I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

   John Glover Roberts, Jr.

2. **Address: List current place of residence and office address(es).**

   Residence:

   Bethesda, MD

   Office:

   Hogan & Hartson L.L.P.
   555 13th Street, N.W.
   Washington, D.C. 20004

3. **Date and place of birth.**

   January 27, 1955
   Buffalo, New York

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Married to Jane Sullivan Roberts, July 27, 1996.

   Spouse's maiden name: Jane Marie Sullivan
   Spouse's occupation: Attorney
   Spouse's employer: Shaw Pittman
   2300 N Street, N.W.
   Washington, D.C. 20037

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Attended Harvard College, 1973-1976 (entered with sophomore standing). Awarded A.B. summa cum laude June 17, 1976.

   Attended Harvard Law School, 1976-1979. Awarded J.D. magna cum laude June 7, 1979.

6. Employment Record: **List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

Summer 1977: Law clerk, Ice, Miller, Donadio & Ryan, Indianapolis, Indiana.

Summer 1978: Law clerk, Carlsmith, Carlsmith, Wichman & Case (now Carlsmith, Ball, Wichman, Case & Ichiki), Honolulu, Hawaii.

June 1979 - June 1980: Law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit. At the time Judge Friendly also served as the Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court.

July 1980 - August 1981: Law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States.

August 1981 - November 1982: Special Assistant to Attorney General William French Smith, United States Department of Justice.

November 1982 - May 1986: Associate Counsel to the President, White House Counsel's Office.

May 1986 - October 1989: Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004. I joined the firm as an associate and was elected a general partner of the firm in October 1987.

October 1989 - January 1993: Principal Deputy Solicitor General, United States Department of Justice.

January 1993 - Present: Partner, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004.

7. Military Service: **Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8. Honors and Awards: **List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Harvard College honors:

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

A.B. degree awarded summa cum laude, 1976. Honors thesis on British domestic politics, 1900-1914.

Harvard Law School honors:

Editor, Harvard Law Review, volumes 91-92. Managing Editor, volume 92.

J.D. degree awarded magna cum laude, 1979.

9. Bar Associations: **List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

I am a member of the following organizations:

United States Judicial Conference Advisory Committee on Appellate Rules
D.C. Circuit Judicial Conference, 1991, 1992, 1998, 2000
Fourth Circuit Judicial Conference, 1995
American Law Institute (elected October 1990)
American Academy of Appellate Lawyers (elected August 1998)
Edward Coke Appellate Inn of Court
State and Local Legal Center, Legal Advisory Board
Georgetown University Law Center, Supreme Court Institute, Outside Advisory Board
National Legal Center for the Public Interest, Legal Advisory Board
Supreme Court Historical Society

10. Other Memberships: **List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

I do not belong to any organizations that are active in lobbying before public bodies. Other organizations to which I belong:

Phi Beta Kappa
Republican National Lawyers Association
Lawyers Club
Metropolitan Club
Robert Trent Jones Golf Club

11. Court Admission: **List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

District of Columbia Court of Appeals, December 18, 1981.

United States Court of Federal Claims, December 3, 1982.

United States Court of Appeals for the Federal Circuit, December 3, 1982.

Supreme Court of the United States, March 2, 1987.

United States Court of Appeals for the District of Columbia Circuit, March 31, 1988.

United States Court of Appeals for the Ninth Circuit, October 17, 1988.

United States Court of Appeals for the Fifth Circuit, November 4, 1988.

United States Court of Appeals for the Eleventh Circuit, May 31, 1995.

United States Court of Appeals for the Third Circuit, November 3, 1995.

United States District Court for the District of Columbia, February 5, 1996.

United States Court of Appeals for the Tenth Circuit, April 10, 1996.

United States Court of Appeals for the Seventh Circuit, June 21, 1996.

United States Court of Appeals for the Fourth Circuit, November 24, 1997.

United States Court of Appeals for the Sixth Circuit, June 3, 1998.

United States Court of Appeals for the Eighth Circuit, February 5, 1999.

United States Court of Appeals for the Second Circuit, September 30, 1999.

12. Published Writings: **List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Publications: "The Takings Clause," Developments in the Law -- Zoning, 91 Harvard Law Review 1462-1501 (1978) (unsigned student note).

Comment, "Contract Clause -- Legislative Alteration of Private Pension Agreements," 92 Harvard Law Review 86-99 (1978) (unsigned student note).

Comment, "First Amendment -- Media Right of Access," 92 Harvard Law Review 174-185 (1978) (unsigned student note).

"New Rules and Old Pose Stumbling Blocks in High Court Cases," The Legal Times, February 26, 1990 (also reprinted in various affiliated publications), co-authored with E. Barrett Prettyman, Jr.

"Article III Limits on Statutory Standing," 42 Duke Law Journal 1219 (1993).

"Riding the Coattails of the Solicitor General," The Legal Times, March 29, 1993.

"The New Solicitor General and the Power of the Amicus," The Wall Street Journal, May 5, 1993.

"The 1992-93 Supreme Court," 1994 Public Interest Law Review 107.

"Forfeitures: Does Innocence Matter?," The Legal Times, October 2, 1995.

"Thoughts on Presenting an Effective Oral Argument," School Law in Review (1997).

I have attached copies of the foregoing items.

Addresses: Brookings Institution, October 2, 1983, on Giving Legal Advice to the President.

Indiana University School of Law, 1994 Harriss Lecture series, January 20, 1994, on Federal Court Jurisdiction.

Maryland Association of County Attorneys, December 7, 1989, on Appellate Advocacy.

District of Columbia Bar Association, Section on Administrative Law, September 19, 1990, on Supreme Court Environmental Cases.

American Bankruptcy Institute, December 7, 1991, on Supreme Court Bankruptcy Cases.

American Academy of Appellate Lawyers, February 5, 1994, Kansas City, MO, on Supreme Court practice.

Elderhostel, Rockville, MD, November 14, 1996, on Supreme Court oral arguments.

D.C. Copyright Law Society, March 18, 1998, on Feltner v. Columbia Pictures.

Bureau of National Affairs, Supreme Court Constitutional Law Seminar, Washington, D.C., September 11, 1998, on Supreme Court oral arguments.

D.C. Bar Administrative Law Section, September 24, 1998, on NCUA v. First National Bank & Trust Co.

Alabama Bar Institute for Continuing Legal Education, 36th Annual Southeastern Corporate Law Institute, Point Clear, Alabama, April 24, 1999, on recent Supreme Court cases.

Arizona Bar Appellate Practice Section, June 25, 1999, on the certiorari process.

National Mining Association, Lake George, NY, September 10, 1999, on amicus briefs.

Republican National Lawyers Ass'n, Washington, D.C., April 3, 2000, on cases pending before the Supreme Court.

Cosmetics, Toiletries, and Fragrances Ass'n, Napa Valley, CA, April 26, 2000, on the First Amendment and commercial speech.

Symposium, Bicentennial Celebration of the Courts of the District of Columbia Circuit, Washington, D.C., March 9, 2001, panelist on Constitutional Confrontations in the District of Columbia Circuit Courts.

I also regularly participate in press briefings sponsored by the National Legal Center for the Public Interest and the Washington Legal Foundation upon the opening of a new Supreme Court term or the Court's rising for the summer.

I did not speak from a prepared text on any of the foregoing occasions, and am not aware of any press reports on these addresses.

In addition, on June 11, 1999, I appeared before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee with former Senators George Mitchell and Robert Dole and former Solicitor General Drew Days to discuss the report of the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution. A copy of the hearing transcript is attached.

I also recall appearing before a subcommittee of the House Judiciary Committee to discuss crime legislation sometime in 1993, but am advised that the hearing transcript was never published. I did not have prepared remarks on that occasion.

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. March 26, 2001.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

06/79 - 06/80	Law Clerk to Judge Henry J. Friendly. United States Court of Appeals for the Second Circuit. Appointed.
07/80 - 08/81	Law Clerk to Justice William H. Rehnquist. Supreme Court of the United States. Appointed.
08/81 - 11/82	Special Assistant to the Attorney General. United States Department of Justice. Appointed.
11/82 - 05/86	Associate Counsel to the President. White House Counsel's Office. Appointed.
10/89 - 01/93	Principal Deputy Solicitor General. United States Department of Justice. Appointed.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

2. **whether you practiced alone, and if so, the addresses and dates;**

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

After graduation from law school, I served as a law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, NY 10007. At the time, Judge Friendly also served as Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court. I clerked for Judge Friendly from June 1979 to June 1980.

I next served as a law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543. I served in that capacity from July 1980 to August 1981.

After completing my clerkship with Justice Rehnquist, I accepted appointment as a Special Assistant to Attorney General William French Smith, United States Department of Justice, Tenth and Constitution Avenues, N.W., Washington, D.C. 20530. I served in that capacity from August 1981 to November 1982.

I left the Department of Justice in November 1982 to accept appointment as Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

I left the White House Counsel's Office in May 1986 to join the Washington law firm of Hogan & Hartson as an associate. I was elected a general partner of the firm in October 1987. Hogan & Hartson is now located at 555 13th Street, N.W., Washington, D.C. 20004.

I resigned my partnership in the firm in October 1989 to accept appointment as Principal Deputy Solicitor General, United States Department of Justice, Tenth and Constitution Avenues, N.W., Washington, D.C. 20530.

I left the Solicitor General's Office in January 1993 to return to my present position as a partner at Hogan & Hartson.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

For the past 15 years, in both the private and public sectors, I have had an intensive federal appellate litigation practice, with an emphasis on Supreme Court litigation. During that time I orally argued 33 cases before the Supreme Court, in addition to arguments before the United States Courts of Appeals for the District of Columbia, Federal, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, as well as the District of Columbia and Maryland Courts of Appeals. The subject matter of these cases covered the full range of federal jurisdiction, including administrative law, admiralty, antitrust, arbitration, banking, bankruptcy, civil rights, constitutional law, environmental law, federal jurisdiction and procedure, First Amendment, health care law, Indian law, interstate commerce, labor law, and patent and trade dress law.

In addition to presenting oral argument and briefing the cases on the merits, the Supreme Court practice consists of seeking and opposing Supreme Court review, seeking and opposing stays pending such review, preparing amicus curiae briefs on behalf of clients interested in pending Supreme Court matters, helping to prepare other counsel to argue before the Court, and counseling clients on the impact of specific Supreme Court rulings.

