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

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

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.