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Testimony of

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Before the
United States Senate
Committee on the Judiciary

on the

***Nomination of Judge John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States***

September 15, 2005

Mr. Chairman and members of the Committee: I am Wade Henderson, Executive Director of the Leadership Conference on Civil Rights (LCCR). I am also the Joseph L. Rauh Professor of Public Interest Law at the University of the District of Columbia. I am honored to appear before you today on behalf of the Leadership Conference to discuss the nomination of Judge John G. Roberts, Jr., to be Chief Justice of the United States, and to explain why we, regrettably, must oppose his confirmation.*

The Leadership Conference on Civil Rights is the nation's oldest, largest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Phillip Randolph, and Roy Wilkins, LCCR works in support of policies that further the goal of equality under law. To that end, we promote the enactment, and monitor the enforcement, of our nation's landmark civil rights laws. Today the LCCR consists of more than 190 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. It is a privilege to represent the civil and human rights community in addressing the Committee today.

In America, the Supreme Court of the United States is the ultimate arbiter of what our laws mean and how they can be applied. The decisions that the Court makes are vital to all of us, and they

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* *Not all organizations in the Leadership Conference on Civil Rights take positions on Supreme Court nominations or have opposed Judge John Roberts' confirmation to the U.S. Supreme Court.*

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shape the kind of country in which we live. The selection of the Chief Justice, the leader of the Court, is therefore of utmost importance to all Americans.

In the last several days of testimony, Judge Roberts has failed to demonstrate an adequate commitment to protecting the civil and human rights that are so important to all Americans. In fact, all evidence suggests that Judge Roberts would use his undeniably impressive legal skills to bring us back to a country most of us would not recognize: where states' rights trump civil rights and where the federal courts or Congress can see race or gender discrimination, but are powerless to remedy it. This is not the America in which most Americans want to live. And as we have seen over the past two weeks in the wake of Hurricane Katrina, when the federal government's role is diminished, the least among us suffer the most.

Based on reasons outlined in more detail below, after a careful review of John Roberts' record, including his testimony before this committee, the Leadership Conference on Civil Rights is compelled to oppose the confirmation of John Roberts to the position of Chief Justice of the United States.

Our nation fought a civil war over the meaning of equality guaranteed by our Constitution and over the role of the federal government in ensuring that equality. In the years immediately following, there was a great debate in our country about the power of the federal government to enforce the 14th and 15th Amendments. Reconstruction failed, and African Americans were returned to a position of near servitude, because those who advocated for weak federal power prevailed. It was not until decades later, when the Court outlawed state-sponsored segregation in *Brown v. Board of Education*, followed by the enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the 1968 Fair Housing Act, and many other key statutes that are now the bedrock of our national commitment to equality of opportunity, that the federal government was finally empowered to play a role in improving the lives of ordinary Americans.

However, in recent years, we have seen the rise of a political movement that is an eerie parallel to the post-Reconstruction period. Today there are those who, in the name of "judicial restraint," advocate a federal retreat in the area of civil and human rights. While our Constitution speaks of fundamental rights, "judicial restraint" advocates oppose allowing the federal courts or Congress to use the Constitution in order to protect individuals against violations of those rights.

Here is one example. The Voting Rights Act is often described as the most effective civil rights statute ever enacted by Congress. Part of its power over the last 25 years is due to amendments made to the statute by Congress is 1982 to make clear that an election practice or procedure that resulted in discrimination violated the Act..

During the 1982 debate over the Voting Rights Act amendments, John Roberts was an aggressive enemy of the "results" standard. According to memos written by Roberts during his time as an advisor to Attorney General William French Smith, Roberts' opposition to the "results" test for voting discrimination was based in part on the view that "widely accepted practices" used by states in their election systems should not be subject to attack in the federal

courts,[1] even if it could be demonstrated that such practices prevented blacks from having equal opportunity in voting. This assertion is astonishing. If the federal courts had not been empowered to invalidate "widely accepted" state and local practices, our country's voting rights revolution would never have happened. Would Roberts have approved of the poll tax or literacy tests because those were "widely accepted practices?"