The Court of Appeals aspect of my federal appellate practice has involved appearances in every federal circuit court of appeals, although the largest number of my Court of Appeals arguments has been before the Court of Appeals for the D.C. Circuit. I have not specialized in any particular substantive area, but instead in the preparation of appellate briefs and the presentation of appellate oral argument.

The nature of my practice was essentially the same during my time at Hogan & Hartson and when I served as Principal Deputy Solicitor General, although of course during the latter period my sole client was the United States. As Principal Deputy Solicitor General, my duties included presenting oral argument before the Supreme Court and preparing and filing briefs on the merits on behalf of the United States, its agencies and officers, subject to the supervision of the Solicitor General

and with the assistance of subordinates in the Office of the Solicitor General. I also supervised the preparation and filing of petitions for and briefs in opposition to certiorari, and engaged in an active motions practice seeking or opposing stays or other relief from the Supreme Court. In addition to this actual litigation before the Court, my duties included participating in the government's determination whether to appeal adverse decisions in the lower courts. Any such appeal, whether from a district court to an appellate court or from a circuit court to the Supreme Court, requires the approval of the Solicitor General.

Immediately prior to joining Hogan & Hartson for the first time in 1986, I served in counseling and advisory roles in the federal government. My duties as Associate Counsel to the President involved reviewing bills submitted to the President for signature or veto, drafting and reviewing executive orders and proclamations, and generally reviewing the full range of Presidential activities for potential legal problems. I participated in drafting and reviewed various documents embodying Presidential action under certain trade, aviation, asset control, and other laws. I played a role in the Presidential appointment process, reviewing the Federal Bureau of Investigation background reports and ethics disclosures of prospective appointees.

My duties as Special Assistant to Attorney General William French Smith were also of an advisory nature, focusing on particular matters of concern to the Attorney General. I also served as a speechwriter and represented the Attorney General throughout the Executive Branch and before state and local law enforcement officials.

I was fortunate to have two appellate clerkships immediately after law school. Judge Henry J. Friendly is justly remembered as one of this Nation's truly outstanding federal appellate judges. The clerkship on the Supreme Court for then-Associate Justice Rehnquist the following year was an intensive immersion in the federal appellate process at the highest level.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Clients of Hogan & Hartson for whom I rendered substantial legal services included large and small corporations, state and local governments, trade and professional organizations, nonprofit associations, and individuals. Some recent examples

are the States of Alaska and Hawaii, the National Collegiate Athletic Association, Litton Industries, Inc., the Credit Union National Association, Pulte Corporation, and Intergraph Corporation.

From October 1989 to January 1993, my sole client was the United States, its agencies and officers. With minor exceptions, the Office of the Solicitor General is the exclusive representative of the federal government before the Supreme Court. I accordingly represented a wide variety of departments, agencies, and other entities within the federal government. In doing so, I worked with each of the litigating divisions in the Department of Justice. Also included among my clients were individual officers of the United States or its agencies sued in Bivens actions.

My clients during my service as Associate Counsel to the President included the President of the United States and members of the White House staff. As Special Assistant to the Attorney General, my client was the Attorney General.

For the past 15 years, I have specialized in federal appellate litigation.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in federal court frequently over the past 15 years, arguing over 55 cases before the Supreme Court of the United States, the Court of Appeals for the District of Columbia Circuit, and various other federal circuit courts of appeals. The public service positions I held prior to 1986 did not involve court appearances, although my two clerkships necessarily afforded intensive exposure to the appellate process.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

Approximately 95 percent of my appearances have been in federal court, and approximately 5 percent in state courts of

record, including the District of Columbia Court of Appeals (the local court for the District of Columbia).

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

Approximately 95 percent civil, 5 percent criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As noted, my practice is primarily an appellate one, and my appearances in court have typically been to argue appeals. I have personally argued over 55 cases leading to a final appellate judgment. I have, however, also appeared on occasion in trial courts.

5. What percentage of these trials was:

(a) jury;
(b) non-jury.

One trial proceeding in which I served as an associate counsel was before a jury, although my participation in the case did not involve work before the jury itself.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. United States v. Halper, 490 U.S. 435 (1989). While in private practice, I was appointed by the Supreme Court to file a brief and present oral argument in support of the judgment below in this case. See United States v. Halper, 488 U.S. 906 (1988) (order of appointment). Mr. Halper, the appellee, had proceeded pro se in the lower court; I was the only counsel briefing and arguing in the Supreme Court against the appellant, the United States. I handled the case on a pro bono basis.

The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties under the False Claims Act for the same false Medicaid claims. It was at the time generally assumed that the Double Jeopardy Clause applied only to successive criminal prosecutions, and had no applicability in the civil context.

In briefing and arguing the case, I sought to distinguish the strong line of precedent holding that the Double Jeopardy Clause did not apply to civil cases. My argument distinguished that aspect of the Clause forbidding successive prosecutions -- which did not apply to civil cases -- from that aspect of the Clause forbidding successive punishments -- which, I argued, had no such limitation.

In a unanimous opinion authored by Justice Blackmun, the Court agreed with this analysis. 490 U.S. 435 (1989). The case was important in establishing that the protections of the Double Jeopardy Clause are not limited to the criminal context, and the decision had a significant effect on the government's imposition of sanctions in a wide range of areas. It was later sharply restricted, however, if not overruled, in Hudson v. United States, 522 U.S. 101 (1997).

I had no co-counsel assisting me. Arguing for the United States was Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. United States v. Kokinda, 497 U.S. 720 (1990). I participated in the briefing and presented argument before the

Supreme Court on behalf of the United States in this criminal case, which involved a challenge to Postal Service regulations making it a misdemeanor to solicit funds on "postal premises," defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The United States Court of Appeals for the Fourth Circuit had struck down the convictions of two individuals for soliciting contributions for their organization on the walkway, holding that such activities could not be banned consistent with the First Amendment.

The Supreme Court ruled in the government's favor and reversed. Writing for a plurality of four Justices, Justice O'Connor agreed with us that the postal walkway was not a public forum, but instead government property set aside to facilitate particular government business -- in this case, the handling of the mails. Since solicitation of contributions to organizations by private individuals would interfere with the conduct of postal business and since the regulation did not discriminate on the basis of viewpoint, Justice O'Connor concluded that the ban on solicitation was valid. Justice Kennedy concurred, relying on our alternative argument that the ban was a valid time, place, and manner restriction.

Other counsel on the brief with me were Solicitor General Kenneth W. Starr, Assistant Attorney General Edward S.G. Dennis, Jr., Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

3. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). The issue in this case concerned the limitations on standing for those who seek to challenge federal land use decisions. The Court of Appeals for the District of Columbia Circuit had allowed an organization to challenge over a thousand individual land use decisions affecting millions of acres of public land on the basis of the affidavits of two individuals asserting an interest in the decisions. As Acting Solicitor General, I authorized and participated in the preparation of a petition for certiorari seeking Supreme Court review on behalf of the Department of the Interior. The Court granted our petition, and I participated in the briefing on the merits and presented oral argument on behalf of the government.

We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5-4 decision, agreed with our analysis. Justice Scalia, writing for the majority, held that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not "presume" the specific facts necessary to establish adequate injury. Justice Blackmun, for the dissenters, argued that the affidavits should have sufficed at the summary judgment stage.

Co-counsel for the United States assisting me were Assistant Attorney General Richard Stewart, Deputy Solicitor General Lawrence G. Wallace, Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

4. Interstate Commerce Commission v. Boston & Maine Corporation, 503 U.S. 407 (1992). This case involved Amtrak's Montrealer service between Washington, D.C. and Montreal, Canada. The question presented was whether the Interstate Commerce Commission could approve Amtrak's exercise of eminent domain authority under the Rail Passenger Service Act, when Amtrak intended to reconvey the subject property to another railroad, which had agreed to rehabilitate and maintain the line for Amtrak. The Commission construed the statute as authorizing such a transaction.

The D.C. Circuit reversed, concluding that the Commission had misconstrued the statute. In particular, the court reasoned that Amtrak did not have authority to condemn property it did not intend to keep, but rather intended to transfer to a third party. While the case was pending on rehearing, Congress acted to overturn the D.C. Circuit decision, amending the law to make clear that Amtrak may subsequently convey property it has condemned to a third party. Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, § 9. The amendment specified that it was applicable to pending cases. The D.C. Circuit nonetheless denied rehearing.

As Acting Solicitor General, I authorized the filing and participated in the preparation of a petition for certiorari on

behalf of the Commission and the United States. After the Supreme Court granted our petition, I participated in the briefing on the merits, and orally argued the case before the Court. Our argument focused on the failure of the D.C. Circuit to give effect to the clearly expressed intent of Congress in the amendment of the statute.

The Supreme Court agreed with our position and reversed the D.C. Circuit, 6-3. Justice Kennedy's opinion for the majority relied on deference to the ICC's construction of the statute it has been charged with administering. Justice White, writing for the dissenters, criticized the majority for adopting a post hoc rationalization to fill a gap in the agency's reasoning and logic.

With me on the brief were Deputy Solicitor General Lawrence G. Wallace and Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217, as well as General Counsel Robert S. Burk, Deputy General Counsel Henri F. Rush, and Attorney Charles A. Stark, Interstate Commerce Commission (now the Surface Transportation Board), 1925 K Street, N.W., Washington, D.C. 20423, (202) 565-1558. Arguing for the opposing party was Irwin Goldbloom, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 637-2200.

5. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999). After the Court of Appeals for the Third Circuit ruled against the NCAA in this case, I was retained to seek Supreme Court review, and to brief and argue for the NCAA on the merits in the event the Court elected to hear the case. The Third Circuit had ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. -- which applies only to organizations that receive federal financial assistance -- applied to the NCAA, because it received dues payments from entities that receive federal financial assistance. We argued in our petition for certiorari that hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent, and the Supreme Court granted review.

The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress' Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come

with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding -- those who knowingly entered into a bargain by accepting the funding -- and does not "follow[] the aid past the recipient to those who merely benefit from the aid." United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 607 (1986). The NCAA, we argued, was accordingly not covered simply because its dues-paying members were.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with our position. The Court explained that, at most, the NCAA's "receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage." 525 U.S. at 468. The Court rejected the respondent's efforts to distinguish the controlling Supreme Court precedent, and vacated the Third Circuit's judgment.

