]e continue to believe that Roe was wrongly decided and should be overruled."

While the nominee's legal record from this period is incomplete due to the Administration's refusal to release records relating to the nominee's government service during this period, the information that we have been able to gather presents a picture of a government official who is not committed to the federal government's role in remedying discrimination.

## III. Judge Roberts's Record as a Federal Appellate Judge

While Judge Roberts's judicial record from his brief tenure as a member of the U.S. Court of Appeals for the D.C. Circuit is exceedingly limited, a number of his opinions from this period raise serious concerns regarding his commitment to the federal courts' constitutional role in protecting civil rights.

### A. Commerce Clause

In *Rancho Viejo, LLC v. Norton*, a real estate developer filed suit in federal court alleging that application of the Endangered Species Act of 1973 ("ESA") to protect the arroyo toad, an endangered species, exceeded Congress's powers under the Commerce Clause. The district court granted summary judgment in favor of the defendants, finding that Congress has the constitutional authority under the Commerce Clause to regulate private lands in order to protect the toad. The district court relied on the "takings" provision of the ESA to conclude that "taking" of the arroyo toad in order to build homes was an economic activity that substantially affected interstate commerce.

The developer appealed the decision and petitioned for rehearing by a panel of judges of the Court of Appeals for the D.C. Circuit Court. This petition was denied, but Judge Roberts dissented from the denial of rehearing and wrote that the district court had inappropriately focused upon whether the challenged regulation (the building of homes) substantially affected interstate commerce, rather than whether the activity being regulated (the arroyo toad) did so. Roberts would have granted a rehearing order to "consider alternative grounds [other than the Commerce Clause] for sustaining application of the Act that may be more consistent with Supreme Court precedent."

The Commerce Clause is a critically important instrument for Congress to enact legislation protective of individual rights and freedoms. Judge Roberts's opinion in *Rancho Viejo* suggests a willingness to contract the scope of Congress' power under the Commerce Clause. Although it is possible that the final line of Roberts's dissent, urging consideration of "alternative grounds for sustaining application" of the ESA, may mitigate the balance of his dissent, the opinion is sufficient to raise serious concerns that the nominee may seek to promote a jurisprudence in which the Commerce Clause's role in enabling protective civil rights and environmental protection legislation is severely cut narrowed from its current state.

### B. Individual Rights/Access to the Courts

Judge Roberts's opinion in *Taucher v. Brown-Hruska* raises serious concerns regarding his philosophy on access to the courts. In *Taucher*, the Court of Appeals reversed and vacated an award for attorneys' fees that was granted under the Equal Access to Justice Act (EAJA). EAJA is a critical tool for public interest attorneys who work to enforce and vindicate civil rights, and opens the courthouse doors for plaintiffs who might not otherwise be able to raise and litigate their claims.

EAJA allows for an award of attorneys' fees in cases where a plaintiff is a prevailing party against the U.S. government, unless the government's legal position is "substantially justified." Judge Roberts, writing for the majority in *Taucher*, vacated the award for attorneys' fees by finding that the Commission's defense was a reasonable one on the merits. The Commission, Roberts wrote, did not "act in defiance of a string of losses" or in conflict with an "unbroken line of authority."

Judge Harry T. Edwards issued a strong dissent from Roberts's majority opinion. Judge Edwards noted that a federal appellate court is bound to engage in a strictly limited review under an abuse-of-discretion standard. Further, he wrote that the "Government's positions bordered on frivolous" and that it was "absolutely clear on the record at hand" that the district court did not abuse its discretion in awarding attorneys' fees.

In *Acree v. Republic of Iraq*, American soldiers who were held as prisoners of war by the Iraqi government while serving in the 1991 Gulf War brought suit in district court under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Plaintiffs sued defendants, including the Republic of Iraq and Saddam Hussein, for compensatory and punitive damages for the torture suffered during their captivity. The district court entered a default judgment for plaintiffs and awarded over $959 million in damages. Following judgment for plaintiffs, the United States filed a motion to intervene, contesting the district court's subject matter jurisdiction. The district court denied the motion as untimely.

The appellate panel held that the district court abused its discretion in denying the United States's motion to intervene. Although the Court of Appeals rejected the government's argument that the FSIA was inapplicable to Iraq, it nonetheless vacated the district court's judgment for the soldiers and dismissed the lawsuit for failure to state a cause of action.

Judge Roberts concurred with the majority's judgment, but on a different basis. Judge Roberts agreed with the United States's argument that the FSIA is inapplicable to Iraq, and held that the Presidential Determination of May 7, 2003 stripped federal courts of jurisdiction in the case. Thus, Judge Roberts would have dismissed the case for want of jurisdiction.

Judge Roberts, in his *Acree* analysis, acknowledged that the jurisdictional question was a close one, and conceded that the majority had case law on its side. Yet he opted in his opinion to accept, unlike the majority, the interpretation that was *more* restrictive of a plaintiff's right to sue. Again, the ruling raises questions about whether Judge Roberts has shown an appropriate commitment to protecting litigants' right of access to the courts under applicable statutory and constitutional provisions.

Judge Roberts again blocked a civil rights litigant's access to the courts in *International Action Center v. United States*, invoking the doctrine of qualified immunity, which is often used to bar actions against government wrongdoers. In this case, Judge Roberts, writing for the majority, reversed and remanded the district court's decision that denied summary judgment for police supervisors based on qualified immunity grounds for the inaction theory of liability. Plaintiffs, in a §1983 action, claimed the supervisors were personally liable for constitutional torts because they failed to properly train and supervise subordinate officers, which led to tortious conduct. The supervisors sought interlocutory review of the district court's denial of qualified immunity as it pertained to this theory of liability. The Court of Appeals held that, absent an allegation that the supervisors had actual or constructive knowledge of past transgressions or were aware of

"clearly deficient" training, the supervisors did not violate any constitutional right through inaction.

**C. Criminal Justice/Prisoners' Rights**

In *Hamdan v. Rumsfeld*, Judge Roberts joined in a recent D.C. Circuit decision that granted the Bush Administration extraordinary power to try suspected terrorists in special military tribunals without basic due process protections, denied these detainees the ability to enforce the provisions of the Geneva Convention in federal court, and undermined bedrock principles of international human rights law. In permitting the military tribunals to go forward, the majority gave an expansive reading to Congress's resolution authorizing the President to respond to the September 11 attacks.

The *Hamdan* decision is troubling both in its erosion of fundamental due process rights and in the tremendous deference and expansive wartime authority that the court bestows upon the executive branch of the federal government. Given that Latino immigrants and other members of the Latino community have become caught in the wide net cast by the "War on Terror," the *Hamdan* decision raises serious questions about how far Roberts would be willing to take that deference to executive power if his is confirmed as Chief Justice.

Roberts's participation in the *Hamdan* decision also raises the ethical question of whether he should have recused himself from the case because the Bush Administration was the party-defendant and, *The Washington Post* has reported, White House aides were interviewing Roberts about his possible nomination to the Court during the same time that he sat on the panel for *Hamdan*. Under applicable law governing judicial ethics, a "judge must recuse himself or herself in any case in which the judge's 'impartiality might reasonably be questioned.'"

**CONCLUSION**

A thorough review and analysis of Judge Roberts's available legal record, as described in part above, has led MALDEF to oppose his confirmation to the post of Chief Justice of the United States. We are not convinced that Judge Roberts properly respects the crucial constitutional function of the Supreme Court in protecting the civil rights of the minority. Further, Judge Roberts has advanced legal opinions in areas of MALDEF's core mission that place him in opposition not only to equal justice for Latinos, but outside of the American mainstream.

We urge Senate Judiciary Committee Members and the full Senate to vote in opposition to the nomination of John G. Roberts, Jr. as Chief Justice of the United States.

## Ann Marie Tallman, MALDEF President and General Counsel

Ann Marie Tallman is a native of Iowa, as are her parents. Her Mexican-American mother is the child of migrant farm workers, and her father is of German descent. Ms. Tallman graduated with honors from the University of Iowa and received her law degree from U.C. Berkeley's Boalt Hall School of Law.

Ms. Tallman began her legal career with the Denver law firm of Kutak Rock, where she specialized in public finance law. In 1993, she was appointed by Mayor Wellington Webb to the post of Deputy Director of the Planning and Community Development Agency of the City and County of Denver. In this capacity, she advised Mayor Wellington Webb on housing and community development matters. Between 1994 and 2004, Tallman served as an executive with the mortgage lender Fannie Mae.

Ms. Tallman began working with MALDEF as a law student at U.C. Berkeley, where she enlisted MALDEF's support in ensuring equal public funding for a student-edited law journal on legal issues affecting the Hispanic community. Upon receiving her law degree, Ms. Tallman collaborated with MALDEF during her tenure as Executive Director of the Colorado Hispanic League, where she spearheaded statewide Hispanic census outreach and was actively involved in MALDEF's reapportionment and political redistricting efforts. Ms. Tallman also recruited a team of private attorneys to support MALDEF's voting rights litigation strategies in Colorado.

Ms. Tallman was appointed to MALDEF's Board of Directors in 1998 and named President and General Counsel of MALDEF in 2004. Founded in 1968, MALDEF advances the civil rights of Latinos through advocacy, legal action, community education, and leadership development. MALDEF focuses on the program areas of education, employment, immigrants' rights, political access, public resource equity, and access to justice.

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Testimony
*United States Senate Committee on the Judiciary*
**Nomination of John G Roberts (Witness List for September 15)**
**September 15, 2005**

**Susan Thistlewaite**
President , Chicago Theological Seminary

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Statement of
The Rev. Susan Brooks Thistlethwaite, Ph.D.
United States Senate Committee on the Judiciary
The Nomination of John G. Roberts as Chief Justice of the United States

My name is Susan Brooks Thistlethwaite and I am President and Professor of Theology at Chicago Theological Seminary. My academic training is in historical theology. My teaching and writing has emphasized contemporary religious life with particular attention to religion and social justice. It is an honor to be asked to give testimony before the Senate Judiciary Committee.

The Constitution's Promise

Our Constitution's promises -- such as the right to live free of tyranny and be able to worship freely -- are generous, even extravagant promises. They are promises made after freedom had been won from tyranny, a tyranny both political and ecclesiastical. They are promises made to the best of the human spirit as created by God.

A Supreme Court Justice entrusted to interpret the Constitution must embrace the fundamental element of our democracy—we will strive to be a body politic rooted in justice and fairness for all citizens. A Justice trusted to interpret the Constitution must understand that the prohibition of any establishment of religion and the protection of the free exercise of religion are particularly critical to the way in which this Constitution promises to "establish justice, insure domestic tranquility… promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

Based on his writings available to the public, John Roberts holds a very limited view of the Constitutional protection of religious liberty and an exceptionally permissive view of religious establishment. John Roberts sees a very small arena for the protection of the individual from tyranny including a rejection of a fundamental right to privacy and a very expansive view of the role of presidential power and law enforcement authority. In short, John Roberts' views seem not to reflect the deep and broad promise of the Constitution, but to risk, in fact permit the very tyranny over the individual's freedoms that the framers who wrote the Constitution most feared.

The Promise of the Constitution in the Thought of Dr. Martin Luther King, Jr.

Few Americans have understood the promises inherent in our Constitution better than Dr. Martin Luther King, Jr. The life and work of Dr. King have had a formative impact on my life. I was present as a teenager on the mall when Dr. King gave his "I Have a Dream" speech and while there almost by accident, it moved me and taught me. I have learned two fundamental lessons from Dr. King. One is that as a Christian it is not enough to talk the talk. You have to the walk the walk. Christianity is not just peppering your speech with a frequent "Amen" or even "Lord". If you can't love your neighbor as yourself, you are no kind of a person of faith.

The second thing I learned from Dr. King is how to be a citizen, indeed, even how to be a patriot. The

true patriot wants her or his country to be a shining example to the world of what a community can and should be, what Dr. King called "the Beloved Community." And when your country stumbles or fails to realize the Beloved Community, then the patriot speaks up and speaks out and witnesses to that fact, no matter what the cost.

Dr. King, in his "I Have a Dream" speech, was able, as few before or since, to reach into our Constitutional past and proclaim the deep sense of the words.

"When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory to which every American was to fall heir."

King argued that so far this promissory note to African Americans had been returned "insufficient funds." But the promise held. This promise for King was then a dream, but not a fantasy. "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'"

Dr. King's speech on the Mall is a solemn word of judgment on those who would interpret our Constitution in too specific or even narrow ways when it comes to the duty of the state to establish justice, to promote the general welfare, and secure the Blessings of Liberty for all Americans. Prophetic religion proclaims, "Justice shall roll down like waters and righteousness like an ever-flowing stream". The rushing river of justice cannot be parsed out by our Supreme Court justices in little droplets. It is not enough to be merely correct in interpreting our founding document. We must hold any candidate for the Supreme Court to the test of the Constitution's promise as King interprets it.

Like the framers of the Constitution, who were writing out of their own experience of resistance to tyranny, Dr. King's experience was with the tyranny of racism. This is certainly one reason why he was able to understand both the depths from which come the Constitution's promise to America, and its reach toward the stars.

The Framers of the Constitution Prohibited Establishment of Religion and Protected the Free Exercise of Religion for Theological Reasons

Dr. King's vision, as is well known, was a deeply theological vision. It is less well known that the framers of the Constitution also drew on a theological vision and that their prohibition of the establishment of any religion and their insistence on the protection of the free exercise of religion was made for religious reasons.

The popular debate uses the "founding fathers" on both sides of any specific controversy on what are called separation of church and state issues. Those who vigorously oppose any perceived breach in the separation of church and state understand the authors of the Constitution as secularists and revolutionaries who established a nation on the concept of liberty, including not only freedom of religion, but also freedom from religion. These strict separationists see religion as a threat to the secular sphere and the individual freedom from religious control that a secular public life entails. On the other hand, those who want to lower the bar in the separation of church and state debates also cite the founders in support of their position. They argue that the founders were not "secularists" who wished to keep religion locked away from public life. As is so often the case, there is truth on both sides of this argument.

The thought of John Locke, on whose work "founding fathers" such as Thomas Jefferson drew, is instructive. Locke, like others in the 17th century, had seen the terrible results of religious wars as Catholics and Protestants struggled for power in England. At first Locke was dubious about the capacity of human reason to provide the bulwark against the terrible abuses that result when "Priest and Prince" are combined. But his own faith led him finally to believe that it is only in the absolute protection of human civil society from any control by religious authorities that people are enabled to come to have faith in God. He paid a high personal cost for challenging the abusive power of the religious state, as he had to flee to Holland to escape execution for treason.

It was, therefore, for a theological reason, not a secular one that Locke and the American founders who drew on his work separated church and state and prohibited establishing one religion over any others. In that way, they protected religious freedom. Locke believed that people could only come to know God under the conditions of absolute freedom from any state control of their consciences. All state control gives you, argued Locke, is the "sin of hypocrisy, and contempt of his divine majesty."

Locke made this simple point: 'God doesn't need the help of the state for there to be faith.' Also, Locke and the framers of the U.S. Constitution were deeply and profoundly suspicious of the motives of those who wanted to bring religious and state control together. Locke notes "how easily the pretence of religion, and of the care of souls, serves for a cloak to covetousness, rapine, and ambition."

The Framers' Construct—The Prohibition of Establishment of Religion and the Free Exercise of Religion—Have Stood the Test of Time

From our vantage point in the twenty-first century we can see that the framers were right. They did not just protect political freedom. They protected religious freedom. It is no accident that the United States through all of its history so far has been free from the terrible effects of religious war. The framers of the Constitution knew what they were doing. Don't merge religion and the state.

This has recently been said with great acumen by retiring Supreme Court Justice Sandra Day O'Connor. As she wrote in a concurring opinion last term, "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. Americans attend their places of worship more often than do citizens of other developed nations, and describe religion as playing an especially important role in their lives. Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" McCreary County v ACLU, 125 S. CT. 2722, 2746 (2005).

The Prophetic and Progressive Faith Traditions

It is helpful for the health of our political life to realize that some people can vigorously object to any attempt to merge religion and the state from deeply held religious conviction. Those who point out the remarkable danger to American society from tendencies to merge religion and the state are not by definition "faithless secularists" or "liberal ideologues".

The faith communities who vigorously defend separation of church and state, who oppose any establishment of religion and who vigorously protect the free exercise of religion are a diverse group.

Some may best be described as "progressives," while others could be called "the prophetic."

The Progressive Faith community is, in large part, the most direct heir to the religious perspectives that informed thinkers such as Locke. Progressive people of faith have roots in the European Enlightenment and in the Protestant movement in Christianity. The root word of "Protestant" is "protest" and the protest was, in part, against the temporal power wielded by the Catholic Church of the 16th century.

These movements were responsible for inventing a concept called the "secular," a place in social life where organized religion does not hold absolute authority. It is the invention of this sphere of "worldliness" (the root of the word "secular" being the Latin for world) that gave rise to the political philosophy that informs the framers of the American Constitution. Subsequently, other religions have brought their faith traditions into the modern era and similarly defined a "world" where government holds sway. Reformed Judaism and Vatican II Catholicism are examples of this.

Progressive people of faith come from many religious traditions today. They share a commitment to the use of reason in human affairs, the duty of religious people to help create a just society and they believe that religious freedom and pluralism are religious and social goods.

The Prophetic faith traditions are also opposed to any infringement on the free exercise of religion and to any breach in the separation of church and state. Prophetic faith traditions often draw significantly on the spirit and want the church and the state to be separate because the latter is not spiritual.

Among the Prophetic faith traditions, African American Christianity, in particular, is very clear about both religious freedom and separation of church and state. African American Christianity was born under horrific state abuses of the individual rights of kidnapped and enslaved African people that were not only legal under American law, but also most often sanctified by the dominant churches. Enslaved African people were prevented, sometimes violently, from practicing their African religious faith and from forming independent Christian churches. This historical experience has given African American Christianity a very healthy skepticism about the dangers of merging religion and political authority and a deep conviction that both need to be constantly held accountable to the demands of true justice.

Jewish Americans contribute to this same perspective out of their experience of the Holocaust and underline that the systematic kidnapping, torture, and extermination of millions and millions of people was legal under the laws of Germany. Nuremberg has established that too narrow a reading of what is "legal" can profoundly betray the duty of the nation state to the claims of transcendent justice. Moreover, the American Jewish experience has been one of the flourishing of Jewish life due to the protections of religious liberty in the United States (though this has not always been perfectly observed by all citizens).

The women's movement in the United States blends elements of both the Progressive and the Prophetic traditions. Nineteenth and twentieth century American women had to counter strong, even virulent, opposition from churches to have their right to vote recognized. To this day, American women do not have an Equal Rights Amendment to the Constitution due, in part, to vocal opposition from the religious quarter in the latter part of the twentieth century.

Together the Progressive and the Prophetic faith communities are united in the view that any move to privilege one religion over another and to blur the lines that separate the power of religion and the power of the state is to run a grave risk of damaging both religion and the state. It is an oft-repeated

phrase, but one that is particularly apt in relationship to the effect of merging religion and politics, "Power tends to corrupt and absolute power corrupts absolutely."

Adherence to Religious Freedom Principles in the First Amendment is Critical in a Pluralistic Society

It might seem contradictory that while as a nation we are more religiously pluralistic than ever before, we see contemporary efforts by some to establish the doctrines of only one religion, Christianity, and indeed only of part of Christianity, as social policy. The strenuous objections to embryonic stem cell research, for example, are directly based on a particular religious conviction that the human soul is made present by God at the time of conception and that the newly fertilized embryo is ensouled .

When we look more closely, however, this is not as contradictory as it seems. While the Constitution protected religious freedom, our culture has been functionally Protestant since its beginning. In the 19th century, public school children were taught from readers that were patently a tutorial in the Protestant faith. Catholic immigrants in the 19th century formed their own parochial schools because they correctly perceived that this so-called public education was in truth nothing short of indoctrination in Protestantism.

What has become evident in the last half of the twentieth century and into the twenty-first is that our society is becoming more genuinely religiously pluralistic. The Harvard "Pluralism Project" has documented this astonishing growth of religious pluralism. As Dr. Diana Eck writes in her widely praised book A New Religious America: How a "Christian Country" Has Become the World's Most Religiously Diverse Nation (HarperSanFrancisco, 2005), "there are now more Muslims than Episcopalians, Jews or Presbyterians" in the United States.

Such increasing religious pluralism calls for even greater vigilance both in protecting religious minorities and clearly avoiding even the appearance of the establishment of any particular religion.

John Roberts and the Supreme Court

It is critical that the Supreme Court be particularly vigilant in these times of vast religious change to maintain our national protections of freedom of religion and to resist any weakening of the vast body of legal precedent prohibiting various forms of religious establishment.

In the limited documents available to discern John Roberts' views, there is evidence that his judicial posture is toward more permissiveness in religious establishment and is less than vigorous in the defense of religious minorities and their freedoms.

It is clear that as a member of the court and especially as Chief Justice, John Roberts is in a position to significantly influence whether the court remains consistent on establishment and free exercise or whether there will be a profound change that would greatly increase the government's endorsement of specific religion(s) and limit the rights of religious minorities. There are currently three justices of the Supreme Court who have consistently attempted to change the way the Establishment Clause of the First Amendment has been interpreted by the Court for decades (Lemon v. Kurtzman, 403 U.S. 602 (1971), Justices Scalia, Kennedy and Thomas. Chief Justice Rehnquist was of a similar view; Justice O'Connor has been the fifth vote for the majority coming to a contrary result.

As Deputy Solicitor General, John Roberts co-authored two briefs urging the overruling of Lemon v. Kurtzman. The viewpoint expressed is that there should be no limit on government endorsement or

support of religion as long as there is no coerced participation. In Lee v Weisman, for example, the government made the argument that clergy should be allowed to offer invocation and benediction prayers as part of a public school's official graduation ceremony because it did not "establish any religion nor coerce non-adherents to participate in any religion or religious exercise against their will." This seems a very severe interpretation of "coercion," since parents and other family attending graduation services really are trapped in their seats and forced to listen to prayers perhaps not of their own tradition to see their child or relation graduate. One can be coerced without the actual use of force. In a related fashion, in the Reagan administration, John Roberts approved a speech by Education Secretary Bill Bennett criticizing Supreme Court decisions barring religion in schools as antithetical to "the preservation of a free society."

In an increasingly religiously pluralistic society, these are particularly egregious positions to have taken since there is an absence of sensitivity to the fact that prayer at public school functions or including religion in schools will inevitably violate right of religious minorities to equal treatment.

John Roberts has, in more than one of the distributed documents, referred to the "so-called right to privacy" and has indicated his view that "arguing we have such an amorphous right is not to be found in the Constitution." This is a source of concern to me as well. Women have benefited greatly from the protection of the right to privacy in reproductive rights. Furthermore, Roberts' aversion to the right of privacy, if reflected in future rulings of the Court, of course, would have adverse affects well beyond the arena of reproductive rights. We are, for example, experiencing a dramatic increase in medical technologies and their use to artificially prolong life. Should the American family have the right to privacy in decisions affecting medical procedures used on their loved ones, or will we see this privacy eroded and the government allowed to legally interfere?

Advocates of his nomination tend to dismiss concerns regarding Judge Roberts' narrow judicial interpretations, including those just discussed, as consistent with a man who has a preference for specific and narrow interpretations of the law.

Disturbingly, however, Judge Roberts' narrowness only runs in one direction – a direction that undercuts the promises Dr. King understood to be inherent in our Constitution. The rejection of affirmative action because it is not "related to curing any violation of the law" is typical and illustrative. "Under our view of the law it is not enough to say that blacks and women have been historically discriminated against as groups are therefore entitled to special preferences." The idea that the redress for historic patterns of systematic, even structural discrimination is "special" and "preferential" indicates a clear unwillingness to consider how a society may become just where injustice has long reigned.

