Testimony of

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Hearing before the Senate Committee on the Judiciary

On the Nomination of John G. Roberts, Jr.

To be Chief Justice of the Supreme Court of the United States

September 15, 2005

Mr. Chairman, Senator Leahy, Members of the Committee:

Thank you for the opportunity to appear here today. The Supreme Court has had in the past, and will have in the future, a profound impact on how our country goes about the work of protecting human health and the environment.

Before I begin, I would like to recognize those in the environmental community whose great efforts have informed the public of the import of these hearings. In particular, both a letter sent to Senators Specter and Leahy signed by ten of the country's leading environmental organizations, and a 2001 report entitled "Hostile Environment," were helpful in preparing my testimony.

Like many Americans, I am still reflecting on Judge Roberts' testimony from earlier this week, as well as his responses to your questions. My purpose for being here today is not to take a position on whether Judge Roberts should be confirmed, but to discuss the fundamental importance of the Supreme Court with respect to our nation's ongoing efforts to ensure clean, safe, and healthy communities for this and future generations.

I have been involved in our system of human health and environmental protection for most of my professional life: as the head of the Environmental Protection Agency, as the head of the Florida Department of Environmental Protection, and as a young lawyer in the U.S. Senate. The laws and regulations that we have crafted have allowed us to make steady progress toward clean air, clean water, and a healthy environment, while growing our economy and engaging the public in this effort. Though not a perfect system, a dismantling of these laws and regulations could leave our country without a sensible way to address ongoing environmental problems such as the presence of mercury, the disappearance of our wetlands, and the reality of global warming.

As you might suspect, during my eight years as Administrator of the EPA we were sued by environmental groups, by polluters, and by states—some saying that we had not done enough and others that we had done too much. We also filed our own lawsuits against polluters and states. The statutory bases for several of the decisions I made at EPA were argued in the Supreme Court, including the constitutionality of provisions of the Clean

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Air Act, which we had relied on to set tough public health ozone and fine particle standards.

The Supreme Court has historically been clear in its recognition of the responsibility of federal regulatory agencies to set standards to protect individuals and communities, to enforce these standards and laws, and, when the government fails to do its job, to allow private citizens to use the courts to ensure the enforcement of our laws. Increasingly, however, lower court judges have been open to the arguments made by opponents of federal environmental protections.

More than fifty years ago, Congress realized that individual states often lacked the power, or were unwilling, to address problems of pollution. Congress also realized that pollution does not recognize the political boundaries of states. Dirty air blows across the country without regard for where it originated, and polluted water inevitably flows downstream. A federal solution is often the only solution.

In response, Congress utilized its Commerce Clause authority to pass environmental legislation designed to protect the quality of the air we breathe, the safety of the water we drink, and the health of our communities and our children.

Nonetheless, the Supreme Court's decisions in *United States v. Lopez* and *United States v. Morrison,* limiting the scope of Congress' Commerce Clause authority, have triggered an effort to undermine a number of environmental laws, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act. In *SWANCC v. U.S. Army Corps of Engineers*, the petitioners argued that Congress lacked the authority under the Commerce Clause to protect "isolated wetlands." As we all know, wetlands are an important part of the ecosystem on which we depend: they not only provide valuable habitat, but also perform a crucial function in minimizing the impact of flooding and naturally cleansing waters. While the Court avoided the Commerce Clause challenge by holding, instead, that the Corps had exceeded its statutory authority, the majority did note "significant constitutional questions" regarding the authority of Congress to protect certain types of wetlands even though used by migratory birds.

Maintaining Congress' Commerce Clause authority is essential to our ongoing progress to protect our air and water, our communities, and the environment.

Justice Kennedy, while joining with the majority in *Lopez*, noted the importance of the Commerce Clause when he wrote, "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."

While Judge Roberts' dissenting opinion from denial of rehearing in *Rancho Viejo v. Norton*—the case now referred to as the "hapless toad" case—is not definitive as to his position on the Commerce Clause power or on the Endangered Species Act, it is certainly worth noting that he rejected the three judge panel's unanimous opinion which

specifically rejected a claim that Congress lacked the Commerce Clause authority to protect the "hapless toad."

Lower court judges have also attempted to restrict the authority of Congress to delegate certain powers to the Executive Branch. In *Browner v. American Trucking Associations,* a case regarding the ozone and fine particle standards set by EPA, the D.C. Circuit struck down a key section of the Clean Air Act as unconstitutional, citing the non-delegation doctrine which had been rejected by the courts for more than 50 years.

For decades Congress has required EPA to set public health air pollution standards for the most commonly found air pollutants based on the best available science. Congress understood that the work of setting these types of standards was best done by a federal agency that could fully vet the science behind the standards, as well as take comments from all members of the public, both ordinary citizens and industry. Ultimately, the Supreme Court unanimously reversed the lower court's finding in *Browner* that Congress had improperly delegated authority to EPA. However, should a future Court embrace the non-delegation doctrine, the work of setting specific pollution levels could well fall to Congress. As I said at the time, such a result could "throw into complete turmoil the underpinnings of almost every single environmental and public health statute in the country."

Finally, Congress has frequently recognized the right of individual citizens to seek enforcement of our country's environmental laws in the courts. These citizen-suits are an important check and balance in the system—a recognition that, at times, the Executive Branch may fail to do what Congress has directed it to do and, as the Supreme Court itself recognized in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, such suits "also deter future violations."

In an earlier case, *Lujan v. Defenders of Wildlife*, while a majority on the Court denied standing to citizens concerned about the destruction of endangered species, Justice O'Connor dissented along with Justice Blackmun who wrote, "I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."

Judge Roberts, commenting on the *Lujan* opinion in a law journal article, wrote that the majority's ruling was "hardly a surprising result" and that Congress may not ask the courts to exercise "oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue."

A rejection of citizens' rights to ensure the enforcement of our nation's environmental laws would be a devastating change to the current system of safeguards.

A key role and responsibility of the government is to protect those things which are held in common: our air, our water, the public health of our communities. The nation's environmental laws are based on a set of shared values, and they rest on principles embraced by Congress over many years. The High Court should respect both the broad authority of Congress under the Constitution and well-established precedents that allow

for a robust federal role in protecting our environment. The Court should also continue to recognize the right of Congress to delegate to the Executive Branch the day-to-day work of setting standards and providing protections. And the Court must protect the opportunity for individual citizens to step in when the Executive Branch fails to do what Congress has directed.