Appearing on the briefs with me in this case were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100, and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN 46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000.

6. Rice v. Cayetano, 528 U.S. 495 (2000). I was retained by the State of Hawaii to brief and argue this case after a petition for certiorari was granted to review what for the State had been a favorable decision by the Court of Appeals for the Ninth Circuit. That court had upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction violated the Fourteenth and Fifteenth Amendments as racial discrimination.

On behalf of the State, we defended the state law and favorable Court of Appeals decision by arguing that the classification drawn by the statute was not drawn on the basis of race. Instead, the statute simply restricted the franchise to beneficiaries of the underlying trusts. The petitioner had

not challenged those trusts, and it was rational to limit voting to those most directly affected by how the trusts were administered.

We also argued that the classification was not based on race but instead on the congressionally-recognized political status of Native Hawaiians as an indigenous people. This ground had been relied on by the Supreme Court and other courts to uphold classifications involving Native Americans in the lower 48 states and Native Alaskans, and we argued that the same rationale should apply to the indigenous people of the Hawaiian Islands.

The Court rejected our arguments, 7-2. Justice Kennedy, writing for the majority, rejected our attempted analogy between Native Hawaiians and other Native Americans, reasoning that Congress had not dealt with Native Hawaiians as members of politically-organized tribes, as was the case with respect to other Native Americans. The majority also rejected our argument that the classification should be regarded as being based on beneficiary status rather than race. Justice Breyer, joined by Justice Souter, concurred in the result, also rejecting the analogy to Native American classifications on the ground that Native Hawaiians were not organized into tribes. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Hawaiian statute should be upheld in light of the unique history of Hawaii and the analogy to principles of American Indian law.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl I. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, Hawaii 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

7. TrafFix Devices, Inc. v. Marketing Displays, Inc., 121 S. Ct. 1255 (2001). The issue in this patent and trade dress case was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind. TrafFix Devices copied and improved upon the design after Marketing Displays' patent expired. The Sixth Circuit Court of Appeals concluded that the distinctive appearance of the Marketing Displays sign stand design could be protected from such copying as trade dress. I

was retained by TrafFix Devices to seek Supreme Court review and brief and argue the case on the merits if review were granted. We argued in our petition for certiorari that the Sixth Circuit decision conflicted with other circuit court decisions and Supreme Court precedent, and the Supreme Court granted review.

In our briefs on the merits and in oral argument before the Court, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder the exclusive rights to his invention for a limited period of time, on the condition that the right to practice the invention becomes public property when the patent expires. Allowing the patent holder to extend the period of exclusive use after the expiration of the patent, under the guise of trade dress, would deprive the public of the benefit of this bargain. We also explained that this was the basis for the trade dress "functionality" doctrine, barring protection for functional features.

The Supreme Court agreed with our position in a unanimous opinion authored by Justice Kennedy. The Court explained that the sign stand design was functional, as evidenced by the fact that it had qualified for and enjoyed patent protection. Because the design was functional, the Court ruled, it could not qualify for trade dress protection.

Co-counsel with me on our briefs were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C., 201 W. Big Beaver, Suite 400, Troy, Michigan 48084, (248) 689-3500. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, Michigan 48034, (248) 223-9500, argued for the respondent.

8. United States v. Chrysler Corporation, 158 F.3d 1350 (D.C. Cir. 1998). I was retained by Chrysler in this case to appeal a district court decision requiring it to conduct an automobile recall. The main issue on appeal was whether the National Highway Traffic Safety Administration ("NHTSA") had provided automobile manufacturers with adequate notice of what was required by a motor vehicle safety standard before seeking a recall on the ground that the manufacturer had failed to comply with the standard.

I participated in the briefing and presented oral argument before the D.C. Circuit. We first had to address the

government's argument that the case was moot, because Chrysler had acquiesced in the recall while pursuing its appeal. We contended that Chrysler's continuing reporting obligations under the terms of the recall sufficed to establish an ongoing legal controversy. On the merits, we argued that a regulated entity must receive "fair notice" of the standards it must meet, as a matter of both administrative regularity and constitutional due process, before an agency can penalize the regulated party for failure to comply. We then explained why, on the specific facts of this case, NHTSA had failed to give adequate notice of how certain testing procedures were to be conducted to test compliance with agency standards.

In a published opinion authored by Chief Judge Edwards and joined by Judges Silberman and Randolph, the court rejected the government's mootness argument, agreed with our contentions on the merits, reversed the district court, and held that Chrysler was not subject to the recall order.

I was assisted by Gregory G. Garre of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Erika Z. Jones, Mayer, Brown & Platt, 1909 K Street, N.W., Washington, D.C. 20006, (202) 263-3000. Irene M. Solet, U.S. Department of Justice, Washington, D.C. 20530, (202) 514-3542, argued the case for the United States.

9. KenAmerican Resources, Inc. v. International Union, UMWA, 99 F.3d 1161 (D.C. Cir. 1996). The issue in this case concerned the scope of an agreement to arbitrate. An arbitrator had ruled that certain coal companies owned by an individual stockholder were subject to arbitration because another company also owned by that same individual had subscribed to an arbitration agreement purporting to bind nonsignatory parents, subsidiaries, and affiliates. I was retained by the companies to overturn that result. I argued the case before the district court, lost on summary judgment, and appealed to the D.C. Circuit.

I participated in the briefing on appeal and presented oral argument before the Court of Appeals. We contended that the district court erred in deferring to the arbitrator on the issue of arbitrability and that the court should decide that issue de novo. On the merits, we relied heavily on the agreement documents and explained that the company that had signed the arbitration agreement had carefully limited the scope of its agreement in a manner that did not include the other companies owned by the common sole shareholder.

In a published opinion authored by Judge Silberman and joined by Judges Ginsburg and Rogers, the D.C. Circuit agreed with our arguments and reversed the district court decision enforcing the arbitration award. The Court of Appeals agreed that the lower court had erred in deferring to the arbitrator on the issue of arbitrability, and agreed with our construction of the agreements limiting the scope of the arbitration clause. The court not only reversed the grant of summary judgment in favor of the Union but directed that summary judgment be entered in favor of our clients.

Co-counsel in the case were Daniel F. Attridge, Donald Kempf, John S. Irving, Jr., and Gary Brown of Kirkland & Ellis, 655 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20005, (202) 879-5000, and Jonathan Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5765. John R. Mooney, Mooney, Green, Gleason, Baker, Gibson & Saindon, P.C., 1920 L Street, N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010, argued the appeal for the Union.

10. Litton Systems, Inc. v. Honeywell, Inc., 238 F.3d 1376 (Fed. Cir. 2001). This case was the third published opinion in a long-running, multi-billion dollar patent and state law dispute between Litton and Honeywell over proprietary interests in laser gyroscope navigational systems for aircraft. Litton had won a $1.2 billion jury verdict on patent and state tort grounds, but the district court entered judgment for Honeywell notwithstanding the verdict. The Federal Circuit reversed and remanded for a new trial. The district court did not hold a new trial but instead once again entered judgment for Honeywell. I was retained to overturn that result.

I participated in the briefing and presented oral argument before the Federal Circuit. The patent law issue concerned whether Litton was estopped from arguing that Honeywell's technology infringed by equivalents, because Litton had amended its patent claims allegedly to exclude all but its precise embodiment of the invention. The answer turned on technical questions involving the operation of the respective ion guns used by Litton and Honeywell to create the perfectly-reflective mirrors employed in ring laser gyroscopes. The state law issues turned on whether there was sufficient evidence in the record to support the jury's finding that Honeywell had interfered with Litton's agreements with the inventor of the pertinent technology.

Our patent claims became moot after oral argument, when the Federal Circuit issued an en banc opinion in another case holding that the doctrine of equivalents was not available at all to a patentee who had amended his claims. The Federal Circuit, however, issued a published opinion agreeing with our position on the state law claims. The opinion was authored by Chief Judge Mayer and joined by Judge Rader. Judge Bryson concurred in part and dissented in part. The Court reversed the district court's grant of judgment for Honeywell, concluding that the lower court had erred in resolving disputed issues of fact. The case was remanded for a new trial on the state law claims.

I was assisted by Catherine Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5491, Frederick Lorig and Sidford Brown, Bright & Lorig, 633 West 5th Street, Los Angeles, California 90071, (213) 627-7774, and Rory Radding, Stanton Lawrence, and Carl Bretscher, Pennie & Edmonds LLP, 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Richard G. Taranto, Farr & Taranto, 1220 19th Street, N.W., Suite 800, Washington, D.C. 20036, (202) 775-0184, argued for appellee Honeywell.

19. Legal Activities: **Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).**

Prior to first joining Hogan & Hartson in 1986, the significant legal activities I pursued generally did not involve litigation. My duties as Associate Counsel to the President and Special Assistant to Attorney General William French Smith are discussed in the response to question 17b. Among the more significant of those activities were the review of legislation submitted to the President, as well as the drafting and review of executive orders, Presidential proclamations, and other Presidential documents.

Significant non-litigation legal activities since 1986 have focused on improving the quality of appellate practice before the Courts of Appeals and the Supreme Court. In addition to involvement with the American Academy of Appellate Lawyers and the recently-established Edward Coke Appellate Inn of Court, I regularly participate in moot court programs designed to improve

the advocacy of those presenting cases before the Supreme Court, in particular the programs sponsored by the State and Local Legal Center and the Georgetown University Law Center Supreme Court Institute. I have also assisted the American Bar Association in presenting its programs on appellate advocacy, appearing as an advocate in its programs, and I write and speak regularly on the subject.

I have also been active in the area of legal reform. I have participated in the work of the American Law Institute, and currently serve on the United States Judicial Conference Advisory Committee on Appellate Rules. Another example of such activity was my work on the bipartisan Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell.

JOHN G. ROBERTS, JR.

SENATE QUESTIONNAIRE UPDATE -- PUBLIC

Part I, Question 12: Add to the list of addresses the following:

Environmental Law Seminar, Harvard Law School, Cambridge, Massachusetts, January 17, 2002, on Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, S. Ct. No. 00-1167.

John F. Kennedy School of Government, Masters Program visit to Washington, D.C., January 24, 2002, on Supreme Court practice.

American Academy of Appellate Lawyers, New Orleans, Louisiana, February 8, 2002, on Supreme Court practice, with E. Barrett Prettyman, Jr., and Seth Waxman.

