Law Professors' Letter Regarding Supreme Court Nominee John G. Roberts, Jr.

September 12, 2005

Dear Senate Judiciary Committee Member:

We write in opposition to the nomination of Judge John G. Roberts as Chief Justice of the United States. His legal ability, experience and professional credentials are very strong, and we respect that elections matter; President Bush is entitled to select a qualified nominee. Our concern is about this nominee's impact on the next several decades of jurisprudence, and our sense of how Judge Roberts is likely to affect the lives of LGBT Americans. A review of what is available from his record indicates that Judge Roberts's views, as revealed by his own writing, are not consistent with the preservation of the basic constitutional and statutory protections that have protected LGBT Americans. We therefare urge you to ensure yourselves that we are wrong, or to oppose his nomination.

Judge Roberts has belittled the constitutional right to privacy. As a Reagan Administration attorney, Roberts wrote that courts have intruded "into areas properly and constitutionally belonging to the other branches or to the states."[1] Although he declined to name specific cases that so intruded, he wrote that courts had assumed functions belonging to the states through "so-called `fundamental rights' analysis.' Roberts strongly implies that privacy is not in fact a fundamental right with constitutional support:

> Courts cannot, under the guise of constitutional review, re-strike balances struck by the legislature or substitute their own policy choices for those of elected officials. Two devices which invite courts to do just that are "fundamental rights" and "suspect class" review. It is of course difficult to criticize "fundamental rights" in the abstract. All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution.[2]

Alternatively, although a doctrine he does support—"judicial restraint"[4]—sounds in the abstract worthy, it is also the potential abandonment of personal liberties to the whims of legislatures. We find no support in the history and text of the Constitution, nor in the precedents developed since *Marbury v. Madison,*[5] for this limitation of the Court's role.

The combination of questioning a basic right to privacy, and his strong advocacy of "judicial restraint", gives us pause. Judge Roberts's failure to recognize the right to privacy has a potentially damaging impact on LGBT Americans. The case of *Lawrence v. Texas,*[6] in which the Court struck down criminal sodomy laws, cites privacy cases *as* the legal underpinning of its holding. Although the Court recognized a Due Process right to "liberty" as opposed to "privacy" in its opinion, it is

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[1] "Draft Article on Judicial Restraint," from Holdings of the National Archives and Records Admin. Record Group 60. Accession #60-89-372. Box 30 of 190 Folder: John G. Roberts Misc.

[2] *See id.*

[3] *Id.*

[4] *See id.*

[5] 5 U.S. 137 (1803).

[6] 539 U.S. 558 (2003).

clear that both *Lawrence* and the privacy cases protect personal autonomy from intrusion by the state.

Judge Roberts intimates approval of Congress stripping the Federal Courts of jurisdiction to review entire classes of cases. Our concern that Judge Roberts would not enforce constitutional protections is reinforced by his writings on "court stripping" statutes. When Roberts was serving in the Reagan Justice Department, he authored a memorandum setting forth arguments in favor of legislation to strip courts of jurisdiction to hear certain classes of constitutional claims. Although the memorandum makes clear that it is an advocacy piece drafted at the behest of his superiors, a later writing indicates that Roberts apparently agrees that they are constitutional. In commenting on an analysis in which then Assistant Attorney General Theodore Olson wrote that opposing the bills on constitutional grounds would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises, and Brinks!"[8] It appears from this writing that Roberts believed that the Constitution *should be read* to permit Congress to eliminate the Court's constitutional function, thereby narrowing litigants' avenues for relief from unconstitutional legislation. We disagree with this conclusion as a matter of constitutional law. And, as a matter of realpolitik, recent "court stripping" legislation from Congress has been targeted at endangering the constitutional rights of LGBT Americans.

Support for "court stripping" legislation is particularly relevant to this nomination for two reasons. First, such legislation is once again darkening the halls of Congress. Two court-stripping bills —one regarding the Pledge of Allegiance, one regarding challenges to the Defense of Marriage Act— passed the House of Representatives in 2004. The Court may see challenges to similar legislation in the upcoming years, and Judge Roberts's record raises concerns that he would uphold legislation that would fundamentally alter the system of checks and balances without which constitutional protections are functionally meaningless.

Support for the elimination of judicial review entirely is deeply troubling for those who view the federal courts as arbiters of constitutional protection. We are deeply troubled by the notion that whole classes of law and protection may be carved from Article III review.