John Roberts' record also reveals a history of demeaning or belittling the existence of gender discrimination. According to memos from Roberts' time as a legal advisor in the Reagan administration, the basic protection of equal treatment under the law for women can be trumped by assertions by the state that compliance would be too expensive. Despite the strong recommendation from a very conservative member of the Reagan administration's civil rights team, Judge Roberts urged the administration not to intervene in a sex discrimination case against the Kentucky prison system, contending that discriminatory treatment of men and women in the prison's vocational programs was "reasonable" in light of "tight prison budgets."[2] Would Judge Roberts then apply the same argument to equal educational opportunities for women generally? Could states, in the name of saving money, refuse to provide equal health services to men and women?

Judge Roberts also has a limited view of the federal government's role in addressing discrimination in education. Roberts has argued that Congress can exclude all school desegregation cases from the federal courts,[3] thus empowering states to be the arbiters of when they have met their obligations under the school desegregation requirements of the federal Constitution. This is, in effect, a pre-*Brown* vision that fits squarely into Roberts' objective of preventing the federal courts from fulfilling the promise of the 14th Amendment.

As many commentators have made clear, Judge Roberts is a gifted and intelligent lawyer and advocate. But that is not the test for determining whether he is fit to lead the highest court in the land. Rather, the test is whether Judge Roberts has demonstrated he is committed to the fundamental principles on which our country was founded, and whether his vision of America matches the expectations of mainstream Americans.

Judge Roberts has failed this test. Therefore, the Leadership Conference on Civil Rights has no choice but to oppose his confirmation. America can and should do better.

LCCR made an effort to gain a fuller view of Judge Roberts' record, by filing a Freedom of Information Act request for some of the documents that have not been produced. We do not believe that the American people are well served by the administration selectively withholding memoranda from Roberts' time as a political appointee in the Solicitor General's office. The Administration has access to these documents, and so should the Senate and the American people. Unfortunately, our expedited request has been denied, and the relevant documents still

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[1] Memorandum to the Attorney General from John Roberts, re "Section 2 of the Voting Rights Act and *Mobile v. Bolden*," November 6, 1981.
[2] Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re "Proposed Intervention in *Canterino v. Wilson*," February 12, 1982.
[3] Memorandum to the Attorney General from John Roberts, re "Meeting with Clarence Pendleton, Chairman, U.S. Civil Rights Commission," September 15, 1982.

have not been produced. The absence of those documents only deepens the concerns that we have about his record.

Unlike some of our member organizations and other allies in the fight for civil and human rights, LCCR did not take a position on this nomination until today. Given the size and diversity of the LCCR coalition, unanimity among our members is rare, and does not exist today with regard to our position on Judge Roberts' nomination. However, our conclusion today reflects the consensus of our more than 190 member organizations.

Our reasons for opposing Judge Roberts' confirmation as Chief Justice of the United States include troubling aspects of his record in the following areas:

**CIVIL RIGHTS ENFORCEMENT**

**Judge Roberts' effort to limit the scope of the Voting Rights Act of 1965.** Judge Roberts' record to date fails to demonstrate that he is committed to upholding the constitutional and statutory foundations that protect the right to vote. During the 1981-82 reauthorization of the Voting Rights Act of 1965,[4] Roberts aggressively promoted – in more than 25 memoranda and other written materials – the Reagan administration's unsuccessful efforts to strike language, included by the House in a bill that was passed by an overwhelming 389-24 margin, which allowed plaintiffs in discrimination cases to establish a violation of Section 2 of the Voting Rights Act if they could show that the voting practice or procedure in question had a discriminatory effect. This effort by Roberts to weaken the reauthorization bill, if successful, would have brought most voting rights litigation to a grinding halt.

Roberts argued against the "effects" test for Voting Rights Act cases even though he understood that it was aimed at eliminating discriminatory practices. What is especially disconcerting is he based his position in part on the view that "widely accepted practices"[5] used by states in their election systems should somehow be protected from judicial scrutiny, even when such practices have been shown to prevent African Americans from fully participating in the voting process. This appeal to "widely accepted practices" speaks volumes and carries with it dangerous implications. After all, if federal courts had not been empowered to invalidate "widely accepted" state and local practices, our nation's civil rights revolution would never have happened.