Georgetown University Law School, Supreme Court Institute, May 16, 2002, 1992 Supreme Court law clerk program, on the 1992 Supreme Court term.

Brigham Young University and J. Reuben Clark Law School, Rex E. Lee Conference on the Office of the Solicitor General of the United States, Provo, Utah, September 12-13, 2002, with 19 other alumni of the Office.

I did not speak from a prepared text on any of these occasions and am not aware of any press reports on my remarks. I understand that the proceedings of the Rex E. Lee Conference are to be but have not yet been transcribed.

In addition, the proceedings of the D.C. Circuit Bicentennial Symposium have now been reported at 204 F.R.D. 499-618.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I will be entitled under the Hogan & Hartson partnership agreement to an amount reflecting my interest in matters pending at the firm at the time of my departure. That amount is calculated based on a set formula specified in the agreement. It is based on percentage ownership interest in the firm and is a set amount at time of departure. I also participate in a fully-vested, defined contribution retirement plan and 401(k) plan at Hogan & Hartson. These plans are administered by an independent trustee, and funds are invested in a range of broadly diversified mutual funds at the election of the individual.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will resolve any conflict of interest by recusing myself from the matter presenting the conflict, following the Judicial Conference Guidelines relating to recusal. I will recuse myself from any matter involving my law firm or former clients for whom I did work, for the periods specified in the Guidelines.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

Approved
May 1999

FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. §§101-111)

1. Person Reporting (last name, first, middle initial)	2. Court or Organization	3. Date of Report
ROBERTS, JOHN G., JR.	U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT	5/13/01

4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type)	6. Reporting Period
U.S. CIRCUIT JUDGE - NOMINEE	✓ Nomination, Date 5/9/01 ___ Initial ___ Annual ___ Final	1/1/00 - 5/13/01

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations
HOGAN & HARTSON L.L.P. 555 13TH STREET N.W. WASHINGTON, D.C. 20004	Reviewing Officer _____ Date _____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
NONE (No reportable positions.)	
PARTNER	HOGAN & HARTSON L.L.P.
ADVISORY BOARD	STATE & LOCAL LEGAL CENTER, GEORGETOWN UNIV. LAW CENTER SUPREME COURT INSTITUTE, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST (ALL UNPAID FOR NONPROFIT ORGS.)

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of instructions.)

DATE	PARTIES AND TERMS
NONE (No reportable agreements.)	
2001	HOGAN & HARTSON PARTNERSHIP AGREEMENT SETS FORMULA FOR PAYOUT TO DEPARTING LAWYER FOR HIS "UNVESTED INTEREST" IN FIRM. RETIREMENT AND 401(K) PLANS ARE DEFINED CONTRIBUTION, FULLY VESTED, AND INVESTED IN MUTUAL FUNDS SELECTED BY INDIVIDUAL

III. NON-INVESTMENT INCOME. (Reporting individual's spouse; see pp. 17-18 of instructions.)

YEAR	SOURCE AND TYPE	INCOME (yours, not spouse's)
NONE (No reportable non-investment income.)		
1999	HOGAN & HARTSON L.L.P.	$715,598
2000	HOGAN & HARTSON L.L.P.	$766,616
2001	HOGAN & HARTSON L.L.P.	$111,111.57
1999, 2000, 2001	SHAW PITTMAN (WIFE'S LAW FIRM)	$
		$

FINANCIAL DISCLOSURE REPORT JOHN G ROBERTS, JR 5/13/01

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions

A Description of Assets (including trust assets)	B Income during reporting period (1) Amt (Code1 (A-H))	B (2) Type (e.g., div., rent or int.)	C Gross value at end of reporting period (1) Value (Code1 (J-P))	C (2) Value Method Code1 (Q-W)	D Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D (2) Date (Month Day)	D (3) Value (Code2 (J-P))	D (4) Gain (Code1 (A-H))	D (5) Identity of buyer/seller (if private transaction)
Place "(2)" after each asset exempt from prior disclosure									
NONE (No reportable income, assets					EXEMT				
AGILENT		NONE	J	T					
AOL		NONE	O	T					
ASTRAZENECA	A	DIV	J	T					
AT & T	A	DIV	J	T					
BECTON DICKINSON	A	DIV	J	T					
BLOCK BUSTER	A	DIV	K	T					
BOEING	A	DIV	J	T					
CISCO		NONE	K	T					
CITIGROUP	A	DIV	K	T					
COCA COLA	A	DIV	J	T					
CORVIS		NONE	J	T					
CP	A	DIV	J	T					
DELL		NONE	M	T					
DISNEY	A	DIV	K	T					
FIRST VA BANKS	A	DIV	J	T					
FREDDIE MAC	A	DIV	K	T					
GILLETTE	A	DIV	J	T					

Income/Gain Codes (See Co. B1, D4) A=$1,000 or less; F=$2,501-$5,000; G=$5,001-$15,000; H1=$15,001-$50,000; H2=$50,001-$100,000; I=$100,001-$1,000,000; J=$1,000,001-$5,000,000; K=$5,000,001-$25,000,000; L=$25,000,001-$50,000,000; M=More than $50,000,000

Value Codes (See Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=More than $25,000,000

Value Method Codes (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash Market; U=Book Value; V=Other; W=Estimated

Gain Codes (See Cols. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001-$100,000; G=More than $100,000

Type Codes (See Col. B2) DIV=Dividend; INT=Interest; RENT=Rent; ROY=Royalty

FINANCIAL DISCLOSURE REPORT — Name of Person Reporting: JOHN G ROBERTS, JR. — Date of Report: 5/13/01

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 14-17 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. (2) Date Month-Day	D. (3) Value Code2 (J-P)	D. (4) Gain Code1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets or transactions)									
PFIZER	A	DIV	J	T					
PROCTER GAMBLE	A	DIV	J	T					
PSNRY		NONE	J	T					
SCHLUMBERGER	A	DIV	J	T					
SCIENTIFIC ATLANTA	A	DIV	K	T					
STATE STREET	A	DIV	K	T					
TEXAS INSTRUMENTS	A	DIV	M	T					
TMO		NONE	K	T					
WCOM		NONE	J	T					
XMSR		NONE	L	T					
WASHINGTON REIT	A	DIV	K	T					
PARADIGM INC PFD	A	DIV	J	W					
AMER CENT GR FUND	B	DIV	J	T					
DAVIS SER REAL EST FUND	A	DIV	J	T					
FIDELITY CONTRAFUND	C	DIV	K	T					
FIDELITY FREEDOM 2010	A	DIV	J	T					
FIDELITY LOW PRICED	D	DIV	M	T					
FIDELITY MAGELLAN	D	DIV	N	T					

Income/Gain Codes (See Col. B1, C1): A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001-$100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000

Value Codes (See Col. C1, D3): I=$15,000 or less; J=$15,001-$50,000; K=$50,001-$100,000; L=$100,001-$250,000; M=$250,001-$500,000; N=$500,001-$1,000,000; O=$1,000,001-$5,000,000; P1=$5,000,001-$25,000,000; P2=$25,000,001-$50,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000

Value Method Codes (See Col. C2): Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash Market; U=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT JOHN G. ROBERTS, JR. 5/11/01

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions

	A Description of Assets (including trust assets)	B Income during reporting period (1) Amt Code1 (A-H)	B (2) Type (e.g. div, rent or int.)	C Gross value at end of reporting period (1) Value Code2 (J-P)	C (2) Value Method Code3 (Q-W)	D Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D (2) Date (Month-Day)	D (3) Value Code2 (J-P)	D (4) Gain Code1 (A-H)	D (5) Identity of buyer/seller (if private transaction)
	Place "(X)" after each asset exempt from prior disclosure						First exempt transaction			
	NONE									
71	VANGUARD INT'L GR	C	DIV	K	T					
72	VANGUARD IN. CAP INDEX	D	DIV	L	T					
73	PILGRIM WW EM FUND		NONE	J	T					
74	ALLFIRST BANK M. MKT	E	INT	C	T					
75	ARK MONEY MKT	A	DIV	J	T					
76	CMA MONEY FUND	C	DIV	L	T					
77	C SCHWAB MONEY MKT	A	DIV	J	T					
78	C. SCHWAB MUNI M FUND	C	DIV	L	T					
79	FIRST UNION CHECKING	A	INT	J	T					
80	CHEVY CHASE BANK	A	INT	J	T					
81	VB INTEREST IN COTTAGE, ROCKLONG, LIMERICK, IRE.	A	RENT	J	W					
82	HOGAN & HARTSON L.L.P. INVESTMENT FUND	A	INT	J	W					
83	SHAW PITTMAN INVESTORS-2000 L.L.C.	A	INT	J	W					

1 Income Gain Codes (See Col. B1, D4): A=$1,000 or less; B=$1,001 - $2,500; C=$2,501 - $5,000; D=$5,001 - $15,000; E=$15,001 - $50,000; F=$50,001 - $100,000; G=$100,001 - $1,000,000; H1=$1,000,001 - $5,000,000; H2=More than $5,000,000

2 Value Codes (See Cols. C1, D3): J=$15,000 or less; K=$15,001 - $50,000; L=$50,001 - $100,000; M=$100,001 - $250,000; N=$250,001 - $500,000; O=$500,001 - $1,000,000; P1=$1,000,001 - $5,000,000; P2=$5,000,001 - $25,000,000; P3=$25,000,001 - $50,000,000; P4=More than $50,000,000

3 Value Method Codes (See Col. C2): Q=Appraisal; R=Cost (Real estate only); S=Assessment; T=Cash Market; U=Book Value; V=Other; W=Estimated

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	700	000	00	Notes payable to banks—secured		0	
U.S. Government securities—add schedule		0		Notes payable to banks—unsecured		0	
Listed securities—add schedule	2,107	021	21	Notes payable to relatives		0	
Unlisted securities—add schedule	2	000	00	Notes payable to others		0	
Accounts and notes receivable:		0		Accounts and bills due		0	
Due from relatives and friends		0		Unpaid income tax		0	
Due from others		0		Other unpaid tax and interest		0	
Doubtful		0		Real estate mortgages payable—add schedule	270	272	27
Real estate owned—add schedule	435	000	00	Chattel mortgages and other liens payable		0	
Real estate mortgages receivable		0		Other debts—itemize:		0	
Autos and other personal property	18	600	00				
Cash value—life insurance	11	911	06				
Other assets—itemize:	778	615	76				
SEE SCHEDULE							
				Total liabilities	270	272	27
				Net Worth	3,782	275	76
Total Assets	4,052	548	03	Total liabilities and net worth	4,052	548	03
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		0		Are any assets pledged? (Add schedule.)		NO	
On leases or contracts		0		Are you defendant in any suits or legal actions?		NO	
Legal Claims		0		Have you ever taken bankruptcy?		NO	
Provision for Federal Income Tax		0					
Other special debt		0					