But while narrow and specific interpretation is applied to those who have suffered discrimination, there is also a pattern of an expansion of both the authority of the President and law enforcement. Judge Roberts, for example, joined a D.C. Circuit decision adopting the Bush administration's position that detainees designated as "enemy combatants" could be tried before military commissions without basic procedural safeguards, that the Geneva Convention was unenforceable in U.S. Courts and in any case did not apply to these detainees. Given the multiple sources of indisputable evidence of mistreatment and even torture of these detainees, this is alarming in the extreme and bodes ill for this country and its moral health.
Furthermore, when on the bench Judge Roberts rejected several significant claims of improper search and seizure, demonstrating an expansive view of the authority of law enforcement. This is a source of concern in one who would now be nominated to interpret the Fourth Amendment's prohibition against unreasonable searches and seizures.

Conclusion

The Constitution is a document that sought to implement a vision of fundamental rights, a vision of a society such as none in human history had seen before. This is both a profoundly human vision that has as its source the rise of the human spirit in the Enlightenment, but has another and more profound source, the notion that certain fundamental human rights are endowed by the Creator and that no authority of any kind has the right to overturn them.

Our legislatures are subject to the polarizations of politics and the pressures of special interest groups. To whom can we turn then to care for the "fundamentals" of the vision of this Constitution to "establish Justice," "promote the general welfare", and secure the "Blessings of Liberty" than, as the Constitution provides, that "one supreme Court"?

I have certainly been impressed with the incisive mind of John Roberts. That is a necessary but not sufficient credential for Chief Justice. I ask you to inquire about his passion for justice, his care for the general welfare and his concern to secure the blessings of liberty for all Americans. I ask you to inquire whether he believes in the dream that is the United States of America.

Testimony of

Dick Thornburgh

Former Attorney General
of the United States

Before a Hearing of
The Judiciary Committee of
the United States Senate

On the Nomination of
Judge John Roberts

To be Chief Justice
of the United States

Thursday, September 15, 2005

Washington, DC

Chairman Specter, Senator Leahy, and distinguished Members of the Judiciary Committee, it is my distinct honor and privilege to be here today in full support of Judge John G. Roberts's nomination to be the 17th Chief Justice of the United States. I approach this testimony with profound respect for the Supreme Court and its history and the important job of the Senate in exercising its "advice and consent" role in considering the President's nomination to lead the highest court in this country.

The sad passing of Chief Justice William Rehnquist after 33 years of public service on the Court gives us an opportunity to reflect on his intellect, fairness, belief in the Constitutional principles that have made this country so great, his respect for history, and the judicial temperament that the late Chief Justice embodied. The example set by Chief Justice Rehnquist during the 19 years he led the Court sets a high bar for Justices of the Court and for future Chief Justices. Fortunately, this is a standard that Judge Roberts meets and, in my opinion, has the potential to exceed.

Being a student of Supreme Court history as he was, Chief Justice Rehnquist was no doubt thrilled that one of his former clerks was nominated to be an Associate Justice, and he would be even more pleased that his former clerk, if confirmed by the Senate, will succeed him as Chief Justice.

Before you is an important opportunity to consider the qualities of the leader for a coequal branch of the government. That person must have extraordinary legal skills, a keen intellect, an abiding respect for the United States Constitution – which necessarily includes an understanding of the proper role of and limitations on the Judiciary - a

judicial demeanor and temperament that is respectful and solicitous, a sense of unbiased fairness, and a personality that speaks of humility. In each of these categories, I can think of no finer candidate than Judge Roberts.

I have known Judge Roberts as a friend and colleague for over 15 years and can attest to his outstanding personal characteristics and undoubted integrity. Perhaps more important for present purposes, Judge Roberts's extraordinary legal skills and keen intellect are undisputed. Before his Senate confirmation by unanimous consent over two years ago to be a judge on the D.C. Circuit Court of Appeals, he was heralded by leading Democrats and Republicans alike as "one of the very best and most highly respected appellate lawyers in the Nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness."

I can echo this fanfare because of the deep and lasting respect I have for Judge Roberts's legal abilities that I saw first-hand when he served as the Principal Deputy Solicitor General while I was Attorney General under Presidents Reagan and George H. W. Bush. In that capacity, Judge Roberts represented the United States Government in all manner of cases before the Supreme Court, where he was charged to defend, among other things, legal attacks on the constitutionality of Acts of Congress. John represented the government in 39 cases before the Supreme Court while in the Solicitor General's office. He is a truly remarkable lawyer – bright, witty, capable, respectful, and creative. I had the good sense to enlist him as my "coach" for my final appearance before the Court in 1991 – and we won the case!

Over the past two years he has served as a judge on what some call the "second-highest" court in the United States, the D.C. Circuit Court of Appeals, where his legal skill, keen intellect, and respect for the law have been ably demonstrated. With Judge Roberts, the Senate is presented with a nominee who is not a "blank slate," but one who has a solid record as a jurist that undeniably reflects his fidelity to the Constitution and his understanding of the role of the Judiciary.

On the Court of Appeals, Judge Roberts has demonstrated in practice the principles he had articulated over 20 years earlier as a young attorney working at the Justice Department. Reflecting on the role of judicial restraint as a guiding standard for how courts should approach the judicial decision-making process, Judge Roberts explained in materials he drafted for then-Attorney General Smith:

> The phrase "judicial restraint" may mean many things to many people, but at its core is the notion that federal courts must scrupulously avoid engaging in policymaking, which is committed under our system of government to the popularly elected and accountable branches and to the states.

Judicial "activism," Judge Roberts stated, "is neither conservative nor liberal." He recognized that:

> Throughout history and to this day both liberal and conservative interests have sough to enlist an activist judiciary in the achievement of goals which were not obtainable through normal political processes. . . . Today different groups urge judges to substitute their own policy choices for those of federal and state legislatures, but the evils of judicial activism remain the same regardless of the political ends the activism seeks to serve.

Indeed, he sagely recognized that the "greatest threat to judicial independence occurs when the courts flout the basis of their independence by exceeding their constitutionally limited role and engaging in policymaking."

Of course, one may wonder how a Chief Justice Roberts might distinguish between judicial restraint and blind adherence to precedent. Here again, we have Judge Roberts's own well-articulated views. In his response to the Senate's questionnaire, Judge Roberts noted the "important role" that precedent plays in "promoting stability of the legal system." But at the same time, Judge Roberts told this Committee during his 2003 confirmation hearings that judicial restraint does not preclude the rejection of a bad decision. He stated: "Obviously if the decision is wrong, it should be overruled. That's not activism. That's applying the law correctly."

With Judge Roberts, we are fortunate to have more than mere theoretical musings on the subject of judicial restraint; we have over two years of his record as a jurist that demonstrates his views in real-life situations. We know from this experience that Judge Roberts approaches each case objectively, with an eye toward fairness. We know that Judge Roberts is appropriately deferential to the policy choices made by Congress, respecting the separation and balance of powers enumerated in the Constitution. We know that Judge Roberts appreciates the appropriate role of the Judiciary. Most importantly, we know that Judge Roberts meant what he said to this Committee over two years ago – that he will approach each case independently and will make determinations based upon the facts and the law, without any pre-conceived notion or bias as to the outcome.

Let me highlight a few of Judge Roberts's decisions. These cases clearly reflect the correctness of his approach that cases should be decided based upon the text of a statute, the Constitution, and the particular facts before the court.

First, I'd like to discuss a case where Judge Roberts and the other members of the D.C. Circuit Court or Appeals panel affirmed a district court decision[1] where they clearly disagreed with the underlying policy judgment, but nonetheless showed the proper restraint by allowing the legislative body – in this case, the D.C. City Council – to correct its own misguided policy. I know that most members of this Committee are familiar with this case, which has been nicknamed the "French-fry" case. The facts are straightforward: the D.C. City Code made it illegal to eat or drink in a Metro station, and the local Transit Authority imposed a zero-tolerance policy for violations since it had received complaints about bad behavior in certain Metro stations. A 12-year-old girl who stopped at a fast-food restaurant on the way home from school made the mistake of eating a French fry while waiting for her friend to purchase a fare card. She was arrested and hauled off to jail for booking and, ultimately, some three hours later, delivered to the custody of her mother.

Was this bad policy? Yes. In fact, after the publicity surrounding this case, the City Council adopted a new rule whereby they would merely issue citations to juvenile offenders, rather than arresting them. Was the policy unconstitutional? Both the district court judge and the unanimous panel of the D.C. Circuit agreed that it was not – because age or, more specifically, youth is not a suspect classification under the Constitution or

[1] The district court judge was Clinton appointee Judge Emmett G. Sullivan.

any act of Congress, and because probable cause existed to support the arrest since she did, in fact, eat the French fry in violation of the city's zero-tolerance policy.

Why discuss such a seemingly silly case? I think that in the opening paragraph of the decision, Judge Roberts forcefully establishes his understanding of the court's limited role, while at the same time expressing hope that the policy is changed at the appropriate level:

> No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later – all for eating a single French fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as "foolish," and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not. . . .

Judge Roberts has also stated repeatedly his belief that cases should be decided on the merits, not on the basis of a judge's personal opinion. As he expressed as recently as this past July in *United States v. Jackson*, "sentiments do not decide cases; facts and the law do."

Understanding that most basic principle highlights the significant difference that exists between a lawyer, acting as an advocate on behalf of a client, and the role of a judge, charged with deciding cases fairly and objectively. But all too often in the sound-bites that have passed for reviews of Judge Roberts's record, one group or another will state that Judge Roberts doesn't support, for example, the rights of criminal defendants,

environmental enactments, or the civil rights laws -- or, most egregiously, that Judge Roberts condoned the bombing of women's clinics. The supposed bases for these claims is gleaned, interpreted, and misconstrued by these critics from their interpretation of arguments that Judge Roberts made as a lawyer, both in private practice and for the government.

The distinguished Members of this Committee can easily see through this argument, for we all know and appreciate that lawyers are duty-bound to be zealous advocates for their clients. Thus, we have seen where, as a lawyer for the government, Judge Roberts argued in *EEOC v. Arabian American Oil Co.* for extending Title VII protections to employees of U.S. companies operating outside the United States. And in *Houston Lawyers Association v. Attorney General of Texas,* Judge Roberts argued for applying the "results" test of the Voting Rights Act to the election of state court judges. He also filed briefs for the government that set forth the Administration's position that *Roe v. Wade* was wrongly decided and that the FCC's minority preference policies for the ownership of broadcast stations was unconstitutional. We do not know whether these arguments represented Judge Roberts's personal views at the time he was a government lawyer, and it does not matter. He represented his client vigorously, forcefully, intelligently, and capably – as a good lawyer should. Similarly, as a lawyer in private practice, Judge Roberts represented an individual *pro bono* in an appeal under the Double Jeopardy Clause to bar the imposition of civil penalties to a person who had already been convicted and punished under federal criminal law for the same conduct. He represented

the Tahoe-Sierra Preservation Council against development of a natural area. And he also represented corporate clients in many business-related matters.

These cases argued by John Roberts as a government lawyer or a lawyer in private practice, in my opinion, say little about how John Roberts as a Supreme Court Justice will approach cases, other than, as in all his professional life, he approaches matters with great skill, dedication, and earnestness. It is John Roberts's record as a jurist that is most impressive and most persuasive. It is a record that speaks of a judge who understands the role of the Judiciary, who approaches each case independently and objectively, who respects history and precedent, who interprets the law based upon the facts of before him, who does not engage in judicial policy-making, and who will make this country proud as the next Chief Justice of the United States Supreme Court.

I sincerely appreciate the Committee's invitation to speak today and the Committee's careful and deliberate consideration of Judge Roberts's nomination. He is, in my view, an exemplar of what we should seek in our next Chief Justice.

AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

STATEMENT

OF

STEPHEN L. TOBER

STANDING COMMITTEE ON FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF

THE HONORABLE JOHN G. ROBERTS, JR.

to be

CHIEF JUSTICE OF THE UNITED STATES

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 15, 2005

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober of Portsmouth, NH, and it is my privilege to chair the ABA Standing Committee on Federal Judiciary. I am joined by Thomas Z. Hayward, Jr., of Chicago, my immediate predecessor, and Pamela A. Bresnahan, who represented the District of Columbia Circuit on the 2004-05 Standing Committee.

For more than 50 years, the ABA Standing Committee has provided a unique and comprehensive examination of the professional qualifications of candidates for the Federal bench. It is composed of fifteen distinguished lawyers who represent every judicial circuit in the United States and who each volunteer hundreds of hours in public service to our profession. The Standing Committee's evaluation of a nominee is based on its thorough, non-partisan, non-ideological peer review, which is conducted by using long-established standards that measure the nominee's integrity, professional competence and judicial temperament.

In the sense that a major portion of the investigation consists of scores and scores of interviews with judges and lawyers who know the nominee, our evaluation is very much the voice of the bench and bar of this nation.

Over the course of its history, the Standing Committee has never proposed a candidate of its own, nor does it do so now. Its function, rather, is to receive the name of each nominee, investigate and evaluate the professional qualifications of each nominee, and then rate that nominee either "Well Qualified," "Qualified" or "Not Qualified."

The Standing Committee's investigation of a nominee for the United States Supreme Court is based on the premise that such an individual must possess exceptional professional qualifications. The significance, range and complexity of issues that such a nominee will face on

that Court demand no less. As a result, our investigation of a Supreme Court nomination is more extensive and procedurally different from our other investigations:

- All circuit members on the Committee contact by letter or by phone a wide range of people within their circuits who are most likely to have information regarding the nominee's professional qualifications. Each circuit member then conducts confidential interviews with those individuals who have personal knowledge of the nominee. It is not unusual for the Standing Committee to conduct hundreds of such interviews during the course of a Supreme Court investigation.
- There are at least two reading teams that review the nominee's legal writings. A team of academicians from a respected law school examines the nominee's legal writings for quality, clarity, knowledge of the law, and analytical ability. This reading team is composed of professors who are recognized experts in various substantive areas of law. A second reading team composed primarily of pre-eminent practicing lawyers with Supreme Court experience examines the nominee's legal writings from the perspective of practitioners who are fully familiar with appellate practice at the highest level. All reading teams analyze the nominee's writings in detail, and their findings are reported to the full Committee for careful consideration.[1]

After the comprehensive investigation is completed, the findings are assembled into a detailed, confidential report. Each member of the Standing Committee reviews the final report thoroughly and individually evaluates the nominee using three rating categories: "Well Qualified," "Qualified," and "Not Qualified." Needless to say, to merit an evaluation of "Well Qualified,"

[1] In Judge Roberts' case, the chair of the practicing lawyers' reading team—Professor Charles Fried—has indicated that he will be testifying before this Committee on issues that are beyond the scope of those considered by the ABA Standing Committee. Professor Fried acknowledges that he does so as a private citizen, and not on behalf of the Standing Committee or the American Bar Association.

the nominee must possess professional qualifications and achievements of the highest standing.

With respect to Judge Roberts' nominations to the Supreme Court, the Standing Committee has rated him twice. When he was nominated by President Bush to be Associate Justice in July, the 2004-05 Standing Committee, chaired by Tom Hayward, undertook an extensive investigation of Judge Roberts' integrity, professional competence, and judicial temperament in order to evaluate whether he was professionally qualified for the position. That committee reached out to over 1,500 individuals to identify and interview as many people as possible who knew Judge Roberts professionally. Its evaluation of Judge Roberts was based on interviews with more than 300 judges, lawyers, and community leaders throughout the nation; reviews of Judge Roberts' decisions and selected substantive memoranda from the National Archives prepared by both reading groups and individual circuit members; and a personal, detailed interview with the nominee.[2] The 2004-05 Standing Committee unanimously concluded that Judge Roberts was "Well Qualified" to be Associate Justice of the Supreme Court.

When the President thereafter nominated Judge Roberts to be Chief Justice of the United States on September 5, the 2005-06 Standing Committee, which took office in mid-August with seven new members, including myself as chair, performed a supplemental investigation directed solely at determining whether the nominee had the requisite additional leadership and administrative skills that would be required of him as Chief Justice of the United States.

The Standing Committee had only a handful of days to complete its supplemental evaluation. Nonetheless, the supplemental effort included interviews with well over 80 judges, lawyers, and community members who had first-hand knowledge of John Roberts' leadership and management skills; a review of the background materials and report prepared by the

[2] Thomas Z. Hayward Jr., and the District of Columbia and Federal Circuit Representatives, Pamela A. Bresnahan and Sheila Slocum Hollis, conducted the first interview of Judge Roberts.

2004-05 Standing Committee; and a personal interview with Judge Roberts.[3] On the basis of its supplemental investigation, the 2005-06 Standing Committee unanimously concluded that Judge Roberts is "Well Qualified" to handle the administrative and leadership responsibilities of Chief Justice of the United States.

Our two ratings, when considered together and in conjunction with the accompanying detailed letter to your Committee, which we ask to be made a part of this hearing record, provide the Senate Judiciary Committee with our comprehensive, independent peer review of Judge Roberts.

Allow me to summarize. The ABA Standing Committee is fully satisfied that, by virtue of his academic training, his service in the Federal government, his experience in private practice, his scholarly writings, his distinguished service for the past two years on the Federal bench, and his administrative and leadership skills, Judge Roberts meets the highest standards required for service on the United States Supreme Court as Chief Justice. He enjoys the admiration and respect of his colleagues on and off the bench. And he is, as we have found, almost the very definition of "collegial."

Mr. Chairman, the goal of the ABA Standing Committee has always been--and remains--in concert with the goal of your Committee: to assure a qualified and independent judiciary for the American people.

Thank you for the opportunity to present these comments.

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[3] The 2005-2006 District of Columbia and Federal Circuit representatives, Marna S. Tucker and John Payton, interviewed Judge Roberts after he was nominated to be Chief Justice of the United States.

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September 14, 2005

The Honorable Arlen Specter
Chair, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (hereafter the "Standing Committee") to present its report regarding the nomination of the Honorable John G. Roberts, Jr. to be Chief Justice of the United States.

The Standing Committee's evaluation of Judge Roberts (and every other judicial nominee) is based upon a thorough, non-partisan peer review investigation of his professional qualifications, that is, his integrity, judicial temperament and professional competence. In addition, because Judge Roberts was nominated for Chief Justice -- a position with distinct additional duties, the Standing Committee also undertook a separate peer review investigation of his administrative abilities and leadership qualities to determine if he also possesses the additional professional qualifications that are essential to fulfilling the role of Chief Justice. The Standing Committee did not investigate or consider Judge Roberts' ideology or

political views during the course of either of its evaluations, nor did it examine what Judge Roberts' views might be on any issues that may potentially come before the Supreme Court.

The timing of President Bush's announcement of his intention to nominate Judge Roberts for Associate Justice in July, followed by President Bush's re-nomination of Judge Roberts for Chief Justice last week, posed an unusual situation for the ABA Standing Committee; they straddled the end of one association year and the beginning of the current one, an event that is marked by changes in leadership and committee membership throughout the organization. While there was considerable continuity of membership on the committee, the 2004-05 Standing Committee, chaired by Tom Hayward, Jr., had initiated the investigation of the professional qualifications of Judge Roberts for Associate Justice on July 20, and was therefore charged with completing the investigation and evaluation. It submitted its rating of Judge Roberts for the position of Associate Justice to your Committee on August 17 and was poised to present its detailed evaluation during the confirmation hearings originally scheduled to commence September 6. In the meantime, as you well know, President Bush withdrew Judge Roberts' nomination for Associate Justice and nominated him to be Chief Justice of the United States. Given the need to complete the evaluation of the nominee's fitness for the added responsibilities of this new position in approximately one week, the current (2005-06) Standing Committee, chaired by Stephen L. Tober, undertook a peer investigation directed solely at determining if Judge Roberts had the requisite additional professional skills needed to fulfill the role of Chief Justice. This letter, therefore, explains the Standing Committee's two separate ratings of Judge Roberts –the 2004-05 Standing Committee's rating reflects its evaluation of Judge Roberts' professional qualifications for Associate Justice of the Supreme Court, and the 2005-06 Standing Committee's supplemental rating reflects its evaluation of whether the nominee possesses the

leadership and administrative skills necessary for the position of Chief Justice of the United States.

**Evaluation of the Professional Qualifications of Judge Roberts for the Position of Associate Justice of the Supreme Court**

To merit the Standing Committee's evaluation of "Well Qualified" or "Qualified," the Supreme Court nominee must be at the top of the legal profession, have outstanding legal ability and exceptional breadth of experience and meet the highest standards of integrity, professional competence and judicial temperament. The evaluation of "Well Qualified" is reserved for only those found to merit the Standing Committee's strongest affirmative endorsement.

In conducting its investigation, the members of the Standing Committee personally reached out by letter to over 1,500 individuals representing a wide spectrum of people across political, racial and gender lines, including lawyers, judges and community leaders to identify and interview as many people as possible with personal knowledge of Judge Roberts. The Standing Committee interviewed more than 300 people with such knowledge. This included over 150 federal and state court judges, including all members of the Supreme Court of the United States, members of the United States Courts of Appeals, members of the United States District Courts, United States Magistrate Judges, United States Bankruptcy Judges, and numerous state judges. The investigation included contacting all of Judge Roberts' colleagues on the United States Court of Appeals for the District of Columbia Circuit and all United States District Court Judges from the District of Columbia. Most of the judges on the District of Columbia federal courts were interviewed in person. .

Members of the Standing Committee personally questioned several hundred other individuals. These individuals included former Supreme Court law clerks, practicing lawyers and law professors. Interviewed practitioners included lawyers who were adversaries and co-counsel, as well as lawyers who have appeared before Judge Roberts since he was appointed to the District of Columbia Circuit. Standing Committee members also interviewed law school deans, faculty members of law schools and constitutional scholars throughout the United States.

All circuit members of the Standing Committee conducted confidential interviews within their circuits with individuals who had information regarding Judge Roberts' professional qualifications

The Standing Committee also reviewed its files pertaining to two earlier investigations of Judge Roberts when he was nominated by President George W. Bush in 2001 and by President George H.W. Bush in 1991. In 1991, Judge Roberts was unanimously found by the Standing Committee to be Qualified. In 2001, he was unanimously found by the Standing Committee to be Well Qualified to sit on the District of Columbia Circuit, which recommendation was reaffirmed by the Standing Committee in 2003.

It has been the practice of the Standing Committee to ask distinguished legal scholars and Supreme Court practitioners to conduct an independent review of all of the opinions and other legal writings authored, in whole or in part, by the nominee for the Supreme Court. This practice was followed again for this nomination. Judge Roberts' opinions were reviewed by:

(1) Practitioners' Reading Committee of distinguished lawyers chaired by Charles Fried. Professor Fried is a former Solicitor General of the United States and a former Chief Justice of the Massachusetts Supreme Court. He is presently Beneficial Professor of Law at Harvard Law

School. The Practitioners' Reading Committee consisted of a diverse group of fourteen lawyers who have practiced before the Supreme Court and Courts of Appeals; and

(2) Reading Committee of distinguished law professors chaired by Ronald J. Allen, John Henry Wigmore Professor, Northwestern University School of Law. This Reading Committee consisted of eleven members of Northwestern's law school faculty chosen for recognized expertise in a wide variety of substantive areas of the law.

The lawyers and professors who participated in these Reading Committees are listed in Exhibits A and B to this letter. The Standing Committee commends the Reading Committees for their thorough and thoughtful review of Judge Roberts' writings.

The two Reading Committees submitted reports to the Standing Committee regarding their independent analyses of Judge Roberts' opinions, briefs and other writings. These detailed reports were carefully reviewed by the members of our Standing Committee and taken into consideration in developing its assessment of Judge Roberts' professional qualifications.

