Testimony of Charles Fried*
Senate Judiciary Committee, September 9, 2005

It is a great privilege to have been asked to testify in these hearings on a nomination that I believe will do enduring honor to the President who made it and the Senators who give their advice and consent to it. I am only slightly acquainted with Judge Roberts personally, although I have long known of his reputation. In 2002, before Judge Roberts moved to the bench, he and I represented separate but similarly aligned parties in an appeal to Second Circuit in a commercial case.(*World Trade Center Properties, Inc. v. Hartford Insurance Co., et al.*) In that connection I had one or two conversations with Judge Roberts and reviewed drafts of his briefs in the appeal. This summer I served as Chair of the practitioners' reading committee asked to give our evaluation of Judge Roberts's judicial writings to the Standing Committee on the Judiciary of the American Bar Association. In that capacity I have read almost all of Judge Roberts's opinions, including all his dissenting and concurring opinions and any opinion he wrote for the court, in which another judge wrote a concurring or dissenting opinion. (The judgment I express today on those opinions is my own. The unanimous conclusion of our committee is referred to in the Report of the Standing Committee.) I have also read press accounts and press excerpts of the memoranda he wrote while he served in the office of the Attorney General and the office of the White House Counsel. I do not recall reading any of his memoranda written while he was in the latter office and I was Solicitor General.

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My strongest impression of Judge Roberts is that he is a superb lawyer, perhaps one of the finest of his generation. No one has raised any objection to John Roberts's ability, learning, experience or integrity, but debate has arisen about his "judicial philosophy"—that is, his theory of judging, of the constitution, of individual rights, of federalism. Such an inquiry profoundly misconceives how many good judges—even great judges—decide cases. If questioned about their philosophies on these matters prior to becoming judges how would the all-time greats like Earl Warren, John Harlan, Henry Friendly (for whom Roberts clerked) or indeed John Marshall have answered? These men came to the bench without a worked-out philosophy of the job they were about to undertake. Rather they had dispositions and character. There are counter-examples—Oliver Wendell Holmes, Jr., Felix Frankfurter, Richard Posner, Antonin Scalia, Robert Bork had he been confirmed--but they prove my point. These are all legal scholars whose profession it was to have a philosophy about their subject. That is why Robert Bork could hardly have avoided questions about his philosophy of law—it's what he had been writing about and lecturing on for years.

Come back to Earl Warren or Henry Friendly: it is only after they had been on the bench for some time that a philosophy could be attributed to them, and even then it is those who observe them not the men themselves who could best articulate their philosophies. Benjamin Nathan Cardozo, who wrote some of the most illuminating essays on the art of judging, only wrote after he had been a judge on New York's highest court for several years. Stephen Breyer—a fine and learned Justice—has recently written and lectured extensively about his philosophy of the constitution. But though he had been a professor of administrative and antitrust law and a lower court judge for many years, he

did not articulate a constitutional theory until after several years on the Supreme Court. Henry Friendly, the consummate judges' judge—only wrote some of his great articles after many years on the bench. Before that he had been too busy as a corporate lawyer—his principal client had been Pan-Am—for such speculation. The philosophy of these great judges only emerged by reflecting on what they had been doing, not as an agenda or a mindset with which they came to the Supreme Court.

This is such an outstanding nomination, therefore, not because of some distinctive, worked-out "philosophy" with which Judge Roberts would comes to the Court, but just because he is first and foremost a superb lawyer. Indeed Judge Roberts has told us that he does not come to cases with any single approach, method or theory. He may not have a philosophy, but Judge Roberts does show a disposition, and his judicial writings show the kind of person and judge he is. The forty-nine opinions he wrote in over two years as a judge show him to be careful, modest in the face of the law, unlikely to embark on constitutional adventures, respectful of institutions, not a reformer, not a slayer of dragons, not a man on a mission, and someone too smart, too skeptical to be taken in by extravagant, novel theories. His judicial writings, though lightened by touches of gentle humor—"the hapless toad"—do not scorn those who disagree with him. Unlike some of his more strident opponents, he is evidently not a hater.

Let me give some examples. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), is particularly noteworthy. Judge Merrick Garland, another exceptionally fine judge (and former Friendly clerk) disagreed with Judge Roberts on the application of the Federal False Claims Act to false claims alleged to have been submitted to the grantee (here Amtrak) of federal funds. Judge Roberts ruled that

the statute did not apply to such claims unless they were submitted to or forwarded to the federal government for payment, and that claims that would be paid under previously made grants to a grantee were not covered. Judge Roberts, citing Judge Friendly, concluded that the language of the statute was plain enough to resolve the issue without recourse to legislative history. Judge Garland dissented in an equally careful and measured opinion that made considerable use of legislative history and the structure of the statute. What is noteworthy in this disagreement is the care, detail and professionalism shown in both opinions as they respectfully took issue with each other. It is striking that Judge Roberts did not dogmatically deny the appropriateness of referring to legislative history, and Judge Garland did not argue that history and structure overwhelmed an argument from the text of the statute.