Real Estate Mortgage Payable

On personal residence:	Fleet Mortgage $270,272.27 balance 30-yr. fixed, 8.125%

Other Assets

Mutual Fund	Value
Fidelity Contrafund	$32,560.97
Fidelity Freedom 2010	2,038.06
Fidelity Low-Priced	109,959.55
Fidelity Magellan	278,718.32
Fidelity OTC	37,417.88
Fidelity Overseas	29,209.21
Janus Fund	16,455.27
Janus Enterprise	15,617.88
Janus Worldwide	28,900.57
Pilgrim Worldwide Emerging	5,390.49
American Century Growth	10,988.95
Davis Series Real Estate Fund	12,394.00
Franklin Mutual Discovery Z	5,622.00
Franklin Mutual Beacon Z	11,324.00
GAM Global C	8,579.00
Lord Abbett Dev Growth	16,525.00
Fidelity Select Energy	14,749.86
Seligman Comm A	13,519.00
TR Price European Stock	8,220.20
TR Price Sci & Tech	7,916.49
Putnam Voyager	6,214.48
Putnam New Opportunities	5,696.58
CMA Money Fund	86,848.00
Hogan & Hartson L.L.P. Investment Fund	3,750.00
Shaw Pittman Investors-2000 L.L.C.	10,000.00

Description	Quote Symbol	Total Market Value
JDS UNIPHASE CORPORATION(M)	JDSU	$ 2,139.00
JOHNSON & JOHNSON(M)	JNJ	9,648.00
LORAL SPACE & COMMUN LTD(M)	LOR	2,370.00
LUCENT TECHNOLOGIES INC(M)	LU	4,004.00
MERCK & CO INC(M)	MRK	15,194.00
MICROSOFT CORP(M)	MSFT	271,000.00
MOTOROLA INCORPORATED(M)	MOT	13,995.00
NIKE INC CLASS B(M)	NKE	4,181.00
NOKIA CORP SPON ADR F(M) 1 ADR REP 1 NOKIA CORPS	NOK	54,704.00
NOVELLUS SYSTEMS INC(M)	NVLS	16,545.00
P M C SIERRA INC(M)	PMCS	4,160.00
PAC CENTY CYBERWKS ADR F(M) SPONSORED ADR 1 ADR REP 10 ORD	PCW	778.80
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Chairman HATCH. Then we will just start with questions, if it all right with you. Senator Leahy, I will turn to you.

Senator LEAHY. Well, thank you.

Mr. Roberts, over the last decade, the Supreme Court has issued a series of 5–4 decisions. These struck down legislation on federalism grounds. And some see this as a federalism crusade and a very activist Court. It has included—those who have seen laws to protect them struck down have included people with disabilities, older workers, children in gun-infested schools, intellectual property owners, and victims of violence motivated by gender. I am talking about such cases as *Alden* v. *Maine*, *Florida Prepaid, Garrison, Morrison, Lopez, Kimmel*. You are familiar with all those, I know. You have commented publicly on some of these decisions that have overruled Congressional enactments as unconstitutional.

My questions are these: Do you believe that they represent a departure or a continuing trend? And what has contributed to this dramatic shift, mostly in the past decade, in the Supreme Court's interpretations of the powers of Congress?

Mr. ROBERTS. Well, I think the first of the series of those cases, to limit myself to the State sovereign immunity cases, the *Seminole Tribe* case, the question whether it was a departure or a continuation was one of the issues that the Court addressed at some length, both the majority and the dissent. There was a particular prior precedent that seemed to have addressed the question of whether Congress under the Commerce Clause could override State sovereign immunity, and the majority explained why they didn't read the case that way; and if it was going to be read that way, it would be no longer controlling. And the dissent, of course, joined issue on that.

So the Court has addressed in that first case the question of whether it was a departure or a continuation, and I think recognized that, at least to some extent, to the extent they were moving away from that prior arguable precedent that the majority and the dissent read differently, it certainly can be regarded as a departure.

The cases since then have addressed different refinements on that issue, and that certainly is a continuation of the lead *Seminole Tribe* case. These cases construe the 11th Amendment, and this is not the first time in our history that the 11th Amendment has been a cause of some division. When the Supreme Court early in its existence decided *Chisholm* v. *Georgia* and held that a citizen of another State could sue the State of Georgia, that prompted a reaction in the country that led to the 11th Amendment. And then I think perhaps the key departure, if you will, came in the case of *Hans* v. *Louisiana*, where the Court held that although the 11th Amendment addressed only the issue of a citizen of another State suing a State, its reasoning, its principle applied when a citizen of the same State sued.

Senator LEAHY. Mr. Roberts, I hesitate to interrupt but—and I appreciate the history and I don't disagree with that. But I am wondering why so many in the past few years. Do you see this as a basic shift? Do you see this as a reaction to Congress? Do you see this as a trend that is going to continue?

Mr. ROBERTS. Well, I think there's—so many in the last few years is because, given that *Seminole Tribe* was sort of the first of the decisions—again, this is the debate, whether it's a departure or continuation. But it was the first of them, and the ones you've had following in the wake of it are kind of fleshing out that principle, the application of the 11th Amendment and the question whether it can be abrogated under the Commerce Clause, which was the issue in *Seminole Tribe* or some of the other principles.

Others cases I think may well follow, which is in a reaction to the sovereign immunity decisions, because the Court has recognized there are ways for the Federal Government to—I don't want to say get around the 11th Amendment, but address this issue without running afoul of it. Section 5 of the 14th Amendment—

Senator LEAHY. It seems that some of the cases coming down in the last few years are finding less and less ways—again, we are even going to intellectual property cases and copyright.

Mr. ROBERTS. Well, what you have—

Senator LEAHY. It is almost as though copyright was something new even though it is in our Constitution.

Mr. ROBERTS. Well, the patent and copyright clause, you know, in *Seminole Tribe* the issue was: Does the Commerce Clause allow the Federal Government to overrule it? Then you're sort of going down each of the different provisions. Does the Intellectual Property Clause allow Congress to overrule it? And they're addressing those.

But the Court has—

Senator LEAHY. Well, don't *Lopez* and *Morrison*—would you agree with Judge Noonan's contention that the ones most likely to overturn Congressional statutes are conservative judges?

He uses, I believe, *Morrison* and *Lopez* as an example of that.

Mr. ROBERTS. Well, I do not know that conservative or liberal justices are more likely to overturn laws. Certainly, in the Warren Court era, for example, I would suppose it would be the justices you would consider more liberal who were overturning laws.

Senator LEAHY. So you do not agree with Judge Noonan, then.

Mr. ROBERTS. I have not read his book. I know it is there.

Senator LEAHY. I would recommend it to you. It is not a beach book, by any means, but it is one where when it came out, I got it and read it. And I am not one who has always agreed with Judge Noonan, but the book is well worthwhile.

I do not, let me quickly add, Mr. Chairman, I do not get any percentage of the profits on the books, and I am not a noted author like you are, but I thought this was a—I also read his book.

But what worries me on it, on this whole issue of federalism, it seems to me the Court is going more and more to saying they would superimpose their views, an unelected court, on the views of an elected representative form of Government, the Congress, in disability areas, and intellectual property and others, and I worry about that, and I worry about that trend.

Now, I realize, on the court you are going on, of course you are restricted to stare decisis, but you know you are not going to have too many cases that fit on all fours, and there is a great deal of flexibility. It is very easy for somebody up for either a district or

a circuit court judgeship to say, "Well, I have to follow the dictates of the next higher court."

But usually when they get to the Circuit Court of Appeals for the District of Columbia, you do not have many cases that get all of the way up to you guys that they are on all fours, on something that the Supreme Court has ruled on. There is hardly any use for it.

You mentioned, in your earlier hearing, that in certain situations the Constitution is very clear. Then, you said there are certain areas where literalism obviously does not work. If you are dealing with the Fourth Amendment, something on unreasonable search and seizure, the text is only going to get you so far, well, then what does guide you? Take the Commerce Clause, take the spending power, what does guide you? Obviously, the text is not enough by itself, but I agree with you on that. You cannot go by the literal words on a number of these things in a changing economic world, but what does guide you? What is your lodestone?

Mr. ROBERTS. Well, certainly, as a circuit judge, of course, my lodestar would be the Supreme Court precedence, and they have volumes of them on how to interpret the Commerce Clause, fewer precedents on how to interpret the Spending Clause. I think there are going to be more important cases in that area in the future.

But starting with *McCullough* v. *Maryland*, Chief Justice Marshall gave a very broad and expansive reading to the powers of the Federal Government and explained that—and I don't remember the exact quote—but if the ends be legitimate, then any means chosen to achieve them are within the power of the Federal Government, and cases interpreting that, throughout the years, have come down.

Certainly, by the time *Lopez* was decided, many of us had learned in law school that it was just sort of a formality to say that interstate commerce was affected and that cases weren't going to be thrown out that way. *Lopez* certainly breathed new life into the Commerce Clause.

I think it remains to be seen, in subsequent decisions, how rigorous a showing, and in many cases, it is just a showing. It's not a question of an abstract fact, does this affect interstate commerce or not, but has this body, the Congress, demonstrated the impact on interstate commerce that drove them to legislate? That's a very important factor. It wasn't present in *Lopez* at all. I think the members of Congress had heard the same thing I had heard in law school, that this is an important—and they hadn't gone through the process of establishing a record in that case.

Other cases are different. But, again, as a circuit judge—

Senator LEAHY. We have got some cases, like the Disability Act, where we have had hundreds and hundreds of hearings around the country, thousands of pages of testimony, and the Court says, of course, we have not established a record. You sometimes think that there is picking and choosing.

