1204

STATEMENT OF JUDITH RESNIK

PREPARED FOR THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

HEARING: JUDICIAL NOMINATION:

JOHN G. ROBERTS, JR. OF MARYLAND

TO BE

CHIEF JUSTICE OF THE UNITED STATES

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Submitted September 9, 2005

I. THE OPPORTUNITIES PRESENTED BY THE CONFIRMATION PROCESS

The consideration of a nominee to the Supreme Court is a unique occasion in American political life -- in part because it is a rare event and in part because the Supreme Court plays a central role in our nation. This hearing, convened by virtue of the Constitution's decision to locate the authority for selection of life-tenured federal judges in the two political branches of government, invites open discussion of the American legal system, of the purposes and scope of constitutional rights, and of the obligations and responsibilities of public and private actors under the rule of law.

While focused on a particular nominee, each hearing is a testament to this constitutional democracy's deep commitments to justice under the rule of law. Each hearing is also a moment to focus not only on the many accomplishments of the person under consideration but also on why we care about courts, what the constitutional creation of life-tenured judgeships entails, and what purposes are served by judicial independence.

These propositions are all the more important when a person is nominated to be the Chief Justice of the United States. As Senator Strom Thurmond explained when William Rehnquist (whose untimely death prompts this hearing) was being considered, the Chief Justice is the "symbol of the Court."[1] At that time, Senator Kennedy offered a parallel comment, that the Chief Justice "symbolizes the rule of law in our society; he speaks for the aspirations and beliefs of America as a Nation."[2]

As I will detail below, given the evolution of the role of the Chief Justice, the person holding that office wears many hats. As Senators Thurmond and Kennedy have described, as the senior jurist of nine rendering decisions on America's highest court, the Chief Justice serves as America's symbol of justice. In addition, the Chief Justice is the chief executive officer of the entire federal judicial system, devoted to responding to thousands of cases through decisions rendered by hundreds of lower court judges. As the spokesperson and agenda-setter for the Third Branch of government, the Chief Justice has enormous discretionary powers.

In recent years, with some difficult confirmation hearings, the process has been criticized as too contentious. Under-appreciated by these critics are the purposes for and the history of disagreements over nominations. Controversy about individuals to serve as jurists is both a longstanding feature of American politics and fairly reflective of the role that law itself plays in American politics. Conflict is *not* a recent artifact of televised Senate hearings or the disagreements resulting from the nominations of Robert Bork and Clarence Thomas. Rather, from the nomination of John Rutledge in 1795 to that of Melville Fuller in 1888 and then through the twentieth century to the debates during the last several years, participants have used

individual nominations to make arguments about what they hope United States law is and will be.[3]

Since this country's founding, the institution of the federal courts has been recognized as a means of shaping the rights of the people and the powers of the national and state governments.[4] Further, after the creation of new judgeships by the Federalists and the conflict ending with the 1803 decision of *Marbury v. Madison*[5] that established the principle of judicial review, Americans have understood that the legal philosophies, the party affiliations, and the ideological commitments of individuals serving as federal judges affect the content of legal doctrine.[6] Then, as now, people in the United States have disagreed about the scope of national powers and about the desirability of an expansive role for federal adjudication. One of the many ways in which those debates occur is through the prism of discussing a given individual's record and qualifications to serve as a life-tenured jurist.[7]

Not only is debate about the nomination of John Roberts constitutionally appropriate and consistent with longstanding practices, it provides an opportunity for all Americans to reflect on our aspirations for this nation and for the role of government in our lives. This is a "constitutional moment,"[8] and one we should proudly use to demonstrate our commitment to the panoply of American constitutional values. Now is the time to celebrate the protection of individual liberties and rights in a system in which independent jurists provide justice under the rule of law.

The confirmation process itself has also served, repeatedly, as a means of developing or clarifying legal norms. At hearings in the eighteenth century, conflicts emerged about the Jay Treaty. During the nineteenth century, debate was had on issues relating to railroads and unions. During the twentieth century, hearings addressed the constitutional rights of women and men of all colors, as questions of racial and gender equality came to the fore. Now, in the twenty-first century , the topics include rights to sexual privacy, to reproductive choice, religion and the public sphere, the legally appropriate responses to threats of terrorism, and the scope of Executive and congressional powers. Through discussions about individual nominees, certain of these issues will be identified as powerfully divisive and others as so settled as to not even appear to have "political" implications.

When attitudes are widely shared, they are not perceived as constituting an "ideology." Only when norms and values are contested do we think of a set of questions as touching on ideology. For example, were a nominee to suggest that the Supreme Court in *Brown v. Board of Education* ought not have ruled against state-created segregation, that person could not be confirmed. Other issues of equality remain contested, as can be seen when a nominee refuses to acknowledge that a particular precedent is so bedrock a principle of the American polity that it cannot be revisited.

What are the questions and the issues that should be at the center of these hearings -- the first in more than a decade on the nomination of a Supreme Court justice and the first since 1986 on the Chief Justiceship? Given that, as is detailed below, the office of the Chief Justice has grown in scope in the last thirty years, this occasion requires new articulation of the particular

qualifications requisite for the leader of the entire federal judiciary. One cannot answer the question of whether this particular person is the right individual to be both the symbolic and the actual leader of America's great federal judiciary without asking: What *are* the symbolic and the actual purposes of the courts that he would lead? Why do we care so passionately about courts?

This nominee's attitudes toward adjudication and the role of the Third Branch matter so much because an intense struggle is underway about the role of courts. The United States Constitution has a complex structure both separating the powers of government but also rendering the branches of government interdependent. The fact that the two political branches must work together to appoint judges to the Third Branch is but one of many examples in which the branches interact and rely upon each other. Another is that the federal judiciary -- an icon of independence -- must in practice rely on Congress to enable it to do much of its work. Although the Constitution guarantees life-tenure for judges whose salaries cannot be diminished,[9] the Constitution does not expressly require that budgets be provided for the courts. Members of Congress, like the Executive, must share in giving substance to the constitutional promise that federal judges be protected from incursion so as to provide due process of law.

Many in this nation (as well as around the world) celebrate courts as central to the well-being of an economically sound democracy. A robust judiciary enables stability, predictability, and security because both institutional and individual actors understand that their grievances will be heard in regular processes that are transparent, rule-based, and precedent bound. Further, courts offer opportunities for independent and impartial third parties to assess the validity of claims. Moreover, courts in democracies serve as deliberate checks on majoritarian power by constraining inappropriate exercises of executive, congressional, and more generally, of sovereign authority. Courts are an especially critical resource for the less powerful who, through adjudication, are given the opportunity to get a fair hearing even when they lack the resources to lobby Congress or to obtain attention from the media.

Some, however, do not embrace this conception of adjudication. Rather, they seek to limit the legal obligations and the liabilities of public and private sector actors. One means by which to achieve those goals is to cut back on the jurisdiction of judges to respond to claims of rights, on the remedies available, on the discretion of judges to decide the merits of cases, on the ability of ordinary people to access legal processes, and on the resources made available to courts. Another is to license the power of the state by immunizing its officials from challenge, by ruling that they have unchecked authority, or by concluding that judicial review is unavailable.

Of course, as the vast literature about "the federal courts" makes plain, hard questions exist about how to allocate federal judicial resources and about what role those courts should play in the American polity. Given this deep conflict about the proper place for judging, I urge Senators to learn more about what this nominee believes courts are for, about who should have access to them and for what claims, and about how he understands the role judges should play in checking the power of government, in interpreting constitutional and statutory rights, and in holding accountable those responsible for injury.

These words may be abstract, but the principles that they reflect are not. During the last two hundred years, the Congress, the Executive, and the federal judiciary, working in concert and encouraged by many private organizations, have done a remarkable job in creating a substantial, important federal judicial system. Through hundreds of different statutes, Congress has repeatedly turned to the federal courts by vesting authority in the judiciary to enforce new rights aimed at safeguarding consumers, at protecting the environment, and at ensuring fair treatment of all people.

To serve the American populace, Congress has also endowed the federal judiciary with significant resources. The import of the nation's constitutional commitment to judicial independence and authority can be seen in the more than 750 federal courthouse facilities at which the 1200 life-tenured jurists and the hundreds of magistrate and bankruptcy judges (aided by 30,000 in staff) work in response to the 350,000 civil and criminal cases and 1.6 million bankruptcy petitions filed annually. More profoundly, the evidence of the importance of the American commitment to courts can be found in the faith Americans have placed in the federal judiciary -- to listen to their claims and adjudicate them fairly, to insist on the human dignity of all persons and recognize their equality before the law, to acknowledge the challenge of enabling equal access in a world of disputants with very unequal resources, and to restrain undue exercises of power.

The nomination of a person to serve as the Chief Justice of the United States is thus a critical occasion upon which to insist on the promotion of a culture that cherishes judging, respects individual judgments when rendered after deliberation, obliges judges to take responsibility for their decisions through explanation and publication, and appreciates judges for protecting constitutional liberties and rights. To do so, we need a Chief Justice committed to a judiciary that is an independent and vibrant branch of government. We need a Chief Justice prepared to serve as the advocate for access to justice -- ready to press Congress to provide the resources necessary for courts to discharge their constitutional obligations to render judgment. We need a Chief Justice who reminds Congress and the Executive to respect and to promote decisionmaking by independent judges. We need a Chief Justice who understands that law must be a source of strength for those in need as well as a source of strength for those already well-resourced. Those are the "litmus tests" of which we should all be proud.