In other memoranda, Roberts argued that the "effects" test would "establish a quota system" and "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[6] He urged the Attorney General to "not be fooled by the House vote or the 61 Senate co-sponsors of the House bill into believing that the President cannot win on this issue," alleging that "many members of the House did not know" what they were doing when they overwhelmingly approved the effects test.[7] Roberts urged the Attorney General to use the materials and analysis he had written, which he thought could help Senators become more

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[4] Voting Rights Act Amendments of 1982, P.L. 97-205 (96 Stat. 131), approved January 12, 1983.
[5] Memorandum re *Mobile v. Bolden*, *supra* note 1.
[6] Memorandum to the Attorney General from John Roberts, re "Voting Rights Act: Section 2," December 22, 1981.
[7] Memorandum to the Attorney General from John Roberts, re "Talking Points For White House Meeting on Voting Rights Act," January 26, 1982.

"educated" on the differences between the President's position and the "serious dangers" in the House-passed version.[8] Instead of the "effects" test, Roberts argued in favor of requiring plaintiffs to prove that election officials acted with the intent to discriminate – a much higher burden that would have allowed many discriminatory voting schemes to go unchallenged.

The bill to reauthorize the Voting Rights Act that was eventually passed by Congress and signed into law by President Reagan included the "effects" language, despite Roberts' objections. Roberts' opposition to the use of an "effects" test to prove racial discrimination with regard to what the NAACP Legal Defense and Educational Fund describes as "the nation's most effective civil rights statute"[9] suggests a cramped and unrealistic view of civil rights law, and raises serious questions about his commitment to equal opportunity and the protection of civil and human rights for all Americans.

**Judge Roberts' hostile attitude toward affirmative action.** Throughout his career, Roberts has strongly attacked affirmative action policies. When the U.S. Commission on Civil Rights issued a report in 1981 that said affirmative action programs needed to be expanded, he wrote a memo arguing that it relied on "circular logic" and that it was pushing "racial quotas."[10] Roberts in 1981 also tried to undermine a long-standing policy in the executive branch that encouraged affirmative action by government contractors. When Reagan administration officials indicated their intent to continue the policy, Roberts complained in a memorandum to the Attorney General that it advanced "offensive preferences" based on race and gender.[11] Even though the Supreme Court had ruled voluntary affirmation action programs were legal in *United Steelworkers v. Weber*, Roberts argued that the ruling "has only four supporters on the current Supreme Court" and that "[we] do not accept it as the guiding principle in this area."[12]

In a 1990 *amicus curiae* brief in the case of *Metro Broadcasting Inc. v. Federal Communications Commission*,[13] Roberts took the unusual step of taking the opposite side of another federal agency in an effort to fight its affirmative action policy – and referred to the FCC's program as "a policy in search of a purpose."[14] More recently, in his private capacity, Roberts characterized affirmative action as "racism" in a 1995 television interview.[15] If confirmed to the Supreme Court, the evidence strongly suggests that Roberts would use his position to abolish policies that have long been used to remedy past discrimination and advance racial, ethnic and gender diversity.

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[8] *Id.*

[9] NAACP Legal Defense and Educational Fund, Inc., *Report on the Nomination of Judge John G. Roberts, Jr. to the Supreme Court of the United States*, August 31, 2005 at 18.

[10] Charlie Savage, *Roberts Vote Seen as Critical in Racial Issues: Earlier Writings Opposed Affirmative Action Plans*, THE BOSTON GLOBE, August 7, 2005 at A1.

[11] Memorandum to the Attorney General from John Roberts, re "Meeting with Secretary Donovan on Affirmative Action," December 2, 1981.

[12] *Id.*

[13] 497 U.S. 547 (1990).

[14] *Metro Broadcasting, Inc. v. Federal Communications Commission*, No. 89-453, Brief of Amicus Curiae United States in Support of Petitioners, 1989 U.S. Briefs 453, February 9, 1990.