For example, in your NPR interview, you talked about an originalist approach to Constitution interpretation, but how do you do that? Does a judge pick and choose, based on his or her own predilections, whether they are going to use the context of the 18th century or the context of the 21st century? Obviously, there are some things that it would be impossible, although Justice Scalia

said that the Constitution means today what it meant when it was written, and he even uses an 18th century dictionary to understand what the 1789 words meant.

Do you believe judges pick and choose? I mean, how do you do a literal interpretation?

Mr. ROBERTS. Well, we talked about this some at the first hearing. Again, the Supreme Court has given some guidance on particular areas and said that when you're interpreting this particular provision, this is the kind of approach you should use. The example I like to give is the Seventh Amendment. The Court has said: We take a very historical approach to deciding whether you have a right to a jury trial because of the way the Seventh Amendment is worded.

So even if I decided I am going to be a textualist or an originalist or whatever, I do not have the flexibility, when I get to a Seventh Amendment case. The approach, not just the particular results, but the approach is laid out as well there.

Now, when you get to the Eleventh Amendment, the one thing we know from the Supreme Court's decision is that strict adherence to a text doesn't give you what the Supreme Court says are the right answers. You have to look at the historical context a little more, and it varies with provisions, as we've said. There's a provision in the Constitution that says a two-thirds vote of the Senate is required. Well, even if you think provisions should be interpreted in light of evolving standards, that doesn't mean two-thirds can become three-fifths.

Unreasonable searches and seizures, that's a little more difficult to say just based on the text I know what's unreasonable and what's not. You have to look beyond the text in interpreting that.

Senator LEAHY. Thank you. I will have further questions. I will submit some for the record, and I know that the distinguished Chairman intends to have a Committee vote next week, and I would urge you to get answers back in time so that we can have a chance to review them in case there are follow-ups.

Mr. ROBERTS. Thank you, Senator.

Senator LEAHY. It is good to see you again.

Mr. ROBERTS. Thank you.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Kennedy. Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

Welcome back.

Mr. ROBERTS. Senator Kennedy, thank you.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. We welcome the nominee back to the Committee to continue the hearing which began 3 months ago.

The advice and consent function assigned to us by the Framers of the Constitution is vital to the proper functioning of our Government. It was a major feature of the structure of the Framer's design, not only for themselves, but for all future generations, and we do not sit here today merely to express our individual preferences about particular judges or even to express the preference of our constituents. We act today as inheritors of a great tradition and a

great responsibility to balance the powers of the Executive Branch in selecting the members of the Judicial Branch.

We were given the advice and consent power over judicial appointments so that the two elected branches—the Executive and the Legislative—would share coordinate and co-equal responsibility for the third branch, the undemocratic branch, in which the judges are insulated from us, and from the President and from the electorate by lifetime appointments.

But the Framers gave us insulation, too, so that we could exercise our functions, including the advice and consent function, fearlessly and freely, even when required to consider the actions of a popular President. We were given 6-year terms, longer the House, longer the President. We were given staggered terms so no more than a third of us would be elected at one time, and we were given the authority to set our own rules for the way we exercise our responsibilities, including advice and consent.

We had the constitutional obligation to assure the Judicial Branch remains free and independent, is not a political tool of the Executive, that its obligation is to the constitutional principles, constitutional rights which lie at the heart of our democracy. Our role is positive and proactive, not passive and reactive, regardless of whether the President shares our political or philosophical views.

And we, on the Judiciary Committee, have a unique role which we cannot fulfill unless we have ample opportunity in Committee to question the nominee and to discuss in detail how we think the advice and consent power should be exercised with respect to each nominee, and that process resumes today with respect to Mr. Roberts.

His nomination is a special one because he has been nominated for a special court. The D.C. Circuit makes the decision with national impact on the lives of all of the American people.

Its decisions govern the scope and the effectiveness of our Occupational Health and Safety laws, o of our consumer protection laws, of Federal labor laws, of fair employment laws, including race, gender, disability and discrimination cases, of workers' rights to organize, Clean Air Act rules, Freedom of Information rules, First Amendment rights in broadcast media and many other rights of individuals under the Constitution laws enacted by Congress, and so we must take special care with this and all other appointments to this court.

No one has the right to be appointed to any Federal appellate court. The burden is on the President and the nominee to demonstrate that the nomination should have our consent. The less weight the President places on the Senate's advice role, the more weight must be placed on our consent role. Because the District of Columbia has no Senators of its own, the usual prenomination consultation has not occurred, leaving an even heavier burden on the process that we conduct today. So let us approach it with the seriousness of purpose and deliberation it deserves.

Mr. Roberts, you responded to questions, the written questions, for which I am grateful. I would like to pick up on some of these.

You describe your judicial philosophy as insisting that judges confine themselves to adjudication of the cases before them and not legislate. You want judges to show an essential humility, grounded

in the limited role of an undemocratic judiciary, reflected in deference to legislative policy judgments and judicial restraint, not shaping policy.

Now, as you are well aware, in the recent years, we in Congress have made bipartisan legislative judgments about policy on issues vital to the public, based on extensive hearings and findings, yet we have had our policy discussion second-guessed by appellate judges.

How would you describe the presumption of validity that should attach to our actions, and what do you think we can do to insulate ourselves from this second-guessing on policy issues by judges who do not adhere to the humility and deference standard you prescribe?

And what in your writings, in your professional record, should demonstrate and reassure us that, as a judge, you would, in fact, act with the humility and deference to Congressional judgments which you claim is your philosophy?

Mr. ROBERTS. Well, the Supreme Court has, throughout its history, on many occasions described the deference that is due to legislative judgments. Justice Holmes described assessing the constitutionality of an act of Congress as the gravest duty that the Supreme Court is called upon to perform.

I'm familiar with those quotations because I've used them in briefs many times when I was in the Justice Department representing the United States and defending acts of Congress before the Supreme Court, and it's a principle that is easily stated and needs to be observed in practice, as well as in theory.

Now, the Court, of course, has the obligation, and has been recognized since Marbury v. Madison, to assess the constitutionality of acts of Congress, and when those acts are challenged, it is the obligation of the Court to say what the law is.

The determination of when deference to legislative policy judgments goes too far and becomes abdication of the judicial responsibility, and when scrutiny of those judgments goes too far on the part of the judges and becomes what I think is properly called judicial activism, that is certainly the central dilemma of having an unelected, as you describe it correctly, undemocratic judiciary in a democratic republic. And certainly the most gifted commentators we've had have struggled with that.

I think the doctrines of deference that have developed over the years, when you're assessing a legislative classification and an area that doesn't implicate a protected class like race or gender, disability, then all you have to show is a rational basis, and that shouldn't be too hard.

If you're in one of those other areas, the Court has developed a stricter scrutiny because they think in those areas there is more reason to probe a lot more deeply. But you asked what in my work sort of shows that, I guess I would look to the job I did when I was deputy solicitor general and was defending acts of Congress before the Supreme Court.

Senator KENNEDY. I am going to come back to the judicial deference in a minute. We had, in your exchanges with Senator Leahy about the power of the Congress, we have seen that the Supreme

Court has limited the ability to legislate under the Commerce Clause, the *Lopez* case.

And under Section 5 of the Fourteenth Amendment—that is the ADA case and the RFRA case—we had extensive hearings, listened to Republican and Democrat Attorneys General. There is no even suggestion at that time that we were not going to meet the constitutional requirement.

For some of us, the last great authority is the spending power, and the concern that many of us have is where you are going to be on this issue, further limitation of the power of the Congress in using the spending power. The Supreme Court has ruled on this, as you well know, that in the Dole case involving Congress, could, under the Spending Clause, condition Federal highway funds on States, raise the minimum drinking age. Rehnquist authored the opinion. White, Marshall, Blackmun, Powell, Stevens, even Scalia, agreed with that.

What is your own view about the authority in the Spending Clause and the power of Congress to use the Spending Clause to achieve its objectives? Is there anything, in terms of your own view, that would, in any way, find that that Spending Clause would be compromised to permit to—to undermine the Dole case?

Mr. ROBERTS. Well, first of all, of course, if I were to be confirmed, my own personal views would not be relevant. I would follow the Supreme Court precedent.

There is not a lot of precedent in this area.

Senator KENNEDY. The only problem is we have seen the changes and the difference in the interpretation by the Court in the Commerce Clause and in Section 5 of the Fourteenth Amendment. I mean, I was the Chairman of the Committee when we had those, and we listened, and there was not going to be a problem on that. And, of course, there were decisions that were made that reinterpreted past history on it.

I want to know whether we are taking a chance with you on the Spending Clause. That is the last real authority for us.

Mr. ROBERTS. You discussed the Dole case, *South Dakota* v. *Dole*, and in that case, the justices you listed reaffirmed Congress's power to say: If you're going to accept Federal funds, here's what you've got to do.

Senator KENNEDY. You are not troubled by that?

Mr. ROBERTS. No, it's a basic principle, and I would just point out, as an aside, you listed the justices who agreed with that, the justices who disagreed and dissented in *South Dakota* v. *Dole* were Justices Brennan and O'Connor. It is not necessarily the sort of division, sort of the typical conservative/liberal lines at all.

In *South Dakota* v. *Dole*, the Court referred to a prior precedent. I think it is the Stewart Machine case. And the argument has been made, well, aren't—the issue that I think the Court will address is are there limits on that; is it if you accept one dime of Federal money you have to do all sorts of things, even if they're not germane or proportional? Those are the two standards that had been developed in the prior cases. It wasn't an issue in *South Dakota* v. *Dole*.

If you didn't lower the drinking age, you lost highway funds. There was certainly a relationship between underage drinking and

highway accidents. So the Court ruled in that case that that was an appropriate proportional and germane response.

I worked on a brief in that case with my—I was an associate at that time—

Senator KENNEDY. You understand this is the law, and this would be the precedent that you would follow.

Mr. ROBERTS. The South Dakota case.

Senator KENNEDY. Yes, the Dole.

Mr. ROBERTS. Yes.

Senator KENNEDY. Let me move on, if I could. I do not mean to cut you off.

You talked about the judicial activism. Would you agree that activism can come from both sides of the ideological spectrum?

Mr. ROBERTS. Certainly.

Senator KENNEDY. Could you give us some examples of any of the appellate cases you believe that show impermissible activism on each side.