II. The Role of the Chief Justice of the United States

My contribution to these hearings stems from my work as a scholar of the federal courts. I teach and write about adjudication, the role of judges, the procedural system that guides their decisionmaking, and those parts of the Constitution that address the relationships among the courts, Congress, and the presidency and between the state and federal systems.[10] Further, I have focused on the changing role of federal judges at both the trial and appellate levels and the development of the judicial branch over the course of the twentieth century.[11] As a consequence, I have learned about the breadth of authority of the Chief Justice of the United States and how much that position has expanded in the last three decades.[12]

Many Americans are familiar with the role that the Chief Justice plays on the Supreme Court. The Chief Justice presides at both the public and the private sessions of the Court. When

voting with the majority, the Chief Justice has the power to select which justice writes the opinion for the Court. Further, aided by special staff, the Chief Justice is the senior official in charge of the Supreme Court itself. That institution, housed in one of Washington's most beautiful buildings, is supported by a budget of about $60 million and employs more than 300 people. The Court hosts both lawyers (practicing before the Court under special rules made by the Court) and the American public (watching its proceedings). As television cameras recorded last week during the mourning of the death of Chief Justice William Rehnquist, the Court itself is an icon of justice in America. And, commenting on that loss, Associate Justice Ruth Bader Ginsburg captured the many aspects of the Chief Justice's role by describing him as the "fairest, most efficient boss" whom she had ever had.[13]

Americans may be less familiar, however, with the several other roles of the Chief Justice who is, in essence, the Chief Executive Officer for the entire federal judicial system. The "Chief" serves as the spokesperson for the American judiciary, as the chair of the Judicial Conference of the United States (which, as detailed below, has evolved into a major policymaking body that opines regularly to Congress about the desirability of enacting various kinds of legislation), as the person charged with appointing judges to certain specialized courts, as the person who authorizes certain judges to "sit by designation" on other courts, and as the person given a host of other, more minor, functions such as service on many boards.

None of these roles are constitutionally mandated. Indeed, the part of the Constitution devoted to establishing the judicial branch makes no mention of a Chief Justice at all.[14] Rather, the one reference that can be found is in the Constitution's discussion of presidential impeachments -- vesting sole power for trying impeachments in the Senate and specifying that "the Chief Justice shall preside" when a president is tried.[15]

The tasks and parameters of the role of Chief Justice -- including the very question of whether to commit such broad authority to one person -- stem not from the Constitution but from dozens of statutes enacted in an ad hoc fashion over many decades, as well as from customs and from the decisions and ambitions of those who hold the office of the Chief Justice.[16] The current scope of this position is itself a tribute to the impressive leadership of Chief Justice Rehnquist.

A brief historical reminder makes plain how much the Chief Justiceship has changed. At the turn of the twentieth century, about one hundred life-tenured federal judges were dispersed across the nation. Dealing with a total of some 30,000 cases in a year, these judges were mostly left to their own devices, with few shared practices and little means of communicating with each other except through the publication of opinions. This situation prompted Chief Justice William Howard Taft to complain in 1922 that each judge had "to paddle his own canoe."[17]

In contrast today, some 2000 life-tenured and non-life tenured judges work in the hundreds of facilities around the United States that deal annually with the thousands of filings at the trial level and the 60,000 appeals.[18] No longer solo actors, judges are linked together through the Administrative Office (AO) of the United States Courts, created in 1939, and they are supported with educational programs and research provided by the Federal Judicial Center (FJC), chartered in 1967.[19] Their central headquarters is in one of Washington's major new

buildings, named after Justice Thurgood Marshall and located across from Union Station. The day-to-day management of the entire judicial enterprise and its $5.4 billion budget falls to the Director of the AO.[20]

But it is the Chief Justice of the United States who has the power to appoint and to remove the Director of the AO,[21] who serves as the permanent chair of the Board of the Federal Judicial Center,[22] who presides at the meetings of the Judicial Conference, who (upon consultation with others) selects the 250 people who sit on the twenty-four committees of the Judicial Conference, and who gives annual addresses to the nation about the administration of justice. This charter to the Chief Justice began to take shape through congressional responsiveness to the concerns of Chief Justice Taft. In 1922, Congress created the forerunner of what is now called the Judicial Conference of the United States,[23] the policymaking body of the federal judiciary.

Because it may be hard to grasp the import of the role played by the administrative apparatus of the federal court system, a bit more detail about its evolution is in order. Initially, the group of the then-eight senior circuit judges were asked to "advise" the Chief Justice about the "needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved."[24] From my reading of the transcripts (stored in the National Archives) of the yearly meetings during the early years, I learned that the Conference discussion consisted of oral reports from the senior circuit judges. They described how the individual judges with whom they worked were (or were not) managing to stay abreast of the work, as well as whether to request more judgeships. Topics ranged from better salaries, facilities, and supplies to concerns about rules of procedure, sentencing laws, and the need to provide indigent defenders with lawyers.

By mid-century, the Judicial Conference took on its current form, with district court judges included.[25] Today, with the Chief Justice presiding, the Conference has twenty-seven members. By statute, each circuit sends the chief judge of its appellate court, as does the Court of International Trade, and each circuit elects a district judge for a term.[26] Over the decades and influenced by the various Chief Justices, the Conference has enlarged its own agenda. While it often used to decline to comment on matters related to pending legislation by noting that certain issues were "legislative policy" and therefore inappropriate for judicial input, the Conference now takes positions regularly on an array of proposals. Beginning during the tenure of Chief Justice Earl Warren and then expanding significantly under Warren Burger and William Rehnquist, the Conference has become an important force.

As may be familiar to those who work on the Hill but less obvious to the American public, the judiciary functions in many respects like an administrative agency, seeking to equip itself with the resources needed to provide the service -- adjudication -- that the Constitution and Congress requires. Further, during the last half century, the federal courts have also become an educational institution teaching judges about how to do their job, a research center on the administration of justice, and an agenda-setting organization -- articulating future goals and plans. In addition to an Executive Committee, the Conference's committees cover topics that

range from technology to criminal justice. The Conference opines on legislation from security and court construction to proposed new civil and criminal jurisdiction for the federal courts.

The Chief Justice is the presiding officer of this entire apparatus and has the ability, through a host of discretionary judgments, to shape the institutional decisions of "the federal courts." For example, in 1991, under Chief Justice Rehnquist, the judiciary created its own Office of Judicial Impact Assessment to undertake the difficult task of anticipating the effects of proposed legislation.[27] In 1995, after convening a special committee on Long Range Planning, the Conference issued a *Long Range Plan for the Federal Courts*, a first-ever monograph making ninety-three recommendations about the relationship among state, federal, and administrative adjudication and about the civil and criminal dockets of the federal courts.[28] The *Long Range Plan's* recommendations included asking Congress to have a presumption against enacting any new rights for civil litigants, if those actions were to be enforced in federal court, as well as a presumption against prosecuting more crimes in federal courts.[29]

Further, under the leadership of the Chief Justice, the Judicial Conference may decide to offer its views on pending legislation even though, if enacted, judges may be required to preside on cases calling the legality of a particular provision into question. For example, in the early 1990s, when an initial version of the Violence Against Women Act (VAWA) was introduced, the Judicial Conference created an Ad Hoc Committee on Gender-Based Violence. Appointed by the Chief Justice, the Committee studied the proposed statute, which included that a new civil rights remedy be made available in federal court to victims of violence. The judiciary's Ad Hoc Committee recommended opposition -- which became official federal judicial policy as reported by the Chief Justice in the early 1990s.[30]

After the proposed legislation was modified (in part in response to the concerns raised by judges) and its scope narrowed, the Conference took no position on the propriety of enacting the civil rights remedy but supported other aspects of the legislation including educational efforts.[31] In 1994, at the behest of some forty state attorneys general and many others, Congress enacted the Violence Against Women Act, including its provision of federal jurisdiction (supplemental to that available in state courts) giving civil remedies to victims of gender-motivated violence. Thereafter, and again exercising his discretionary authority, the Chief Justice continued his criticism of VAWA. In 1998, the Chief Justice commented in a speech before the American Law Institute that the legislation raised grave problems of federalism. He cited VAWA (as well as other recent statutes) as inappropriate expansions of federal jurisdiction. In his view, "traditional principles of federalism that have guided this country throughout its existence" should have relegated these issues to state court.[32] In 2000, the Chief Justice wrote the majority opinion that ruled, five to four, that Congress lacked the power under the Commerce Clause to confer that form of jurisdiction on the federal courts.[33]

In addition to guiding the Judicial Conference, which adopts formal policy through voting, the Chief Justice has an independent platform from which to speak. William Howard Taft and his successors went regularly to the American Bar Association and to the American Law Institute to give major addresses on their views of the judiciary's needs and priorities. That tradition continues.

