STATEMENT OF PETER B. EDELMAN, PROFESSOR OF LAW, CO-DIRECTOR, JOINT DEGREE IN LAW AND PUBLIC POLICY, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. EDELMAN. Thank you, Mr. Chairman. I am very pleased to be here and appreciate the opportunity to testify and join Professor Fried in complimenting the Committee as a citizen on the civility of these proceedings and the way in which there is an opportunity to educate our country. I think after that we probably disagree.

I am here to urge that this nomination of Judge Roberts be rejected. The history of the decisions interpreting our Constitution is one that over the two-plus centuries is one of greatly increasing protection for the rights and liberties of our people. The evolution in the meaning of the open-ended language has meant more respect for individual rights and liberties against governmental over-reaching and at the same time more power for Congress to act to protect people against exploitation and injury by special interests. And as many witnesses have said, this has all made a great difference in the lives of millions of Americans, the two witnesses on the previous panel. So who sits on the Court matters really crucially for all of us.

Senator Biden talked about the record as one criterion before the earlier panel. Senator Kyl talked about best evidence. And I think that the best evidence we have here is really a long record over a long period of time, unlike some nominees that come before this Committee, not just his judicial record. And to me—and I did start out looking into this and doing the reading without a particular view other than knowing Judge Roberts's reputation as a very intelligent and able lawyer and as a conservative. But what I have concluded is really that it adds up to a troubling likelihood that we have here a nominee who as Chief Justice is really going to try to turn the clock back on this pattern of protection that I talked about.

It is not about one particular case that might be overruled. As to any one case, as important as it is, it is difficult to figure out what he might do. It is really about his judicial philosophy across the board in a whole lot of areas. It is how he views the Constitution as a whole. And it is where that will take him in particular cases and many different kinds of questions.

He says a lot of the memos from the early 1980's were as a young staff lawyer done at the behest of his superiors. I think he is too modest, because you look at that and over and over again those memoranda that often he wrote on his own initiative or in response to a question, recommendations for action were requested, there was no decision already made. And he was at the right fringe of even his conservative colleagues in the Reagan administration. And so that is the issue here, and this is kind of a pure case about the direction that a nominee is going to take.

There is no question about his intelligence, his ability as a lawyer, his integrity, his character. Those are not in issue. The issue is one of a conservatism that I think really radically threatens the meaning of the Constitution as we know it.

He said the other day that judging is like being an umpire, just calling the balls and strikes, and I am not one for adding to the

pile of sports analogies here. But, you know, if the umpire stands two steps to the right behind the catcher, strikes are going to look like balls and many balls are going to look like strikes. And so I think the analogy is remarkably disingenuous.

Constitutional interpretation is not like calling balls and strikes. Why do we have 5–4 decisions? These are matters of first impression where the precedent is to be looked at, but they are there because the decision has not been made on the issue. And so what we are here is trying to see—trying to compare these strong differences of view that exist, 5–4, about the meaning of the text, because that is the heart of it, the intention of the Framers, and all the other relevant history and societal values. And so it is subtle and complex, and there is a deep division and debate, and that is why this nomination is so important.

We are really looking at a question of what our Constitution is all about, and we are looking at whether it is about fundamental principles of protection of individual rights and liberties or really a much more cramped and crabbed view of those things.

You know, we have changed over the course of a century. The cramped view was where we were 100 years ago, and I am afraid from looking at the record here that as a Chief Justice Judge Roberts is going to work to take us back in time.

Many of you remember the hearings—we all remember the hearings on Judge Bork's nomination. He made things easy for the Committee. He put it all in one article in the Indiana Law Journal. There it was and the Committee could decide, the Senate could decide.

Judge Roberts is what I call Bork by accretion, bit by bit, memo by memo, speech by speech, and now opinion by opinion. And I think what it adds up to is far more erratically conservative than Judge Bork.

And so if you go through the list of issues—Senator Kennedy, you asked him about a series of civil rights issues. Others have asked about other matters. When you add them all up, I think you have a pattern in each of these areas—civil rights, civil liberties, access to justice, a whole series of things—and then the pattern adds up to a pattern. And so that is why I am here really to testify, because I think that what the pattern adds up to is a dangerous recipe for our Nation, one that may result in injury and renewed vulnerability for literally millions of Americans who fought for decades and even centuries to be included in our constitutional promises.

So I do urge the Committee and the Senate to reject this nomination. Thank you for the chance to testify.

[The prepared statement of Mr. Edelman appears as a submission for the record.]

Chairman SPECTER. Breaking protocol just a little, Professor Edelman, do you really think Judge Bork made it easy for the Committee?

[Laughter.]

Mr. EDELMAN. I think—

Chairman SPECTER. You don't have to answer that question.

Mr. EDELMAN. I appreciate the comment, Senator, Mr. Chairman.

Chairman SPECTER. Our next witness is Professor Patricia Bellia from Notre Dame, an extraordinary academic record, summa cum laude from Harvard, Yale Law School graduate, clerked for Justice O'Connor, and before that, Judge Cabranes of the Second Circuit. Thank you for coming in today, Professor Bellia, and we look forward to your testimony.

STATEMENT OF PATRICIA L. BELLIA, PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL, SOUTH BEND, INDIANA

Ms. BELLIA. Thank you, Mr. Chairman, and other distinguished members of this Committee. It is an honor for me to appear before you in support of the President's nomination of John Roberts to be Chief Justice of the United States. I have never worked with Judge Roberts. Indeed, I have never met him. But during my time in Washington as a law clerk and as a lawyer in the Justice Department, I have had the privilege to know his work as an advocate before the Supreme Court.

More recently, in my teaching and research in constitutional law and other areas, I have come to know his work as a judge on the U.S. Court of Appeals for the D.C. Circuit. In my view, the best evidence of how a nominee will perform as a judge is how he has performed as a judge. I have read all of the opinions that Judge Roberts has written in his time on the D.C. Circuit. His service on that court demonstrates beyond doubt that he resolves cases with competence, care and fair-mindedness. Most importantly, his jurisprudence on the court of appeals demonstrates in decided fashion that Judge Roberts does not seek in his decisions to advance any platform of any current political ideology. He has joined and written opinions upholding claims of criminal defendants and joined and written opinions denying such claims. He has both accepted and rejected challenges to executive agency action claimed to be unlawful. He has interpreted statutes with great care, with a primary focus on the text that Congress has enacted, but never categorically dismissing any evidence that is probative of congressional intent.

His opinions, be they for the court or for himself, display no rancor; rather, they are notable for the respect and care with which they outline any disagreement he might have with the position of litigants or his colleagues on the court. Nor do his opinions betray any impatience for the claims of any class of litigants. The occasional hints of exasperation in Judge Roberts's opinions are reserved for the district court judge or the administrative agency that has decided upon the rights and claims of individuals without providing the considered explanation to which he believes all persons who find themselves before our tribunals are entitled. It is, therefore, no surprise to find in Judge Roberts's opinions an extensive and careful scrutiny of the individual claims that each case squarely presents, no more and no less.

There is not the time here for me to analyze each opinion that Judge Roberts has written on the court of appeals, and my written testimony examines in detail two areas of structural constitutional law in which Judge Roberts's work has been subject to criticism, the first involving questions of congressional power and the second involving questions of Executive power, particularly in foreign af-