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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).