In the 1980s, Warren Burger initiated another practice -- providing annual "state of the judiciary" speeches that are released to the nation. Chief Justice Rehnquist followed suit, beginning each new year by setting out agendas and themes. In that capacity, Chief Justice Rehnquist regularly spoke about the values of judicial independence. Upon occasion, he criticized the Congress or the Executive for engaging in behavior that, he believed, suggested that the coordinate branches of government did not sufficiently appreciate the centrality of an independent judiciary to a thriving democracy.

Yet another aspect of the powers of the Chief Justice is important: He has the authority to select individual judges to serve on specific courts. Rather than using a system of random assignment (for example, staffing a court by assigning sitting judges whose names are drawn by lot), Congress has endowed the Chief Justice with the power to pick individual judges to sit on specialized tribunals.

For example, the Chief Justice appoints the seven judges on the Judicial Panel on Multidistrict Litigation[34] (with authority to decide whether to consolidate cases pending around the country and to centralize pretrial decisionmaking in a judge selected by that panel). The Chief Justice also selects the eleven judges who sit for seven-year terms on the Foreign Intelligence Surveillance Act Court (FISA) which, since 1978, has approved of more than 10,000 government requests for surveillance warrants.[35] The Chief Justice also has the power to select the five judges who comprise the Alien Terrorist Removal Court, chartered in 1996 to respond when the Department of Justice files cases seeking to deport legal aliens suspected of aiding terrorists.[36] As a result of these various statutes, according to Professor Theodore Ruger, Chief Justice Rehnquist made "over fifty such special court appointments, filling more federal judicial seats than did every individual United States President before Ulysses S. Grant."[37]

In sum, the Chief Justice is not only the symbolic leader of the federal judiciary. He also has a number of specific powers and a good deal of practical authority. He is the most powerful person in the entire federal judicial apparatus. Time and again, individual Chief Justices have proven to be the judiciary's most effective lobbyist, the judiciary's most visible spokesperson, and the nation's most important judicial leader.

Such a repertoire of powers is stunning -- and anomalous -- for a democracy. That role entails authority significantly different from that of either other judges or justices who sit on courts. Judges on appellate courts work collectively; they must persuade others of the correctness of their views in order to prevail. Both constitutional and common law traditions mandate openness in courts. Most decisions are explained by reasons that are available to public scrutiny and then revisited as new cases arise. In contrast, the administrative powers of the Chief Justice are neither officially shared nor constrained by obligations of accounting.

Further, these many grants of power contrast sharply with the authority of other executive officials. Presidents have term limits. Heads of independent agencies generally do as well. Currently, however, the Chief Justice has life-time consolidated authority over the administration

of both the Supreme Court and the lower federal courts and does not have legal obligations to share that power with other jurists nor to explain the decisions made.

On the occasion when we must reflect on the role of the Chief Justice, I would be remiss not to add that because the current structure is a creature of Congress and custom, it could be altered. A new Chief Justice could decide to depart from many of the practices that I have described by, for example, asking other judges to take on various tasks or by going to Congress to seek revision of some of the statutory charters that run to that office. The assignment of chairing the Judicial Conference could rotate from one Chief Circuit Judge to another, just as the position of chief judge of a lower court is gained through seniority and is term-limited.[38] Indeed, the Office of Chief Justice itself could be a rotating position, held by different members of the Court for a period of four years.

Given the current configuration of authority, however, too much power is at stake for the office to change hands without intensive inquiry -- detailed below.

III. THE SENATE'S ROLE

As is familiar, the United States Constitution charges the two political branches with the job of selecting federal judges. The President is instructed to present nominations to the Senate, which has a constitutional mandate to provide its advice and to give or to withhold its consent.[39] Professor Charles Black explained several decades ago that, in light of the text, history, and structure of the Constitution, its words "Advice and Consent" should be understood as authorizing members of the Senate to take an active role in selecting the individuals who shape the meaning of federal judiciary.[40]

The confirmation of a federal judge is unlike that of the other positions over which the Senate also has the powers of advice and consent. Cabinet members, for example, serve only as long as a President is in office. Congressional deference flows from the sense that the Executive ought to have the ability to pick its "own" people to run the government. Judges, however, are not supposed to be "the President's men." Rather, through life tenure and salary protection, they are given the independence that enables them to sit in judgment of those who have appointed them and, when appropriate, to rule against their own employer, the United States.[41]

America's life-tenured jurists (described in Article III and nicknamed "Article III judges"[42]) are unique in another respect. Unlike jurists in many states and in other democracies, Article III judges have no mandatory age for retirement nor a fixed, non-renewable term of office.[43] Further, as many scholars have recently discussed,[44] Article III judges serve for very long periods of time. While the sixteen justices appointed to the Supreme Court during the first twenty years of this nation's history averaged fourteen years on the bench, those appointed to serve between 1983 and 2003 averaged twenty-four years.[45] As we were reminded this past week when the nation mourned the death of Chief Justice Rehnquist, some justices serve for more than thirty years.

Thus, the decision to approve a Presidential nominee to sit as Chief Justice is one of the most important a Senator can make, for it gives an individual a charter to hold power long after the appointing President has relinquished office. Given that a life tenured appointment is a rare event in any democracy, those selected and confirmed must be individuals in whom confidence is shared.[46] No apologies are needed from Senators who take seriously their obligation to be confident that a particular nominee -- for any level of the life tenured judiciary, let alone the Chief Justiceship -- is the appropriate person in light of the country's needs and the composition of a particular court at a particular time.

When introducing these comments, I argued that rather than complain about confirmation hearings, we should see them as opportunities for a national "teach-in" about the values of American law. Although awkward and sometimes uncomfortable (and, at times, inappropriately so for an individual nominee), the discussion of whether the Senate ought to confirm a given person is one way to understand what American law is -- or ought to be -- and to understand what we believe the job of judging entails.[47]

One illustration of the role nomination hearings have played in articulating concerns comes from the area of women rights. Until the 1970s, the Senate did not even inquire into nominees' attitudes about the protection afforded women under the Constitution. Specifically, the first question about attitudes of a nominee towards women emerged in 1970, when George Harrold Carswell was questioned.[48] Congresswoman Patsy Mink from Hawaii raised concerns about that nomination, which she described as "an affront to the women of America" because of Judge Carswell's role in a case upholding the refusal of an employer to permit women with children of pre-school age to be hired, although men with children of pre-school age were so employed.[49] At the confirmation hearing, Senator Birch Bayh of Indiana asked Judge Carswell to address "the impression that [Carswell was] not in favor of equal rights for women." Carswell responded that he was committed to the enforcement of the "law of the land."[50]

The Carswell nomination was rejected but not because of Carswell's views on women's roles in society.[51] The following year, when William Rehnquist and Lewis Powell were nominated to be associate justices, several witnesses objected to both nominees' attitudes towards women's rights.[52] While such testimony prompted Senator Bayh to ask William Rehnquist about his views on equal rights for women,[53] no such questions were addressed to Lewis Powell.[54] Thereafter and up until 1987, a nominee's attitudes toward women's rights were not a focus of discussion.[55]

The hearings on the nomination of Robert Bork, in 1987, were the first in which women's issues moved to center stage and became relevant to the outcome.[56] Several witnesses questioned Judge Bork's interpretations of constitutional doctrine to exclude women from heightened protection under the Fourteenth Amendment,[57] as well as his decisions in non-constitutional cases. While many factors contributed to Judge Bork's rejection, his belief that discrimination against women was not directly prohibited by the Equal Protection Clause of the Fourteenth Amendment,[58] his opposition to the Equal Rights Amendment,[59] and his narrow construction of statutory rights for women played an important part.[60] In short, nomination

hearings were one of the ways in which the Senate highlighted the struggle for women to become equal rightsholders under the United States Constitution.[61]

IV. The Hard Questions at the Heart of These Hearings

To be confirmed to serve as the Chief Justice of the United States, a nominee should demonstrate a prior commitment to advancing a positive role for the judiciary and a longstanding appreciation of the contributions that a robust judiciary makes to American law. Because no person is entitled to a judgeship, a nominee needs to establish that he or she is the appropriate person for the particular position in the offing. As detailed above, the office of Chief Justice of the United States has three dimensions -- the chief justice of the Supreme Court, the chief administrator of the federal judicial system, and the central symbol of justice in America.

Given my view that the Chief Justice needs to be a devoted advocate of access to justice and of an independent judiciary, I reviewed written materials made public to date to learn about the nominee's approach to these questions. I limited my consideration to decisions made by Judge Roberts on the D.C. Circuit, to memoranda that he authored when, as a policymaking lawyer serving between 1981 and 1986 for the Reagan Administration, he gave advice on whether the government ought to take particular positions. I also reviewed published essays and transcripts of commentary in radio interviews. Unlike his work as a retained lawyer in private practice (upon which I do not rely), Judge Roberts' positions in government gave him many occasions to make his own views plain.[62] Further, since joining the federal bench in 2003, Judge Roberts has written about fifty opinions, including dissents, and he has sat on many more panels. Thus, a good deal of information is available.

