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United States Senate Committee on the Judiciary

On the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States

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Mr. Chairman and Members of the Committee:

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Thank you for the opportunity to appear today. I have taught constitutional law at the Georgetown University Law Center since 1982, and I am here to urge that the nomination of Judge Roberts be rejected. On the basis of the record – and it is an extensive record with particulars that extend over a long period of time – Judge Roberts is among the most conservative nominees in modern history. I do not believe Judge Roberts has said anything before this committee over the past few days that alters this conclusion.

The history of how "we the people" have interpreted our beloved Constitution is one on the whole of increasing protection for the rights and liberties of people. From the time of the Sedition Act, through the infamous Dred Scott and Plessy decisions, through the New Deal and on up to the present, we have seen a pattern of change and development in the meaning of its open-ended language that has meant both more respect for individual rights and liberties against governmental overreaching and, at the same time, more power for Congress to act to protect people against exploitation and injury by special interests. We are better off as a nation as a consequence of this process of development. What our Supreme Court has decided in hundreds, perhaps thousands, of cases has made an enormous difference in the lives of millions of Americans. Who sits on the Court matters crucially to all of us.

Judge Roberts' record on a long list of issues marks him as determined to turn the clock back on this deeply ingrained pattern of protection. This inquiry is not about whether one particular case will be overruled. It is about Judge Roberts' judicial philosophy across the board, in dozens of areas. It is not about what he thinks on one issue. It is about how he views the Constitution as a whole, and where that will take him in particular cases on many different kinds of questions. He has dismissed some of what he said as the work of a young staff lawyer done at

the behest of his superiors. He is too modest. Over and over, he wrote memoranda on his own initiative, or with recommendations for action – not carrying out a decision already made – that were at the right fringe of even his conservative colleagues in the Reagan Administration.

The issues in these hearings allow for exactly the kind of debate we need to have about a nominee. There are no extraneous issues about Judge Roberts' personal life. No one challenges this nomination on questions of character. No one disputes his intelligence. The issue is one of a conservatism that radically threatens the meaning of the Constitution as we have come to know it. That is exactly what we should be discussing with regard to a judicial nomination, provided the nominee is otherwise competent. Ultimately, it is the reason why this nominee should not be confirmed.

Judge Roberts said the other day that judging is like being an umpire – just calling balls and strikes as the ball comes over the plate. But if the umpire stands two steps to the right behind the catcher, strikes will look like balls and many balls will look like strikes. In any case, the analogy is remarkably disingenuous. Constitutional interpretation is not like calling balls and strikes. Constitutional and other issues that come before the Supreme Court concern issues that have not been previously adjudicated, and the process of deciding them is far more complicated than calling balls and strikes (as much as I respect umpires). Some cases are decided unanimously, to be sure, and always will be, but many involve 5 to 4 splits – based on strong differences of view about the meaning of the text, the intention of the framers, and other relevant history and societal values. Two hundred-plus years of constitutional history demonstrate that the process of constitutional decision-making is subtle and complex, and subject to deep division and debate on the Court and in the country. That is why this nomination and the one to come are

so exceptionally important. Whether this nominee is confirmed will be critical to direction of constitutional interpretation for years to come, and this will make a major difference for all of us in our daily lives.

This is a teachable moment. We are not here to debate the future of some one particular case. The question is, what is our Constitution about? Is it about fundamental principles of protection of individual rights and liberties, and assuring that government has the power it needs to act for the people, or is it about a cramped and crabbed view of protection for individuals and a view that government is to have vast power to invade our lives but little power to protect us? There is what some people call a "Constitution in exile." It involves a growing body of theory that seeks to justify and establish the latter view, which was the reigning approach a century ago, and which, until recently, many of us thought had been rejected for all time..

My conclusion from studying Judge Roberts' long record over the past quarter century is that he will exert every bit of influence he can to take America back 50 to 100 years or more on a wide variety of issues about the meaning of our basic charter. That is why I believe this nomination should be rejected.

Many here remember the hearings on the nomination of Judge Robert Bork to be an Associate Justice of the Court. That was another time when Americans paused to consider the content of the Constitution. Judge Bork had made things easy for this committee. He put nearly all of his views about the Constitution into one article in the Indiana Law Journal, and he said that nearly every important rights-protecting decision of the Supreme Court in the 20th century was wrong – except Brown v. Board of Education. Basically, all one needed to do was read that article, and it was plain that Judge Bork was not suitable to sit on our Supreme Court.