In addition, one of the two principal investigators for the Standing Committee has reviewed indices and documents authored by the nominee that were made available by the National Archives. The investigator, Pamela A. Bresnahan, then selected substantive memoranda that were reviewed by the Chair and forwarded to the law school reading committee for evaluation and to the members of the Standing Committee for their consideration...

Finally, three members of the Standing Committee personally interviewed Judge Roberts: Pamela A. Bresnahan, Sheila Slocum-Hollis, appointed to the Standing Committee to represent the District of Columbia Circuit and the Federal Circuit, respectively, and the Chair.

## Evaluation

### Integrity

The matter of integrity is self-defining. A nominee's character and general reputation in the legal community are investigated, as are his industry and diligence.

Judge Roberts has earned and enjoyed an excellent reputation for his integrity and character. No one interviewed by the Committee had any question or doubt in this regard. Representative comments about his character and integrity are as follows:

"He is probably the most honorable guy I know and he is a man of his word."

"I would be amazed if anyone had any greater integrity on either a personal or professional level."

"He's a man of extraordinary integrity and character."

"He is honest and straightforward and I do not have the slightest hesitation about any aspect of his integrity."

On the basis of our interviews with Judge Roberts and with over three hundred judges and lawyers who know Judge Roberts professionally, the Standing Committee concluded that Judge Roberts is a man of impeccable integrity.

### Judicial Temperament

In investigating judicial temperament, the Standing Committee considers the nominee's compassion, decisiveness, open-mindedness, judicial courtesy, patience, freedom from bias and commitment to equal justice under the law. His colleagues and opponents from private practice, the Attorney General's office, White House Counsel's office and the Solicitor General's office, lawyers who have appeared before him in the District of Columbia Circuit and his current

judicial colleagues universally give Judge Roberts the highest rating for his demeanor, temperament and manner of treating people. Representative comments include:

"He's collegial and, if he disagrees, he does so in a respectful way."

"With respect to his demeanor, Judge Roberts is an even-paced guy, very low-key, open and fair-minded."

"He has one hundred percent integrity, open-mindedness, demeanor and integrity."

"He is a very appropriate, polite, well-tempered and pleasant individual."

"He is very easy to deal with in a social setting."

"He is not just an engaging person, but he is very interested in hearing and conversing with others."

"He is compassionate and an extremely good listener."

"He's the kind of judge you like to be before."

"He's very nice and he asks good questions."

"He has the kind of temperament and demeanor you would want in a judge."

"He is extremely well-mannered with the advocates, always courteous to them and extremely pleasant."

"He was extremely even-tempered and was so good that he could give classes on it."

"John Roberts is respectful, polite and understated. He has no bluster and is a fabulous lawyer. He has no need to impress anyone."

"He is a terrific listener; he absorbs both sides of all questions. He has no preconceptions about anything. He is, in one sense, a highly traditional lawyer because of his absorption of the facts and the law."

"He will decide the cases that come to him and he is not an ideologue."

Judge Roberts' judicial temperament meets the highest standards set by the Standing Committee for appointment to the Supreme Court of the United States.

Professional Competence

Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience.

Judge Roberts' educational background has amply prepared him for service on the Supreme Court of the United States. He attended public and private schools in Indiana. He graduated from Harvard College in 1976 *summa cum laude* and was elected a member of Phi Beta Kappa. He graduated from Harvard Law School in 1979 *magna cum laude*. He served as the managing editor of the Harvard Law Review. After law school he served as law clerk to Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit. Following his clerkship with Judge Friendly, he served as law clerk to then Associate Justice William H. Rehnquist of the Supreme Court of the United States.

His service with the federal government included the positions of Special Assistant to Attorney General William French Smith, United States Department of Justice; Associate Counsel to the President, Ronald Reagan, White House Counsel's Office; and Principal Deputy Solicitor General, United States Department of Justice. He was an associate and then a partner in the respected Washington, D.C. law firm of Hogan & Hartson. There, he became a leader of the firm's appellate practice section. After his second nomination by President George W. Bush, he was appointed to the United States Circuit Court of Appeals for the District of Columbia Circuit in 2003.

Prior to his appointment to the District of Columbia Circuit, he had an extensive federal appellate litigation practice, both in the private and public sectors. From 1984 to 2003, he argued 39 cases before the Supreme Court. In addition, he has argued cases before the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeals, the Federal Circuit and the Court of Appeals for the District of Columbia Circuit. He represented clients in a broad range of

appellate matters, including administrative law, admiralty, anti-trust, arbitration, banking, bankruptcy, civil rights, constitutional law, environmental law, federal jurisdiction and procedure, First Amendment matters, health care, Indian law, interstate commerce, labor law and intellectual property rights.

Judge Roberts has participated actively in legal organizations and has lectured and written about the law throughout his career. Judge Roberts was praised repeatedly by his peers during the Standing Committee's investigation for his excellent analytical writing skills. Representative comments include these:

"He is brilliant and he understands the importance of the independence of the judiciary and the role of the rule of law."

"His opinions are clear, succinct and very well-written."

"His opinions are in the mainstream of American jurisprudence."

"His competence is off the charts, and he is one of the smartest lawyers I have ever worked with."

"He asks good and tough questions but with a great manner."

"He is one of the best appellate lawyers in the country."

"As an advocate, Judge Roberts was the best oral advocate around practicing before the United States Supreme Court."

"He has good intellect, good judgment and a lot of common sense. He is well-balanced as a person and a lawyer."

"John Roberts is superb as an advocate."

The legal opinions that Judge Roberts has written during his two years on the District of Columbia Circuit also cover a wide range of subjects.

The comprehensive reports submitted to the Committee by the two Reading Committees of scholars and Supreme Court practitioners further support the Standing Committee's conclusions concerning the scholarship and writing ability of Judge Roberts. The Chair of one of

the Reading Committees summarized his colleagues' assessment of Judge Roberts' opinions and other writings as follows:

> "Judge Roberts has written 49 opinions in his two years and two months on the bench in which 40 were opinions for unanimous opinions, three were majority opinions for a divided panel, three were concurring opinions, one was an opinion concurring in part and dissenting in part and two were dissenting opinions. All of the members of our committee agree that all of Judge Roberts' opinions were very well written, clear, as simple as the subject matter allowed and meticulous in their treatment of the facts and the law, with occasional light touches but no rhetorical displays. No member of our committee thought that Judge Roberts stretched a point, disregarded appropriate arguments or authority or dealt other than fairly with the cases before him."

The Chair of the second Reading Committee summarized his colleagues' assessment of Judge Roberts' writings as follows:

> "We reviewed 51 of Judge Roberts' opinions and 49 briefs filed in the United States Supreme Court that were signed by Judge Roberts in cases that he argued. There was remarkable unanimity in our group regarding the inferences that can be drawn from Judge Roberts' opinions. He is highly intelligent, well-trained, skillful in every respect, and he writes lucid and convincing opinions that adhere closely to the letter of the law whether the letters be found in statutes or case law. The upshot of all of this is that there is no serious question about whether he is highly qualified in terms of legal ability and professional competence. He is as qualified as any appointment to the Supreme Court in recent memory. There is nothing in his written product that indicates that he is other than a man of integrity and accommodates disagreement with grace and respect, strongly indicating an appropriate judicial temperament."

The same Reading Committee Chair commented as follows with respect to his briefs:

> "The briefs confirm the view that Judge Roberts' reputation is one of the leading Supreme Court advocates of his generation. They are very well crafted in every meaning of the term. Like his opinions, they are exemplars of effective legal writing; clear, succinct, organized and persuasive. They give the suggestion of total command of the relevant fields as well as an inexorable logic favoring the position of his clients. Like his opinions, there are no diversions into peripheral academic debates or needless theorizing. Collectively, they comprise an impressive body of work and again contain nothing that casts doubt on Judge Roberts' qualifications for appointment to the Supreme Court."

The same Reading Committee Chair perhaps best summarized the reasons why both Reading Committees praised the excellence of Judge Roberts' writing and scholarship by stating:

> "Judge Roberts' opinions are very well written. They are clear and concise in their description of the facts and the law. Judge Roberts is deferential to government agencies, and to lower courts – as standards of review often require – but this deference does not cause him to skimp on his own analysis of and explanation for a particular outcome. Moreover, Judge Roberts' opinions focus on legal doctrine but they do not shy away from engagement with public policy arguments. However, he ties his evaluation of public policy arguments not to his own social/moral compass but to the Congressional concerns and purposes that seemed to motivate the statute at issue."

As mentioned previously, one of the Standing Committee's principal investigators has personally reviewed the indices provided by the National Archives and online documents and individual files. From that review, the investigator selected substantive memoranda on diverse subject matters written by Judge Roberts during different time periods. The memoranda were then submitted to the law school reading committee for review and evaluation. Substantive writings and analyses, consisting mostly of memoranda about legislative proposals, statutory interpretation, agency proposals or specific legal problems, were cogent and well-written. The numerous substantive memoranda reviewed represented an attorney's advice and independent counsel to his client, the United States Government or the President. His legal analyses of substantive issues were always well-crafted and well-written, although at times reflective of Judge Roberts' young age at the time. Judge Roberts' memoranda from his years at the White House cover a plethora of legal issues. His writing is prolific but careful. He clearly worked very hard and diligently during his tenure at the Department of Justice and White House. Clearly, Judge Roberts' later writings and opinions show a more in-depth analysis of the subject matter at hand and are generally reflective of his greater maturity as a lawyer. In sum, the later written products are a far better indicator of his professional competence as a lawyer and as a judge.

Judge Roberts meets the Standing Committee's criteria for having the highest level of professional competence.

**Supplemental Evaluation of the Administrative and Leadership Ability of Judge Roberts for the Position of Chief Justice of the United States**

On September 5, the Standing Committee commenced a limited supplemental investigation focused solely on determining whether Judge Roberts has the requisite additional leadership and administrative skills necessary to successfully execute the responsibilities of Chief Justice of the United States. These responsibilities include managing the decision-making of the Court and overseeing the various administrative functions of the federal judiciary (the Judicial Conference of the United States, the Administrative Office, the Federal Judicial Center, the various specialized courts, etc.). In addition, there is the overall leadership obligation placed on the Chief Justice as both the real and symbolic head of the third branch of government.

As with the first investigation, each committee member contacted a variety of individuals within his or her circuit who were likely to have personal knowledge of Judge Roberts' leadership and management abilities. The Standing Committee made a concerted effort to interview judges, lawyers and community leaders from diverse backgrounds. In total, approximately 80 interviews were conducted.

The challenges of managing the decision-making process of the Court (e.g., conducting the Court's conferences and assigning the drafting of opinions) seem to be particularly well-suited to the personality and the leadership style of Judge Roberts. Virtually everyone who has worked with or observed Judge Roberts described him as a "very good listener" and as someone

who made sure everyone's views "got a fair hearing." He displays a "light touch" in his management style and is respectful of others. The results of his style and approach are uniformly described in glowing terms. Representative comments include:

"He has excellent skills in managing people."

"A great manager. He gave the staff tremendous support and never lost his temper. He is a great listener."

"High marks on collegiality. He reaches out to people for their input and opinions."

"[H]e can advocate for the judicial system as well as he can for a client."

"He has a superb ability to state reasons for his views, which makes him valuable and effective as a leader."

As a result of its investigation, the Standing Committee is satisfied that Judge Roberts' leadership and administrative skills are of the highest quality and make him well-suited for the position of Chief Justice of the Unites States.

## CONCLUSION

Over the years, John Roberts has garnered praise for his impeccable professional demeanor, his graciousness, his careful and thoughtful manner, his ability to listen to and treat people with respect, and his self-deprecating manner. His work products are finely-crafted, his analytical skills are unparalleled and his oral advocacy is outstanding. He is an exceptional lawyer whose strong connections with the community in which he and his family live will keep him grounded and aware of the problems and needs of those he will serve. Judge Roberts is a conscientious and deliberative individual, an excellent manager with strong "people" skills and

proven leadership abilities, as well as a widely respected leadership style. During the Standing Committee's two investigations, a number of individuals commented that even though they were not of the same political party and did not share some of the ideological values held by Judge Roberts, they nevertheless believed, based on first-hand experience, that he is well qualified and deserving of the Standing Committee's highest rating.

His academic training, his broad experience in the federal government and private practice, and his service on the District of Columbia Court of Appeals have contributed to his professional stature as a well-rounded and well-trained lawyer who meets the articulated standards of professional excellence set by the Standing Committee's guidelines.

The 2004-05 Standing Committee, having determined that Judge Roberts has impeccable integrity and the finest judicial temperament and meets the highest standards of professional competency, unanimously concluded that Judge Roberts is Well Qualified for appointment as Associate Justice of the Supreme Court. Furthermore, the 2005-06 Standing Committee is unanimously of the opinion that Judge Roberts is Well Qualified to assume the administrative and leadership responsibilities of Chief Justice of the United States. These two unanimously "Well-Qualified" ratings, when considered together, provide the Senate Judiciary Committee with the Standing Committee's comprehensive evaluation.

**In sum, the Standing Committee's two recently completed independent peer-review evaluations of Judge Roberts have satisfied the Standing Committee that Judge Roberts meets the highest professional standards and is Well Qualified for appointment as Chief Justice of the United States.**

Consistent with our longstanding practice, the Standing Committee will review this report at the conclusion of the public hearings and notify you if there are any circumstances that would require a modification of these views.

On behalf of the Standing Committee, thank you Mr. Chairman and the Members of the Senate Judiciary Committee for your invitation to participate in the confirmation hearings on the nomination of the Honorable John G. Roberts, Jr. We are grateful for the opportunity to participate in the process of assuring the highest quality of judges in the federal judiciary.

Respectfully submitted,

Thomas Z. Hayward, Jr.
Chair (2003-2005)

Stephen L. Tober
Chair (2005-2006)

cc: Members, Committee on the Judiciary, United States Senate
Michael S. Greco, President, American Bar Association
Robert J. Grey, Immediate Past-President, American Bar Association
Members, American Bar Association Standing Committee on Federal Judiciary

*Exhibit A*

Practitioners' Reading Committee

Donald B. Ayer, Jones Day Reavis & Pogue, Washington, D.C., former Deputy Attorney General of the United States

John Bouma, Snell & Wilmer L.L.P., Phoenix, Arizona

Daniel H. FitzGibbon, Barnes & Thornburg LLP, Indianapolis, Indiana

John J. Gibbons, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., Newark, New Jersey, retired Judge, Third Circuit Court of Appeals

William F. Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts

Timothy K. Lewis, Schnader, Harrison, Segal & Lewis LLP, Washington, D.C. and Pittsburgh, Pennsylvania, retired Judge, Third Circuit Court of Appeals

Neil L. Lynch, Boston, Massachusetts, retired Associate Justice, Supreme Judicial Court of Massachusetts

Maureen E. Mahoney, Latham & Watkins LLP, Washington, D.C.

Vincent L. McKusick, Pierce Atwood LLP, Portland, Maine, retired Chief Justice, Supreme Judicial Court of Maine

Kathryn A. Oberly, Ernst & Young LLP, Washington, D.C.

Charles B. Renfrew, San Francisco, California, former Deputy Attorney General of the United States, retired Judge, District Court for the Northern District of California

Ignacio Salceda, Wilson Sonsini Goodrich & Rosati, PC, Palo Alto, California

Charles Stevens, Stevens & O'Connell LLP, Sacramento, California

Charles Fried, Committee Chair, Beneficial Professor of Law, Harvard Law School, former Solicitor General, retired Associate Justice, Supreme Judicial Court of Massachusetts

*Exhibit B*

Reading Committee, Northwestern University, School of Law

Ronald J. Allen, John Henry Wigmore Professor of Law, expert in the fields of evidence, procedures and constitutional law

Robert W. Bennett, Nathaniel L. Nathanson Professor of Law, former dean of the School of Law, expert in the field of constitutional law and a professional arbitrator

Steven G. Calabresi, George C. Dix Professor of Constitutional Law

Charlotte Crane, Professor of Law, expert in the area of tax law

David A. Dana, Professor Law, Associate Dean for Faculty and Research, expert in the fields of environmental, property, intellectual property and professional responsibility law

Mayer G. Freed, Professor of Law and Associate Dean for Academic Affairs and Curriculum, expert on employment discrimination and employment law issues, constitutional law and Jewish law

Andrew M. Koppelman, Professor of Law and Political Science, expert in constitutional law and political philosophy

John O. McGinnis, Research Professor of Law, expert in international trade and constitutional law

Victor G. Rosenblum, Nathaniel L. Nathanson Professor of Law Emeritus, expert in administrative law and constitutional law

James B. Speta, Professor of Law, expert in telecommunications and internet policy, antitrust, administrative law and market organization

Kimberly A. Yuracko, Professor of Law, expert in antidiscrimination law employment law, property and family law

# TESTIMONY OF THE NATIONAL BAR ASSOCIATION

**BY ITS PRESIDENT, REGINALD M. TURNER, JR.**

**BEFORE THE**

## U.S. SENATE JUDICIARY COMMITTEE

**IN THE CONFIRMATION HEARINGS OF**

## JUDGE JOHN G. ROBERTS, JR. (D.C. CIR.)

**ON HIS NOMINATION TO THE**

## UNITED STATES SUPREME COURT

**SEPTEMBER 15, 2005**

## SALUTATION

Mr. Chairman and other distinguished Members of the United States Senate Judiciary Committee,

Good morning.

I am Reginald M. Turner, Jr., and I am the 63rd President of the National Bar Association.

It is an extraordinary honor and privilege to testify on behalf of the National Bar Association before this Committee during the Confirmation Hearings of Judge John Roberts regarding his nomination to serve as the Chief Justice of the United States Supreme Court.

The National Bar Association

The National Bar Association (NBA) was organized in 1925. With a network of more than 20,000 members and 80 bar affiliates, the NBA is the oldest and largest association of African American and minority attorneys, jurists, legal scholars, and law students in the world. When the NBA was organized in 1925, lawyers of color were prohibited from belonging to many other bar associations. At the time, there were fewer than 1,000 African American lawyers in the nation, and less than 120 of them belonged to the Association. Over the past 75 years, the NBA has grown enormously in size and influence. The objectives of the NBA are "... to advance the science of jurisprudence; improve the administration of justice; preserve the independence of the judiciary and to

uphold the honor and integrity of the legal profession; to promote professional and social exchange among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammeled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States."

The NBA thanks the Chairman, ranking Democratic member Senator Leahy and this Committee for the opportunity to participate in this confirmation hearing, notwithstanding that it has come after the worst natural disaster in our history and the passing of United States Supreme Court Chief Justice William H. Rehnquist.

The NBA expresses its condolences to the family, friends and colleagues of the late Chief Justice William H. Rehnquist of the United States Supreme Court. Chief Justice Rehnquist spoke eloquently of the need for an independent judiciary to protect the constitutional values we cherish as a Nation. He was also a strong advocate for adequate resources for the federal judiciary. The NBA joined Chief Justice Rehnquist in these efforts, and his leadership in this arena will be missed.

The National Bar Association offers its deepest condolences, and its assistance, to the victims and survivors of Hurricane Katrina. Our prayers are extended to the hundreds of thousands of people suffering from its destruction and devastating aftermath, and to those NBA members residing in the affected region.

Many victims and survivors were people of color and defenseless: poor, elderly, disabled, or young. Regrettably, many lives and substantial property were perhaps

needlessly lost. The NBA is outraged and saddened by the slow and seemingly indifferent response of certain federal, state, and local officials to a long-predicted tragedy. The devastation was exacerbated because no one seemed to want to accept the responsibility for responding to this disaster in our own backyard. This great and powerful democratic Nation, which is often the first to respond to a crisis elsewhere, failed its own people when they needed it the most. This democracy exists for the common good of all Americans – regardless of their race, gender, economic portfolio, educational achievement, or social background. Members of Congress, the NBA, the NAACP Legal Defense and Education Fund, the Republican and Democratic Parties, and many others have contributed to the creation and protection of the fundamental rights and privileges people residing in the United States enjoy.

Sadly, this Nation was founded on principles and laws that denied many rights and privileges – including the right to vote and of citizenship - to African Americans and women. True to its mission, the NBA will not be silent, while others work to retard further progress on these basic rights and privileges for those who have been discriminated against since our Nation's founding. As the Honorable Senator Edward Kennedy stated during this hearing, the devastation of Katrina exposed America's continued racial inequities and economic disparities. There is still much work to be done.

America's most vulnerable citizens need a strong and responsive national government in times of severe crisis. The Senate must be satisfied that Judge John Roberts appreciates the significance of, and necessity for, strong a federal government and the appropriate congressional power to delegate the proper resources adequately and

fairly to all people. Moreover, the Senate must be certain that Judge Roberts understands that there are significant constitutional limits on presidential power, even during periods of national crises, while appreciating that as an elected body, Congress must have the authority to reach across state borders to address concerns with national implications. At a minimum, the Senate must ensure that Judge Roberts unquestionably supports constitutionally-mandated congressional oversight power to insure that federal officials fulfill their responsibilities to the people. The residents of the Gulf States learned first hand what happens when territorial infighting and unspoken prejudices impede humanitarian relief and a nation's obligations to its own citizens.

## INTRODUCTION

Confirmation of the Chief Justice

As has been stated during this hearing, the Senate Judiciary Committee has an enormous Constitutionally mandated responsibility to "Advise and Consent" to a nomination of an Article III federal judge. The significance of the confirmation of the Chief Justice of the U.S. Supreme Court cannot be overstated. The Senate Judiciary Committee must insure that the nominee is extraordinarily qualified to serve as Chief Justice. Bluntly stated, there is no room for error. The Chief Justice is the leader of the third branch of our national government, co-equal to the Executive and Legislative branches. The Chief Justice leads the branch of government that ultimately interprets the law. The Chief Justice must lead this branch of government upon which African Americans and the NBA have come to rely upon to protect their civil rights and personal liberties.

Throughout our Nation's history, the United States Supreme Court has played a crucial role in shaping the progress of African-Americans. For the last century, from the regrettable rulings in *Dred Scott* and *Plessy v. Ferguson*, to the renewed hope offered in *Brown v Board of Education* and *Grutter v. Bollinger*, the Supreme Court has defined the status of, and the opportunities available for, African-Americans in a way that perhaps is unduplicated with respect to any other people in the United States, including other people of color. During the last two decades, especially, the Supreme Court has decided almost every major civil rights case involving issues of race by razor thin margins, most

typically 5-4. The stakes in this appointment could not be higher, and the NBA welcomes this opportunity to appear here before you today to discuss our concerns.

National Bar Association Evaluation of Judicial Nominees

The NBA has established a process for evaluating judicial nominees and established criteria. The NBA takes a position on a nomination only after a complete and exhaustive evaluation of the nominee's record. Judge Roberts was evaluated consistent with this process and these criteria. The NBA reviewed Judge Roberts' entire record, including his professional and educational background and the available records of his years as a government lawyer. The record is complex and troubling, and most importantly, incomplete. Judge Roberts has impressive educational credentials and a distinguished employment history. However, these credentials, alone, are not sufficient to qualify a lawyer or judge to become a Justice of the United States Supreme Court, let alone Chief Justice. Unfortunately, the available record evidences a clear hostility to civil rights and personal liberties by Judge Roberts.