I regret to report that, at least on this record, Judge Roberts has not regularly expressed enthusiasm for adjudication or for ready access by members of the public to the federal courts. In the hundreds of pages that I have reviewed, I have not found sustained discussion of why courts are institutions to be treasured or about how courts are necessary to enable individuals or groups to bring claims of right into the public sphere for decision.

Instead, when given an occasion to opine on why courts should remain accessible, on why the Department of Justice should lend its hand to help needy Americans get into court, on why judges should be available to respond to claims for redress, on why a range of remedies should be available, and on why the Constitution's vision of equal protection and due process protected through adjudication should embrace us all, the nominee has generally argued against the use of courts. Further, Judge Roberts has been solicitous of the power of the Executive Branch, often at the expense of individual rights and judicial review. Because the record available in advance of these hearings provides little assurance that this person is the one to be charged with protecting judicial independence and the values of judging and because his nomination for this position was an abrupt change of course, I urge the Senate to undertake a thorough review of the many instances in which Judge Roberts advocated narrowing access to justice and then to consider how those judgments would affect or forecast his work, were he confirmed as Chief Justice, the symbolic center of America's courts.

A few examples of the positions he advocated or the decisions he rendered explain the concerns. Return first to my analysis of the complex structure of the Constitution, with interdependent branches. Rather than approaching separation of powers as a vibrant principle of American constitutional law that enables nuanced, interactive dialogues among the branches, Judge Roberts has described separation of powers as a "zero-sum game," with actions of one branch coming at the "expense of the other branches."[63]

In practice, in that "zero-sum game," Judge Roberts has often sided with one player: the Executive. The powerful illustration is *Hamdan v. Rumsfeld*,[64] issued in July of this year. Judge Roberts joined the judgment, written by Judge Raymond Randolph of the D.C. Circuit, that gives enormous latitude to the President to label individuals "enemy combatants" and that bar such persons from access to life-tenured judges to adjudicate their claims.[65] Further, rather than turning to the military courts operating under congressional authorization with detailed procedures, reflecting the due process requirements of the United States Constitution, the *Hamdan* decision relegates individuals to the decisions of an ad hoc tribunal comprised of "three colonels."[66] Indeed, the decision concludes that violations of the Geneva Convention -- the 1949 agreement governing the treatment of war prisoners to which the United States is a party -- are not "judicially enforceable."[67] If this decision stands, then the President has the judicially-unreviewable power to consign individuals to such tribunals, which lack one of America's great contributions to world political thought: the insistence that truly independent jurists have the power to sit in judgment of the Executive.

Several of the memoranda by Judge Roberts when he served as an advisor to the government in the 1980s underscore how longstanding is the commitment to Executive power displayed in the 2005 *Hamdan* decision. Most troubling is the assumption in one memorandum that, once in judicial office, judges appointed by a particular president will remain loyal to that president's political stances. At issue was a proposal (raised by then-Chief Justice Warren Burger among others) to create a new court -- an Intercircuit Tribunal to resolve disputes among the circuits and thereby to ease the workload burden from the Supreme Court. The Department of Justice recommended supporting the proposal on an experimental basis for five years.

John Roberts objected on the grounds that an Intercircuit Tribunal would give courts more opportunities to render judgments and would give the President less control over the judges making those decisions. One ground for objection, Roberts stated, was that the idea seemed to conflict with President Reagan's "long campaign[] against government bureaucracy and the excessive role of the federal courts."[68] But he added that "it strikes me as misguided to take action to permit" the Supreme Court to do more than it was doing.

> Creating a tribunal to relieve the Court of some cases -- with the result that the Court will have the opportunity to fill the gap with new cases -- augments the power of the judicial branch, ineluctably at the expense of the executive branch.[69]

Further Roberts found the idea of giving the Chief Justice the ability to assign sitting judges to the new court a problem for the President. As he explained,

> the new court will assuredly *not* represent the President's judicial philosophy - and will have the authority to reverse decisions from courts to which the President has been able to make several appointments that *do* reflect his judicial philosophy. Under the committee proposal a Carter-appointed judge (there definitely will have to be some on the new court) could write a nationally-binding opinion reversing an opinion by Bork, Winter, Posner, or Scalia -- something that cannot happen now.[70]

In other words, sitting judges -- whether nominated by a President of either party -- were not viewed, once in office, as independent jurists but rather expected to "reflect" the President's positions.

Other memoranda also show a deep commitment to Executive power. As an attorney-advisor in the White House, Mr. Roberts worried that a resolution in "Opposition to Torture" was "mildly objectionable" because it could affect "the Executive's conduct of foreign relations;" he also noted (referring to a point made by the Department of State) that the resolution was not at odds with the current policy.[71] In another memorandum, Mr. Roberts commented that a bill to permit the President to "declare an immigration emergency" under certain criteria and then to have the power to "prohibit vessels from traveling to designated areas" is a "broad grant of emergency powers" but not "too broad" given the experience of efforts by Cubans who had been jailed in Cuba to escape to the United States.[72] And yet other memoranda follow the leitmotif of opposition to ready access to the federal courts. For example in one advisory opinion, Mr. Roberts bemoaned the Supreme Court's reading of Section 1983 as permitting filings for violation of federal statutory rights.[73]

A critical issue today is whether we can hold government accountable. For a judge on the D.C. Circuit, the issues arise primarily in the context of federal executive power. But on the Supreme Court, the question often comes up in terms of whether states are immune from suit. The legal parameters of this relatively arcane doctrine of federal law are complex. In a series of decisions since the 1990s that involve different facets of the problem, the United States Supreme Court has, in five-to-four decisions, found states to be immune from damages when individuals seek to protect their rights under federal labor standards,[74] federal patent law,[75] and federal provisions protecting the aged and the disabled.[76] The majority has held that Congress lacks the power to authorize private parties to seek damages from states for such violations unless Congress created the underlying rights pursuant to its powers under the Fourteenth Amendment and did so in a method that shaped a remedy both congruent and proportionate to the violation found.[77]

Judge Roberts' views of these issues can be found in a 1999 radio interview in which he joined others, including Professor Akhil Amar, to discuss one of the major sovereign immunity decisions, *Alden v. Maine*,[78] rendered by the Supreme Court just days earlier. Professor Amar noted that the expansion of the doctrine of sovereign immunity and the constriction of congressional remedial powers ran against "a very deep principle in our constitutional system" that individuals can seek remedies for violations of rights in courts.[79] Judge Roberts took a different tack -- praising the decision as recognizing that the "states are co-equal sovereigns

[with] their own sovereign powers and that includes, as everyone at the time of the Constitutional Convention understood, sovereign immunity."[80] What is troubling about his statement is not simply the conclusion that states are immune from suit and that states are "co-equal sovereigns" -- both problematic stances given the nature of the federal system.[81] Of equal concern is his assertion that "everyone at the time of the Constitutional Convention understood" those principles to be so enshrined.

This approach to constitutional law is problematic in two respects. First, the historical record does not support that claim. Insulation of government from challenge by ordinary citizens was not so obviously a feature of the early days of America. Rather, as a host of scholars have demonstrated[82] and as Justice David Souter so carefully detailed in his dissent in the *Alden* decision itself, the "notion of sovereign immunity . . . was not an immediate subject of debate [at the time of the framing of the Constitution], and the sovereignty of a State in its own courts seems not to have been mentioned" at all at the Convention.[83] Second, the too-ready claim that the issue had been decided two hundred years later avoids acknowledging the very challenging aspect of constitutional adjudication: the obligation to assess nuanced and conflicting evidence and then to take responsibility for making a difficult judgment. The answer to the many hard (and contentious) questions of American law should not be reduced to an erroneous and oversimplified claim about what "everyone understood" in 1789.

Returning to Judge Roberts' rulings on the D.C. Circuit, another decision that gives me pause involves a cutting edge issue affecting the rights of ordinary Americans in civil litigation: enforcement of contracts that send employees, consumers, and purchasers of various services away from the courts by mandating arbitration. Writing the decision for the D.C. Circuit, Judge Roberts did not give evidence of a deep appreciation for the importance of adjudication in independent, public courts or of the effects of inequality on the capacity to bargain.

A word of explanation about the legal doctrine that forms the background to the case is in order. In decades past, the federal courts had taken the position that, because of unequal bargaining powers and the importance of enforcing federal rights, the courts would not enforce contracts waiving rights of access to courts if the parties made those agreements before a dispute had arisen. In 1953, for example, the United States Supreme Court refused to hold a buyer of a security to terms mandating arbitration in a securities case. The Court held that because the federal securities statute was "drafted with an eye to the disadvantages under which buyers [of securities] labor," and because arbitration was a private and flexible process that did not offer the same remedies as did adjudication, the agreement was unenforceable.[84]

But, through a series of decisions beginning in the 1991, the Court (often ruling five to four) has enforced such contracts, even when consumers or employees make arguments that their rights under federal law have been breached. The touchstone for enforcement, however, is that the alternative to the judicial processes provide an "effective" means of "vindicating" the statutory rights and that the private, alternative dispute program provide remedies comparable to those available under law by courts.[85]

In light of those holdings, lower courts are now involved in developing the law about when arbitral remedies are effective and when to enforce or refuse to enforce mandatory arbitration clauses.[86] To assess whether a particular arbitration program suffices to enable vindication of legal rights, courts compare the procedural rights (such as discovery), the remedies, and the costs of the arbitration program with the rights provided in court.