[15] Interview, MacNeil/Lehrer News Hour, June 12, 1995 (While discussing the recent Supreme Court ruling in *Adarand Constructors v. Pena*, Roberts stated that "what the Supreme Court said today is that you don't overcome racism by engaging in it yourself").

**Judge Roberts' aggressive approach to narrowing Congressional authority under the Commerce Clause, which serves as the basis for many critical federal laws.** John Roberts' record demonstrates a disturbing pattern of action to restrict legal protections of average citizens. Too often his efforts have resulted in overturning safety protections for workers, consumers and public health. In his dissent to the D.C. Circuit's denial of a rehearing *en banc* of *Rancho Viejo, LLC v. Norton*,[16] Judge Roberts questioned whether the Endangered Species Act[17] could be applied, under the Commerce Clause, to prohibit real estate developers – plainly operating in interstate commerce – from endangering a particular species whose habitat lies entirely within the boundaries of a single state. Roberts' extraordinarily narrow perspective of Congressional power expressed in his *Rancho Viejo* dissent raises serious concerns about his views on the legitimacy of such major and historically effective pieces of civil rights infrastructure as the ban on discrimination in places of public accommodation in the Civil Rights Act of 1964 and, equally, on Congress' authority to move the country forward with additional civil rights laws such as hate crime and non-discrimination legislation to better protect the lesbian, gay, bisexual and transgender community.

**Judge Roberts' troubling views on immigrants' rights.** In a 1982 decision, the U.S. Supreme Court[18] struck down, on Equal Protection grounds, a Texas law that prevented undocumented immigrant children from attending public schools. The 5-4 decision guaranteed the right of undocumented children to attend public schools and recognized that undocumented immigrants could claim protection under the Fourteenth Amendment. Justice Brennan, writing for the majority, pointed out that it was "difficult to conceive of a rational justification for penalizing these children"[19] for being in the U.S. based on the actions of their parents. Justice Brennan also pointed out that the denial of a basic education and the stigma of illiteracy would impose "a lifetime of hardship on a discrete class of children not accountable for their disabling status."[20] In a memorandum to then-Attorney General William French Smith,[21] Roberts criticized the ruling as a decision by the product of the "activist duo," Justices Brennan and Marshall. Roberts advised the Attorney General that the Reagan administration should have filed an *amicus curiae* brief in favor of upholding the Texas law because the weight of brief from the U.S. Solicitor General on the "values of judicial restraint could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case."[22] Roberts also endorsed the idea of a national I.D. card,[23] and in another instance he pointed out that President Reagan should mention his support for a legalization proposal in an upcoming interview with a Latino publication because he thought readers would be pleased that Reagan wanted to grant legal status to their "illegal amigos."[24]

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[16] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).
[17] P.L. 93-205 (87 Stat. 884), approved December 28, 1973.
[18] Plyler v. Doe, 457 U.S. 202 (1982)
[19] *Id.* at 220.
[20] *Id.* at 223.
[21] Memorandum to the Attorney General from Carolyn B. Kuhl and John Roberts, re "*Plyler v. Doe* - The Texas Illegal Aliens Case," June 15, 1982.
[22] *Id.*
[23] Memorandum to Fred F. Fielding from John G. Roberts, re "National I.D. Comments," October 21, 1983.
[24] Memorandum to Fred F. Fielding from John G. Roberts, re "Presidential Interview with *Spanish Today*," September 30, 1983.

**Judge Roberts' attempt to undermine the wall of separation between church and state.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Lee v. Weisman*.[25] He not only argued that it was constitutional for a public school to sponsor prayers at graduation ceremonies, but also urged the Court to scrap the long-standing test that federal courts have used to decide whether laws and practices violate the Establishment Clause. The test Roberts urged on the Court would have allowed highly sectarian prayers in public schools and would threaten the longstanding rights of religious minorities. His argument was not only rejected by the Court but criticized by the majority for its erroneous First Amendment analysis. Earlier in his career, Roberts repeatedly endorsed legislation that would strip the federal courts of the ability to even hear cases dealing with school prayer.[26]