In this country, race and the treatment of racial issues by the judiciary profoundly affect every aspect of American life and play critical roles in the formulation of American social, economic, and political agendas.[1] Accordingly, the NBA has adopted a standard that determines whether a federal judicial nominee will interpret the Constitution and laws to effectuate racial equality and eliminate oppression. This standard is defined as "a

[1] "Evaluation of the Current Judicial Nominations Process and Proposed Standards for the Congressional Black Caucus/ National Bar Association Task Force on Judicial Nominations." Alfreda Robinson: Chair, Standing Committee on Judicial Selection National Bar Association.

contextual and historical jurisprudential approach, to judicial adjudication, in order to achieve equal justice under the law." Our standard examines not only the professional qualification of nominees, but also scrutinizes whether the nominee has the ability to judge fairly, to conduct matters with judicial temperance, and to advance and seek equal justice under the law. The standard challenges unconstitutional and illegal oppression on the basis of race, gender, and class. Moreover, our standard is vital to ensuring that groups that have been historically marginalized by the legal system obtain the American mandate of equal justice under the law.

Despite the claims of neutrality and equality, the legal system is not as colorblind as it pretends to be. In *Grutter v. Bollinger*, which upheld the use of affirmative action in the admissions process at educational institutions, Supreme Court Justice Sandra Day O'Connor acknowledged that: ". . . in a society, like our own . . . race unfortunately still matters."[2] Moreover, due to the fact that our judicial system has historically marginalized women and people of color, it is imperative that the law be viewed through a historical and contextual lens. A judicial nominee should be able to articulate support for Constitutional principals, statutes, and legal doctrines that serve to extend the blessings of liberty and equality to all Americans, including people of color.

Upon Justice Sandra Day O'Connor's announcement of her retirement from the Supreme Court and the recent passing of Chief Justice William Rehnquist, the NBA urged President Bush to nominate a candidate for the Supreme Court who is not

[2] *Gutter v. Bollinger*, 539 U.S. 306, 333 (2003) (where the Court upheld use of race as a factor in law school admissions).

ideologically rigid and predictable, but who is fair and open-minded, and committed to protecting the advances in civil rights that we as a nation have achieved. The NBA's Judicial Selection Committee has reviewed thousands of pages of documents and engaged in dialogue and correspondence the Alliance for Justice, Lawyers Committee for Civil Rights, Leadership Conference for Civil Rights, NAACP Legal Defense and Educational Fund, and People for the American Way to attempt to determine whether the nominee meets the requisite standard.

Without more evidence to counter the distinctively negative impression left by the incomplete record of Judge Roberts' views important constitutional principals, related Congressional enforcement statutes, executive branch policies, our Nation's civil rights laws, and history more broadly, the record as it now stands precludes the NBA from supporting the nomination of Judge Roberts as Chief Justice to the United States Supreme Court.

The NBA takes this position on the following grounds:

(1) the record in incomplete, as many important documents have been withheld purposefully from the Senate Judiciary Committee and the public;

(2) there are numerous available documents demonstrating that the nominee does not support civil rights, personal liberties, and equal justice under the law;

(3) there are numerous documents evidencing that the nominee's views on the authority of Congress to promulgate legislation for the public good under the Commerce Clause and Section 5 of the 14th Amendment of the Constitution are

inconsistent with well-established jurisprudence, and contrary to the well-being of the public; and,

(4) the nominee's answers to questions during the hearing process thus far have not indicated a willingness to reveal his judicial philosophy in a manner that would allow the Senate and the public to evaluate fully and completely whether he could be fair and impartial while sitting as Chief Justice of the United States Supreme Court.

The NBA is mindful also that there are many other civil rights organizations that have already submitted extensive written comments, which are part of the record. We see no purpose in duplicating their efforts and adding to the panoply of detailed written testimony for you to consider. We therefore submit a written summary of the record and background of Judge Roberts that we consider troubling, and our brief analysis regarding our inability to support his nomination.

**ANALYSIS**

Civil Rights

Based upon a careful review of the available documents released from the National Archives and the Ronald Reagan Presidential Library, it is now apparent that Judge Roberts played a key role in the governments' retrenchment on civil rights during the most destructive period for civil rights enforcement in the second half of the 20th century.

The period in which Roberts worked as Special Assistant to Attorney General William French Smith was marked by a deep hostility to civil rights enforcement. The Justice Department, specifically the Civil Rights Division, was characterized by a drastic repudiation of civil rights principles that had evolved over the previous four decades.[3] Three years into his tenure, then Assistant Attorney General for Civil Rights William Bradford Reynolds was nominated to be Associate Attorney General. His nomination was defeated, however, by a Republican-led Judiciary Committee based on his antipathy toward civil rights.[4]

In key civil rights areas, Judge Roberts was very active in implementing the Reagan Administration's retreat. These issues run the civil rights gamut, including voting rights, affirmative action, equal educational opportunity/school desegregation, discrimination by federally funded institutions, fair housing and employment, and enforcement of federal statutory rights. In each area, the record shows that Judge Roberts has been a committed advocate for narrowing civil rights laws, and for minimizing the scope and substance of civil rights enforcement, contrary to previous Presidential administrations, slowing our Nation's progress in embracing our wonderful diversity. The resulting upheaval in race relations has polarized our Nation at a time when unity, tolerance of diversity, and equality of opportunity are extremely important to our national security and our continued development as a great nation.

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[3] *See e.g.*, In the Administration, a Pattern Develops on Conservatives' Agenda, The Washington Post, Feb. 2, 1982.
[4] The Senate Judiciary Committee voted down the nomination, 10 to 8. The Washington Post called Reynolds' defeat "a stunning rejection of the chief architect of the Reagan Administration's civil rights policies." Reynolds' Nomination Voted Down, The Washington Post, June 28, 1985.

Voting Rights

Since its enactment, the Voting Rights Act of 1965 has played a critical role in providing equal access to the right to vote to minority citizens and continues to be hailed as "the most successful civil rights law ever enacted."[5] During a significant portion of his career, Judge Roberts sought to limit the protections of the Voting Rights Act. More than twenty-five memoranda authored by Judge Roberts illustrate his leadership in formulating and advancing the Reagan Administration's opposition to amending Section 2 of the Voting Rights Act to provide an "effects test." The NBA has serious reservations about his respect for the constitutional and statutory provisions that protect the right to vote because he was one of the principal architects of the attacks on this basic civil right.[6]

As special assistant to Attorney General William French Smith, Judge Roberts strongly opposed bipartisan congressional efforts to reinforce the effectiveness of the Voting Rights Act following a Supreme Court decision that previously weakened the protections of the Act.[7] In *City of Mobile v. Bolden*, the Supreme Court ruled that intentional discrimination must be shown to establish a violation of Section 2 of the Voting Rights Act. By requiring a specific showing of intent, the *Bolden* decision changed the legal landscape, making it considerably more difficult to establish violations

[5] People For the American Way, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court, p.52 (2005); Leadership Conference on Civil Rights, Without Justice at 56 (Feb. 1982).
[6] NAACP Legal Defense and Educational Fund, Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States, at 5-6 (2005).
[7] People For the American Way, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court, at 52 (2005).

of Section 2.[8] Recognizing this threat, the House of Representatives passed, by an overwhelming bipartisan margin of 389 to 24, an amendment of the Voting Rights Act that restored the "effects test" in Section 2 of the Act.[9] Congress recognized that state legislators would rarely, if ever, express clear discriminatory intent in the published legislative history. Accordingly, the purpose of the amendment to Section 2 was to permit courts to find a violation when state and local officials' actions, rather than their words, had the "effect" or "result" of abridging the right to vote on account of race.[10]

The record reveals that Judge Roberts vigorously urged the Reagan Administration to oppose the House bill based specifically on the "effects" language used in the bill.[11] In inflammatory language, Roberts argued the House compromise amendment would create a system of "proportional representation" of minorities in electoral politics. This mischaracterization of the "effects test" was directly contrary to the carefully negotiated language in the proposed bill making clear that proportional representation would not be required. Roberts also wrote that Justice Stewart in his *Bolden* opinion "correctly noted.... incorporation of an effects test in § 2 would establish 'essentially a quota system for electoral politics,'" yet Justice Stewart never referred to quotas in the opinion.[12]

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[8] *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

[9] People For the American Way, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court at 52 (2005); *See* Robin Toner and Jonathan D. Glater, "Roberts Helped to Shape 80's Civil Rights Debate," New York Times (Aug. 4, 2005)("8/4 NYT")(quoting Jordan).

[10] NAACP Legal Defense and Educational Fund, Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States at 6 (2005).

[11] *See generally*, David G. Savage and Richard B. Schmitt, "Portrait of Nominee as a Young Lawyer," Los Angeles Times (Aug. 7, 2005).

[12] Memorandum from John Roberts to the Attorney General (Dec. 22, 1981) (Attachment at 2); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The disdain displayed by John Roberts for the effects test in the voting context is similar to his view of the same test in other civil rights areas. The NBA is deeply troubled by John Roberts' rejection of the longstanding method of proving discrimination by showing a disparate effect on a protected class, as opposed to showing evidence of intentional discrimination.

Equal Education Opportunity

In stark contrast to Supreme Court Justice Sandra Day O'Connor's acknowledged reference to real racial discrimination in *Grutter v. Bollinger*[13], Judge Roberts' record reveals his insensitivity towards the efforts made to increase diversity in our educational institutions.. Justice O'Connor struck a delicate balance between our aspirations for a color-blind society and our current need to consider race to remedy the present effects of past and present racial discrimination. She spoke eloquently of the compelling governmental interest in fostering diversity:

> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . What is more, high-ranking military officers and civilian leaders of the United States military assert that, 'based on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security'.[14]

[13] *Grutter v. Bollinger*, 539 U.S. 306 (2003)(where the U.S. Supreme Court upheld the use of race as a factor in law school admissions).
[14] *Grutter, supra,* at 539 U.S. 306, 330-31 (2003) *quoting, Johnson v Transportation Agency*, 480 U.S. 616, 638 (1987).

Decades after the landmark decision in *Brown v. Board of Education*, Judge Roberts supervised and co-authored briefs arguing against educational diversity by limiting the specific requirements of desegregation plans and blocking courts from hearing cases on this issue. In *United States. v. Fordice*, the Solicitor General was forced to withdraw the government's brief, the drafting of which Judge Roberts' supervised personally, because the Supreme Court rejected the argument that , Mississippi had satisfied its duty to provide equal education to students, despite large disparities in funding and academic programs, because these students were free to choose to attend historically white or historically Black schools.[15] In *Freeman v. Pitts*, Judge Roberts's *amicus brief* excused clear racial imbalances in the school system, attributing them merely to "demographic shifts", and favorable argued for setting aside the relevant desegregation decree.[16] In *Oklahoma City Public Schools v. Dowell*, Judge Roberts again argued in favor of terminating a relevant desegregation decree, even though the local decision to eliminate busing, which Judge Roberts espoused, resulted in the re-segregation of a number of schools.[17]

At a time when opportunities in our schools for young women were limited, Judge Roberts was a passioned advocate for a more narrow view of preventing gender discrimination in education than President Reagan's own Secretary of Education, Terrel

[15] Brief for the United States as Petitioner, *United States v. Fordice*, Nos. 90-1205 and 90-6588, 1990 U.S. Briefs 1205, at *31-*33 (July 1, 1991).
[16] Brief for the United States as *Amicus Curiae*, *Freeman v. Pitts*, 503 U.S. 467 (1992).
[17] Brief for the United States as *Amicus Curiae*, *Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991). Judge Roberts often lamented what he considered "the imposition of forced racial busing." Memorandum from John Roberts, to The Attorney General, re: Summary of Material Sent by Arthur Flemming, Chairman of the U.S. Commission on Civil Rights (Aug. 25, 1981).

Bell. [18] Judge Roberts' argument conflicted with prior Democratic and Republican administrations, which traditionally tied federal funds allocated to any particular budget of an educational institution to compliance with Title IX requirements throughout that institution. Judge Roberts' own restrictive interpretation of Title IX anti-sex discrimination provisions would have permitted schools receiving federal funds purposefully to engage in sex discrimination so long as it occurred in unrelated programs. When Congress responded to certain judicial limitations on enforcement of Title IX by passing the Civil Rights Restoration Act of 1987, Judge Roberts' denounced the legislation as an attempt to "radically expand the civil rights laws"[19] and suggested the administration seek to curtail further expansion.[20] Unfortunately, in 1999, it was apparent that while in private practice, Judge Roberts was still advancing a hostile interpretation to Title IX legislation and well-established jurisprudence of Title IX.[21]

Judge Roberts' hostility to expansion of educational opportunities has not been limited solely to young women and students of color. Judge Roberts has sought to limit the educational opportunities available to children with disabilities. Among other things, Judge Roberts supported a position that would weaken the Education for All Handicapped Children Act, by dismissing a lower court ruling in favor of a deaf student's right to a quality education as merely "an effort by activist lower court judges."[22]

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[18] Memo from T.H. Bell to Edwin Meese, III, December 21, 1982.
[19] Memo from John Roberts, to Fred F. Fielding, re: Correspondence from T.H. Bell on Grove City legislation (July 24, 1985).
[20] Memo from John Roberts to Fred Fielding re Grove City -- Civil Rights Legislation, April 12, 1985.
[21] *National Collegiate Athletic Ass'n v. Smith*, , 525 U.S. 459 (1999) (where Judge Roberts argued the NCAA should not be bound by gender discrimination requirements).
[22] *Bd. of Educ v. Rowley*, 458 U.S. 176 (1982).

Commerce Clause

Finally, our review and analysis of the available records on Judge Roberts also included an examination of the nominee's view on Congress' power to legislate, specifically under Article I, Section 8 of the Constitution, known as the Commerce Clause, which empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[23] An overly narrow reading of Congress' Commerce Clause authority would threaten civil rights protections because Congressional regulation of private entities derives generally from its Commerce Clause authority. The judiciary, most notably the Supreme Court, plays a crucial role in interpreting the extent of civil rights. A single Supreme Court ruling can change the very nature of a protected right throughout the entire country, and Supreme Court decisions can also affect the manner in which Congress enacts civil rights legislation, as occurred with the Civil Rights Act of 1964. It is fair, then, to ask what views Judge Roberts, who as Chief Justice would have the power to mold opinion among the other Justices, holds on this constitutional provision. One indication of Judge Roberts' view is in a dissenting opinion in *Rancho Viejo v. Norton*,[24] a 2003 case in which the U.S. Circuit Court of Appeals for the District of Columbia upheld the application of the federal Endangered Species Act to stop a California development. In a five-paragraph dissent, Judge Roberts questioned whether the Commerce Clause justified using it in a matter apparently limited to just one state. Specifically, Judge Roberts asked if Congress' Commerce Clause

[23] U.S. Const. Art I, § 8, cl. 3.

[24] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

powers could reach "a hapless toad" that lives only in California, prompting Senate interest.[25]

Judge Roberts' apparent limiting view of Congress' authority potentially threatens a wide swath of legislation rooted in the Commerce Clause, specifically the Civil Rights Act of 1964 which Congress passed using its power to regulate interstate commerce. This Committee and our country deserve to know expressly whether or not Judge Roberts would support curtailing Congressional authority to protect, among many things, civil rights.

**CONCLUSION**

In conclusion, on the basis of our thorough review of the available record on Judge Roberts and for the reasons cited above, the NBA cannot support the confirmation of Judge Roberts as Chief Justice. For several decades Judge Roberts has championed limitations on voting as well as educational and employment opportunities for people of color and women. If his views had prevailed in many cases, our Nation would not be far beyond the days when opportunities for Americans like Justices Sandra Day O'Connor and Thurgood Marshall were truncated on the basis of gender and race. Now is not the time for retrenchment. Now is the time for America to step forward into the 21st Century opening the doors of mainstream society to all Americans for the benefit and protection of all Americans.

Again, thank you for the opportunity to testify here today.

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[25] *Rancho Viejo supra* at 1160.

September 15, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Chairman Specter and Ranking Member Leahy,

We write on behalf of the Union for Reform Judaism, whose 900 congregations encompass 1.5 million Reform Jews throughout North America, the largest segment of American Jewry. With the Senate Judiciary Committee hearings on John Roberts' nomination as Chief Justice underway, we write to express our strong concerns regarding Judge Roberts' nomination.

The Executive Committee of our national board met on September 12th. The Committee reaffirmed our approach, namely that we should not take a formal position on the nomination until we listen to everything that comes out in the hearings. At the same time, the Committee voted unanimously to send a letter to the Senate conveying our deep concerns about this nomination, which we hope will be addressed by the hearings.

We have been, of course, watching the hearings with great interest. We have been impressed by Judge Roberts' erudition, articulateness, and personal manner. It is not Judge Roberts' character or qualifications that trigger our concern, but rather the direction he, as Chief Justice of the Supreme Court, may take jurisprudence in this country.

On almost every issue of importance to the Reform Jewish Movement, Judge Roberts has indicated, often in very strong terms, that he holds views in stark contrast to our own core values. While Judge Roberts was charged with advancing the Administrations' policies as a member of the Reagan and George H.W. Bush Administrations, it is reasonable to assume that Judge Roberts' personal beliefs were well-attuned to the Administrations for which he worked; otherwise he would not have chosen to act on their behalf. Further, in many of his notations and memos he clearly expressed his own views, sometimes disagreeing with the Administrations' policy, and almost every time represented an even more conservative perspective. It is for precisely this reason that our Movement calls for release of the currently withheld documentation demonstrating Judge Roberts' more mature work.

Among Judge Roberts' writings that cause us concerns are:

- His reference in a 1981 internal memo to the Attorney General to the "so-called right of privacy;"
- His written arguments as Principal Deputy Solicitor General (in *Rust v. Sullivan*) when he wrote, "we continue to believe that *Roe* was wrongly decided and should be overruled;"

- His opposition (in *Lee v. Weisman*) to the "*Lemon* test," which the Court uses to analyze Establishment Clause cases. The effect of moving away from the "*Lemon* test" would be to transform church-state jurisprudence and allow a significant lowering of the wall protecting religion from government;
- His 1981 memo to the Attorney General stating that the Department of Labor and the Office of Federal Contract Compliance Programs were promoting "offensive preferences" based on race and gender, demonstrating his opposition to affirmative action;
- His work in both the Reagan (in *Plyler v. Doe* and *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*) and first Bush Administrations (in *Board of Education of Oklahoma City v. Dowell* and *Freeman v. Pitts*) arguing for a restrictive interpretation of a wide variety of civil rights laws;
- His opinion as a DC Circuit Court Judge (in *Lujan v. National Wildlife Federation*) that restricted access to federal courts through a crabbed reading of Section 1983 standing; and
- His opinion as a DC Circuit Court Judge (in *Rancho Viejo, LLC v. Norton*) that was based on a narrow reading of the Commerce Clause that could undermine Congress' power to enact legislation designed to regulate the environment, protect workers' health and safety, and protect civil liberties and civil rights.

All of these speak to core values and fundamental rights that have been at the heart of the Reform Jewish Movement's social justice work for decades.

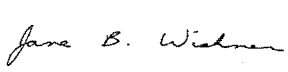
When President Bush first nominated Judge Roberts to fill Justice O'Connor's seat, the Reform Jewish Movement created an "Ask Judge Roberts" website to allow Reform Jews and others the opportunity to raise questions they believe Judge Roberts should answer during his confirmation hearings. The questions, a selection of which were sent to you earlier this month, reflect the broad issues of concern to our Movement, including civil rights and liberties, reproductive rights, the separation of church and state, environmental protection, and *stare decisis*. Information about Judge Roberts' record has become available through news reports and through questioning during his hearings, but the questions raised by our Movement have not been answered in any direct way.

How can the American people and Senators make an informed decision about his suitability to be Chief Justice of our nation's highest court if Judge Roberts does not answer these and other questions about his views on basic rights and freedoms? It would be difficult to imagine any potential employer considering a job applicant's silence on critical issues as a positive attribute. How then can you accept Judge Roberts' silence on these issues, or suggest, as some have, that such silence eases the way toward Judge Roberts' confirmation?

With respect we submit that the burden is now on you, the members of the Senate Judiciary Committee, to encourage Judge Roberts to be forthcoming and to answer questions about the important issues that will come before the Court.

Sincerely,

Robert Heller
Chairperson
Union for Reform Judaism Board of Trustees



Jane Wishner
Chairperson
Commission on Social Action of Reform Judaism

CC: Senate Judiciary Committee Members

**Unitarian Universalist Association** of Congregations
Washington Office for Advocacy
1320 18th Street, Suite 300B Washington, DC 20036
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Rob Keithan
Director

September 1, 2005

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Leahy and Specter,

I write on behalf of over 1000 congregations that make up the Unitarian Universalist Association in regards to your consideration of the judicial record of Judge John Roberts.

We are extremely concerned that Mr. Roberts' judicial philosophy and expressed beliefs threaten civil liberties, civil rights, women's rights, worker rights and the rights of people with disabilities. From the materials available about Mr. Roberts, he clearly has a record of being in the forefront of advocating out-of-the-mainstream conservative causes, as well as for restricting important rights and legal remedies. The American people deserve a Supreme Court Justice committed to upholding the rights and liberties of *all* people, regardless of their class, gender, sexual orientation, religious beliefs or race.

**Therefore, as a denomination committed to protecting the worth and dignity of all people, we ask that the Senate Judiciary Committee be resolute in its examination of the record and the judicial philosophy of Judge John Roberts.**

The American people deserve to know the truth about who John Roberts is and how he views the Constitution and laws of the land. The Bush administration's withholding of documents is not only disruptive to the confirmation process, it is also disrespectful to the American public.

**We ask that you persist in your efforts urging the White House to be forthcoming with the American public by cooperating with the constitutional process and releasing all documents requested by the Senate Judiciary Committee in a timely manner.**

As a Supreme Court Justice, Judge Roberts primary responsibility would be upholding the Constitution. Certain constitutional principles—and in particular the First Amendment—have permitted Americans to believe in and practice the religion they choose without governmental interference or penalty. Our Founders' vision of a free and just society guaranteed religious liberty for Americans of all faiths, as well as for those who affirm no faith. Respect for religious freedom has enabled the United States to become the most religiously pluralistic society the world has ever known, and it should continue.

Recent public debate has focused on the appropriateness of asking questions concerning religion during the confirmation hearings next week. However, questions about the intersection of religion and the Constitution have been asked without controversy in past confirmation hearings, with senators of both parties asking nominees how their deeply held religious or philosophical beliefs would affect their understanding and interpretation of the Constitution. Senators have also asked nominees how their view of the Constitution would affect religious freedom in our country.

**We ask that you continue this type of respectful, thorough and rigorous questioning with Judge Roberts. Questions should probe the nominee's willingness and ability to be bound by the Constitution as the "supreme law of the land" and not his personal faith.** We have attached a list of questions compiled and approved by trusted colleagues. We ask that these questions be thoroughly covered in next week's hearings.

Again, we are concerned that Mr. Roberts record suggests a judicial philosophy consistent with those who would overturn established legal protections. We believe that America's vision of justice includes respect for the equality of all people, regardless of race, religion, or political perspective. As people of faith, we are called to witness for justice so that one day this vision will be a reality.

**We urge you to continue your efforts to conduct an open, fair, and thorough confirmation process. We ask that you hold Judge Roberts to the highest standard of justice, thoroughly investigating his views of the values and laws Americans hold dear.**

I am available to discuss this letter and any other inquiries. Thank you for your consideration.

In Faith,

Robert C. Keithan, Director

*cc:*

Senator Joseph R. Biden, Jr.
Senator Sam Brownback
Senator Tom Coburn
Senator John Cornyn
Senator Mike DeWine
Senator Richard J. Durbin
Senator Russ Feingold
Senator Dianne Feinstein
Senator Lindsey O. Graham
Senator Charles E. Grassley
Senator Orrin G. Hatch
Senator Edward M. Kennedy
Senator Herbert H. Kohl
Senator Jon L. Kyl
Senator Charles E. Schumer
Senator Jeff Sessions
President George W. Bush

**Critical Questions Concerning Religious Liberty**

**1.** *The First Amendment states that "Congress shall make no law respecting an establishment of religion." In interpreting this clause, Justice Scalia has written that "there is nothing unconstitutional in a State's favoring religion generally." Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring).*

- Does the Establishment Clause prohibit the government from favoring religion generally, or just from favoring a particular religion over others? Does the Establishment Clause prohibit the favoring of religious beliefs over non-religious beliefs?