One such opportunity presented itself to Judge Roberts, confronted with the question of what to do when part of an arbitration agreement was plainly unenforceable. That case is *Booker v. Robert Half International, Inc.*,[87] a decision issued in July of this year. The underlying dispute involved a claim of discrimination based on race. When taking a job for a company with reported revenues in 2004 of about 2.7 billion dollars,[88] Timothy Booker signed a contract; paragraph 18 stated that the parties agreed to arbitrate any dispute and that they agreed that punitive damages would not be available.[89]

I do not know how carefully Mr. Booker looked at all the terms of that contract. (I do know that many of us who have cell phones and credit cards have not read all the provisions -- including the waivers of rights of access to court.) What I do know from Judge Roberts' opinion as well as from the website of the Equal Employment Opportunities Commission (the EEOC) is that the EEOC filed a brief, amicus curiae, on Mr. Booker's behalf. The EEOC argued that the arbitration clause did not permit Mr. Booker to vindicate his statutory rights as he could have, were he permitted to go to court. Because the District of Columbia's Human Rights Act authorized punitive damages for wrongful discrimination and the contract proffered by the employer barred that remedy, the EEOC urged the D.C.Circuit to decline to enforce arbitration.[90]

Moreover, as the briefs before the Court on behalf of Mr. Booker argued, judicial refusal to enforce arbitral contracts that include problematic clauses is an important means of constraining the institutions that draft form contracts. If courts were routinely to redraft contracts by severing objectionable clauses, then the party proffering the contract might be encouraged to put in provisions otherwise unlawful. Uninformed consumers or employees would not know of these defects unless and until they challenged the enforceability of the arbitration clauses in courts -- assuming that they had the resources to get to court. Thus, the less knowledgeable parties would be stuck with contracts that unfairly -- and illegally -- disadvantaged them.

These kinds of concerns did not, however, persuade Judge Roberts to permit the litigation to proceed in court. Rather, on behalf of the panel, he severed the objectionable bar on punitive damages and sent Mr. Booker away from adjudication to make his discrimination claim in the arbitration program provided by his employer. What to me is particularly disturbing about this conclusion is the opinion's emphasis on the "mutual assent" of Mr. Booker and his employer and the focus on the "intent of the contracting parties."[91]

As a great many analysts of the burgeoning practice of using arbitration clauses have noted, these contracts are generally proffered by institutions, which also author the form contracts.[92] Indeed, in some of reported cases, mandatory waivers of arbitration appear on the

applications for jobs.[93] Negotiating the terms is not often available, as I can attest to personally, having failed in my own effort to renegotiate a cell phone contract. Professor Jean Sternlight recently explained the many problems with such mandatory arbitration programs which, she concluded, were "unjust" not only because they lacked the public features of adjudication but also because they enabled one private party to impose this procedural mechanism on another.[94]

In short, awareness of the problems of unequal access ought to frame judicial inquiry into form contracts that waive rights to court. Those concerns have, more generally, produced important constitutional jurisprudence, as the Supreme Court articulated the constitutional rights of access to courts. In 1971, in *Boddie v. Connecticut*,[95] Justice Harlan explained that the Due Process and Equal Protection Clauses required the state not to put up barriers to poor individuals, unable to pay for the costs of filing a petition for divorce. These concerns again shaped the majority in *M.L.B. v. S.L.J.*,[96] holding in 1996 that, when an indigent litigant cannot afford a transcript required for an appellate court to review the termination of parental rights, the state must lend a hand.

But attentiveness to such problems is not much in evidence in Judge Roberts' work. A very troubling example comes from an exchange as an advisor to the Attorney General in a debate about whether the Department of Justice should enter a case filed by women prisoners who faced a host of discriminatory practices while incarcerated in Kentucky. The case, *Canterino v. Wilson*,[97] involved a whole panoply of ways in which women prisoners were disadvantaged.

William Bradford Reynolds, then the head of the Civil Rights Division of the Department of Justice, sought permission to intervene in this "sex discrimination case against the Kentucky state prison system."[98] Reynolds wanted the Department to become involved in a narrow aspect of the case. Based on its own investigation, the Division of Civil Rights had learned that

> male inmates have access to a much greater variety of vocational courses, to training for more highly-paid fields, to full-time training rather than part-time training, and to training for longer periods of time in each field than do female inmates. Most female inmates are being prepared only for low-paid traditional female office jobs, or for unpaid housework and childcare.[99]

Specifically, while women learned about "business office education and upholstery," men were trained in "auto body and repair, auto mechanics, carpentry, drafting, electricity, masonry, meatcutting, printing, radio and TV repair, small engine repair, upholstery, and welding."[100]

Reynolds explained that federal statutes provided the Attorney General with the power to intervene and that federal law gave those women rights that were being violated. Further, he argued that intervention was needed because of the "unique role" the Department could play in "informing the court of the experience of the Bureau of Prisons," which was a "leader in upgrading the vocational opportunities of female prisoners in the federal system" (citing women apprenticeships as "auto mechanics, electricians, plumbers, painters, and bricklayers.")[101] In addition, according to Reynolds, the trial judge had sought the Department's help in another

related case and praised its contributions. Further, the "available documentation" constituted a "very strong record . . . to assert women's rights to equal vocational training," as was required by federal statutes and the federal government's own prison policies. And "[f]inally, the discrimination at issue is particularly counter-productive" because it deprived women of the ability to prepare for "productive and useful work" upon release.[102]

But John Roberts urged the Attorney General to deny permission to intervene on behalf of the United States government.[103] In Roberts' view, the fact that the "private plaintiffs" had already filed suit meant that there was "no need for involvement of the Civil Rights Division."[104] In making that judgment, he referred negatively to another case, involving terrible conditions in the Texas prison system; there, the Department of Justice had intervened, augmenting the litigating resources of the prisoners so much in need of basic sanitation, medical care, and safety.[105] What for some of us is an example of the useful role that government can and should take was for him a minus.

Further, Roberts argued that development of "the equal protection claim . . . based on semi-suspect treatment of gender classifications" would not be appropriate, given that the Attorney General had "publicly opposed such approaches outside the area of race," and, in addition, had opposed federal involvement with state prison programs.[106] Finally, Roberts suggested that "economies of scale" might justify having "certain programs for the male prisoners but not for the many fewer female prisoners," and given "tight prison budgets," one result could be no programs at all.[107]

These examples are but some of many instances in which the written record shows a person devoted to the authority of the Executive Branch and of the states at the expense of individual access to courts. While Judge Roberts has often complained about too much access to or too many remedies from courts, he has said little about the need for courts. Not readily available from the many memoranda and opinions is an affirmative vision that the federal courts play a vital role in delivering justice to individuals, in safeguarding their rights, in protecting their human dignity, and in making government transparent, accountable, and responsive to the people.

The Chief Justice of the United States is a leader of all Americans. The person who occupies that office must embody the principle of judicial independence and should proudly assert the unique contributions courts make to the American polity. Given the information available to date, the question is whether the deep skepticism about the role of courts and the ready license to the President -- lacing Judge Roberts' written work -- will give way, were he confirmed to serve as the Chief Justice. Whether he meets the qualifications for the Chief Justiceship is a judgment reserved for each Senator who must discharge the constitutional obligation of deciding whether to consent to this nomination.

[1] *See Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 12 THE SUPREME COURT OF THE UNITED STATES: HEARING AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS at 312 (eds. Roy M. Mersky & J. Myron Jacobstein, 1989) (Opening Statement of Chairman Strom Thurmond).

[2] *See Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 12A THE SUPREME COURT OF THE UNITED STATES: HEARING AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS at 1549 (eds. Roy M. Mersky & J. Myron Jacobstein, 1989).

[3] Indeed, as I have written elsewhere, my concern is that the Senate often does too little rather than too much. *See* Judith Resnik, *Supermajority Rule*, N.Y. TIMES, June 11, 2003 at A34. Most persons considered by the Senate to be Article III judges are confirmed by large majorities. I have also suggested that, as a means of expressing how unique life-tenured jobs are in democracies and how deep the political consensus about the propriety of appointing persons to such positions ought to be, the Senate should rely on a practice of requiring sixty votes for approval. Knowing that most confirmation votes currently exceed that number, I do not imagine that this form of structural intervention would have great impact but rather that it would underscore the normative peculiarity of life tenure and make plain that widespread consensus in the Senate should be the basis for confirmation.

[4] *See generally* Maeva Marcus, *Is the Supreme Court a Political Institution?*, 72 GEO. WASH. L. REV. 95 (2003).

[5] 5 U.S. (1 Cranch) 137 (1803). Given that decision's recent two hundredth anniversary, new discussions have addressed the holding. *See, e.g.*, Philip Hamberger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003) (arguing that judicial review was a feature of English, colonial, and state law before *Marbury* was decided).