Mr. ROBERTS. Well, I cited in my written responses a case from California, an old case from the California Supreme Court, because I thought it was important to avoid criticizing binding Supreme Court precedent, in which the California Supreme Court—it was a Lochner era-type case—struck down, on substantive due process grounds, a California law that required employers to pay employees at certain intervals. Their reasoning was that employees are free to negotiate whatever agreements they want, and if they don't negotiate that, you shouldn't interfere with their liberty of contract.

Several Supreme Court cases follow the same principle in what people loosely call the Lochner era. I think that's an example of judicial activism. A policy judgment had been made by the State legislature in that case to address a real problem, the inequity in negotiating positions, the fact that employers were frequently not paying employees. I think there were a lot in the mining industry that were directly affected when wages were due, but many months later, and that was a policy judgment. I don't think that was a constitutional evaluation.

Senator KENNEDY. How about on the other side of the philosophical spectrum, do you see other examples? I mean, conservative/liberal, how would you find? Do you think there has been activism on both sides of the spectrum? And, if so, how would you define that?

Mr. ROBERTS. Well, I do think there has been activism on both sides. I haven't given any thought to a particular Supreme Court case that I thought exhibited liberal judicial activism. Again, I feel reluctant to criticize pending or binding—

Senator KENNEDY. Well, I can understand that, but we are trying to give life to your words. You talk about your professed philosophy of deference and humility as real and not just words. That is what I am trying to see from your own kind of experience, in response to those questions, whether you had examples that would give light to those words.

President Bush ran on a platform of selecting judges who will be like Justice Scalia and Justice Thomas. We all understand that meant judges who will be activists in reducing the power of Congress to protect people's rights. You must understand, as everyone

else does, that you were selected because those at the White House and the Justice Department knew your record and assured the President your decisions would please President Bush.

What can you tell us which will reassure us that you will not necessarily follow the lead of Justice Scalia and Thomas?

Mr. ROBERTS. Well, I will follow the lead of the Supreme Court majority in any precedents that are applicable there. And if Justices Scalia and Thomas are in dissent in those cases, I am not going to follow the dissent. I'm going to follow the majority.

Senator KENNEDY. Are there any cases which you believe that either one of them showed insufficient deference to Congress and became judicial activists?

Mr. ROBERTS. No, I haven't gone through and looked for particular occasions. If they were majority opinions by either of those justices, I would not feel it appropriate for me to criticize those because I would have to apply that majority opinion, whether I agree with it or not.

And I think it's important for the Committee to understand I have been asked questions in some areas I think because people wonder whether I'm going to follow a particular precedent or because they're concerned I might not, and in other areas the concern seems to be that I might, depending on whether a particular questioner is critical or supportive of those decisions.

I am going to follow both the decisions I agree with and the decisions that I don't agree with, regardless of any personal view.

Senator KENNEDY. Well, as you understand, I am not trying to get the outcome of your judgment on a particular fact situation, but I have listened for 40 years nominees say that they are going to follow the precedent and interpret the law, and yet every single day on just about every single court, they come out in different directions. Some are in the majority and some are in the minority, and they have sat here and given similar kind of answers.

And what I am trying to find out is what is behind those answers so that we can give some light to it. Because, as you understand, every single day people are applying what they understand is the law and applying what the President—and there is, in many, many instances, a wide difference. Certainly, there is even in the courts.

So our ability for—you give words about, particularly on the authority and responsibility of Congress, you are talking you would be a nonjudicial activist, and we are trying to find out what these words mean in terms of your own kind of life experience, either by your writings, your statements or your opinions about this, and that I think we are entitled to find out.

Mr. ROBERTS. I guess what I would point to, Senator—I'm obviously not a sitting judge. I don't have decisions—but I do have a history of litigating cases, and when you talk about the ability to set aside personal views and apply precedent without regard to personal ideology or personal views, that's something I've been able to do in my practice.

My practice has not been ideological in any sense. My clients and their positions are liberal and conservative across the board. I have argued in favor of environmental restrictions and against takings claims. I've argued in favor of affirmative action. I've argued in

favor of prisoners' rights under the Eighth Amendment. I've argued in favor of antitrust enforcement.

At the same time, I've represented defendants charged with antitrust cases. I've argued cases against affirmative action. And what I've been able to do in each of those cases is set aside any personal views and discharge the professional obligation of an advocate.

And I would urge you to look at cases on both sides. Look at the brief, look at the argument where I was arguing the pro environmental position. Take a brief and an argument where I was arguing against environmental enforcement on behalf of a client. See if the professional skills applied, the zealous advocacy is any different in either of those cases. I would respectfully submit that you'll find that it was not.

Now, that's not judging, I understand that, but it is the same skill, setting aside personal views, taking the precedents and applying them either as an advocate or as a judge.

Senator KENNEDY. Well, now, I hear you on this. But, every day, responsible disagree with one another, and there is an implicit band of discretion in the decisions before them. In many cases, there is an explicit role for judicial discretion. That is what I am interested in. That is what I am interested in.

Do you really believe that the judge's sensitivity to the purpose and the result of the laws they interpret is irrelevant to the way they will exercise their discretionary review of other judges or review other judge's exercise of discretion. I am interested in what in your background or expertise demonstrate you will be sensitive to the human impact of your decisions.

You are going to be a judge that is going to be making judgments and decisions on these range of issues—health and safety, consumer protection, the labor laws, fair employment, gender, race, disability, Clean Air, workers' rights, Freedom of Information, a whole range, a whole range, a whole range.

What can you tell us, in your own experience, would reflect on your judgment in being sensitive to the human conditions that are going to be involved in the great numbers of cases there are going to be for that?

Mr. ROBERTS. I don't know if this is responsive or not because, of course, when you are an advocate, you're advocating a client's position, and you're concerned about a particular human impact and not others. Certainly, when you're a judge, you want to apply the law and, yes, you have to be sensitive to the impact of your decision, but at the same time apply the law fairly without regard—what the judicial oath says—without regard to persons.

At the same time, I appreciate the fact that the law has impact on people in society, and I think it's, for example, an important obligation of a lawyer to do pro bono work, to address the situation of people impacted by the law who don't have the resources to respond.

Senator KENNEDY. Maybe you can tell us. Talk about that.

Mr. ROBERTS. One of the cases I handled before the D.C. Court of Appeals was *Little* v. *Barry*. I represented a class of general public welfare recipients in the District who had had their welfare benefits terminated, and we argued, and argued on the basis of *Goldberg* v. *Kelly*, a landmark civil rights case, that those individuals

were entitled to individualized hearings before their welfare benefits were terminated. I argued that before the court of appeals on a pro bono basis. And that was a case where the law had a very real and direct impact on the most needy citizens in our country, and I was happy to take that case on behalf of that class of welfare recipients.

Senator KENNEDY. If there are others, I would be interested in it.

Mr. ROBERTS. Well, there are other—

Senator KENNEDY. We can talk now, but there is going to be this band of discretion. You are going to apply the law, as you have outlined. You can be on the pro and con. You have answered that kind of question, but there is that band of discretion which judges are exercising, and this court makes judgments on matters that have enormous impact in terms of the quality of life and rights of individuals. And I am looking for that ingredient in your kind of life experience that would help to show that the human element that is being considered in this is something that you both understand, appreciate and would be concerned with.

Mr. ROBERTS. Senator, there are other examples. The first case I argued in the Supreme Court was on a pro bono basis on behalf of an individual facing the almighty might of the U.S. Government, going after him criminally and civilly.

I regularly participate, our firm has a Community Services Department that does pro bono work. Whenever there is an appeal involved, I and members of our appellate group help prepare. We have recently done issues involving termination of parental rights. I can't imagine a more direct impact on an individual. Minority voting rights is another case we participated in, in which we prepare the people arguing pro bono for the appeals.

I do a street law program that I think is important.

Senator KENNEDY. With the law school or with—

Mr. ROBERTS. It's done in conjunction with the Supreme Court Historical Society. Every summer high school teachers who are teaching about the courts come to learn a little bit about it, and I talk to them about how the Supreme Court functions, and it's a very, I've always found it very rewarding to sit with the high school teachers and hear what they, the difficulties they have in communicating with their students about the justice system.

Senator KENNEDY. That is very, I am interested in it, and I appreciate your response to these questions and anything else on this would be useful.

I just had one final. I know I am out of time, but I have one final question, Chairman.

In your answers to the committee's questions, you indicate your understanding the Framers insulated the judges from the public pressures. Do you also understand and agree that in keeping the Senate small and giving us the staggered terms, letting us make our own rules for exercising the key responsibility of the advice and consent also intended to insulate us to exercise our authority to prevent the Executive Branch from going too far in the assertion of their powers and the exertion of the Executive Branch powers?

Mr. ROBERTS. Well, I don't know about in particular reference to advice and consent, but certainly, as I understand the structure of

the Constitution, the Senate was, as you indicated earlier, given a longer term, given staggered terms because it was supposed to exercise something of a restraining influence on the more popularly responsive branches of government.

Senator KENNEDY. This is a well-rooted responsibility, as I understand. I mean, we have seen at times when you can take—the most obvious historic would be the court-packing by President Roosevelt, when there would be an important responsibility by the Congress to stand up to a President, actions of the Executive Branch. And as someone who is a constitutional authority, such as yourself, where of that historic responsibility and role and thought about it, if there is anything you can tell—

Mr. ROBERTS. Well, I don't claim to be a constitutional authority, but certainly the Senate obviously has a critical responsibility in this area. My memory may not be correct, but I believe original drafts of the Constitution provided that the Senate would actually be appointing the judges.

[Laughter.]

Senator KENNEDY. There you go. Did you hear that, Orrin?

Chairman HATCH. That is what they think they are doing now.

[Laughter.]

Mr. ROBERTS. Cooler heads prevailed before the end.

Chairman HATCH. I am glad you added that last part.

Mr. ROBERTS. But I am happy to be scrutinized under whatever standard the Committee or the Senate wishes to apply.

Senator KENNEDY. Thank you very much.

Chairman HATCH. We will turn to Senator Durbin now.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman.

Mr. Roberts, thank you for coming back. I am glad we had a chance for this hearing, and I thank the Chairman. I think we have reached an accommodation here that may be helpful in moving this Committee forward in a better environment.

I understand my fate in life as a back-bencher in the minority in the Senate with a Republican President, that nominees that come before us are not likely to share my political philosophy. That is a fact of life.