**2.** *Originally the Bill of Rights only limited actions by the federal government, but over time most, if not all, of the provisions of the Bill of Rights were "incorporated" to limit the ability of the states to intrude on the rights of the people.*

- Has the Establishment Clause been properly incorporated, or are individual states free to establish a religion if they so choose?

**3.** *Some Justices have stated that, for the Framers, "establishment" involved "actual legal coercion."* Van Orden v. Perry, *125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring); see also,* Lee v. Weisman, *505 U.S. 577, 640 (1992) (Scalia, J., dissenting).*

- Please explain what, in your view, constitutes "legal coercion" that would violate the Establishment Clause.

- Do you believe the Framers understood "establishment" as necessarily involving "actual legal coercion"? If legal coercion is not necessary to violate the prohibition against an "establishment of religion," what is necessary for such a violation?

**4.** *The brief you filed in Board of Education v. Mergens while you were in the Solicitor General's Office criticizes the Lemon test by arguing that:*

> *"Especially when the Lemon test is divorced from the context in which it was spawned — financial aid to highly sectarian institutions — it sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people."*

*In both Lee and Mergens, therefore, you argued that, instead of applying the Lemon test, courts should "draw inferences from long-established traditions to approve practices in contemporary settings." Your briefs argued that longstanding governmental expressions of religion are constitutional, and even new categories of governmental expression of faith or support for religion should be viewed as constitutional at least if they are generally analogous to longstanding practices.*

- Can you explain how the fact that a practice has occurred for a long period of time renders it constitutional?
- In your view, does the fact that a practice dates to the founding of the Constitution render it permissible?

5. *As you know, religious institutions are exempted from Title VII's prohibition on religious discrimination. That exemption was upheld by the Supreme Court in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). In that case, however, the church did not receive public funds, and the positions in question were not funded in whole or in part with tax dollars.*

*In Renzi v. Connelly School, 224 F.3d 283 (4th Cir. 2000), a case involving an exemption for parochial schools from various zoning requirements, you took the position on behalf of a client that "efforts to accommodate religion are invariably constitutional when the State simply chooses to relieve religious institutions" of legal obligations.*

- Does your view that exemptions are "invariably" constitutional extend to publicly-funded positions? That is, in your view, would it be constitutionally permissible for a religious institution that receives public funds to use those public dollars to fill positions reserved for "Christians only"?

- If a particular State wanted to condition the receipt of public funds on non-discrimination – would that, in your view, violate the Free Exercise or other rights of religious institutions? Is it your view that religious institutions are actually constitutionally entitled – under the Free Exercise Clause or otherwise – to an exemption from generally applicable anti-discrimination statutes?

- If a state program that provides financial assistance to private schools in that State makes funds available for building, maintaining, or restoring school buildings, in your view, would it be constitutional for those funds to be provided to church-operated schools?

6. *In Edwards v. Aguillard (1987), the Supreme Court struck down a Louisiana statute requiring public schools to give "equal time" to instruction in creationism if they teach the scientific theory of evolution.*

- Do you think that Edwards was correctly decided?

- If so: Would you come to a different conclusion if, in addition to teaching the scientific theory of evolution, public schools were to give "equal time" to criticizing evolution and teaching as an alternative the view that an 'intelligent designer' is responsible for the origins of life or the complexity of organic structures in the natural world?

John W Warner

**Introductory Remarks (as prepared)**
**before the Senate Judiciary Committee**
**Nomination of Judge John Roberts**
**to the position of Chief Justice of the United States**

**Senator John W. Warner, R-Va.**
**September 12, 2005**

Mr. Chairman, Senator Leahy, members of the Committee, it is a privilege for me to appear before you again, as I have many times, with respect to a nomination to our third branch of government -- the federal judiciary.

Before I begin, though, I'd like to associate myself with the remarks made by others on the Committee who have paid homage to the late Chief Justice of the United States, William Rehnquist.

Mr. Chairman, this hearing today is an important chapter in the history of the United States. In the 218 years since the Constitution was ratified, the nation has had 43 Presidents but only 16 individuals have served as Chief Justice.

Further, the Senate deliberations, in this hearing, and to be followed with floor debate, provide a unique opportunity for generations of Americans, particularly younger ones, to follow these proceedings and learn about the inter-relationship of our three branches of government, the role of the judicial branch in our constitutional framework of government, and the ongoing debates in constitutional law.

For example, does the Constitution protect a general right of privacy? Should the courts construe provisions of the Constitution in accordance with their meaning at the time the Constitution was ratified -- the doctrine of original intent? Or is the Constitution a living document that evolves over time? What does the term "judicial activism" mean?

Accordingly, I hope educators across the land will encourage students to follow all or parts of the Senate proceedings.

I am confident that this distinguished committee will perform its functions in a manner that will comport with the finest traditions of the Senate, and will impart on our audience across America, particularly our younger citizens, a respect for and an understanding of the U.S. Senate, and its duties under the Constitution.

The Constitution, together with the Bill of Rights, is an amazing document. For it is the reason that our nation's government stands today as the oldest, continuous, democratic republic form of government in the world today. Indeed, most all of the other bold experiments in government have gone into the dustbin of history. That is why so many other nations today are forming governments that embrace the principles of our own.

Within the basic foundation of our Constitution lies the bedrock principle that our government is composed of three different, yet coequal, branches -- the Congress, the Executive, and the Judiciary.

While the Constitution provides each of these three, coequal branches with its own unique responsibilities, it is appropriate today to focus on how the Founding Fathers made the continuity of the judicial branch entirely dependent upon the other two branches of government -- the Executive branch and the Congress -- fulfilling their constitutional obligations.

Within our Constitution, the Founding Fathers entrusted to the Executive branch the exclusive power to nominate individuals to serve on our federal judiciary. At the same time, the Founding Fathers also entrusted to the United States Senate, under Article II, Section II of the Constitution, the exclusive power to give, or withhold, consent to serve.

Only if the President and the Senate exercise these respective constitutional powers fairly, objectively, and in a timely manner, can the Judicial branch have the numbers of qualified judges to serve properly the needs of our citizens. For this reason, in my view, a Senator has no higher duty than his or her constitutional responsibilities under Article II, Section II -- the advice and consent clause.

Recently, fourteen Senators, of which I was one, committed themselves, in writing, to support our Senate leadership in facilitating the Senate's responsibility of providing "advice and consent." In our Memorandum of Understanding, Senator Byrd and I incorporated language that spoke directly to the Founding Fathers' explicit use of the word "advice" in Article II, Section 2, of our Constitution. Without question, our Framers put the word "advice" in our Constitution for a reason: to ensure consultation between a President and the Senate prior to the forwarding of a nominee to the Senate for consideration. And, in my view, with this nomination, the President met these responsibilities in an exemplary way.

Now, with the beginning of these hearings today, the Senate commences the next phase -- the consent phase -- of this constitutional process. After committee consideration, the nomination will move to the full Senate for debate, followed by a vote. Throughout this process, the ultimate question will remain the same: whether the Senate should grant, or deny, its consent.

In the twenty-seven years I have been privileged to serve in the United States Senate, slightly more than 2000 judicial nominations have been submitted to the Senate by a series of Presidents.

When evaluating nominees, it has been my practice to recognize political considerations, but not to be bound by them. I give far greater weight to an individual's credentials, which I judge fairly and objectively. I look at a wide range of factors,

primarily: character, professional career, experience, integrity, and temperament for lifetime service on our courts.

In my view, the unique posture in which our Framers placed our federal judiciary, with respect to the other two coequal branches of governments, requires such fairness and objectivity.

I judge John Roberts' credentials to be Chief Justice in the same manner I have applied to all other nominees during my 27 years in the Senate. And in my view, I can say, without equivocation, that I have never seen a nominee with stronger qualifications than John Roberts.

Some two years ago, when Roberts was nominated to serve on the United States Court of Appeals for the District of Columbia, I was privileged, at his request, to introduce him to this Committee. At the time, he was relatively unknown; today the world knows him.

It was during that process that I first really came to know John Roberts, and gained my great respect for him. We were brought together because we were both fortunate to have been partners, at different times in our careers, at the law firm of Hogan & Hartson -- a venerable law firm known for its integrity.

Among the firm's many salutary credentials, Hogan & Hartson has long been known for its extensive commitment to *pro bono* representation, particularly in court appointed cases.

In fact, if I could share a personal story -- in 1960 I was serving as an Assistant United States Attorney in the District of Columbia. Late one day, an attorney who had been appointed by the court to represent an indigent defendant charged with first-degree murder, knocked on my door. The lawyer asked me for the opportunity to introduce himself and for a period of consultation. Subsequently, the defendant's case went to trial, and midway through the proceedings, the court accepted a plea of guilty to a lesser included offense.

The lawyer who represented that criminal defendant was Nelson T. Hartson, a founding member of the law firm of Hogan & Hartson.

I have such a profound respect for the late Nelson Hartson for many reasons, but mostly because of his ethics and his dedication to *pro bono* work. Mr. Hartson always had the highest standards of ethics and instilled this in the culture of the firm. He also always strongly encouraged young lawyers to combine public service in their careers along with private practice.

Judge Roberts, you have exemplified that combination of experience.

John Roberts shares the belief that lawyers have an ethical duty to give back to the community by providing free legal services, particularly to those in need. The hundreds and hundreds of hours he has spent working on *pro bono* cases are a testament to that. He didn't have to do any of it. The bar doesn't require it. But John Roberts, again and again, volunteered his time to help others.

Those who know him best can also attest to the kind of person he is. Throughout his legal career, both in public service, private practice and through his *pro bono* work, John Roberts has worked with and against hundreds of attorneys. Those attorneys who know him well typically speak with one voice when they tell you that dignity, humility, and a sense of fairness are hallmarks of John Roberts. These qualities represent the embodiment of a federal judge, particularly a Chief Justice of the United States.

While I thoroughly understand that all do not share my views, the simple fact is that this nomination easily fits within the confines of Senate history and precedent.

Over the last fifty years America has seen a total of 27 Supreme Court nominees:

- 6 of those nominees received the unanimous consent of the Senate by voice vote.

- Another 15 of those nominees, including 7 current members of the United States Supreme Court, received the consent of the Senate by more than sixty votes.

- In fact, only 3 nominees to the Supreme Court over the course of the last fifty years have failed to receive the consent of the Senate.

The modern day history of the Senate is even more illustrative:

- Chief Justice Rehnquist was confirmed to the court as an Associate Justice in 1971 with 68 votes in support, and later confirmed as Chief Justice with 65 votes;

- John Paul Stevens received the consent of the Senate by a vote of 98-0;

- Justice O'Connor, Justice Scalia and Justice Kennedy were all confirmed by the Senate unanimously;

- Justice Souter was confirmed via a vote of 90-9;

- Justice Ginsburg was confirmed by a vote of 96-3; and

- Justice Breyer received the Senate's consent by a vote of 87-9.

In conclusion, I'd like to take a moment to remind everybody that this exact week, 218 years ago, our Founding Fathers finished the final draft of the U.S. Constitution after a long, hot summer of drafting and debating. When Ben Franklin ultimately emerged

from Independence Hall upon the conclusion of the convention a reporter asked him, "Mr. Franklin, sir, what have you wrought?" To which Franklin replied, "A republic, if you can keep it."

And that is ultimately what this advice and consent process is all about. But while the Constitution sets the course for our country, it is without question the Chief Justice of the United States who must have his hand on the tiller to keep our great ship of state on a course consistent with the Constitution.

I shall follow the deliberations of this committee carefully, and will participate in the floor debate, and look forward to the privilege of voting for you.

Form: All Guided Search Forms > News
Terms: **(children with aids) and date(geq (08/29/1985) and leq (09/01/1985))** (Edit Search | Suggest Terms for My Search)

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*The Washington Post, August 31, 1985*

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**August** 31, 1985, Saturday, Final Edition

**SECTION:** First Section; Around the Nation; A18

**LENGTH:** 139 words

**HEADLINE:** N.Y. Schools to Accept AIDS Victims

**BYLINE:** From news services and staff reports

**DATELINE:** NEW YORK

**BODY:**
New York City school officials said they would admit students with acquired immune deficiency syndrome (AIDS) if they met behavioral standards.

Mayor Edward I. Koch announced formation of a special committee to screen students before classes begin Sept. 9. City officials said all of the seven known school-age children in New York City with AIDS will be examined before school opens.

The announcement was made one day after the federal Centers for Disease Control issued guidelines for admitting **children with AIDS.** The CDC said there was no evidence the disease could be transmitted through casual contact in the classroom, school showers, day-care centers, gyms or elsewhere.

City school officials said that AIDS children must be able to function at their grade level and not have behavioral problems such as biting.

Form: All Guided Search Forms > **News**
Terms: **(children with aids) and date(geq (08/29/1985) and leq (09/01/1985))** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Thursday, September 1, 2005 - 2:56 PM EDT

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The Washington Post
September 4, 1985, Wednesday, Final Edition
SECTION: First Section; A1

# AIDS: A Menace Beyond 'Risk Groups'; Research Raises New Fears About Disease's Scope and Virulence

By Boyce Rensberger and Cristine Russell, Washington Post Staff Writers

AIDS, the dreaded new disease of the 1980s, has breached the confines of the few risk groups most often associated with it -- male homosexuals, drug abusers, and those infected by contaminated blood or blood products.

Of the more than 12,000 U.S. cases to date, there are now nearly a thousand victims in the United States alone who fit none of the chief risk groups.

New research suggests that AIDS may be transmitted in more ways than originally thought, and that it may infect more tissues in the body than previously realized. Moreover, earlier assumptions that only about 10 percent of those exposed to the AIDS virus would contract the fatal disease are now being questioned. Some researchers now worry about an AIDS time bomb -- that after many years, a substantially higher portion of those exposed could become ill.

However, there is some good news from the laboratories where AIDS is being studied. Researchers are testing on monkeys a prototype vaccine for which they have high hopes; if ultimately successful in humans, it could prevent future infections of AIDS virus, though it will do no good for the hundreds of thousands -- perhaps millions -- already infected.

One thing is clear, researchers say: AIDS is not just a disease of male homosexuals. It is simply a sexually transmitted disease -- the only one that is almost invariably fatal.

AIDS was first identified among American homosexual men, whose sexual activities encouraged rapid spread. For them, one New York physician said, it is already a "catastrophe" that will decimate their numbers. But they were never the only victims.

Now it is clear that in other countries, chiefly in Africa, it is a heterosexual disease; about half the victims are women. In several African nations it appears to be spreading rapidly, as it is here, although precise figures are not known. Contact with prostitutes is a common factor in many African cases.

In the United States -- as in Europe -- the number of cases of AIDS is doubling every year. Government experts expect this rate of growth to continue, which would mean about 17,000 new American cases in 1986, bringing the total here to about 35,000 by the end of next year.

But those suffering from AIDS itself are only the tip of an iceberg. For every victim, there are 5 to 10 more people who suffer from a less severe form of the disease that is not fatal, and 50 to 100 more who have been infected with the AIDS virus but show no symptoms -- 600,000 to 1.2 million in this country, by some calculations.

No one knows how far or fast the epidemic will spread.

"I think that, given enough time and enough heterosexual contact with infected people, that this virus is going to move gradually and steadily into all parts of the population if we don't do something about it. I believe that very strongly," says Dr. Robert Gallo, a National Cancer Institute researcher who was a discoverer of the AIDS virus.

"I think we're going to see a gradual increase by heterosexual spread but by no means as rampant in society as we now have it in homosexual men," argues Dr. Anthony Fauci, head of the National Institute of Allergy and Infectious Diseases. But for the groups at highest risk, "it is already as serious and devastating a scourge as I can name in memory," he says. "You couldn't design a virus more diabolical than this one," Fauci added. "It knocks off the very cells that are supposed to protect you from it."

"I consider it a terrible threat. It's a staggering problem for society," says Department of Health and Human Services Secretary Margaret Heckler, who pronounced AIDS America's number-one public health problem.

Virus of Uncertain Origin

Before inroads against AIDS can be made, medical researchers must learn much more about the nature and behavior of the cause of acquired immune deficiency syndrome: a bizarre new virus of uncertain origin. The search for this knowledge confronts researchers with one of modern biology's most urgent challenges.

Thus far, scientists are unsure just how the AIDS virus works, why it targets the white blood cells, known as T4 lymphocytes, that are the one indispensible element of the body's immune system. Ultimately, a victim of AIDS is left vulnerable to an array of life-threatening infections and cancers.

Further complicating the search are recent findings that AIDS may sometimes show itself first as a disease attacking the brain and nervous system, perhaps even damaging the brains of unborn babies who become infected. The virus has

now been found in brain cells. New molecular probes have also found it in the epithelial cells that line the eyes and eyelids. Some fear the virus, known primarily for its highly targeted attack on the immune system, may eventually play a role in still more diseases.

Although spread of the virus is most often linked to intimate contact involving transfer of blood or semen -- anal intercourse is believed the most efficient mode of transmission -- it is now clear the virus is present in saliva, tears and urine. No one knows how often these fluids lead to human infection.

For now, experts can only reassure unaffected individuals that they are unlikely to get the virus through casual transmission -- a sneeze, handshake or proximity. These assurances are based on American studies of health workers and family members who care for or live with AIDS victims.

The disease does not yet seem to have spread to the general U.S. population in a significant way. Instead, those most likely to be infectious are still overwhelmingly in the few well-defined risk groups who have the far more intimate contact that spreads the AIDS virus:

*Homosexual men: Account for 73 percent of adult cases. AIDS is the leading killer of single men between 25 and 44 years of age in New York City and San Francisco. Blood samples taken in 1978 and frozen show that only 4.5 percent of the homosexual men visiting a San Francisco venereal disease clinic were infected with the virus then. By 1984, about two-thirds were infected, most without symptoms. A recent study done in the San Francisco gay community showed one-third are infected. Other cities report 20 percent or more of homosexual men are infected.

*Intravenous drug abusers: 17 percent of adult cases. Blood tests of street addicts in New York and New Jersey show 80 to 90 percent are infected.

Blood transfusion recipients: Nearly 2 percent of adult cases. A new blood test that can screen for signs of infection by the AIDS virus should eliminate this means of transmitting the disease, but many people already infected by transfusions of infected blood will develop AIDS in years to come.

*Hemophiliacs: Almost 1 percent of adult cases. The blood test and a heat treatment for blood products used by hemophiliacs should stop further transmission, but 80 to 90 percent of severe hemophiliacs may already be infected.

*Heterosexual men and women: About 1 percent of adult cases. Probably contracted by sexual contact with infected bisexuals and heroin addicts.

*Children: Tallied separately from adults are about 180 children, 70 percent of

whom were born with AIDS or were infected with it as newborns by their mothers. Another 20 percent received the virus in blood products.

*Other: About 6 percent of adult cases and 10 percent of childhood cases are in people who fit none of the known risk groups.

Much of the current concern focuses on heterosexual transmission in the United States, but researchers caution that it may take several years for a clear trend to emerge. A key link may be prostitutes, who are often drug abusers and therefore at risk for AIDS.

Nearly one-third of a sample of some 80 male AIDS patients classified as being in the "no known risk" group admitted to prostitute contact. Walter Reed Army Institute of Research studies of American military personnel with AIDS also implicate prostitutes, as do studies of African and Haitian AIDS patients.

At the same time, some believe the threat to the heterosexual population is currently being overdramatized for political reasons. "A lot of funding decisions are being made based on risk to the straight world," says one government official.

Many experts believe the risk to the heterosexual population will increase over the next 5 to 10 years, with those who have many sexual partners in greatest danger.

A new study by the New York City Health Department's Dr. Charles Rabkin found that 3 percent of heterosexual men attending a venereal disease clinic -- presumably very active sexually in a city where AIDS is relatively widespread -- were infected with the AIDS virus. This may not sound high, but it is close to the level found among homosexual men in San Francisco in blood samples taken in 1978 -- an early stage of the AIDS epidemic, before the disease had even been formally identified.

The virus may spread next to other sexually active populations, such as college students, perhaps infecting, as one researcher put it, "the Ivy League college girl whose boyfriend has had sex with a prostitute two years earlier."

First Recognized in 1981

The first cases of AIDS were recognized in the spring of 1981 among homosexual men in Los Angeles. Soon, doctors began asking whether AIDS was a new disease or one that had existed all along in another form or another place. Only recently, however, have pieces of an answer begun to fit together.

The most popular hypothesis now is that AIDS is indeed a fairly new disease, one that originated during the 1960s in central Africa as an evolutionary

descendant of a monkey virus.

Belgian scientists have found many cases of AIDS among the people of Zaire and nearby Rwanda and Burundi, as well as in Uganda, Tanzania and Kenya. Two Harvard scientists, Max Essex and Phyllis J. Kanki, have found that a species known as the African green monkey, which lives in the same region as people who have since contracted the disease, carries a virus very similar to the AIDS virus. Tests of its molecular structure show that it differs only slightly from the AIDS virus, named "HTLV-3" by NCI's Gallo and "LAV" by French researchers.

It is not known whether the virus makes these African monkeys sick, but the same virus has been found in several species of monkeys in primate research colonies in the United States, sometimes causing an AIDS-like disease. It is called SAIDS, for simian, or monkey, AIDS.

Reports from Zaire suggest that some Africans butcher and eat monkeys. Contact with monkey blood, some speculate, may have been the first infection of human beings.

The monkey virus and AIDS virus are so similar it may have required only a minor mutation to produce one from the other, making it capable of invading human cells.

It is thought that the mutation may have happened during the 1960s because frozen blood specimens taken from Zairians around 1970 were found positive for AIDS. Similar samples from around 1960 show no evidence of AIDS.

Whenever the AIDS virus arose, it has clearly been spreading in Africa longer than in the United States. The virus appears to have infected a far larger percentage of Africans than Americans. Reports from Zaire suggest it is transmitted primarily through heterosexual contact among people who have many sex partners.

AIDS is also thought to have appeared in Haiti before reaching the United States, and many epidemiologists suspect that American homosexuals picked up AIDS while vacationing in Haiti, long a favored resort among gay men. Despite the speculation, they still cannot show how AIDS traveled from Africa to the Caribbean.

Centers for Disease Control researchers say it appears that the first infections of homosexual men in the United States occurred in the mid-1970s. But unlike many other deadly infectious diseases, which strike quickly and kill within hours or weeks, the AIDS virus attacked slowly, imperceptibly at first, with symptoms not evident for years.

While the first cases were not recognized until 1981, doctors have since traced cases back to 1978, mainly in New York City. The roughly 200 cases reported in 1981 had mushroomed to 12,736 adult and child cases by last week.

The Deadliest Plague?

Epidemiologists tracking AIDS found that while it spread more slowly than the fearsome plagues of the past, it was perhaps the deadliest ever. Bubonic plague or cholera killed about half their untreated victims, smallpox as many as 40 percent.

The death rate for all AIDS cases to date is 50 percent -- 6,376 deaths. But the disease takes years to kill its victims. Among those from the early years of reporting, the death rate approaches 100 percent. No one has been cured.

"Once you get the disease it is essentially, uniformly fatal. That's unprecedented," says Fauci.

CDC officials were alarmed at the rapid spread, but reassured -- at least at first -- that the disease appeared to be transmitted only through sexual transfer of semen or blood, through sharing hypodermic needles, transfusion of blood products or to an unborn child during gestation or just after birth. In contrast, the great plagues of the past had swept indiscriminately through whole populations, spread by air, water, insects and poor sanitation.