[6] *See, e.g.*, Marcus, *supra* note 4, at 99-100 (describing the rationales for President Washington's appointment of particular men from state judiciaries in an effort to "lessen any jealousy the state judiciaries would feel for the new national . . . system" and commenting on the awareness of federal jurists of the "political repercussions" of some of their decisions). A growing academic literature addresses the relationship between party affiliation, race, gender, and religion to examine correlations and voting patterns of judges. *See, e.g.*, Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making*, 20 J. L. AND ECON. ORG 299, 321 (2004) (summarizing studies and concluding that in addition to an individual judge's gender, race, and ideological position, the gender composition of a panel of judges influences how judges rule); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 492 (2004) (concluding that the most "prominent, salient, and consistent influence on judicial decisionmaking was religion" in cases involving that issue); David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J. L. AND ECON. ORG. 438, 438 (2004) (analyzing nominees to executive agencies and concluding that the ideology of that set of nominees is affected by the "ideological tilt in Congress"); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (concluding that, depending on the kind of case, the political party of the appointing president is a fairly good predicator of an individual judge's vote as is the political party of the president appointing the other judges on a panel); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1459 (2003) (arguing that "legal and political factors" more than "strategic and litigant-driven factors" have greater impact). *See generally* Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 743 (2005).

[7] As political scientists Charles Cameron and Jeffrey Segal detail, battles over appointments predate the practice of holding open hearings on individual nominees. According to an 1888 *New York Times* article discussing the nomination of Melville Fuller to be Chief Justice, "[t]he Judiciary Committee . . . began a rousing search into all the dark abodes of scandal and tattle, to hunt for something against the character of the President's nominee." Charles M. Cameron & Jeffrey A. Segal, *The Politics of Scandals: The Case of Supreme Court Nominations, 1877-1994* at

1, 2004 manuscript distributed and made available at http://www.yale.edu/isps/seminars/american_pol/cameron.pdf (also on file with the author). Cameron and Segal survey the eighty nominations made to the Supreme Court between 1877 and 1994. *Id.* at 2. They picked those dates to permit time for the reemergence of partisan politics after the Civil War. They report that seventy nominations succeeded and that twenty-four were, under their definition, "controversial." To make that assessment, they read all discussion of nominees in articles published in the *New York Times* during the time period they studied. *Id.* at 10.

[8] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991).

[9] *See* U.S. CONST., ART. III, § 1.

[10] *See, e.g.*, Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life-Tenure* 26 CARDOZO L. REV. 597 (2005); Judith Resnik, *Federalism's Options, Afterword to the Symposium Constructing a New Federalism*, YALE J. OF LAW AND POLICY/YALE JOURNAL ON REGULATION 465 (1996).

[11] *See, e.g.*, JUDITH RESNIK, PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES (2004); Judith Resnik, *Civil Processes*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 248-272 (eds. Peter Cane & Mark Tushnet, 2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 INDIANA LAW J. 223 (2003); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[12] A short summary is provided in a recent op-ed, *One Robe, Two Hats*, that I co-authored with Professor Theodore Ruger of the University of Pennsylvania and which can be found in the Week in Review of the *New York Times* of July 17, 2005 at page 13. Many scholars have examined these issues. *See, e.g.*, Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004); ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT (1986); PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973).

[13] The Honorable Ruth Bader Ginsburg's comments can be found in *Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist* (Sept. 4, 2005), *available at* http:///www.supremecourtus.gov/publicinfo/press/pr_09-04-05.html.

[14] U.S. CONST., ART. III. Although the constitutional text is sparse on this subject, many federal statutes advert to the position of the Chief Justice. *See, e.g.*, 28 U.S.C. § 1 (describing the Supreme Court as comprised of eight associate justices and a "Chief Justice of the United States"). That usage began in the First Judiciary Act. *See* Act of Sept. 24, 1789, § 1 (describing the Supreme Court as consisting of "a chief justice and five associate justices").

[15] U.S. CONST., ART. I, cl. 6. The Constitution also does not use either the terms "Chief Justice of Supreme Court" or "Chief Justice of the United States." The later title, now in use, can be found by the second half of the nineteenth century. *See* Hon. William A. Richardson, *Chief Justice of the United States, or Chief Justice of the Supreme Court of the United States?* (a brief essay by the then Chief Justice of the Court of Claims and reprinted in the N.E. Historical and Genealogical Register, July 1895). Richardson reported that in 1888, Chief Justice Fuller was nominated and commissioned as the "Chief Justice of the United States." The usage also appears in The Judiciary Act of 1869, ch.22, 16 Stat. 44, Apr. 10, 1869. Its opening provision states that "the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices . . . ."

[16] As Justice Ginsburg noted, *supra* note 13, "William H. Rehnquist used to great effect the tools Congress and tradition entrusted to him," in his role as the leader of the United States judiciary and of the Supreme Court.

[17] William Howard Taft, *The Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922).

[18] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION TO JUDGES AND JUDICIAL ADMINISTRATION IN OTHER COUNTRIES 42 (2d ed. 2001); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004: CASELOAD HIGHLIGHTS at 10 (2004).

[19] *See* Act of Dec. 20, 1967, Pub. L. No. 90-219, ch. 42, § 620, 81 Stat. 664 (1967); Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 L. & CONTEMPORARY PROBS. 31 (1988), and *"Baby Judges School" Jump Starts Learning Process*, 37 THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS 1 (Aug. 2005).

[20] *See* 28 U.S.C. § 601.

[21] *See id.* (stating that the AO is to be "supervised by a Director and a Deputy Director appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference.")

[22] *See* 28 U.S.C. § 621 (providing that the Chief Justice "shall be the permanent Chairman of the Board").

[23] *See* Act of Sept. 14, 1922, Ch. 306, § 2, 42 Stat. 837, 836 (creating a Conference of Senior Circuit Judges "to advise [the Chief Justice] as to the needs of [each] circuit . . . and the administration of justice"). In 1937, the Act was amended to include participation by the chief judge of the United States Court of Appeals for the District of Columbia, and in 1948, the Conference of Senior Circuit Judges was renamed the Judicial Conference of the United States. *See* Act of June 25, 1948, ch. 646, 62 Stat. 902, now codified at 28 U.S.C. § 331 (2000).

[24] Act of Sept, 14, 1922, § 2, *supra* note 23.

[25] District judges became a part of the Conference in 1957. *See* Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified at 28 U.S.C. § 331 (2000).

[26] *See* 28 U.S.C. § 331.

[27] That process proved complex and controversial in light of the challenges of estimating effects of not-yet enacted laws and of assessing how to count the costs and benefits afforded by enhancing access to the courts. *See generally* CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS (A. Fletcher Mangum, ed. 1995).

[28] JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (Dec. 1995), reprinted in 166 F.R.D. 49 (1995). The Conference formally adopted the ninety-three recommendations but did not specifically approve that commentary of the drafting committee.

[29] *See id.* at 83 (Recommendation 1); *id.* at 88 (Recommendation 6); *id.* (Recommendation 2).

[30] *See* William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, 24 THIRD BRANCH 1 (Jan. 1991) (objecting that the proposed private right of action was too "sweeping").

[31] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICAL CONFERENCE OF THE UNITED STATES 28 (1993).

[32] *See* William H. Rehnquist, *Remarks at Monday Afternoon Session*, in AM. LAW INST., 75TH ANNUAL MEETING: REMARKS AND ADDRESSES, May 11-14, 1998 at 13, 17-18 (1998) (also citing bills on juvenile crime, the Anti-Car

Theft Act of 1992, the Freedom of Access to Clinic Entrances Act of 1994, and the Child Support Recovery Act of 1992).

[33] *See* United States v. Morrison, 529 U.S. 598 (2000).

[34] *See* 28 U.S.C. § 1407(d).

[35] *See* 18 U.S.C. § 1803(a),(b),(d) (2004) and Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* note 12, at 365-68.

[36] *See* The Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, Apr. 24, 1996, 110 Stat. 1214, codified at various parts of Titles 8, 18, 28, 42.

[37] Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* note 12, at 343 (footnote omitted).

[38] *See* 28 U.S.C. § 45 (chief judges of the court of appeals); §136 (chief judges of district courts).

[39] *U.S. Const. Art. II*, § 2.

[40] *See* Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L. J. 657, 664 (1970); *see generally* PAUL SIMON, ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT NOMINATION BATTLES (National Press, 1992); David R. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 YALE L. J. 1491 (1992); Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858 (1990); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

[41] Robert M. Cover, *Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 1791 (1984). *See generally* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen Burbank & Barry Friedman, eds., 2002).

[42] Article III of the United States Constitution states in part that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[43] Both Australia and Canada require retirement at seventy whereas in Canada, mandatory retirement comes at age seventy-five. In Germany, the judges on its constitutional court sit for twelve-year, non-renewable terms. See Aust. Const., Ch. III, § 72; Israel Basic Law: The Judicature, Courts Law [consolidated version] 5744-1984 §§ 1-24; Supreme Court, Act. R.S.C., ch. S-26, § 9(2) (1985) (Canada); Article Four, Law of the Federal Constitutional Court of Germany (as amended 1998), *available at* http://www.iuscomp.org/gla/index.html. Similarly, the new International Criminal Court provides for a nine-year, non-renewable term. *See* Rome Statute of the International Criminal Court, U.N.Doc. A/Conf. 183/9, Art. 36, para. 9(a) (1998), *available at* http://wwww.un.org/law/icc/statute/romefra.htm. Coming back inside the United States, Massachusetts, Vermont, and New Hampshire authorize lifetime judgeships yet also require retirement at age seventy. *See* Mass. Const., pt. 2, Ch. 3, art. 1 (1780), as amended by Art. XCVIII, 1973 (2003); N.H. Const., Art. 73, 78 (1792); Vt. Const., § 35.