**Judge Roberts' narrow views on disability law.** Following the Supreme Court decision in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*,[27] Roberts authored a memorandum that endorsed troubling views on the ability of the federal government to assist people with disabilities. *Rowley* involved Amy Rowley, an eight-year-old deaf student who sought to have a sign language interpreter provided to assist her in school. Lower federal courts ruled that Rowley was qualified under the Education for All Handicapped Children Act of 1975[28] to receive a state-sponsored sign language interpreter. The Solicitor General's office supported her claim when the case reached the Supreme Court on appeal, but in a majority opinion written by Justice Rehnquist, the Supreme Court reversed, stating that Rowley was entitled only to an adequate education and that states were not required to "maximize the potential of handicapped children commensurate with the opportunity provided to other children."[29] A week after the ruling, Roberts wrote a memorandum that attacked the lower court rulings in Rowley's favor as "an effort by activist lower court judges to impose potentially huge burdens on the states," and faulted the Justice Department for weighing in on Amy Rowley's side of the case.[30]

**Judge Roberts' leadership in "anti-busing initiatives."** While in the Reagan Justice Department, Roberts strongly supported, in his words, "our anti-busing initiatives"[31] and referred to busing as a "failed experiment."[32] In advising the Attorney General, Roberts dismissed recommendations by Arthur Flemming, former chairperson of the U.S. Commission on Civil Rights as stressing the "purported need for race-conscious remedies such as busing." In a 1981 memo, Roberts characterized Flemming's arguments as not compelling because they relied on "long quotes from old Supreme Court cases."[33] The case Roberts referred to was *Swann v. Charlotte-Mecklenburg Board of Education*,[34] which was decided only 10 years earlier and

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[25] 505 U.S. 577 (1992).
[26] *See, e.g.* Memorandum to Fred F. Fielding from John G. Roberts, re "S. 47, "Voluntary School Prayer Act of 1985," May 6, 1985.
[27] 458 U.S. 176 (1982)
[28] Public Law 94-142 (89 Stat. 773), approved November 29, 1975; now codified as the Individuals with Disabilities Education Act, 20 U.S.C. Chapter 33.
[29] *Rowley*, 458 U.S. at 189.
[30] Memorandum to the Attorney General from John Roberts, re "Government Participation and Supreme Court Decision in *Board of Education v. Rowley*," July 7, 1982.
[31] Memorandum to William French Smith from John Roberts, re "Summary of Flemming Correspondence," October 5, 1981.
[32] Memorandum re Meeting with Clarence Pendleton, *supra* note 3.
[33] Memorandum re Flemming, *supra* note 31.
[34] 402 U.S. 1 (1971).

clearly upheld the use of court ordered busing to remedy school desegregation. Roberts did not recognize the seminal Supreme Court case as controlling.

**Judge Roberts' support for "court stripping" legislation, which undermines the ability of the federal courts to enforce constitutional protections.** Roberts waged a campaign inside the Reagan administration to support a bill introduced by Senator Helms and others to strip the federal courts of authority to require busing as remedy for illegal segregation. Both Robert Bork and Ted Olson thought the bill would was unconstitutional. Roberts had no such reservations. His memoranda heaped scorn on critics of the legislation, and claimed that Congress had power to eradicate busing as a "failed experiment."[35] Judge Roberts' writings from his tenure in the Reagan Justice Department indicate that he believes that so-called "court stripping" statutes, which withdraw constitutional claims from judicial scrutiny, are constitutional. In commenting on an analysis by then-Assistant Attorney General Theodore Olson, who wrote that opposing a bill to strip the courts of jurisdiction in school desegregation cases would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read."[36] He has also claimed that Congress has the power to strip courts of the ability to hear cases involving matters such as public school prayer and abortion.[37]

Apparently, Roberts believes that the Constitution *should be read* to permit Congress to limit or even eliminate the constitutional role of the federal judiciary in providing relief from unconstitutional legislation. LCCR finds this extremely troubling because the judicial branch has often been the sole protector of the rights of minority groups against the will of the popular majority, and our concerns are particularly relevant to the present day because Congress has voted on a number of court-stripping bills in recent years, including the so-called "Marriage Protection Act."[38] To use another example, if Congress had passed a statute stripping the federal courts of jurisdiction to hear cases raising claims of lesbian, gay, bisexual and transgender rights, the federal constitutional issue presented and vindicated in *Romer v. Evans*[39] would never have reached the Supreme Court. No candidate for the federal judiciary, especially for the Supreme Court, should advocate closing the courthouse doors to any group of Americans.