But the slower pace of the AIDS epidemic is offset by a potentially more frightening uncertainty about who is infected and what may happen to them.

The government's best estimates suggest that 5 to 10 percent of those infected will come down with AIDS in five years. Some 25 percent will develop a syndrome, also over a five-year period, known as ARC or AIDS-related complex, which causes vague symptoms such as fatigue, low-grade fever, swollen lymph nodes, diarrhea and weight loss. More limited follow-up suggests that anywhere from 5 to 20 percent of ARC cases may go on to get AIDS, but for the rest the symptoms of ARC may persist, according to Dr. Harold Jaffe, chief of epidemiology of the CDC's AIDS branch.

Because AIDS is so new, researchers have also tended to underestimate its incubation period. Blood-tranfusion cases now average about 2 1/2 years from exposure to development of disease, but some can take more than five years. A mathematical model developed by the CDC's Dale Lawrence that takes into account slower-developing cases projects that the average incubation may lengthen to more than 5 years, with some lasting beyond 12 years.

And because the virus may insert itself into the host's own genes, the effects of the dormant AIDS virus, some experts speculate, may not show up for decades,

perhaps not until old age when the immune system normally weakens.

"One of the most disturbing things about it is that you don't know someone is ever safe once they have been infected. You could develop AIDS at any time from now on," Jaffe says. "We have to assume that anybody who is truly positive [on the blood test] is potentially infectious to others."

But the deciding factor as to who may be vulnerable to infection may be a person's state of health, says Fauci. Most people in the hardest-hit groups already have infections from other sexually transmitted viruses, such as hepatitis B virus and the Epstein-Barr virus that causes mononucleosis. These groups include not only homosexual men and needle-sharing heroin addicts but the African victims as well. The relative absence of these other infections among heterosexual Americans may put them at much lower risk of getting AIDS.

Experiments in Gallo's lab have shown that AIDS-infected T4 cells growing in a test tube can live indefinitely, dying only when exposed to some unrelated foreign protein that stimulates them into action. Gallo says it is possible that a human infected with the virus could at least postpone the onset of AIDS if he avoided ordinary infections.

Many healthy but infected people may still be contagious, shedding viruses into their blood and virtually all other bodily fluids. No one knows how easily viruses in such fluids can infect other people but both Gallo and Fauci say that intimate kissing, in which saliva is exchanged, could well transmit the disease if the uninfected person has any cuts, sores or bleeding gums in the mouth.

One of the more puzzling new findings suggests such access routes to the bloodstream may not be necessary. Gallo's lab's finding that AIDS virus can infect epithelial cells lining the eyes raises the possibility that the AIDS virus may also be able to infect similar cells that line most surfaces of the body. But there is no evidence that the virus can enter the body through such cells. These findings were discussed at a recent scientific meeting but their significance is not fully understood.

In the meantime, better understanding of the virus is helping scientists design drugs to interfere with its survival and, ultimately, a vaccine that would protect those not yet exposed.

The Search for a Vaccine

Researchers from three centers in the United States and others in Sweden and Scotland are collaborating on a prototype vaccine that has been given to rhesus monkeys at Duke University. The monkeys, which produced antibodies after receiving the vaccine, have recently been infected with the AIDS virus and researchers are waiting to see whether the antibodies prevent the virus from

invading monkey cells.

Earlier experiments showed that while the AIDS virus does not cause disease in the monkeys, it does reproduce in their cells, which then dump quantities of new virus into the blood. If the vaccine works, it should prevent this viral replication.

One potential problem is the fact that the AIDS virus exists in many slightly different forms, the result of minor mutations that altered the precise molecular structure of the virus's protein coat. It has just been found, however, that one part of the protein-coat molecule is the same in all forms. Researchers hope that antibodies to this non-variable part will be enough to prevent all forms of the virus from infecting cells.

The prototype vaccine is made from a specially engineered version of the coat protein containing the non-variable part. Monkeys immunized with the vaccine are being deliberately infected with widely different variants of AIDS virus.

"If this works, we'll have the start of a vaccine that could be purified and tested for toxicity before we can use it on people," says Dani Bolognesi, of Duke's cancer research center. "By the turn of the year, we may know whether we have something."

Vaccine development normally takes several years after proof of effectiveness in animals. "But," says Bolognesi, "I have a feeling they'll speed this up as much as they can. There might be a real vaccine in one or two years." Other vaccine experts caution that unforeseen problems often crop up.

Looking at the record to date, Gallo emphasizes that "there has probably been more rapid progress in understanding the cause of AIDS from the moment that it was recognized as a new disease than any other disease."

In the meantime, health officials urge the public to reduce the risk of spread by changing sexual behavior, particularly by avoiding multiple sexual partners.

"I think that we have to look at the scientific advances in two ways," says CDC's Jaffe. "We have to marvel at how quickly the cause was found and how quickly a blood test was developed. All of that makes us optimistic.

"But," he adds, "looking at the practical problems ahead, we can't count on a vaccine or an effective drug in the next several years. Despite the remarkable accomplishments in AIDS, science isn't going to save us at this point. We have to save ourselves."

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September 4, 1985, Wednesday, Final Edition

SECTION: Health; Pg. 6

LENGTH: 749 words

HEADLINE: AIDS;
No one has ever recovered from AIDS.

BODY:
Since acquired immune deficiency syndrome was first recognized in 1981, the grim totals have risen at an accelerating rate and now are doubling every year. The latest U.S. toll: 12,736 known cases, 6,376 known deaths. In the District: 207 cases, 103 deaths.

For those who have it, for those who have been exposed to it and for those at risk of getting it, AIDS has become another four-letter word for fear.

More than 1 million Americans may have been exposed to the AIDS virus; about one in 10 of those will come down with AIDS. A person carrying the AIDS virus carries it for life, and most who are infected do not know it yet.

What sets AIDS apart from other epidemics is not sheer numbers -- influenza will kill many more Americans this year. But as the numbers have grown, their pattern has remained alarmingly constant: Half of AIDS' known victims are dying, the other half are dead.

AIDS is not a single disease but a lethal condition of risk. The AIDS virus attacks and disables the body's immune system, the very cells that normally protect against infections. A patient with AIDS is vulnerable to a long list of "opportunistic" infections that the immune system normally would fight off harmlessly. Median survival is about one year.

The AIDS virus has been found in blood, semen, saliva and tears, but there is no evidence it can be transmitted by casual contact such as shaking hands, coughing or being in the same room. As infectious diseases go, AIDS is relatively hard to contract. It is spread almost exclusively by exchange of bodily fluids through sexual relations or sharing of intravenous needles.

Ninety percent of the reported cases of AIDS fall into two groups: gay or bisexual men and intravenous drug users. This has colored public reaction to the disease from the start, heightening the fear and, critics say, delaying mobilization of a public health effort

against AIDS.

It also has led some to call AIDS "the plague of the 20th century" and compare AIDS victims to lepers. Besides the physical and mental ravages of their illness, patients with AIDS often face poverty -- medical costs alone average $114,000 per case -- and the isolation and stigma of being treated as outcasts.

Anyone with AIDS has experienced or heard the horror stories -- of patients disowned by their families, fired from jobs, shunned by friends, denied care in hospitals.

"We're going to look back at this in five years," says Caitlin Ryan, program director of the AIDS Education Fund at Whitman-Walker Clinic in the District, "and we're going to be shocked at what did and did not happen."

In 1983, Health and Human Services Secretary Margaret Heckler called AIDS the Public Health Service's "number one priority," but the Reagan administration repeatedly cut that agency's budget requests until recently, when it asked Congress to boost appropriations for AIDS research in fiscal 1986.

AIDS is an enormously complex illness about which much remains unknown, including its origin. The best guess is that it's a mutant virus that originated in central Africa in the green monkey and spread to humans, who carried it to the Caribbean and North America in the late 1970s.

It came to light nearly five years ago, when doctors in New York, San Francisco and Los Angeles began seeing surprising clusters of cases of two rare diseases -- Kaposi's sarcoma and pneumocystis carinii pneumonia -- in previously healthy young gay men. Kaposi's is a cancer found almost exclusively in elderly males of Mediterranean descent, and pneumocystis is usually found only in people with suppressed immune systems, such as cancer or transplant patients.

On the basis of such reports, the Centers for Disease Control announced in mid-1981 the existence of a new disease, and the AIDS epidemic was under way. Two years later, scientists identified the virus responsible -- dubbed HTLV-3 -- and have since developed a test indicating exposure to it. That test is used to screen blood donations.

But still there is no cure. An AIDS vaccine, scientists say, remains a long shot. The best hope is to prevent the spread of the disease by screening blood transfusions, discouraging intravenous drug abuse and encouraging safe sex practices among high-risk groups.

"We would be short-sighted," wrote Dr. Edward Brandt Jr., former assistant secretary for health, in the foreword to a new textbook on AIDS, "if we did not heed a key lesson of this epidemic -- namely, that science alone is not enough."

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SECTION: Health; Pg. 21

LENGTH: 942 words

HEADLINE: AIDS and the Blood Supply, Lithium, Sore Elbows

BYLINE: By Dr. Jay Siwek, Special to The Washington Post

BODY:
Q. Is it reasonable to assume that if my spouse and I remain monogamous and do not use intravenous drugs, we will be safe from AIDS? We know about autologous blood transfusions, but could we donate blood for our children if they ever needed it? We're concerned because of the number of units of blood that test positive for the AIDS virus.
A. It is reasonable to assume you'd be safe from AIDS, mainly because AIDS seems to be transmitted only by intimate contact with an infected person or transfusion of infected blood products. AIDS isn't transmitted by casual contact with AIDS victims. As for intravenous drugs, you don't get AIDS from the drugs themselves -- it's sharing needles with someone who carries AIDS that can give you the infection.

You mention autologous blood transfusion -- donating blood for yourself in preparation for an upcoming operation. This may be one way to assure that blood you receive is free of AIDS, but it's unnecessary, because blood supplies are already being carefully screened. For unexpected operations, autologous transfusion is impossible.

As for your children, you could donate blood for them only if it matched in several ways. This takes more than just having the same blood type, such as A, B, O or AB. In fact, the American Association of Blood Banks, the American Red Cross and the Council of Community Blood Centers have jointly advised against self-selection of blood donors.

There is no evidence that blood from donors chosen by patients is safer than blood from volunteer donors.

Although individual cases have been widely publicized, it's rare to get AIDS from a blood transfusion. Only about 2 percent of AIDS victims (about 200 cases) seem to have gotten their disease from a transfusion, and this was before screening for AIDS virus was available. To put things in perspective, about 3 million people receive blood transfusions each year.

In addition, the new test that screens donated blood for the AIDS virus isn't able to distinguish between blood that can transmit the infection and blood that merely indicates an exposure to the AIDS virus in the past. This question isn't yet answered. We may be discarding infection-free blood unnecessarily and frightening donors, who may mistakenly believe they have a smoldering case of AIDS. But it's best to be safe and not use any blood that shows exposure to the AIDS virus. Q. My doctor just started treating me with Eskalith for manic depression. Although he didn't mention this, I read in a medical book that taking this drug for several years can cause abnormal tongue movements and other uncontrollable body movements and that no cure for these effects is yet known. For this reason, I am afraid to take the drug. Your comments, please. A. Eskalith is the brand name for lithium, generally the most effective drug for manic depression. Like many strong remedies for serious health problems, lithium is not without potential adverse effects. I expect that your doctor will want to carefully check your response to it. Your doctor can also measure the amount of lithium in your blood to keep it in a safe range and reduce the chances of serious side effects.

Lithium can cause the following adverse reactions in your nervous system: tremor; muscle twitching; abnormal movements of your tongue, face muscles or arms and legs; slurred speech; and confusion. These usually occur when you have too much lithium in your body, and disappear when the dose is decreased. They tend to develop gradually, so you'll usually have a warning that you're having a bad reaction.

The type of permanent reaction you refer to that doesn't have a cure is called tardive dyskinesia (meaning abnormal movements occurring late in one's course of treatment). This tragic drug complication, fortunately rare, mostly happens in elderly people and those institutionalized because of mental problems. Lithium causes tardive dyskinesia very rarely, if at all. Instead, tardive dyskinesia is mainly caused by antipsychotic medications such as Thorazine, Stelazine, Mellaril and Haldol. Two basic principles of medical treatment apply to their use: 1) the benefit of treatment should outweigh the potential harm, and 2) the patient should understand the pros and cons of therapy. Q. I get a pain in my elbow whenever I lean on it. It lingers for a while afterwards, then goes away by itself. What could this be? A. You may have a type of bursitis that occurs in people who spend a lot of time leaning on their elbows -- while studying or doing office work work, for instance.

Bursitis means inflammation of a bursa (from the Latin world for purse), a small fluid-filled pouch that acts as a shock absorber. Bursas are located at points of pressure or

friction in the body.

Irritation from overuse or minor trauma causes inflammation, pain, tenderness and sometimes swelling. For severe bursitis, you may need strong anti-inflammatory drugs or an injection of cortisone. Moderate cases usually respond to ice and aspirin. For milder cases, all you probably need to do is avoid the activity that brought it on.

I'll mention another possible cause of your symptoms, and that's pressure on the ulnar nerve, which runs down your arm, through a groove behind your elbow, and into your hand. When you hit your "funny bone" in your elbow, sending a shock-like tingling up and down your arm, you're actually hitting your ulnar nerve. The tip-off here is that the pain feels like a tingling that often extends into your little finger, which gets its sensation from this nerve. This problem generally goes away by itself when you stop putting pressure on the nerve.

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September 4, 1985, Wednesday, Final Edition

SECTION: Health; Pg. 10

LENGTH: 992 words

HEADLINE: Discrimination Born of Fear

BYLINE: By Michael Specter, Washington Post Staff Writer

BODY:
In Virginia a man with AIDS is told to apply for food stamps through the mail. Nobody in the welfare office wants to sit down and talk with him. Television crews in New York and Washington refuse to film AIDS victims, and an Indiana judge had charges dropped against an alleged bicycle thief rather than expose the court and sheriff's personnel to a man with AIDS.

Such tales of fear and discrimination are common throughout the country as the AIDS epidemic grows and the hysteria and misconceptions that accompany the disease become more apparent.

"We have had cases where dying people were denied permission to have visitors in the hospital," says Timothy Sweeney, executive director of the Lambda Legal Defense Fund, a New York civil liberties organization that has published a legal guide to help people battle AIDS-related discrimination. "The housing and employment discrimination has already been clear," he says, citing firings of AIDS victims and denial of housing to members of AIDS risk groups.

As the number of reported AIDS cases mounts, numerous institutions -- including insurance companies, health organizations, funeral homes and police departments -- are considering new policies because of the disease.

The insurance industry has become particularly concerned about AIDS, primarily because most of its victims are young men -- who generally have a low mortality rate and are traditionally counted on to make few insurance claims -- and because the disease is ruinously expensive to treat. While costs vary widely from city to city, the Centers for Disease Control estimates that AIDS treatment costs range from $40,000 to $140,000 per patient. Sixty percent of all life insurance policies are purchased by men in the 20- to 46-year-old range, according to the American Council of Life Insurance.

"The industry is trying to figure out what to do right now," says Robert Bier, a spokesman for ACLI. "Obviously, the disease has some frightening implications for us."

With billions of dollars at stake, life insurers and health carriers are looking at imposing higher premiums on single men, and in some cases are considering requiring potential clients to have their blood screened for the presence of antibodies to the virus that causes AIDS.

"But if we used the blood test we could run right into some antidiscrimination laws," he says. "If the trends continue, insurers will feel a lot of pressure to change their practices." The major change would be to deny insurance coverage to those most at risk, which -- some activists fear -- may include single males with a history of veneral disease.

Only two states, Wisconsin and California, have specific laws that would prevent insurance companies from imposing the test. But gay leaders and civil liberties activists worry that companies in other states will require prospective applicants to submit to the test.

"What do you do, test every single male in a metropolitan area for the antibody?" asks a legislative aide to the House Energy and Commerce subcommittee on health and the environment. "Are you going to deny insurance based on a positive test?"

Recently, the medical director of Midland Mutual Life Insurance Co. in Ohio wrote to the state health department suggesting that "known or suspected homosexual males" should be denied health and life insurance.

"We are very troubled by the trends," said Lou Fabro of Nationwide Insurance Co. "But we are not sure what can be done right now. You certainly don't go around asking people who apply for insurance what their sexual preference is."

Gay rights activists point to a New York state law that prohibits insurance companies from asking women whether or not their mother ever used DES, a synthetic estrogen that was commonly used in the 1950s in the mistaken belief that it prevented miscarriages. The drug now has been associated with increased rates of cancer among women.

In effect, the New York law is a social policy that prevents companies from discriminating against women for physical defects that they may have as a result of DES, and may set a precedent for the illegality of discriminating against homosexuals as a result of AIDS.

The disease also has created new markets and new needs. "We have sold thousands of protective kits," said Harold Haabestad, president of Hydrol Chemicals, which offers protective apparel for employes of funeral homes, hospitals and other institutions where AIDS is a continuing concern.

The kit consists of a rubber safety mask, gloves and a bonded rubber safety apron to wear over clothes. There also are special disposable glasses with side shields and a hood. The kit costs $15.95.

"It is not only for AIDS, but that is clearly why most people are buying the kit," said Haabestad, who noted that sales are rising almost in proportion to the increase in cases.

In many cities instances of discrimination -- both against victims of the disease and against people who are at the highest risk -- have been countered with attempts by elected officials to protect civil rights. The Los Angeles City Council has adopted a resolution banning discrimination against AIDS victims. Some other cities are considering similar rules.

But so far, fear has had the upper hand. Most AIDS victims do not have strong political clout. So when they are evicted from their apartments or fired from their jobs, they often have nowhere to turn. Legal remedies are costly and lengthy. Many who sue are dead before their cases go to court.

"It's a constant battle," said Richard Dunne, executive director of Gay Men's Health Crisis, one of the nation's leading organizations devoted to counseling and treating AIDS victims. "Even for the healthiest person, job discrimination or unfair housing policies can be very tough to fight. Insurance is very complex.

"For someone who is deathly ill, these problems sometimes seem unsurmountable. And unfortunately, they often are."

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SECTION: Health; Pg. 8

LENGTH: 1732 words

HEADLINE: 'I Just Started Crying';
People With AIDS Struggle to Live in the Shadow of Death

BYLINE: By Don Colburn, Washington Post Staff Writer

BODY:
For months, Kerry Shapiro had been feeling tired -- neither well nor sick, "just this constant mild fatigue." His only outward symptom was a swollen lymph node on his neck below his left ear. No weight loss, no night sweats, no diarrhea, no fever, no blotches on the skin. His doctor attributed the tiredness to depression and prescribed antidepressants, which didn't help.

Then, a year ago last April, Shapiro had the lymph node removed. Four days later the surgeon called him at home to tell him he had a rare malignancy called Kaposi's sarcoma. He was sent to the National Institutes of Health for more tests.

While checking in, he noticed what had been written in the blank under diagnosis:

"AIDS."

"I just started crying. It was the first time it had been said or I had seen it. No one had ever said to me, 'You have AIDS.'

"Deep down I knew, but I had been trying to fool myself into thinking it was something different."

At age 25, after months of chronic fatigue, uncertainty and hoping-against-dread, Kerry Shapiro finally knew he was dying of AIDS.

Today, he lives alone in a pin-neat efficiency apartment off Connecticut Avenue, clinging to what remains of his independence and privacy even as his strength dwindles and the realization grows that he cannot take care of himself much longer.

"Every day I feel worse and worse, and my energy level goes down," he says. "For me to get up and get showered and dressed and maybe go out and run one small errand uses just about all my energy. If I go out to dinner, that wipes me out."

Unlike many patients with Kaposi's sarcoma, Shapiro has almost no lesions on his skin. But he has had internal lesions that burn in the back of his throat and upset his stomach after most meals.

One of Shapiro's kitchen cabinets is a miniature pharmacy, filled with antibiotics, painkillers, sleeping pills, ulcer drugs and other medications. He gives himself daily injections of interferon, a promising but still-unproven treatment.

He weighs about 100 pounds, down from 128 before he got sick. Last spring, following radiation treatments to shrink the lesions in his throat, he went nearly two weeks without eating a full meal and fell to 86 pounds.

Shapiro, who quit his job as an optician more than a year ago, spends more and more of his day at home, resting or sleeping, watching TV or talking with friends on the phone. He says he can feel his attention span getting shorter, his mind becoming less keen.

And watching friends die, it gets harder and harder to keep up hope.

"People mean well, and they try to keep your spirits up," he says. "They tell you you're going to get well and they're going to find a cure. You just sort of let it go in one ear and out the other.

"You really know the truth."

AIDS, he says, "leaves no part of a person's life untouched -- physical, psychological, emotional. And it's not a quick disease, either. You see people linger and suffer. These are people, for the most part, who are young and previously healthy.

"It's very saddening. It's very maddening."

One of Shapiro's friends is Sunnye Sherman, 34, who was diagnosed as having AIDS nearly two years ago. She is something of an anomaly among people with AIDS -- a woman, one who never, before she got sick, took intravenous drugs.

Sherman is all but certain she contracted the disease several years ago during a relationship with a bisexual man. She has many close friends in the gay community and has dated many bisexual men.

"When I first came down with AIDS," she says, "people thought I must be a lesbian, because it's perceived as a homosexual disease. Actually, lesbians are the safest group of all from catching AIDS."

When Sherman, a legal secretary, revealed her illness at the law firm where she worked, she says the first reaction was: "Don't come back, and don't tell anybody why."

She had always been overweight. In her twenties, she weighed up to 210 pounds. She loved to cook, party and go out dancing, but was self-conscious because of her weight.

"I couldn't take the social pressures of a straight bar," she says. "But when I went with a gay man to a gay bar, I had no problems. There was no role-playing. I could be myself."

Today, her weight hovers just above 100 pounds, no matter how hard she tries to force down fattening foods.

"When you're fat, your dream is to be able to eat anything you want and not put on weight," she says, softening the irony with a laugh. "Now that dream has come true." A person with AIDS, says Caitlin Ryan, program director for the AIDS Education Fund at the Whitman-Walker Clinic, "is someone who's losing bit by bit."

Their natural immune systems ravaged by a mysterious virus, AIDS patients such as Shapiro and Sherman are prey to a host of common and exotic infections. They learn the relativity of health and measure days in tiny steps.

When she's feeling well, Sherman sets goals for herself, such as "Today I'm going to take a walk down to the trash room," or "Today I'm going to go pick up the mail."

A good day is "being able to get up and fix my meals and walk around the house without huffing and puffing and having dizzy spells." A bad day is when she lacks the strength to get out of bed and her stomach is so cramped she cannot bring herself to eat.

A trip to the bathroom can be exhausting. Stairs are out of the question. It's a struggle to fix French toast.

"First you take out what you're going to fix, and then you sit down to rest. Then you put the French toast in the microwave, and then you sit down to rest. Then you take it out and walk back to the living room and eat it, and then you lie down and rest.

"Everything's done in little stages."

"The key rule in this disease," agrees Kerry Shapiro, "is one day at a time.

"I can't plan ahead. The bottom could fall out the next day."

Sherman is one of the few AIDS patients known to have survived three bouts with pneumocystis carinii, a rare pneumonia. Another bacterial infection, present in dust and carried by pigeons, robs her of appetite and energy.

"We're all exposed to it," she says. "Your immune system can fight it off. Mine can't."

A powerful drug called amikacin sulfate held the infection in check last year, but had to be discontinued because of a frightening side effect: Sherman started to go deaf.