[44] Steven G. Calabresi & James Lindgren, *Life Tenure, Reconsidered: Term Limits for the Supreme Court* (manuscript of April 7, 2005), *available at* http://ssrn.com/abstract=701121; Paul Carrington & Roger C. Cramton, The Supreme Court Renewal Act: A Return to Basic Principles (Jan. 2, 2005) (on file with the author).

[45] *See* Resnik, *Judicial Selection and Democratic Theory*, *supra* note 10, 26 CARDOZO L. REV. at 616.

[46] As Charles Geyh has pointed out, given how few judges are impeached, the selection process is the only point at which the populace can affect the composition of the judiciary. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 220 (2003).

[47] Reflecting the possibility that hearings can play this kind of productive role and concerned that too much attention had shifted to a search for a nominee's idiosyncratic imperfections, Senator Charles Schumer, when chairing the relevant subcommittee in the fall of 2001, convened a series of hearings that were focused on what criteria were appropriate for evaluation of nominees for judgeships. *See The Senate's Role in the Nomination and Confirmation Process: Whose Burden?, Hearings before the Subcomm. on Admin. Oversight and the Courts, Sen. Comm. on the Judiciary*, 107th Cong.(Sept. 4, 2001); *Should Ideology Matter?: Judicial Nominations 2001, Hearings before the Subcomm. on Admin. Oversight and the Courts, Sen. Comm. on the Judiciary*, 107th Cong. (June 26, 2001). A repeated theme was that, in addition to considering whether an individual met the basic requirements of competency, ability, integrity, and knowledge, Senators ought also inquire into that individual's understanding of the meaning and role of law, the function of courts, the job of judging, and the role of government in our lives.

[48] *See Nomination of George Harrold Carswell of Florida, to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 91st Cong. (January 27, 28, 29, February 2 and 3, 1970) [hereinafter *Carswell Hearings*]. One caveat: according to Mersky and Jacobstein, *supra* note 1, in their Preface to Volume I of their series, not all of the Senate Judiciary Committee proceedings during that era have been made public.

[49] *Carswell Hearings*, *supra* note 48, at 81-82. Carswell's role in that case was to serve as a member of an en banc panel that denied rehearing in Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969) (en banc), in which Ida Phillips claimed that the company had violated her Title VII rights by declining to give her, a mother of pre-school age children, a job not denied to men with pre-school age children. The Fifth Circuit concluded that the policy did not discriminate against women but was based upon "the differences between the normal relationships of working fathers and working mothers to their pre-school age children." Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969). That decision was vacated and remanded by the Supreme Court. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

[50] *Carswell Hearings, supra* note 48, at 40-41.

[51] According to one historian of the proceeding, criticism of Carswell centered on his general lack of distinction as well as his 1948 pro-segregation stance, later repudiated. *See* JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 103-106 (1991). Frank noted Congresswoman Mink's opposition, but in his view, the "real sticking points were civil rights and competence." *Id.* at 113. Frank also discussed the political context, a democratically-controlled Senate distressed at the forced resignation of Abe Fortas, which animated the unsuccessful nomination of Clement Haynsworth (in Frank's view, unfortunately rejected) as well as that of Carswell (in Frank's view, appropriately rejected). *Id.* at xiv, 19, 28, 44, 94-95, 102-03.

In May 1970, the Senate approved, with ninety-four affirmative votes (and six absentees), the nomination of Harry Blackmun as an associate justice. *Id.* at 124. No questions were addressed to Blackmun about his views on women's rights during the brief one-day hearing. *Nomination of Harry A. Blackmun to be an Associate Justice of*

the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 91st Cong. (Apr. 29, 1970).

52 *See Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 92d Cong. (November 3, 4, 8, 9, and 10, 1971) [hereinafter *Rehnquist and Powell Hearings*]. Objections were raised about William Rehnquist's testimony while he was in the Justice Department on the Equal Rights Amendment (ERA) and the Women's Equality Act (*id.* at 428-29) and about Lewis Powell's failure, as a leader of the American Bar Association, to take stands on issues affecting women. *Id.* at 423-25, 428-36; *see also* testimony of Catherine G. Roraback, President of the National Lawyers' Guild, *id.* at 457-60 (testifying that, under Powell's leadership, the ABA was silent on the question of equal rights for women). Barbara Greene Kilberg of the National Women's Political Caucus testified not about the nominees but about the absence of a female nominee (*id.* at 421-23), a topic that had been in the news, prompted in part because of President Nixon's statements that "qualified women" should be considered for the two vacancies. James M. Naughton, *Harlan Retires*, N.Y. TIMES, Sept. 24, 1971, at 1.

53 *See Rehnquist and Powell Hearings*, *supra* note 52, at 163 (responding that, if women can be called a "minority," then the Fourteenth Amendment would protect them "just as it protects other discrete minorities").

54 According to a biography of Justice Powell, when confronted by "a group of women's rights activists," he responded: "Ladies, I've been married for thirty-five years and have three daughters. I've got to be for you." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 233 (1994). As Professor Jeffries describes it, the "crucial issue was not gender but race." *Id.* While Justice Powell had resigned his memberships in all-white clubs, concern was raised about his role in the "(non)desegregation of the Richmond schools." *Id.* at 233-34. Justice Powell's defense was to rely on endorsements by a variety of individuals attesting to his efforts to respond calmly to the complex problems of school integration, his work with the all-black National Bar Association, and his commitment to fairness. *Id.* at 235-236.

55 *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT, 20-22 (3d ed. 1992) (discussing the hearings without mention of women's rights); *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearings before the Senate Comm. on the Judiciary*, 94th Cong. (Dec. 8, 9, 10, 1975); *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 99th Cong., (Aug. 5, 6, 1986) [hereinafter *Scalia Hearings*]; *Nomination of Justice William Hubbs Rehnquist to Be Confirmed as Chief Justice of the U.S. Supreme Court: Hearings before the Senate Comm. on the Judiciary*, 99th Cong. at 114 (July 29, 30, 31, Aug. 1, 1986). Justice Scalia defended his membership in an all-male club on the grounds that although the club did discriminate by excluding women, that form of discrimination was not "invidious." *See Scalia Hearings* at 91 (also commenting that a judge should not belong to a club that "practices invidious discrimination"). Justice Scalia resigned his membership in that club; he explained that several factors influenced his decision, including that "I was uncomfortable at doing something which, although I thought it was perfectly OK, was offensive to friends whose feelings I am concerned about." *Id.* at 105.

56 *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (Norton, 1989); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990).

57 *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong. 160-161 (Sept. 15-30, 1987) [hereinafter *Bork Hearings*]. One case that received attention was Griswold v. Connecticut, 381 U.S. 479 (1965), which involved a challenge to a statute making it a crime to prescribe contraceptives. Robert Bork had called the statute a "nutty law," and then, at the hearings, described the case as an "academic exercise." *Bork Hearings* at 114, 240-243; Stuart Taylor, Jr., *The Bork Hearings: Bork Tells Panel He Is Not Liberal, Not Conservative*, N.Y. TIMES, Sept. 16, 1987, at A1; *see generally* Andi Rierdon, *Griswold v. Connecticut: Landmark Case Remembered*, N.Y. TIMES, May 28, 1989, at 12CN, p.6, (describing the efforts of Estelle Griswold and Charles Lee Buxton to lobby the Connecticut legislature

to repeal that law and their subsequent arrest for operating a clinic that openly dispensed contraceptives to poor women; Yale Law School professor Thomas Emerson, who had argued the case, explained its import as one of the early recognitions of a constitutionally based right to privacy).

58 Judge Bork argued that the Fourteenth Amendment was addressed to race and ethnicity, not to gender, and that rules relating to race should not and could not be transposed to gender, because "our society feels very strongly that relevant differences exist and should be respected by government" (referring to single-sex bathrooms and women in combat). *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 328-331 (1990).

59 *Bork Hearings*, *supra* note 57, at 161-162 (Bork explained that his opposition was not heated; he had not "campaigned" against the ERA, but he did believe it would be inappropriate to "put all the relationships between the sexes in the hands of judges.").

60 Nominations thereafter took a different turn and so has the constitutional law, at least somewhat. Discussions in Justices Kennedy, Scalia, and Souter's hearings address specifically the topic of women's rights. *See Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 23, 104-111 (1987); *Scalia Hearings*, *supra* note 55, at 168-185, 207-223, 250-275: *Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 53-57, 362-406, 569-604, 684-701 (1990). Justice Ginsburg was praised for her role as a women's rights advocate, *See Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Congress, 10-11, 27, 40, 228 (1993). Justice Breyer expressed his support for women's equality. *See Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 103d Cong. 178, 269 (1994). And, as is familiar, attitudes toward women more generally played a role in Justice Thomas's nomination hearings. *See Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102nd Cong. 5-26, 157-189 (testimony of Clarence Thomas); 31-157 (testimony of Anita Hill) (Oct. 11, 1991).

