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September 1, 2005

Via Facsimile

Senator Arlen Specter and Members of the Senate Judiciary Committee
United States Senate
Washington, DC 20510

Re: Hearings on Nomination of Judge John G. Roberts, Jr., for Associate Justice of the United States Supreme Court

Dear Senator Specter and Members of the Senate Judiciary Committee:

The National Association of Women Lawyers ("NAWL"), Committee for the Evaluation of Supreme Court Nominees, respectfully submits questions (enclosed), which it urges the Committee to ask Judge John G. Roberts, Jr. in the public hearings on Judge Roberts's nomination for the position of Associate Justice of the United States Supreme Court. This list follows an initial review of Judge Roberts's writings and public statements (see attached NAWL Statement of August 30, 2005).

Very truly yours,

Stephanie Scharf

Stephanie A. Scharf, Chair
Committee for Evaluation of Supreme Court Nominees

SAS:kp
Enclosures

cc: The White House
Judge John G. Roberts, Jr.

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National Association of Women Lawyers®
September 1, 2005

Proposed Questions For Judge John G. Roberts, Jr.
Nominee For Associate Justice, United States Supreme Court

Fundamental Rights

1. Your opinion in *Tracey v. Hedgepeth* (386 F.3d 1148) (2004) refers to a fundamental right as one that is "'deeply rooted in this Nation's history and tradition,'" (*quoting Washington v. Glucksberg,* 521 U.S. 702(1997)). Does this represent your judicial view?

2. Do you favor an approach to constitutional interpretation that allows for the existence of some fundamental rights (whether it be through the 14th amendment due process or liberty clauses; the 9th amendment; the penumbras; history/tradition; universal principles or some other approach) i.e., is there some methodology that leaves open the possibility of constitutionally-protected rights that may not be closely tied to specific textual phrases in the Constitution?

   If so, how are such fundamental rights ascertained and are they absolute or balanced against legislative encroachments?

3. We suggest a series of questions regarding nine cases (listed below) that had a substantial impact on women's rights, all of which were decided by the U.S. Supreme Court. Questioning for each of the cases:

   - With which opinion would you have been most closely allied if you had been sitting on the U. S. Supreme Court at the time it was decided? Please explain why you would have most closely allied with that opinion.

   - Alternative question: how would you have decided this case if you had been sitting on the Supreme Court at the time it was decided? Please explain why.

The nine cases are:

Gonzales v. Castle Rock, Colorado (2005) (deciding there is no property interest under Due Process Clause in enforcement of domestic violence civil protection order).

Jackson v. Birmingham Board of Education (2005) (deciding that Title IX included protection from retaliation for a third party reporting violation).

Stenberg v. Carhart (2000) (deciding that a statute criminalizing the performance of partial birth abortion violates the Constitution because it lacks the requisite exception for preservation of the health of the mother).

Davis v. Monroe County Board of Education (1999) (deciding that Title IX protects students from sexual harassment by other students).

U.S. v. Virginia (1996) (deciding that it is improper under the Equal Protection Clause to exclude all women from citizen-soldier training at a state-run university).

J.E.B. v. Alabama ex rel. T.B, (1994) (deciding that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender).

Bray v. Alexandria Women's Health Clinic (1993) (deciding there is no federal cause of action against persons obstructing access to abortion clinics).

Planned Parenthood v. Casey (1992) (deciding that principles of institutional integrity and the rule of *stare decisis* require that *Roe v. Wade*'s essential holding be retained).

Mississippi University for Women v. Hogan (1982) (deciding that the single-sex admissions policy of a state-supported professional school violates the Equal Protection Clause).

Strict Scrutiny

4. An article that appeared in the American Bar Association Journal (68 ABA Journal 59, Jan. 1982) under the name of William French Smith has been attributed to you. The article has been quoted as stating, "Classifications based on race are suspect and do merit careful scrutiny, in light of the historic purpose of the Fourteen Amendment. Extension of heightened scrutiny to other 'insular and discrete' groups, however, represents an unjustified intrusion into legislative affairs."

   - Did you have any role in drafting this article in whole or in part?
   - Does the statement represent your current judicial view?
   - Are there any justifications for going beyond the specific race-based purposes of the post-Civil War amendments to provide for any heightened scrutiny for gender-based classifications?

Congressional Authority

5. The following 1999 quote has been attributed to you: "We have gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law, whether it is VAWA or anything else. The fact of the matter is: conditions are different in different states and state laws can be more relevant."

   - Do you acknowledge the accuracy of this quotation?
   - If not, what was the actual statement made by you?

6. You supported Congress' attempt to pass legislation prohibiting busing as a remedy, yet you did not approve of VAWA as an appropriate remedy to assist states in addressing issues of domestic violence. How do you reconcile your support of Congress' authority to address appropriate remedies in the one instance yet consider VAWA to have been a misuse of Congress' authority to address appropriate remedies?

7. Do you favor Congress' passing legislation to enact remedies for long standing social inequities when the states have failed to address the issues by implementing effective remedies despite adequate time to do so?

8. How would you describe your views on the following: statutory interpretation, strict reading of language and carrying out legislative purpose?

9. To what extent does Congress have the power to legislate in areas in which women have historically been discriminated against?

10. When, in your view, is cost a legitimate basis for continuing discrimination?

11. Does Congress, in your view, have responsibility for enforcing guarantees of due process and equal protection?

12. Should courts defer to legislative efforts to enforce the guarantees referred to in 11?

13. How would you describe your views on the need (if any) for deference to the legislature?

Stare Decisis

14. What value do you place in the principles of stare decisis?

15. When is it appropriate, in your view, for a court to reverse a long standing precedent?

16. Some years ago, you wrote an article expressing "extreme doubt" on right to privacy. Is that still your view given that there is precedent establishing right to privacy?

Women in Law

17. During your years as a practicing lawyer did you observe discrimination against women in your private practice or in the government? If so, what actions did you take to stop it?

18. Since your judicial appointment:

    - How many women have you interviewed for the position of judicial law clerk?

    - We understand that you have hired only one female law clerk in three classes of clerks. Why have you hired so few female law clerks?