The infection returned, however, Sherman began losing weight again, and last week she and her doctors faced an agonizing choice. If they resumed using the drug, she would lose her hearing altogether. If they didn't, she would risk death from weight loss.

Last Wednesday, she began taking the drug again.

Sherman talks about such high-stakes dilemmas with disarming equanimity, even humor. She continually uses the word "lucky" to describe herself. Lucky to have her mother, Ina, nearby. Lucky in her friends, her case manager, her doctors and nurses at NIH. Lucky to have lived this long -- 22 months -- since her diagnosis.

"Sunnye is a trouper," says Kerry Shapiro.

One of the things that keep her going is the challenge of educating the public about her disease. As much as any other patient, she has gone public with AIDS. She has been a formal or informal counselor to dozens of Washington-area AIDS patients. She has appeared on network television and on the cover of Life magazine. Fan mail arrives from across the country; a couple in their sixties in Alaska keeps sending her picture postcards and, for reasons she still can't fathom, sticks of Doublemint gum.

"People call me and say, 'Is this Sunnye Sherman, the star?' I say, 'No, this is Sunnye Sherman.' "

"Sunnye has been a rock for most of the people she knows," says Jack Sanders, a volunteer from the Whitman-Walker Clinic who has become perhaps her closest friend and confidant. "If they were in trouble, Sunnye was there. She's been lucky in being able to turn that around for herself, through all the grief and terror and sadness she has known."

As Sherman's case manager, Sanders checks up on her almost daily by telephone or in person. If she's feeling well, he may take her out to a movie or for a drive. If not, he may drop by to fix a meal or share a pizza or watch "Ryan's Hope" or "All My Children" or just talk. He has almost never seen her cry, but sometimes she gets quiet and he can tell she is depressed and they lie together on the bed, arms around each other, saying little or nothing, just holding and being held.

"There's not a whole lot of people from my support group I talk to anymore," Sherman says. "Most of them are dead."

Several months ago, Sherman and Jack Mitchell, a member of her original support group, volunteered to speak to a group of visiting nurses. The two talked firsthand about the pain, isolation and fear of AIDS.

"You feel like pieces of your life are being taken away," Mitchell, 37, told the nurses. "You reach the point where you don't have any control any longer over any aspect of

your life."

In a barely audible voice, Mitchell described how he had been fired from his job as a hairdresser, how he had lost his credit and been forced to file for bankruptcy, how he had not had an intimate sexual relationship since his diagnosis, how his only brother also was dying of AIDS, how he had tried to take his own life, how he feared for his parents who, were losing the only children they had.

"We worry more about the people we're leaving behind," Sherman says. Three weeks ago last Saturday, Sherman went to Wolf Trap to hear Mozart's opera "The Magic Flute." She had bought five front-row box-seat tickets months before, hoping she'd be well enough to go. She invited four guests: her mother, her case manager, Jack, and his lover, Bruce, and Kerry Shapiro. They wheeled her wheelchair from the parking lot to the dinner tent for a gourmet picnic, and then to the amphitheater, where they parked the wheelchair and escorted her down the steps to her seat, Jack on one arm and Bruce on the other.

It was a rare, wonderful evening out, a reminder of glamor and life before AIDS.

But Sunnye Sherman knows the odds. Of the dozens of people with AIDS she has met, only two others have survived as long as she has.

"My mother always says, 'You're going to be the first to get well from AIDS,' " she says. "But I've got to be realistic and look at the statistics -- I was diagnosed almost two years ago -- and be grateful I've lived that long."

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September 4, 1985, Wednesday, Final Edition

SECTION: Health; Pg. 7

LENGTH: 1043 words

HEADLINE: Poll Shows Widespread Awareness, Misguided Fears About Disease

BYLINE: By Victor Cohn, Washington Post Staff Writer

BODY:
Almost everyone now fears that AIDS might strike them, not just people in especially vulnerable groups, a new Washington Post survey shows.

Seven in 10 people in the Washington area now think AIDS threatens "the general public," not just homosexuals or other members of high-risk groups. In a nationwide poll two years ago, only one in three thought AIDS would become a public threat.

Nearly one person in four here says he or she has done something to try to avoid exposure to this still spreading disease, and virtually everyone is aware of it.

Seven persons in 10 reject -- and only one in 10 accepts -- the notion "that AIDS is God's punishment" of homosexuals. But many told interviewers they are avoiding homosexuals.

Many said they have changed their sex habits to avoid casual partners, "sleeping around" or prostitutes.

One person in three thinks it is unsafe to associate with someone who has AIDS, even if there is no physical contact, and many more are not sure whether it's safe.

An alarmed elementary school teacher went even further. She said she "would not wipe a student's tears, now that AIDS virus has been found in tears."

A District man said AIDS has "made me a lot more picky about who I mess with."

These are among the results of the Washington Post survey, which shows that the public here has become overwhelmingly convinced that AIDS is a serious public health menace that can personally affect them. The findings are reported by Washington Post survey director Barry Sussman and polling assistant Ken John, who directed a telephone survey of a random sample of 1,057 adults in the metropolitan area.

The results impress those who measure public awareness of problems of all kinds.

Ninety-seven percent of those surveyed knew about AIDS. The number who know about any issue -- medical, political or economic -- is usually much less. A few years ago only 44 percent of the public knew that the Democrats controlled the House of Representatives, and 58 percent that the Republicans controlled the Senate.

The results also might surprise anyone who has read the repeated statements of doctors and scientists that AIDS can only rarely, if ever, be transmitted except by direct and intimate exposure to blood, semen or other body fluids of AIDS victims or carriers. The almost one in four who answered "yes" when asked, "Is there anything you yourself are doing to avoid exposing yourself to AIDS?" showed that many fearful persons are more skeptical.

Many are taking almost certainly useless measures -- avoiding restaurants, for example, because they "might" have gay employes.

And the number of area residents -- 13 percent -- who say they work at a job that might expose them to AIDS is probably much greater than the uncertain number whose work actually might put them at any risk.

When the seven in 10 who think AIDS is already a public health threat are joined by those who think it will become one "in the next few years," the total so convinced becomes eight in 10. Four percent said they personally know an AIDS victim. This translates to more than 80,000 persons in the Washington area.

Fifty-three percent said the government is spending "too little" on AIDS research, only 2 percent said it is spending too much, and 16 percent said it is spending about the right amount. Under pressure from critics, the Reagan administration is now asking Congress to vote $126.3 million for AIDS studies, up from the $85.6 million the president requested last January.

AIDS virus was recently found in tears of an affected person. But simply wiping away a person's tears is not likely to transmit AIDS. All the evidence to date indicates that the main threat comes from sexual or other intimate contact with victims or carriers or contaminated blood -- by sexual acts, use of a contaminated needle or a transfusion of affected blood.

Many persons nonetheless said they are shunning all contact with homosexuals. "I am not hanging out with gays," one man said. Others said: "I won't go near a homosexual," "I'm staying away from gay hangouts," "In a social situation with a gay population, I do not drink from the same glass or smoke their cigarettes when a cigarette is passed," "I am not kissing my gay hairdresser."

Many reported more prudent sexual behavior, From men: "I'm doing less hugging and kissing," "I'm staying away from casual relationships," "I'm limiting my one-night stands," "I'm going out with girls only," "I'm not going out with bisexual chicks."

Also: "I no longer use prostitutes," "I've cut down on going to massage parlors," "I'm being faithful to my wife and hoping she is doing the same."

And from women: "I'm not sleeping around," "I don't date anyone who is bisexual," "I don't mess around with anyone except my boyfriend, and hopefully he's not messing around with anyone with AIDS."

Other women said: "I'm a good girl and stay in at night," "I'm not having sex. You can't stop socializing, but you can avoid having sexual intercourse." And some men reported: "No sex with anybody," "I don't mess with nobody!"

Some said they are praying. Several said they have stopped giving blood -- though there is no danger of catching AIDS by doing so -- and some said they are wary of transfusions, although blood is now being checked for evidence of the AIDS virus.

Many sought to avoid the virus by "staying away from dirty bathrooms," "public bathrooms," "water fountains" or "hot tubs and swimming pools," though, again, there has been no evidence of transmission via these sources. A physician said: "I don't use public telephones at Dupont Circle."

Nurses and other health workers reported being especially careful about using gloves, gowns and masks and other precautions when treating AIDS patients. But some nonmedical workers reported being almost as concerned -- without good reason, doctors would say -- just because they are in contact with "the public."

"I research problem accounts and exchange pens and paper with the public," said one worried woman.

Not everyone reported such extreme fears. One man said he does "nothing more than good personal hygiene -- you can't just avoid people because you never know who's a carrier or who has it until they're very ill."

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September 4, 1985, Wednesday, Final Edition

SECTION: Health; Pg. 15

LENGTH: 393 words

HEADLINE: Advice From the Experts: Limit Partners, Be Clean, Use Condoms

BODY:
Avoiding AIDS infection does not require major life style changes for most people. But experts do suggest these steps to minimize your chance of getting AIDS:

*Limit sexual relations to one partner well known to you.

*Avoid high-risk contact with anyone you do now know well. High-risk contact may include heavy kissing in which large amounts of saliva are exchanged. It is unlikely that the virus can be spread by sharing food, but it is probably unwise to eat from the plate of a diagnosed AIDS victim, although even here the chance of contagion is considered remote.

*Except under a physician's care, don't use needles to self-administer drugs. If you must use intravenous drugs, never share needles with anyone.

*Avoid all sexual or intimate contact with any intravenous drug abuser.

*If your job -- dentist, nurse or undertaker, for example -- requires you to be in contact with other people's bodily fluids, including tears and saliva, wearing protective gear such as gloves and facemasks is prudent. Most important is meticulous hygiene, including heat sterilization of instruments.

*Homosexuals are advised to contact gay health clinics for guidelines on "safe sex." In particular, violent sexual relations seems to facilitate the spread of the AIDS virus, as does oral or anal sex.

*Heterosexuals are urged to take special precautions with bisexual partners. Precautions include use of condoms and avoidance of oral or anal sex with bisexual partners.Condoms are recommended by gay health groups as a protection against AIDS transmission. If lubricants are used, they should be water-based rather than oil-based and should come in tubes or bottles.

*Condoms can be ruined by the oil-based creams, and open cans of grease are fertile breeding ground for bacteria and other germs.

The AIDS virus eschews cleanliness and is vulnerable to germicidal agents. Particular attention to personal hygiene, especially after sexual relations, is encouraged.

Most experts emphasize that natural expressions of affection should not be withheld from any AIDS victims for fear of contracting the disease. It almost certainly cannot be spread by hugging or cuddling or sitting next to child victims in schools, playing with them, holding hands. The loss of love is perhaps as cruel an aspect of this illness as its deadliness.-- Sandy Rovner

GRAPHIC: Chart, How AIDS Virus Infects Cells. The Washington Post

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September 4, 1985, Wednesday, Final Edition

SECTION: Health; Pg. 15

LENGTH: 1202 words

HEADLINE: How the Virus Spreads;
Certain Sex Practices Carry Greatest Risk

BYLINE: By Sandy Rovner, Washington Post Staff Write

BODY:
A sheriff in California warns his deputies to "consider AIDS" before giving cardio-pulmonary resuscitation without plastic devices to prevent mouth-to-mouth contact between rescue techicians and their patients.

Elsewhere: Dentists are urged to wear gloves and heat-sterilize all equipment. Eye doctors get similar instructions. School officials ban a 13-year-old hemophiliac AIDS victim from classes. Actresses are reportedly hesitant about kissing their gay leading men. Residents of Belle Glade, Fla. -- which has the nation's highest AIDS rate -- worry that mosquitoes may be transmitting the disease there. Several Australian women show AIDS-like symptoms after artifical insemination with semen from the same donor.

The virus for AIDS has been isolated in virtually all body fluids, even saliva and tears, and fears of contracting the relentless killer are having an increasingly chilling effect, not only within the gay community, but in an ever-widening circle of society.

There is no cure, no vaccine, and although scientific progress in identifying the causative agent is a signal triumph, there is not a great deal science can offer to allay public fears.

"The trouble is," says Dr. Harold Jaffe, the deputy director of the AIDS task force at the federal Centers for Disease Control in Atlanta, "people are looking for absolute guarantees. They want you to say that it is absolutely impossible for the disease to be spread this way or that way, and they're not happy with an answer that says, 'We've never seen that,' or even, 'It is extremely unlikely.'

"For AIDS, people want assurances that it is impossible to give them."

In this country, three out of four AIDS victims are homosexual and bisexual men. It appears closely linked to the particular gay life style that involves multiple partners and often-violent oral and anal sexual contact.

But it also is spread by contaminated needles, shared casually among abusers of intravenous drugs, and -- until recent screening tests virtually eliminated the possibility -- by transfusions of contaminated blood and use of blood products. It can be transmitted by an infected mother to an unborn child.

In Africa, where the mysterious retrovirus may have originated, it is spread by heterosexual contact, but also by blood transfusions and contaminated needles. Most cases involving AIDS transmission from a woman to a man have occurred in Africa, says the CDC's Jaffe, where it appears that using prostitutes poses a risk. "The evidence for this kind of transmission in the United States is not as strong," he says, "but it is true that there is a small number of men with AIDS who say their only risk factor was contact with a woman drug user. It is also true that some men we can't classify into any of the other risk groups say that they have had prostitute contact.

"It may be we haven't seen very much of this female-to-male transmission because the number of infected women in the U.S. population is probably fairly small. Secondly, it may be biologically less efficient to transmit the disease from women, but I think we have to assume it occurs."

Some pathologists who are studying AIDS at the National Institutes of Health believe that some homosexual practices have inadvertantly given the virus a particularly efficient route of transmission.

They have found -- and have published -- evidence that the particular type of immune system cell that is vulnerable to the AIDS virus is clustered close to the rectum. According to their still controversial theory, these cells run along the entire intestinal tract to protect the body from invasion from what one researcher called "the sewer we have running through our bodies."

AIDS is not transmitted by casual contact with victims, experts say. Not even the pathologists who performed the first autopsies on AIDS victims have shown any evidence of AIDS themselves. In fact, Jaffe notes that in the entire world, there is only one case -- out of hundreds of accidents -- in which a British health care worker, accidentally exposed by being jabbed with a contaminated needle, has developed antibodies to the virus.

Gay health groups are urging homosexuals and bisexuals to refrain from the kinds of activities -- barely known to many members of so-called straight society -- that seem to facilitate AIDS transmission.

In "safe sex" fliers and brochures, some of them subtle, some clinically graphic, gay and bisexual men are urged to forgo sexual activities in which damage is done to the rectal area or in which there is oral/anal contact. The British medical journal The Lancet has warned that the "anal receptive" partner is at greater risk than the "anal assertive."

Gays are also urged to give up the practice of "cruising" and the casual sexual encounters it implies. The use of condoms is strongly encouraged.

Heterosexuals are also urged to confine sexual relations to a single partner well known to them. Women should avoid unsafe sexual practices with bisexual men. AIDS does not appear to be a threat among lesbians.

"I think it's going to turn out that there are certain routes of transmission more efficient than others," says Jaffe, "but you have to assume that any sort of sexual contact that would involve exposure to semen or to blood including menstrual blood is potentially dangerous."

he CDC's AIDS task force is taking these steps, Jaffe says, to clarify the AIDS transmission routes: Despatching a team to investigate the high AIDS rate in Belle Glade, Fla. "Mosquito transmission, as has been suggested there," says Jaffe, "is a complicated question. If you talk about mosquito transmission, you're talking about two possibilities. One is that the virus could actually replicate within a mosquito the way malaria has part of its life cycle in the mosquito. We think that is extremely unlikely. The AIDS virus is extremely selective about the kind of cell in which it will replicate.

"But could the mosquito be just a mechanical means of getting blood from one person to another? It could be, but our feeling is that it very likely is not. Health care workers with contaminated needle-sticks get more blood than a mosquito could transmit, for example. But, I don't think you can say it's impossible." Interviewing all AIDS patients to determine their risk factors.Studying families of drug addicts with AIDS. Studying families of patients with transfusion AIDS to help determine the risk to sexual partners and to other family members.Funding local health department blood tests of prostitutes. Funding VD clinic and blood bank studies to find proportion of people with virus antibodies who have no apparent risks.

So far, says Jaffe, "the only people in families with infected members who seem to get infected themselves are the sexual partners of the patients or infant children born to infected mothers. We don't find infection of older children in the household or in other adults.

"Again, that would be a setting where you would expect that there would be very close contact. So given that, it is hard to imagine that much less intimate contact, the kind that would take place at work, school or church, would transmit the disease."

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BERNARD SANDERS, VERMONT, INDEPENDENT

September 1, 2005

Senator Arlen Specter
Senator Patrick Leahy
Committee on the Judiciary
United States Senate

Dear Senators:

I am writing to request that you question Supreme Court nominee John G. Roberts about his role in a particularly shameful chapter in the history of the AIDS epidemic in the United States: the hysteria that led many communities to bar children with AIDS from attending school.

In 1985, unfounded fears over AIDS transmission were sweeping across the country. The Centers for Disease Control and Prevention (CDC) responded on August 30, 1985, by issuing a landmark scientific statement. The agency reviewed all available evidence and concluded that there was no evidence of spread through casual contact. CDC recommended that most children with AIDS "should be allowed to attend school and after-school day-care and to be placed in a foster home in an unrestricted setting."

Two weeks later, President Reagan had an opportunity to reassure the nation. Draft briefing materials for a major press conference advised the President to say that "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact."

Yet in his role as Associate Counsel to President Reagan, Mr. Roberts recommended striking this statement from the President's briefing. Claiming that AIDS transmission through casual contact was a "disputed scientific issue," Mr. Roberts wrote that "we should assume that AIDS can be transmitted through casual or routine contact."

Five days later, when asked whether it was safe for children with AIDS to go to school, President Reagan did not cite the nation's leading public health officials. He instead stated, "I can understand both sides of it." The President's failure to speak clearly about scientific understanding of AIDS transmission is now widely understood to have stoked the hysteria about AIDS and the social stigma suffered by children with AIDS.

I urge you to question Judge Roberts about his actions in this case. How he answers will shed needed light not only on the past, but also on Judge Roberts's future approach to using scientific evidence in the formulation of law and policy.

**Background**

In the summer and fall of 1985, the nation was swept up in a tide of hysteria about the presence of children with AIDS in public schools. Parents and school authorities worried that AIDS might be transmitted through casual contact among children and widespread panic had begun to set in. That summer, an Indiana school had barred 13-year-old Ryan White, a hemophiliac with AIDS, from returning to school.[1] Protesters organized mass boycotts of New York schools that had decided to allow children with AIDS to attend.[2] It was a time of great fear and confusion.

At the same time, however, scientific evidence had emerged to demonstrate that the risk of transmission from casual contact was certainly remote and very likely nonexistent. Based on this evidence, public health experts drew up comprehensive guidelines on the issue of AIDS children in schools. The goal of the effort was to counter the prevailing hysteria with the facts of actual risk.

On August 30, 1985, the Centers for Disease Control and Prevention (CDC) issued the first public health recommendations for children with AIDS.[3] The recommendations began by reviewing available evidence to date. According to CDC, not a single case of AIDS in the United States was known to have been transmitted in "school, day care, or foster-care setting or through other casual person-to-person contact." The agency also pointed out that not a single one of the family members of over 12,000 AIDS patients had been reported to have AIDS. The agency concluded that "casual person-to-person contact as would occur among schoolchildren appears to pose no risk." CDC recommended that most children with AIDS "should be allowed to attend school and after-school day-care and to be placed in a foster home in an unrestricted setting."

In drafting and publicizing the guidelines, leading public health experts attempted to calm parents' fears by raising public awareness of overwhelming scientific evidence that AIDS could not be transmitted through casual contact. Director of the National Institute for Allergy and Infectious Disease Dr. Anthony Fauci stated, "There's no evidence the virus is spread by casual contact, by saliva, by coughing, by any of the normal contact children might have in the

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[1] *AIDS Victim Kept From School in Indiana*, New York Times (Aug. 1, 1985).

[2] *The New Untouchables; Anxiety over AIDS is Verging on Hysteria in Some Parts of the Country*, Time (Sept. 23, 1985).

[3] Centers for Disease Control and Prevention, *Current Trends Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, Morbidity and Mortality Weekly Reports, 517-21 (Aug. 30, 1985).

classroom setting."[4] CDC director Dr. James Mason described the risk of getting AIDS from another child in schools as akin to the risk of "being struck by lightning when you walk out the front door in the morning" and "much less than the chance of the boiler that heats the building blowing up."[5] He stated that AIDS was causing an "epidemic of fear" that was "entirely unnecessary."[6]

**Inside the White House**

In the midst of a battle to counter ignorance and panic with science and reason, President Reagan held a press conference on September 17, 1985. It was a critical moment. Even though more than four years had passed since the first cases had been reported, it would be the first time that the President had discussed AIDS in public. In preparing for this appearance, the White House staff debated what the President should say about the transmission of AIDS.

Draft briefing materials provided to the White House counsel's office advised that the President clearly explain the views of leading scientific experts. He was to say, "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact."[7]

Yet in a memo dated September 13, 1985, John G. Roberts, who was then Associate Counsel to the President, advised a completely different approach. In an internal memo, Mr. Roberts recommended deleting any reference to the best scientific evidence. He gave several reasons.

First, Mr. Roberts argued that the President should not provide information to the public on a technical point. He wrote that the President "has no way of knowing the underlying validity of the scientific 'conclusion,' which has been attacked by numerous commentators."[8] No citations were provided.

Second, he expressed concern that relating the views of the country's top scientists could embarrass the president if the state of scientific evidence changed.

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[4] *As schools opened across the nation this month, the spectre of young AIDS' victims attending classes with healthy children has created an epidemic of fear...*, United Press International (Sept. 15, 1985).

[5] *U.S. Counters Public Fears of AIDS*, New York Times (Sept. 15, 1985).

[6] *Id.*

[7] John G. Roberts, Deborah K. Owen, *Memorandum for Fred F. Fielding, Domestic Briefing Materials for Press Conference* (Sept. 13, 1985).

[8] *Id.*

Third, he endorsed the scientific idea that "we should assume AIDS can be transmitted through casual or routine contact, as is true with many viruses." He stated that the assumption that AIDS can be transmitted through casual contact could be overcome only when "it is demonstrated that it cannot be."[9]

At the same press conference, the President provided technical information to the public on the impact of tax reform and trade policy. But Mr. Roberts apparently did not object to the use of these data on the ground that the President was not an expert.

Mr. Roberts provided no scientific support for his assumption that AIDS can be transmitted through casual contact. Moreover, his standard for dislodging that assumption would require scientists to conclude otherwise with absolute certainty, a standard that is not applied elsewhere in medicine or public health.

Sadly, President Reagan followed Mr. Roberts's advice. At the news conference on September 17, 1985, the President was asked about the issue of AIDS in schools. Instead of affirming the conclusions reached by the nation's top scientists, the President undermined them. The President stated that he was glad not to be faced with the decision of whether or not to send a child to school with a child who had AIDS. He added:

> I can understand the problem of the parents. It is true that some medical sources have said that this cannot be communicated in any way other than the ones we already know and which would not involve a child being in the school. And yet, medicine has not come forth unequivocally and said, "This we know for a fact, that it is safe." And until they do, I think we just have to do the best we can with this problem. I can understand both sides of it.[10]

The President's failure to support the science on AIDS transmission exacerbated fear, prejudice, and discrimination against children with AIDS. After the press conference, one pediatrician told the *Los Angeles Times* that he expected parents to "quote the President and say, 'Gee, even the President doesn't come out and support the medical experts — how can he expect us to send our children to school?'" The expert added, "Given the current information and the circumstances, he could have been much more definite."[11]

**Questions for Mr. Roberts**

It is important for the Senate and the public to understand Judge Roberts's role in this deplorable chapter in the history of public health in the United States. Judge Roberts should be

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[9] *Id.*

[10] *Close to Home*, Washington Post (Sept. 22, 1985).