**Judge Roberts' narrow interpretation of relief under Section 1983.** While in the Reagan Justice Department and again as Deputy Solicitor General, Roberts sought to narrow the definition of "rights" under Section 1983,[40] originally enacted as part of the Civil Rights Act of 1871. In a 1982 memorandum, he made clear his strong disagreement with the Supreme Court's ruling in *Maine v. Thiboutot*,[41] which held that Section 1983 provides a remedy for violations of statutory rights as well as constitutional ones, and discussed ways to "undo the damage created

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[35] Memorandum re Meeting with Clarence Pendleton, *supra* note 3.
[36] Handwritten comments by John Roberts on memorandum to the Attorney General from Ted Olson, re "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases," April 12, 1982.
[37] Jo Becker, R. Jeffrey Smith and Sonya Geis, *In 1980s, Roberts Criticized the Court He Hopes to Join*, THE WASHINGTON POST, August 20, 2005 at A04.
[38] Marriage Protection Act of 2003 (H.R. 3313, 108th Cong., passed by U.S. House of Representatives on July 22, 2004).
[39] 517 U.S. 620 (1996).
[40] 42 U.S.C. § 1983.
[41] 448 U.S. 1 (1980).

by *Thiboutot*."[42] In *Wilder v. Virginia Hospital Association*,[43] Roberts argued before the Supreme Court that Medicaid rights were not privately enforceable under Section 1983. And in *Suter v. Artist M.*,[44] he took the position that children could not utilize Section 1983 to enforce provisions of the Adoption Assistance and Child Welfare Act, which required states to make reasonable efforts to reunite children with their families. Section 1983 is a critical federal provision that ensures that individuals can obtain relief when their federal rights have been violated by state or local officials, and has long been a primary tool for holding states accountable. Any efforts to limit its scope should be viewed as extremely troubling.

**WOMEN'S RIGHTS**

**Judge Roberts' troubling, dismissive attitude toward gender discrimination and his efforts to undermine a key law preventing it.** Throughout his government service, Roberts advocated positions on gender discrimination that are well outside of the mainstream. Indeed, Roberts' writings often seem to reflect outright denial that gender-based discrimination even exists, with memoranda authored by him even referring to "perceived problems of gender discrimination."[45] In one memorandum, he ridiculed the concept of equal pay for comparable work as a "radical redistributive concept" and mocked several female Republican members of Congress who had asked the administration not to oppose it in a pending court case.[46]

During Roberts' tenure in the Reagan Justice Department, he argued that there should be no "heightened judicial review" of laws and policies that discriminate against women. In the gender discrimination case *Canterino v. Wilson*, in which state prison officials discriminated against women by providing dramatically fewer vocational training and work opportunities than were available to men, Roberts urged his superiors to not intervene in the case because they would be forced to argue in favor of a higher standard of scrutiny.[47] This is disturbing because the Supreme Court had already ruled – definitively – that laws or policies that discriminated on the basis of gender were required to meet a higher burden under the Equal Protection Clause.[48] Equally troubling is the fact that Roberts also argued against government intervention on the ground that discriminatory treatment of men and women in the prison's vocational programs was "reasonable" in light of "tight state prison budgets,"[49] as if cost considerations should somehow outweigh the protection of women (or any group of individuals) from unlawful discrimination.

