Testimony of

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The Judiciary Committee of
the United States Senate

On the Nomination of
Judge John Roberts

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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.