61 Of course, that work intersected with important legislative efforts -- including the Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000); Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. § 2601-2654 (2000 & Supp. 2002); the Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 , 1903 (1994) (codified in various sections of Titles 18, 28, and 42 (2000)).

62 *See, e.g.*, Memorandum from John G. Roberts to Fred F. Fielding, the subject of which was "Proposed Justice Report on S. 139 (Anti-Busing Bill)," dated February 15, 1984. Roberts there commented that he "spent several months . . . disputing Ted Olson's approach" to the issues and that the letter from the Attorney General "signalled Olson's victory in the extended internal debate." At issue was whether busing was ever constitutionally required, a position espoused by Mr. Olsen but not by Mr. Roberts.

63 *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1230 (1993).

64 415 F.3d 33 (D.C. Cir. 2005), *cert. pending*, 74 U.S.L.W. 3108 (Aug. 8, 2005). I should note that, as a law professor who teaches about relevant aspects of the Constitution, I joined a group of some fifteen law professors who, with David Vladack of Georgetown Law School as Counsel of Record, filed an amicus brief in December of 2004 in the Circuit on behalf of Mr. Hamdan. In addition to the judgment in this case, Judge Roberts also specially concurred in another decision, Acree v. Republic of Iraq, 370 F. 3d 41 (D.C. Cir. 41), *cert. denied*, 125 S.Ct. 1928 (2005), that underscores his openness to presidential authority. In *Acree*, he disagreed with the majority's judgment that the Emergency War Supplemental Appropriations Act "should not be read to authorize the President to restrike

this previously-fixed balance between the interests of a newly non-terrorist state and those of victims of terrorism." *Id.* at 61.

65 To do so, the panel reasoned that the Joint Resolution of Congress which authorized military force in response to 9/11 also permitted the President to detain and designate Salim Ahmed Hamdan, captured in Afganistan, and to subject him to decisionmaking by a military commission. 415 F. 3d at 37-39.

66 *Id.* at 43.

67 415 F.3d at 40. Judge Williams specially concurred, noting his agreement with the majority's holding that "the Geneva Convention is not enforceable in courts of the United States." *Id.* at 44. He went on, however, to conclude that Article 3's "modest requirements of `human [ ] treatment'," as well as "the judicial guarantees which are recognized as indispensable by civilized peoples" did apply to the conflict with al Qaeda. *Id.*

68 Memorandum from John G. Roberts to Fred F. Fielding, entitled "Department of Justice Recommendation on Creation of an Intercircuit Tribunal," dated August 19, 1983.

69 *Id.* at 2.

70 *Id.* at 3 (emphasis in the original). In another memorandum on this subject, Mr. Roberts noted that others have argued that the creation of such a court could also "undermine the morale of circuit judges." He added that it might be a disincentive, in addition to "low salaries," to "attract the ablest candidates." Memorandum from John G. Roberts to Fred F. Fielding of February 10, 1983 at 2. In that memorandum, Mr. Roberts also commented that the Court was at fault for taking on too many issues and resolving them in an unclear fashion. *Id.*

71 Memorandum from John G. Roberts to Fred F. Fielding, entitled "H.R. Res. 605-- U.S. Policy in Opposition to Torture," dated Oct. 3, 1984.

72 Memorandum from John G. Roberts to Fred F. Fielding, entitled "Justice Draft Bill, Immigration Emergency Act," dated August 4, 1983.

73 *See* Memorandum from John Roberts to Steven Brogan, Office of Legal Policy, entitled "Development of Legislative Changes to 42 U.S.C. § 1983" (discussing the "damage created by Maine v. Thiboutot," a Supreme Court decision holding that Section 1983 claims could be predicated upon federal statutory rights), dated Aug. 9, 1982.

74 Alden v. Maine, 527 U.S. 706 (1999).

75 Florida Prepaid Postsecondary Educ. Expense Bd. v. College Saving Bank, 527 U.S. 627 (1999).

76 Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

77 *See generally* Robert Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003); Robert Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

78 527 U.S. 706 (1999).

[79] National Public Radio, Interview of June 26, 1999.

[80] *Id.* The decision in *Alden v. Maine* was announced on June 23, 1999.

[81] A lively debate surrounds the issue of what role Congress may play -- through which powers -- in authorizing suits against states by individuals for damages. *See generally* JOHN T. NOONAN, JR. NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

[82] *See, e.g.*, John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2002); Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

[83] Alden v. Maine, 527 U.S. 706, 760, 772 (1999) (Souter, J. dissenting, joined by Justices Stevens, Ginsburg, and Breyer). Further. "[a]round the time of the Constitutional Convention, . . . there existed among the States some diversity of practice with respect to sovereign immunity," which, to the extent that it existed, appeared to have been an English common law doctrine imported by some but not all of the states. From Justice Souter's "canvass of this spectrum of opinion expressed at the ratifying conventions, one thing is certain, no one was espousing an indefeasible, natural law view of sovereign immunity." *Id.* at 778. In fact, in 1793 -- only a few years after ratification of the Constitution -- the United States Supreme Court held that a state was liable for monetary damages to a private party. As Justice Souter explained, in that decision (*Chisolm v. Georgia*, 2 Dall. 419 (1793)), "two Justices (Jay and Wilson), one of whom had been present at the Constitutional Convention, took a position suggesting that States should not enjoy sovereign immunity (however conceived) even in their own courts." 527 U.S. at 789. After detailing the position of the other three justices sitting on this case, Justice Souter concluded that "[n]ot a single Justice suggested that sovereign immunity was an inherent and indefeasible right of statehood." *Id.*

[84] Wilko v. Swan, 346 U.S. 427, 435-36 (1953).

[85] *See* Gilmore v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Green Tree Financial Corp. Alabama v. Randolph, 531 U.S. 79 (2000). *See generally* Paul D. Carrington & Paul Y. Castle, *Mandatory Arbitration: The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROB. 207 (2004).

[86] *See generally* Lee H. Rosenthal, *Competing and Complementary Rule Systems: Civil Procedure and ADR: One Judge's Perspective on Procedure as Contract*, 80 NOTRE DAME L. REV. 669 (2005).

[87] 413 F. 3d 77 (D.C. Cir. 2005). The panel also included Judges Randolph and Williams and Judge Roberts wrote the decision.

[88] *See* Robert Half International Inc, Fact Sheet, *available at* http:///www.rhi.com/portal/site/rhi-us (fact sheet).

[89] The clause stated that

> Any dispute or claim arising out of or relating to Employee's employment or any provision of this Agreement, whether based on contract or tort or otherwise . . . shall be submitted to arbitration pursuant to the commercial arbitration rules of the American Arbitration Association. . . . The parties agree that punitive damages may not be awarded in an arbitration proceeding required by this Agreement."

See Booker v. Robert Half International, Inc., 315 F. Supp. 94, 96 (D.D.C. 2004).

[90] See Booker v. Robert Half International, Inc., discussed at httpL///www.eeoc.gov/litigation/02/annrpt.html. In that discussion, the EEOC also noted that an offer by the employer to amend the contract ought not be relied on, or one party could "unilaterally agree to modifications in the agreement as a way of securing its enforcement."

[91] 413 F. 3d at 83, 84.

[92] *See generally* Linda J. Demaine & Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004).

[93] One example comes from EEOC v. Waffle House Inc., 534 U.S. 279, 282-83 (2002) (describing the requirement that all prospective employees sign an application that includes a mandatory arbitration agreement).

[94] Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* 57 STAN. L. REV. 1631 (2005).

[95] 401 U.S. 371 (1971).

[96] 519 U.S. 102 (1996).

[97] Several opinions were issued. Lower court decisions described the problems as they were in the early 1980s. *See* Canterino v. Wilson, 562 F. Supp. 106 (D.Ky. 1983); 546 F. Supp. 174 (D. Ky. 1982). A more recent holding can be found at Canterino v. Wilson, 875 F.2d 862 (6th Cir. 1989).

[98] Memorandum for the Attorney General from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, "Proposed Intervention in Canterino v. Wilson (Decision Needed on Expedited Basis)," dated Feb. 5 1982 at 1.

[99] *Id.* at 1.

[100] *Id.* at note 1.

[101] *Id.* at 2-3.

[102] *Id.* at 3.

[103] Memorandum from John Roberts to the Attorney General, Proposed Intervention in Canterino v. Wilson, Feb. 12, 1982 [hereinafter Roberts' Canterino Intervention Memo]. So did Bruce Fein, Associate Deputy Attorney General, in a memorandum for Edward C. Schmults, Deputy Attorney General, dated Feb. 10, 1982.

[104] *Id.* at 1.

[105] *See, e.g.*, William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1 (1990).

[106] Id.

[107] Roberts' Canterino Intervention Memo, supra note 103, at 1.