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[42] Memorandum to Steve Brogan, Office of Legal Policy, from John Roberts, re "Development of Legislative Changes to 42 U.S.C. § 1983," August 9, 1982.
[43] 496 U.S. 498 (1990).
[44] 503 U.S. 347 (1992).
[45] Memorandum to Fred. F. Fielding from John G. Roberts, re "Draft 'Status of the States' 1982 Year-End Report," January 17, 1983.
[46] Memorandum to Fred F. Fielding from John G. Roberts, re "Nancy Risque Request for Guidance on Letter from Congresswoman Snowe et al.," February 20, 1984.
[47] Memorandum re Canterino v. Wilson, *supra* note 2. The Department of Justice intervened in the case in support of the plaintiffs, despite Roberts' recommendation, and the district court found that the prison system in question had indeed unlawfully discriminated on the basis of gender. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky. 1982).
[48] See, *e.g. Craig v. Boren*, 429 U.S. 190 (1976), *Califano v. Westcott*, 443 U.S. 76 (1979).
[49] Memorandum re Canterino v. Wilson, *supra* note 2.

Roberts has also consistently argued in favor of narrowing the scope of Title IX of the Education Amendments of 1972, the key law prohibiting gender discrimination in education.[50] During his tenure in the Reagan Justice Department, Roberts argued in 1981 in favor of a proposal to limit the reach of Title IX by applying it only to schools that received *direct* federal aid and not *indirect* federal support such as student loans and grants.[51] While the administration – and eventually the Supreme Court – fortunately rejected his view, the end result would have been to allow many schools to receive significant federal funding without being required to comply with Title IX's provisions.

In 1982, Roberts argued that Title IX applied only to specific, individual programs within schools that receive specifically earmarked federal funds,[52] even though the institution as a whole benefits from the funding. When the Supreme Court accepted this argument in *Grove City College v. Bell*,[53] a dramatic decrease in civil rights enforcement in colleges and universities resulted. Congress clarified that it had intended for educational institutions, rather than specific programs, to be covered under Title IX by passing the Civil Rights Restoration Act in 1987,[54] over the objections of Roberts.[55]

As Deputy Solicitor General, Roberts again took a position that would have seriously weakened Title IX. In *Franklin v. Gwinnett County School District*,[56] Roberts co-authored a brief in which he argued that a high school student could not obtain damages under Title IX for years of sexual harassment and sexual abuse by her coach. His overly restrictive view of proper remedies under Title IX was rejected unanimously by the Supreme Court, which found that sexual harassment is an intentional violation of Title IX and that its victims can recover money damages. Roberts' position in *Franklin*, and his restrictive views on Title IX in general, raise serious questions about whether he would allow women to fully vindicate their legal rights. These concerns would apply to victims of racial and disability-based discrimination seeking redress under Title VI or section 504 of the Rehabilitation Act, which are parallel in structure to Title IX, as well.

**Judge Roberts' position in *Bray v. Alexandria* raises questions about his willingness to protect women from discrimination.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief and delivered two oral arguments in *Bray v. Alexandria Women's Health Clinic*,[57] in support of Operation Rescue's legal position in a case involving trespassing and preventing women from accessing health clinics, tactics that "present[ed] a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its name."[58] What is troubling about John Roberts' role in *Bray* is that he readily threw the weight of the U.S. government behind

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[50] P.L. 92-318 (86 Stat. 235), approved June 23, 1972.
[51] Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re: "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance,'" December 8, 1981.
[52] Memorandum to the Attorney General from John Roberts, re "*University of Richmond v. Bell*," August 31, 1982.
[53] 465 U.S. 555 (1984).
[54] Civil Rights Restoration Act of 1987, P.L. 100-259 (102 Stat. 28), approved March 22,1988.
[55] Memorandum to Fred F. Fielding from John G. Roberts, re "Correspondence from T.H. Bell on *Grove City* Legislation, July 24, 1985.
[56] 503 U.S. 60 (1992).
[57] 506 U.S. 263 (1993).
[58] *Id.* at 313 (Stevens, J. dissenting).

Operation Rescue's position and against using federal civil rights law to stop aggressive and dangerous tactics from being used to prevent women from accessing health care. In doing so, he once again advanced an overly restrictive view of federal authority to enforce constitutional rights.