[11] *Health Experts Glad Reagan Cited AIDS; Pleased by Attention, Disappointed He Did Not Quell School Fear*, Los Angeles Times (Sept. 19, 2005).

asked to explain why he blocked President Reagan from referring to the views of our nation's leading scientific experts, why he substituted his own uninformed scientific judgment for theirs, and whether he regrets contributing to a climate of unsubstantiated fear.

Judge Roberts also should be asked to explain his actions in the context of how he views the appropriate role of scientific evidence in the formation of law and policy. One important question is whether he would now defer to the medical judgment of public health officials, as he failed to do in 1985. This issue came before the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which involved a school teacher with tuberculosis who had been fired from her job. In that case, the Court held:

> In the context of the employment of a person handicapped with a contagious disease, we agree with the *amicus* American Medical Association that this inquiry should include "findings of facts, based on reasonable medical judgments given the state of medical knowledge about the nature of the risk (how the disease is transmitted) ... and the probabilities the disease will be transmitted ...." In making these findings, courts normally should defer to the reasonable medical judgment of public health officials.[12]

Similarly, the case of *Bragdon v. Abbott*, 524 U.S. 624 (1998), involved a patient with HIV whose dentist had refused to treat her. In that case, the court stated:

> In assessing the reasonableness of [the dentist's] actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority.[13]

Another important question relates to the role of scientific certainty in regulatory and judicial decision-making. In 1985, Mr. Roberts appeared unwilling to take any position on HIV transmission in the absence of complete scientific certainty. He applied a standard that required scientists to prove a negative, a requirement that can be impossible to satisfy.

But the Supreme Court must make decisions in the absence of total scientific certainty. For example, in the recent case of *Roper v. Simmons*, (125 S.Ct. 1183), the Court held the death penalty to be unconstitutional when applied to those who commit crimes under the age of 18. In reaching this conclusion, the Court relied on an array of studies and expert opinions that "tend[ed] to confirm" the limited maturity and sense of responsibility of juveniles under 18.[14] It

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[12] *Arline*, 480 U.S. 273, 288 (1987). Emphasis added.

[13] *Abbott*, 524 U.S. 624, 650 (1998). The Court continued: "The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm." *Id.* The Court then found that there should be a remand to allow this kind of debate since the CDC guidelines on dental care were not definitive.

[14] *Roper v. Simmons*, 125 S.Ct. 1183, 1195 (2005) (emphasis added).

also relied on the apparent lack of deterrent effect of the death penalty on juveniles, despite the absence of absolute proof for that conclusion. While noting that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles," the Court held that "'the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'"[15]

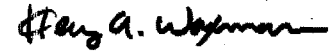
In our increasingly complex world, law and science frequently intersect. Understanding Judge Roberts's views on these important issues will shed considerable light on his approach to the responsibilities of a Supreme Court justice. It would be a significant departure from the Court's current jurisprudence were he to seek to impose a standard of proof that requires absolute scientific certainty, as he appeared to do in the fall of 1985.

**Conclusion**

On April 8, 1990, Ryan White died. In an editorial eulogizing Ryan, President Reagan stated: "We owe it to Ryan to make sure that the fear and ignorance that chased him from his home and his school will be eliminated."[16] The President implicitly acknowledged that he had been wrong not to support the findings of his own experts sooner, and that his refusal to trust the evidence had only contributed to the isolation and shame that surrounded AIDS.

It is important for the Senate and the American public to hear whether Judge Roberts learned the right lessons as well.

Sincerely,



Henry A. Waxman
Ranking Minority Member

[15] *Id.* at 1196 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

[16] President Reagan, *We Owe It to Ryan*, Washington Post (Apr. 11, 1990).

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September 6, 2005

United States Senate
Washington, D.C. 20510

Dear Senator:

On behalf of The Wilberforce Forum, I urge you to support Supreme Court nominee John Roberts – an accomplished and proven lawyer committed to upholding the U.S. Constitution.

John Roberts possesses a track record worthy of admiration. Not only is he known for his sharp intellect and sound temperament, but he also holds superb legal credentials. Roberts has served as judge on the prestigious D.C. Circuit. As a lawyer, he argued 39 cases before the Supreme Court. The American Bar Association deemed Roberts "well qualified" – the ABA's top honor.

Roberts deserves unbiased, bipartisan support. His sound qualifications make him a deserving nominee for the Supreme Court. Indeed, *The National Journal* said that "John Roberts seems a good bet to be the kind of judge we should all want to have – all of us, that is, who are looking less for congenial ideologues than for professionals committed to the impartial application of the law."

Please stand up in support of Roberts – an exceptionally-qualified lawyer who will dutifully defend the Constitution and consistently apply the law of the land.

Sincerely,

Mariam Bell
National Director of Public Policy
The Wilberforce Forum, Prison Fellowship

To: Arlen Spector, Chairman, Judiciary Committee
FAX 202-224-9102

From: Dustin Valley

Date: July 28, 2005

Subject: Nominee Judge John G. Roberts

President Bush has made a wise choice in his nomination of John G. Roberts, Jr. to the Supreme Court of the United States. He will honor the integrity of the Constitution and strive to defend it. We urge you to give your highest commendation to this nominee and quickly pass the nomination on to the Senate for a full up-or-down vote.

502 Oxford Court
Worthington, Ohio 43085

# Foundation Opposes Judge John Roberts' Nomination as Chief Justice of the Supreme Court

***The Women's Sports Foundation issued the following statement in response to questions regarding its position on the appointment of Judge John Roberts as Chief Justice of the Supreme Court and the Title IX implications if he were to be confirmed:***

The Women's Sports Foundation opposes the nomination of Judge John Roberts to the United States Supreme Court. Dating back to the 1980s, Roberts has taken positions in several key cases that substantially weakened Title IX's protections or could have, had his positions prevailed.

**1. Roberts Took Positions that Would Have Resulted in Eliminating Title IX Coverage of Athletics**

During his tenure as a Special Assistant to the Attorney General, Roberts argued that Title IX coverage should not extend institution-wide. He argued that Title IX covered only those programs that specifically receive federal funds. (1) These arguments were accepted by the Department of Justice in *Grove City v. Bell* (1984), where it successfully argued for the Supreme Court to adopt a program-specific approach to Title IX (i.e., only the specific program that receives federal funds would be prohibited from discriminating on the basis of sex, not the entire educational institution). (2) Because virtually no athletic program receives direct financial aid, this ruling essentially stripped the OCR of the power to eradicate sex discrimination in intercollegiate athletics and the growth of women's sports was significantly slowed for a period of almost four years.

*Grove City* marked a major setback in the progress Title IX had made for women and girls. Roberts continued to support the program-specific approach, and even opposed the Civil Rights Restoration Act (CRRA), which restored Title IX to its pre-Grove City (institution-wide) status and was eventually passed in 1988. The law has since been pivotal in the successful enforcement of civil rights laws like Title IX.

**2. Roberts Advocated Limits on Title IX's Application to Athletics Governance Organizations (NCAA)**

While in private practice, Roberts brought a case to the Supreme Court on behalf of the NCAA, arguing that it was not covered **at all** by Title IX. (3) The court agreed with Roberts, in part, ruling that the receipt of dues from member institutions that were subject to Title IX

was alone insufficient to subject the NCAA to Title IX. (4) However, according to a report by the National Women's Law Center, the court did not rule on Robert's more "far-reaching" claim, that the NCAA be exempt from Title IX coverage altogether. "Because the NCAA effectively controls intercollegiate athletics, if this argument were to prevail there would be no recourse for any practices or policies of the NCAA that discriminate on the basis of sex, (race, national origin, disability, or age.)" (5)

**3. Roberts Urged the Denial of Full Remedies for Intentional Discrimination Prohibited by Title IX (Franklin)**

As a Deputy Solicitor General, Roberts filed an amicus brief in *Franklin v. Gwinnett County Public Schools* that argued that victims of intentional discrimination should not receive any damages for the injuries suffered under Title IX. (6) The Supreme Court rejected Robert's arguments and found that victims could recover monetary damages in Title IX cases. (7)

*Franklin* was a case regarding sexual harassment of an athlete by her coach. This position is particularly disturbing because monetary damages are sometimes the only form of relief available to the victims, who may have graduated by the time their cases reach a decision.

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Over the past few years, women's rights in athletics have been advanced by the judicial system—progress that we want to continue. Chief Justice William Rehnquist's replacement must be someone who will continue to support progress towards gender equality for women and girls in sports. As we examined Robert's record, we are gravely concerned that his placement on the Supreme Court would result in Title IX setbacks and send the wrong message to women and girls in sport.

The Foundation is urging its members to take action by writing to their Senators expressing concern about Robert's Title IX record, asking them to oppose his appointment to a lifetime seat on the Supreme Court.

Take action! Ask your Senators to oppose Roberts.

***Editor's Note:***
*The Women's Sports Foundation is non-partisan. We do not take sides based on the political affiliation of proponents of bills or the party that nominated an appointee, etc. By policy, we do not get involved in issues that are not directly related to sports and physical activity participation and do not comment on political or judicial appointee unless they are directly involved in making decisions related to sports or physical activity participation. Our internal test*

*for whether we comment on an issue, urge action or support or reject proposed appointees is whether doing so would advance increased participation in sports and physical activity, guarantee equality of treatment in sports or physical activity or support the enforcement or promulgation of gender equity laws or policies that impact opportunities or treatment of girls and women in sports.*

*As a 501-c-3 not for profit organization, we are prohibited from campaigning for the election of political candidates. However, 501-c-3 organizations are permitted to engage in limited lobbying in support of legislation, urge elected representatives to take positions on issues or influence confirmation of judicial or other federal appointees. Such lobbying (1) must be directly related to our exempt purpose and (2) may not be a "substantial part of our organization's activities". With regard to this latter point, in general 501-c-3 non-profit organization cannot spend more than 5% of its operating budget on such an activities. The Foundation does not expend dollars when we take such positions because communications to members are via e-mail. Of course, there are always a few hours of volunteer or staff time devoted to developing position papers or doing the research that justifies our positions on an issue or an appointee.*

**References**

(1) Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re *"University of Richmond v. Bell"* at 1-2 (Aug. 31, 1982).
(2) *Grove City College v. Bell*, 465 U.S. 555, 564 (1984).
(3) Brief of Petitioner at 26-28, *NCAA v. Smith*, 525 U.S. 459 (1999) (No. 98-84), 1998 WL 784591 (Nov. 10, 1998).
(4) NCAA v. Smith, 525 U.S. 459 (1999).
(5) National Women's Law Center. *Judge John Roberts' Record on Protection From Sex Discrimination Under Title IX and the Equal Protection Clause*. Aug., 2005.
(6) *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
(7) *Franklin*, 503 U.S. at 75-76.

Testimony of Henrietta Wright

Of Counsel, Goldberg, Godles, Wiener & Wright

Chairman of the Board, Dallas Children's Advocacy Center

September 15, 2005

In the nomination of John G. Roberts, Jr.

To be Chief Justice of the United States

I am not here today to discuss Judge Roberts's judicial opinions or his political views. Instead, I hope to give you some insight into John Roberts, the man--whom I have had the privilege and pleasure of knowing for almost twenty years. The President could not have made a better choice to be Chief Justice of the United States.

I am a lifelong Democrat. John worked for two Republican Administrations and was put on the bench by a third; I served in President Carter's White House, indeed worked for Sarah Weddington, who successfully argued Roe v. Wade, and I campaigned for President Clinton. I mention this because my political views have not "disqualified" me from being in John's close circle of friends. Over the two decades we have known each other, John has never tried to impose any Administration's views on me, much less his own. I can tell you that he would not be someone I enjoyed being around so much if he had a doctrinaire approach to life.

John was a member of a long-standing group beach house on the Delaware shore, and in fact that's where he met his wife Jane. I know from first-hand experience that it was definitely a bipartisan beach house, and they all, including John, celebrated each other's successes in various Administrations.

Then, as now, when issues of the day come up around a dinner table, John always approaches them from a legal, not political, point of view. I recall John discussing one of his cases while still in private practice that involved a moratorium on development on Lake Tahoe. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (2002). This case had special importance to me and my husband Ed because we own property in the area. In his remarks, there was never a bit of "environmentalist vs. developer" analysis from John. His discussion hinged on the narrow point of law in front of the court -- whether a 30-year long moratorium on development constituted a taking of the per se variety.

John is truly a lawyer's lawyer. His intellectual curiosity, especially about the law, is immense. While still in private practice, he and my father, Charles Alan Wright, a legal scholar whom some of you on the Committee knew, had an on-going exchange over the fine points of various cases, really just for the pleasure of the discussion. And it was not just loyalty to an old friend that brought John to see my father argue the last Supreme Court case of his career, Ruhrgas AG v. Marathon Oil Co et al. (1999). The truth is, John is passionately interested in almost every aspect of the law. He and I are both long-time members of the American Law Institute, and have been together at many of those functions

over the years. He is capable of intelligently discussing any area of the law that comes up -- which is not the case for many of us who have toiled in one field of the law for our entire careers. In fact, when John was initially nominated to the Supreme Court this summer, he was in the middle of teaching a course on international trade law—not a subject that comes before the court on which he currently sits, but by no means beyond John's legal ability and intellectual interest.

There is of course more to John than the law. He enjoys a number of interests, including a broad and eclectic taste in reading, as well as swimming with his children in the local community pool. And he loves golf. Not surprisingly for one to whom rules and procedure are so important, he can be a stickler for applying the rules of golf – but only to himself. If he is playing with a lesser golfer—like me, for example—he never imposes his approach to the rules more broadly which might impede my enjoyment of the game.

John has always been supportive of women and aware of the difficult life choices that many of us have faced. As his wife Jane and I made the long march to law firm partnership and then motherhood (we became friends in 1984, the year we both clerked on the Court of Appeals for the Fourth Circuit), he was unstinting in his encouragement. When I had successes in my Washington law practice, John applauded them; when my daughter Sierra turned three and I decided to become a full-time volunteer he understood and supported the reasons for that decision too. He is happy to join in any discussion that Jane and I might have -- whether we are strategizing how to get a new client, or ruminating about when to start swimming lessons for our kids. John is definitely a man who respects smart women: his wife has two more degrees than he has.

While some men may give only lip service to the importance of their wives' careers, John's support of Jane's work is constant and genuine. And the Roberts household, and how it runs, reflects this. Jane Roberts worked from home when Josie and Jack were infants, and John looked after the children during her evening conference calls. Just recently, when Jane's family in New York held a celebration on the same day that she needed to be away on law firm business, John dressed and packed the children for the trip, drove them to New York, and spent several days at Sullivan family functions as a single parent — thinking nothing of it. In fact, the concept of equal partnership is carried out in their home to the point where, they each put one of the children to sleep every night, and the next night they switch.

Indeed, witnessing John's dedication to his children makes me proud to have a man like him on our Nation's highest Court. I serve as the volunteer Chairman of the Dallas Children's Advocacy Center. Each morning we open our doors to children in need of hope and healing; children who were abused and destroyed by the very people who should love them the most.

The Robertses are out-going, and have always enjoyed having people over to their house. Jane is mainly the one who cooks, and John, among other things, is always in charge of setting the table. He does know his limits, though. Jane puts out one place setting and John carefully does the rest by following her example. There is a modesty in his attitude at all times -- a humility and lack of pretense -- that still disarms me. When Jane was turning 40 and John wanted to give her a surprise party, he didn't race ahead with bold plans that pleased him. Instead, he pondered what might make her most happy, and when he wondered if his choices were right, he called a friend for advice.

John is a very likable, congenial person and the Court will benefit from his persuasive ability, tact, and personal attributes. It is not a given that lawyers, especially super smart ones, have good social skills. From what I have heard, the Justices increasingly make up their minds about cases alone in their chambers. Maybe as Chief Justice, John can help reverse this trend and the Court will produce greater consensus in its opinions. He will also bring a dry, often self-deprecating wit to the proceedings. Sometimes this brand of humor is hard to discern on paper. I laughed, and groaned, to see articles picking apart a flippant sentence John wrote when he was much younger about whether homemakers should be encouraged to become lawyers. I could hear the smile in his voice when I read these remarks – and felt certain that he had found yet another way to make fun of himself and show his awareness of all those "lawyer jokes" people love to tell. Rather than suggesting that women shouldn't become lawyers, he was openly speculating: Do we really want more lawyers in the world?

From my perspective, how someone handles disappointments in life says more about them than how they handle success. John's life does seem charmed, I know. And he's publicly demonstrated how elegantly he handles success. But I've seen some private struggles which he's managed with equal dignity and poise. He and Jane went through considerable effort and anguish to have children, sometimes wondering if, as prospective first-time parents in their forties, it would ever happen. It took a long time to arrange their first adoption – and it fell through just days before the baby was due to come home with

them. I was pregnant myself at the time, and wondered how hard it must have been to seem so close to their dream and watch it slip away. But rather than being angry or devastated, John and Jane remained calm and positive.

Career disappointments came too. John's first two nominations to the Court of Appeals for the D.C. Circuit were not acted on by the Senate, before he was confirmed to the bench eleven years later. Again, I remember wondering what it must have been like for him – to be so close only to have the possibility disappear. For eleven years, he never showed any bitterness about it. Instead, he appeared to relish the challenge of his years in private practice.

He seemed perfectly accepting of the possibility that he would never become a judge. But I, and I'm sure many others, believed that if merit truly determines judicial appointments, it could only be a matter of time before he would be on the bench – and even on the Supreme Court.

What do all of these highly personal impressions of John indicate for this Committee's consideration of him as a nominee? I have heard from dozens of people who were surprised that a committed Democrat was supporting John's nomination. They seem reassured to hear such a positive endorsement from someone who has known John in many unguarded private moments. I can assure you, and the American public, that what you see is what you get: John Roberts is smart, tolerant, collegial, of even temperament, and loves the law. From my experience, John Roberts has no agenda other than to apply the law as it is written. It will be a great credit to this Committee, and to the rest of the Senate, for his nomination to be speedily approved.

**Hearings before the Senate Judiciary Committee on the**

**Nomination of John G. Roberts to be Chief Justice of the United States**

**September 15, 2005**

**Testimony of Christopher S. Yoo***

It is an honor to be invited here to testify in support of John Roberts's nomination as Chief Justice of the United States. I have had the chance to get to observe Judge Roberts from three different vantage points: first, as an associate working for the appellate group at Hogan & Hartson; second, as a law clerk watching him argue cases before the Supreme Court; and third, as a member of the faculty of the Vanderbilt University Law School reading his judicial opinions. Because other witnesses can speak to his excellence as a Supreme Court advocate and his qualities as a member of the Court of Appeals, I will focus my remarks on the time Judge Roberts and I spent together at Hogan. During his time at Hogan, Judge Roberts demonstrated an open-mindedness and ability to bring people together that would serve him well as Chief Justice. He also treated everyone around him with respect and decency. I had the chance to witness these qualities first hand in the support and compassion that he showed to me when a tragedy struck my family.

Judge Roberts's open-mindedness is evident in his decision to join Hogan & Hartson when leaving the White House Counsel's Office in 1986. Hogan has long prided itself on its ability to embrace attorneys from across the political spectrum. To cite just two prominent examples, its ranks include such leading Republicans as former House Minority Leader Bob

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* Professor of Law, Vanderbilt University Law School. Associate, Appellate Group, Hogan & Hartson LLP, (1998-1999). Law Clerk, the Honorable Anthony M. Kennedy, Supreme Court of the United States (1997-1998); Associate, Appellate Group, Hogan & Hartson LLP, (1996-1997). Law Clerk, the Honorable A. Raymond Randolph, U.S. Court of Appeals for the District of Columbia Circuit (1995-1996). J.D. Northwestern University School of Law (1995). M.B.A. The Anderson School at UCLA (1991). A.B. Harvard College (1986).

Michel and such leading Democrats as former Chairman of the House Subcommittee on Health and the Environment Paul Rogers. It is also a firm that takes seriously the bar's obligation to provide free legal services to public interest organizations and to individuals who are unable to afford them.

Judge Roberts was exceptionally well liked throughout the firm. His regular lunch partners reflected the underlying diversity of the firm itself. Even more telling is his decision to return to Hogan after his successful stint as Principal Deputy Solicitor General. At a time when firms were lining up for the chance to hire him, including firms that attract those who wish to surround themselves with like-minded colleagues, Judge Roberts preferred to return to a more balanced and politically diverse environment.

Judge Roberts's open-mindedness can also be seen in the manner in which he developed Hogan's appellate practice. Although the practice group was never large, the attorneys he hired reflected the diversity of the entire firm. Indeed, I suspect that he takes considerable pride in the fact that nearly half of the associates brought into the appellate group under his leadership were women and that the women with whom he worked most closely on Supreme Court and appellate matters are now partners in the appellate group. He also represented a broad range of clients with diverse and even conflicting ideologies without requiring that every client's position match his own personal views. His reputation for fairness and willingness to engage all viewpoints were so well established that Democratic Attorneys General and Governors did not hesitate to hire him to represent their interests. In the process, he successfully advocated positions on behalf of clients on environmental protection and race-conscious remedies that did not match what many might regard as the standard "conservative" position on those issues.

Indeed, the pattern of fairness and open-mindedness that is apparent in his professional decisions is consistent with my own experiences working with Judge Roberts. He brought the same probing intellect and rigorous professionalism to every aspect of each case, searching through every possible viewpoint in the process of deciding how best to approach it. Simply put, Judge Roberts's tenure at Hogan & Hartson suggests a person who is fair and who is willing to engage and consider all points of view before making up his mind.

My other memory of Judge Roberts from our time together at Hogan is the respect with which he treated everyone around him, from senior partners to secretaries and paralegals to law students who were only working at the firm for a summer. He was always supportive and encouraging, even while holding us to the highest professional standards.

He also never forgot the personal side of the people who worked for him. I had the chance to see this aspect of Judge Roberts's character firsthand shortly after I rejoined the firm after my Supreme Court clerkship. I was working full bore on a full slate of cases. My father-in-law had just arrived in the D.C. area to celebrate the recent birth of my second son, Brendan. Shortly after my father-in-law arrived, he was admitted to the intensive care unit of Arlington Hospital. After a three-and-a-half month battle for his life, he eventually died.

Judge Roberts reacted the way that we wish everyone would. The minute he found out about my father-in-law's illness, he offered his sympathy and support. He rearranged my assignments to make it possible for me to make my family my first priority. He often checked in on me, always with a thoughtful gesture or a kind word. And when my father-in-law passed away, he released me from all of my assignments on a moment's notice and placed me on a paid leave of absence so that I could take care of my family when it needed me, even though I was facing a number of deadlines and doing so would mean taking on considerable work himself.

When I returned, he welcomed me back with open arms, without a single word about the problems caused by the abruptness of my departure. For John Roberts, it was all very simple. It was just the right thing to do.

At the same time, John Roberts has a humility that is somewhat surprising in someone so accomplished. It was most evident whenever he was preparing for a Supreme Court argument. He invariably became as nervous as a school boy. It was quite humbling to see one of the most distinguished appellate advocates in the country take nothing for granted and prepare for his twenty-fifth Supreme Court argument with the eagerness and the modesty of a newly minted attorney preparing for his first appearance in court.

In short, I am convinced that John Roberts possesses the open-mindedness, compassion, and humility that the Senate seeks in members of our nation's highest court. He combines these qualities with a respect for the law and for the Supreme Court as an institution that leave no doubt in my mind that he would make an admirable Chief Justice.



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