I also understand that I have a responsibility under the Constitution to ask questions of those nominees to satisfy my judgment that they would be well-suited to serve on the Federal bench. Many of the nominees have been forthcoming, and open, and candid in their answers, others have not. As a politician, I can certainly identify with that. I have danced around questions in my life, Waltz steps, Polka steps, Samba steps, I try them all when I do not want to answer a question.

And now I am going to ask you a question, just a limited number of questions relating to some dance steps I see in your answers here.

So, in 1991, you are in the Solicitor General's Office, and in *Rust* v. *Sullivan*, you end up signing on to a brief which calls for overturning *Roe* v. *Wade*, one of the more controversial Supreme Court cases of my lifetime. When we asked repeatedly in questions of you

what your position is on *Roe* v. *Wade*, you have basically danced away and said, "No, no, my personal views mean nothing. I am just going to apply the law."

This, in my mind, is evasive. I need to hear something more definitive from you. Was the statement in that brief an expression of your personal and legal feelings about *Roe* v. *Wade*, that it should be repealed?

What is your position today, in terms of that decision?

Mr. ROBERTS. The statement in the brief was my position as an advocate for a client. We were defending a Health and Human Services program in which the allegation was that the regulations issued by the Department of Health and Human Services burdened the constitutional right to an abortion recognized in *Roe* v. *Wade*.

At that time, it was the position of the administration, articulated in four different briefs filed with the Supreme Court, briefs that I hadn't worked on, that *Roe* v. *Wade* should be overturned.

Now, if *Roe* v. *Wade* were to be overturned, the challenge to the regulations that we were tasked with defending would fail, and so it was appropriate in that case to include that argument. I think it was all of one or two sentences. The bulk of the brief was addressed to why the regulations were valid, in any event.

But since that was the administration position, and the administration was my client, I reiterated that position in the brief because it was my responsibility to defend that HHS program.

Senator DURBIN. Understood. I have been an attorney, represented a client, sometimes argued a position that I did not necessarily buy, personally. And so I am asking you today what is your position on *Roe* v. *Wade*?

Mr. ROBERTS. I don't—*Roe* v. *Wade* is the settled law of the land. It is not—it's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision. Accordingly, it's the settled law of the land. There's nothing in my personal views that would prevent me from fully and faithfully applying that precedent, as well as *Casey*.

Senator DURBIN. Then, let me ask you this question. You make a painful analogy, from my point of view, when you suggest that calling for the overturn of *Roe* v. *Wade* was not any different than the Government calling for overturning *Plessy* v. *Ferguson* and *Brown* v. *Board of Education*. *Plessy* v. *Ferguson*, separate, but equal, was really the basis for racial discrimination and segregation in America for decades.

I hope that that is just a strict legal analogy and does not reflect your opinion of *Roe* v. *Wade* policy compared to *Plessy* v. *Ferguson* policy.

Mr. ROBERTS. Senator, the question I was asked, were there other occasions in which the Department—if I am remembering correctly—if there were other occasions in which the Solicitor General had urged that a Supreme Court precedent be overturned, and that is just—*Brown* v. *Board of Education* is the most prominent one. The answer wasn't meant to draw a particular substantive analogy.

Senator DURBIN. And I will not push any further because I was hoping that is what your response would be.

So in the panel that you were on the last time before us, Justice Deborah Cook of the Ohio Supreme Court was one of the members of the panel, and I sent a written question to her, which I sent to you. And the basic question goes into the cliches we use in this Committee about strict construction, and where are you, and how do you compare yourself to Justice Scalia and Justice Thomas, and then try to draw some conclusions.

Now, as oblique as those questions may be, that is as good as it gets in this Committee. That is as close as we can get to trying to find out what is really ticking in your heart when it comes to your judicial philosophy.

And her answers were, as I have said, painful, but painfully honest. She said she was not a strict constructionist, but she conceded in answers to question that if the Supreme Court had a majority of strict constructionists, it is not likely they would have reached the same conclusion in *Brown* v. *Board of Education*, the *Miranda* decision or *Roe* v. *Wade*. I thought that was the most honest answer we have been given by a Bush nominee, and I have used it as kind of a standard ever since to just see how far other nominees would go in their candor and honesty.

I found your answer evasive. When I look at what you had to say about your philosophy, you said, "In short, I do not think beginning with an all-encompassing approach to constitutional interpretation is the best way to faithfully construe the document," and then you went on to say I am not going to draw any conclusions on the Supreme Court decisions.

I need more. I need to hear more from you about where you are coming from and, at least hypothetically, if you agree that those who call themselves strict constructionists would not likely be in the vanguard of the socially important Supreme Court decisions that we have seen in Brown v. Board, *Miranda* or *Roe* v. *Wade*.

Mr. ROBERTS. Well, Senator, I don't know if that's a flaw for a judicial nominee or not, not to have a comprehensive philosophy about constitutional interpretation, to be able to say, "I'm an originalist, I'm a textualist, I'm a literalist or this or that." I just don't feel comfortable with any of those particular labels. One reason is that as the Constitution uses the term "inferior court judge," I'll be bound to follow the Supreme Court precedent regardless of what type of constructionist I, personally, might be.

The other thing is, in my review over the years and looking at Supreme Court constitutional decisions, I don't necessarily think that it's the best approach to have an all-encompassing philosophy. The Supreme Court certainly doesn't. There are some areas where they apply what you might think of as a strict construction; there are other areas where they don't. And I don't accept the proposition that a strict constructionist is necessarily hostile to civil rights.

For example, Justice Black thought he was a strict constructionist of the First Amendment. No law means no law. Well, that's a very sympathetic view to people who have First Amendment claims. I can see the argument that someone who is going to be a strict constructionist on the Eleventh Amendment might result, come forward with decisions that are more acceptable to some of the questions Senator Leahy was raising earlier. The Eleventh Amendment says the citizen of another State, so how does it apply

with citizen of the same State if you are going to be a strict constructionist?

The Supreme Court doesn't apply a uniform and consistent approach. I certainly don't feel comfortable with any uniform or consistent approach because the constitutional provisions are very different. You have a very different approach in saying how are you going to give content to the Fourth Amendment prohibition on unreasonable searches and seizures. That's one thing. It doesn't mean that you apply the same approach to a far more specific provision like the Seventh Amendment.

Senator DURBIN. That is a reasonable answer. It is also a safe answer, and I am not going to question your motive in that answer. I accept it at face value as being an honest answer, but it raises the question that comes up time and again. If this job is so automatic, if the role of a judge is strictly to apply the precedent, then, frankly, I think we would have as many Democrats being proposed by the Bush White House as we do Republicans, but we do not. They understand that it is not automatic, it is not mechanical.

There are going to be discretionary and subjective elements in decisions, and that is why we have people coming from major law firms who have made a living representing rather wealthy clients. We have people who are conservative in their philosophy. We have many, many members of the vaunted Federalist Society, which my Chairman is so proud to be part of, all of these people come before us because I think, when it gets beyond the obvious, we understand that there is subjectivity here.

The last question I will ask you is a quote, and you better take care when you get quoted, but you were asked about the Rehnquist Supreme Court in 2000, for your opinion.

Now, many people had characterized it as a very conservative Court, but you said, "I don't know how you can call the Rehnquist Court conservative."

When asked specifically about the 1999–2000 Supreme Court term, a term in which the Court rendered numerous, highly controversial decisions, you said, "Taking this term as a whole, the most important thing it did was to make a compelling case that we do not have a very conservative Supreme Court."

What were you talking about?

Mr. ROBERTS. Well, that was the labels that people had been tossing about, and I thought that it didn't help public understanding of what the Court does to not look beyond that label. In that particular term, 1999 to 2000, some of the things the Supreme Court did was reaffirm the constitutional basis of the *Miranda* rule; strike down a restriction on partial-birth, late-term abortions in the case out of Nebraska; strike down, as violating the First Amendment, the giving of an invocation at school. In other words, reinforced *Miranda*, reinforced *Roe*, reinforced the ban on school prayer.

It issued the *Apprendi* decision, a great benefit to criminal defendants in sentencing. If there is going to be an enhancement of your sentence, you have all of the constitutional rights before that enhancement can be applied.

In the Nixon case out of Missouri, it even upheld constitutional limits on campaign contributions. In the Playboy Enterprises case,

it struck down an act of this body, this Congress, trying to regulate indecent speech. And I'm thinking, sitting there, well, there are six cases, every one of which—again, the labels are not helpful—but every one of which you would describe not as a conservative Court. It's a conservative Court giving criminal defendants a big break, reaffirming *Miranda*, reaffirming *Roe*, striking down regulation of indecent broadcasts, striking down school prayer.

Now, you can tell, if you're being interviewed for public consumption, you can say it's a conservative Court, it's a liberal Court. I think if you want to educate a little bit about what the Court does, they need to know that even when other people would say this is a conservative Court, there are those decisions. It's much more complicated than those labels.

Senator DURBIN. Thank you, Mr. Roberts.

Mr. ROBERTS. Thank you, Senator.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman HATCH. Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

I would like to welcome Mr. Roberts. Many of us wanted to have you back before the Committee for quite some time. So I want to thank the Chairman for scheduling this hearing. I hope this is a first step toward restoring some measure of regular order to our consideration of judicial nominations, and I do think, Mr. Chairman, if we work together in good faith it will be possible to bridge some of the differences we have on the issues.

Mr. Roberts, I enjoyed your reference to the Missouri Shrink case, which I agree is an important case.

Let me ask you something else. You were interviewed on the radio in 1999 and said, "We have gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a Federal law, whether it is the Violence Against Women Act or anything else. The fact of the matter is conditions are different in different States, and State laws can be more relevant is I think exactly the right term, more attune to the different situations in New York, as opposed to Minnesota, and that is what the Federal system is based on."

That is your quote, and I certainly do not disagree with some of the sentiments of it, but could you elaborate a little bit on the statement. Were you referring there simply to the constitutional limits on Congress's power that were being asserted in the case that challenged VAWA or were you saying that Congress was going too far in trying to address Violence Against Women, even if the Court were to hold that it could constitutionally take the action that it did?

Mr. ROBERTS. I didn't have any particular reference. I think that it was the VAWA case that had come up, if I am remembering the interview correctly, and I didn't mean to be passing either a policy or a legal judgment on the general policy question. I just wanted to make the basic point, and I'm sure it is a judgment that Senators deal with every day, that simply because you have a problem