Judge Roberts is what I call Bork by accretion, Bork by dribs and drabs. He never put it all in one article or document. He said it bit by bit, memo by memo, speech by speech, and now opinion by opinion. But what it adds up to is far more radically conservative than Judge Bork. The list of issues is far longer and the views are every bit as conservative and then some. As one reporter wrote recently, every time Judge Roberts had the choice of being conservative or ultra-conservative, he chose the latter. He was overruled in positions he urged by impeccable conservatives like Ted Olson and Bradford Reynolds.

Judge Roberts didn't just oppose restoring the full reach of section 2 of the Voting Rights Act after a Supreme Court decision had watered it down. He called the pre-existing section 2 a "radical experiment" and was overruled by a wide bipartisan majority in Congress. He called legislation to strengthen the Fair Housing Act "government intrusion." He described the remedies of employment offers and back pay under Title VII of the Civil Rights Act as "staggering." Discussing women's pay equity, he referred to the "purported gender gap," and called it a "canard." He questioned the constitutionality of independent regulatory agencies like the Federal Reserve, the NLRB, the Consumer Product Safety Commission, and OSHA. He attacked Plyler v. Doe, which held that children brought to this country illegally have a right to public education. He criticized the "damage" done by a Supreme Court decision broadening the reach of section 1983, the statutory right of people to sue the government for violations of their rights. He pressed for measures to deprive the Supreme Court and the lower federal courts of jurisdiction over desegregation, school prayer, and abortion cases – proposals that were vehemently rejected by then-Assistant Attorney General Ted Olson.

Judge Roberts' recent record as a sitting judge is also deeply troubling.

I am especially concerned about his vote in the recent Hamdan case. I admire our current Supreme Court's responses thus far when questions have arisen about the breadth of governmental power to curtail civil liberties in this awful time of terror. We have a sorry history of craven Supreme Court decision-making in times of threats to national security – decisions which in hindsight are widely agreed to have been wrong, from Schenck to Korematsu to Dennis. The current Court – obviously not a consistently liberal institution as things are – has stood up to invasive claims of executive power based on incantations of national security need. Judge Roberts' vote that the Geneva Convention does not apply to enemy combatants tried before military commissions says to me that he will bring a discordant view to the Court, and this worries me greatly.

Judge Roberts' vote in Rancho Viejo, the so-called hapless toad case, also raises serious concerns. He dissented along with Judge Sentelle from a decision not to grant a motion to hear the case *en banc*. His unprecedented position – that the full D.C. Circuit should consider whether a section of the Endangered Species Act is unconstitutional – was one which conservative Judges Ginsburg, Henderson, and Randolph did not join. Judge Roberts' vote has far-reaching implications, because his analysis implies fundamental questions about Congress' power to enact laws protecting civil rights, the minimum wage, clean air and water, and workplace safety. There is implied here a basic challenge to national power to protect our people that would take us back nearly 70 years, to a time when the "nine old men" of that period thwarted basic building blocks of the New Deal that were key initiatives toward reversing the national economic catastrophe of the time.

As Senators know, all of this is just a short list. The list of ultra-conservative statements

and actions includes many more examples in the areas I have mentioned, and similarly constrictive views in a other areas. What is especially important is that each item is part of a pattern – these are not isolated positions on individual issues.

For example, Judge Roberts' views and actions on court-stripping, section 1983, standing, attorneys' fees in civil rights cases, and habeas corpus add up to a frontal attack on access to the courts for individual Americans who would consequently lack access to justice with regard to urgent matters including the violation of their fundamental constitutional rights. His advocacy of court-stripping legislation contrasts quite dramatically with Chief Justice Rehnquist's strong and repeated defense of the independence of the courts.

His views and actions on voting rights, sex discrimination, employment discrimination, and school desegregation add up to a hostility to civil rights that we have not seen on the Supreme Court since President Roosevelt ushered in the modern era with his appointments in the late 1930s.

His views and actions on civil and religious liberties and liberty rights of autonomy and personal choice add up to a broad-ranging hostility to individual liberties. His views and actions on Presidential and Executive power, and Congressional power, in areas of national security also present serious dangers to individual liberties, while his views and actions on the limits of Congressional authority vis a vis the states take the opposite tack for the same purpose – to limit protection for the rights and liberties of ordinary Americans.

The pattern in each area adds up to a meta-pattern: denial of government power – be it legislative, executive, or judicial – when the exertion of that power would be for the purpose of protecting the most vulnerable and those most victimized by discrimination throughout our

history, and affirmation of government power to invade individual liberties in circumstances where that fits his view of the way the world should work.

With all respect, this is a dangerous recipe for our nation, one that may result in injury and renewed vulnerability for literally millions of Americans who have fought for decades and even centuries to be included in our constitutional promises.

I urge the committee and the Senate to reject this nomination. I believe we as a nation will rue the day that John Roberts became Chief Justice of the United States.