This same meticulous, courteous and professional approach was demonstrated in Judge Roberts's partial dissent in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), a suit against the Republic of Iraq—and eventually against the United States as holder of funds seized from the Republic of Iraq—by U.S. military personnel captured and mistreated during the first Gulf War.

Hedgepath v. Washington Metropolitan Area Transit Authority, 386 F.3d 1148 (D.C. Cir. 2004), has attracted some attention. A good description of the case as well as a sense of Judge Roberts's style and approach may be gathered from the opening paragraph of his opinion:

> No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and

> detained until released to her mother some three hours later – all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as "foolish," and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not, and accordingly we affirm.

Finally, a great deal has been made of Judge Roberts's dissent from a denial of rehearing *en banc* in *Rancho Viejo, LLC v. Norton*, 334 Fd.3d 1158 (2003), *cert. denied*, 540 U.S. 1218 (2004). In that case a panel of the District of Columbia Circuit, following circuit precedent, had ruled that the Endangered Species Act, as applied to forbid a developer from putting up a fence that would disturb the movements of the arroyo toad—an animal that is neither migratory nor an item of commerce—was not beyond the power of Congress under the Commerce Clause. Judges Sentelle and Roberts dissented from the denial of the petition for rehearing *en banc*. Judge Sentelle concluded that the statute as applied was unconstitutional under the Supreme Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995). Judge Roberts did not join Judge Sentelle's opinion. Judge Roberts stated that the panel's "approach seems inconsistent with the Supreme Court's holdings in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000)." Judge Roberts wrote: "To be fair, the [D.C. Circuit] panel faithfully applied *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C.Cir.1997)." Moreover, both Judges Sentelle and Roberts noted that rehearing *en banc* was appropriate because

the panel's decision was in conflict with a recent decision of the Fifth Circuit, *GDF Realty Investment, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*,125 S. Ct. 2898 (2005). Such a circuit conflict is, of course, a standard reason for granting rehearing *en banc*. It is particularly noteworthy that Judge Roberts concluded his opinion by that en banc "review would also afford the opportunity to consider alternative grounds for sustaining application of the [Endangered Species] Act that may be more consistent with Supreme Court precedent."

What then of the thousands of pages of memoranda Judge Roberts wrote while working for Attorney General Smith and as a staffer in the White House during the two Reagan Administrations? They certainly do show a political disposition by a man who worked in trusted political positions. It was a disposition that accorded with the one project we in the Reagan Administrations all shared: to discipline the free-form inclination of some judges and justices to make the law up as they went along because they had enthusiastically embraced the philosophy of the legal realists and critical legal studies that law was just the continuations of politics by other means and that the best judges use their power to help remake society when legislators would not or could not. As their dissenting opinions in the Supreme Court and in opinions in lower federal courts since the 'sixties and and through the 'seventies suggest or even explicitly proclaim these judges would have: eliminated the death penalty, made uncounselled police questioning and warrantless searches virtually impossible, given lower federal courts general authority to supervise state criminal judgments, opened our borders by making deportations so cumbersome as to be not worth bothering with, and in the name of equal protection mandated minimum levels of welfare, medical care, housing and education.

And all of this would be facilitated by relaxed rules of standing that would have allowed any organization with an ideological project to urge its cause in the federal courts. In short our democracy—state and federal—would have been placed in the receivership of federal judges.

To be sure some of these memoranda also addressed potential legislation and therefore some may disagree with his conclusions. But there is ample evidence that Judge Roberts understands the difference between political convictions and the discipline of the law, the discipline that should constrain the judge. It is passion for that discipline that I see as the principal energy behind his work as an administration official. The slogan that the constitution must be interpreted according to the original intent of the framers was in my view an understandable but over-simplified and sometimes meaningless attempt to impose such discipline on this looming judicial coup d'etat. The real cure is judges who actually believe that law, doctrine, precedent and tradition have meaning, that they can and therefore should discipline the work of judges. No formula or pledge of allegiance to original intent can guarantee such judging. That is a matter of character, competence, and temperament. And that is where we began. John Roberts promises to be a justice who will neither be a rigid ideologue in the grips of a theory as some fear he might, nor will he be a Justice Brennan of the right as some hope. The best hope for the law and for all of us is that he will be the Henry Friendly of his generation. If he tells of his judicial philosophy it will only be ten or more years from now, during which time he would have brought judgment, balance and a towering intellect to the decision of particular cases.