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

Sen. Richard J. Durbin
Opening Statement
Senate Judiciary Committee
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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

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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.