**HUMAN RIGHTS**

**Judge Roberts' expansive view of administrative power to suspend fundamental due process protections.** In *Hamdan v. Rumsfeld*,[59] Judge Roberts joined an opinion that gave broad leeway to the administration to try suspected terrorists in military tribunals that lack many of the important protections normally available to criminal defendants. Under the ruling, Hamdan would have no right to be present throughout his trial and would not have a right to see all of the evidence against him. Furthermore, the court ruled that Hamdan and similar detainees could not seek judicial relief under the Geneva Conventions. This decision raises serious questions not only about Judge Roberts' views on the separation of powers but also on basic principles of civil and human rights.

**Judge Roberts' willingness to curtail *habeas corpus* appeals in death penalty cases.** While in the Reagan administration, Roberts called for severely restricting the ability of individuals facing the death penalty to allege constitutional violations in federal court. He asserted that it is rare for "the meritorious claim [to have] anything to do with the petitioner's innocence," and that "the question would seem to be not what tinkering is necessary in the system, but rather why have federal *habeas corpus* at all?"[60] He later argued that the Supreme Court should hear fewer appeals and stop serving as the "fourth or fifth guesser in death penalty cases."[61] Given the irreversible nature of the death penalty, and the fact that at least 116 individuals have been convicted of capital crimes and then exonerated since 1973,[62] it is irresponsible to so cavalierly dismiss *habeas corpus* appeals or any other legal safeguard.

**Judge Roberts' distorted views on civil and human rights in Africa.** Judge Roberts' troubling statements on civil and human rights matters have not been limited to purely domestic issues. A 1982 memorandum included disparaging comments about TransAfrica Forum,[63] an African American organization that wanted to dismantle apartheid systems around the world, including in South Africa. When asked by Kenneth Starr to respond to a gift magazine subscription from TransAfrica, Roberts wrote: "Sometimes silence is golden. TransAfrica is the American lobby group supporting various Marxist takeover attempts in Africa, particularly in Namibia. The only appropriate reply would be a curt acknowledgment-- not even a 'thanks for

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[59] 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005).
[60] R. Jeffrey Smith and Jo Becker, *Sifting Old, New Writings for Roberts' Philosophy*, THE WASHINGTON POST, August 21, 2005 at A01.
[61] Memorandum to Fred F. Fielding from John G. Roberts, re "Chief Justice's Proposals," February 10, 1983.
[62] Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty*, September 2004.
[63] TransAfrica was established with the support of the Congressional Black Caucus in 1977 to advocate on behalf of people of African descent. Its educational affiliate, TransAfrica Forum, was formed in 1981 and produced a quarterly journal and monthly issue briefs. John Roberts was asked to draft a letter of response to the complimentary subscription TransAfrica Forum had provided the Attorney General.

the free subscription'--and I think it best not to respond at all. The fact that Randall Robinson is the brother of ABC's Max Robinson does not legitimate the organization."[64]

When Judge Roberts wrote this memorandum, future South African President Nelson Mandela was a political prisoner, and had been incarcerated by the apartheid regime for 18 years. The South African regime was launching cross-border attacks against its neighbors, emboldened by the now-discredited Reagan administration policy of "constructive engagement." With this terse note, Roberts dismissed any notion of the legitimacy of the struggle against apartheid, the rigid legal system of white minority rule imposed through brutal force against the people of South Africa and Namibia. Despite worldwide support for the popular movements that were struggling against apartheid, he omitted any mention of the racist system that was the subject of worldwide concern. His response suggests that he viewed even the historic battle against South Africa's repressive system of apartheid and illegal occupation of Namibia through a distorted ideological prism. The work of TransAfrica – and many other organizations – was simply a part of longstanding efforts to win equal rights for people of African descent around the world.

**CONCLUSION**

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political agenda. Unfortunately, Judge Roberts' record fails to show such a commitment, and for that reason, we must oppose his confirmation as Chief Justice.

Thank you for the opportunity to testify before the Committee today. I would be pleased to answer any questions Senators may have now, or to provide additional information if needed.

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[64] Memorandum to Kenneth Starr from John Roberts, February 16, 1982.