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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

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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

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[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

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[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. The Reagan Administration

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

[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,

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[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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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.

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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.