Judge Roberts's cramped view of the Commerce Clause is deeply troubling. Judge Roberts's reported opinion involving the Commerce Clause, and Congress's authority to regulate broadly relying on Commerce Clause power, is cause for great concern. The enforcement of modern federal civil rights statutes rely in part on a robust Commerce Clause power. The recent activism of the Supreme Court in questioning Congress' authority to rely on the Commerce Clause for jurisdiction is already deeply troubling; Judge Roberts is likely to weigh in on the side of conservative activists in further limiting federal authority.

In a dissent from the denial of *en banc* rehearing in *Rancho Viejo, LLC v. Norton,*[9] Judge Roberts took a position that, if adopted by a majority of the Court, would severely limit Congress' authority to address national concerns. In that case, the D.C. Circuit upheld the Endangered Species Act as applied to a housing developer's challenge to limitations imposed to protect an

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[8] *See* Theodore Olson, "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases." April 12, 1982. With handwritten comments by John G. Roberts. Roberts is apparently referring to Harvard Law Professor Lawrence Tribe, New York Times columnist Anthony Lewis, and then-ABA President David Brink;, who opposed such bills.

[*] "Marriage Protection Act," H.R. 3313, passed 233-194 on July 22 2004 (stripping jurisdiction over challenges to the "Defense of Marriage Act"); Pledge Protection Act, H.R. 2028, passed 247-173 September 23, 2004 (stripping jurisdiction over cases involving the Pledge of Allegiance).

[9] *See* 334 F.3d 1158 (D.C. Cir. 2003).

endangered species that lived only in one state. Roberts's dissent encouraged completely re-framing the way that courts review challenged statutes under the Commerce Clause, striking down any regulations on intrastate activities even if they are a part of a larger scheme of regulation of a class of activities affecting interstate Commerce. This approach—which the Court recently rejected in *Gonzales v. Raice—would* undermine Congress's authority to enact civil rights, environmental, and workplace protections.

The enforcement of the Employment Non-Discrimination Act and the Local Law Enforcement Hate Crimes Prevention Act" when passed, and other civil rights statutes, relies in part on a robust view of Congress's Commerce Clause authority. This view is entirely lacking in Judge Roberts's record.

Full disclosure of relevant documents and rigorous questioning of the nominee is essential to fulfill the Senate's constitutional role of advice and consent. A Supreme Court nominee is not entitled to a presumption of confirmation, nor does the nominating president enjoy an unfettered right to interfere with the Senate's constitutional role in the judicial selection process. We are particularly troubled that the Senate has had no access to relevant documents relating to Judge Roberts's service as Principal Deputy Solicitor General from 1989 to 1993.

In light of this severe impediment to the Senate's ability to assess Judge Roberts's record, we remind that a Senator may ask, and the nominee must answer, questions relating to the nominee's philosophy with regard to already-decided cases. In the words of Second Circuit judge Roger J. Miner:

> "If I were a Senator, I would not tolerate evasion or stonewalling in answering my questions. While a nominee may not disclose how he or she would decide a particular case, there are a number of questions that he or she should be required to answer — questions respecting an understanding of history; questions about important prior decisions of the Court; questions designed to elicit an understanding of the current issues confronting the Court; questions of approach to judging, of philosophy, of adherence to *stare decisis*. I would not accept an answer that obviously is untrue, such as one that denies having taken any position on a controversial issue before the Court that is under discussion by the entire nation. If I could not get the answers I wanted, I would vote 'no?'"[1]

Judge Roberts has expressed on numerous occasions that the courts have improperly intruded into matters appropriately dealt with by the legislatures. Although he has declined to enumerate such cases in most instances, in his capacity as a litigator before the Court he has included *Roe v. Wade* among those cases. It is therefore reasonable both to ask him to name decided cases with which he disagrees on the grounds of "judicial restraint" and to seek an answer, both with regards to *Roe* and other cases with similar constitutional underpinnings.

For all of these reasons, we cannot support Judge Roberts, and urge you, consistent with your constitutional obligation under the Advice and Consent, to withhold your support as well. His personal comportment and credentials are no substitute for the troubling body of evidence before us.

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[m] 125 S.Ct. 2195 (2005)(upholding federal government's power to prosecute users of medical marijuana who grew the drug for their own consumption).

H.R. 2662.

[1] Hon. Roger J. Miner [Judge, Second Circuit Court of Appeals, nominated to district court and elevated to Second Circuit by Pres. Reagan], *Remark: Advice and Consent in Theory and Practice,* 41 AM. U. L. REV 1075, 1083-84 (1992).

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The Honorable Patrick Leahy
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Dear Senators Specter and Leahy,

As law professors from across the United States, we write to express our opposition to the confirmation of Judge John Roberts to the United States Supreme Court.

The record made available to date suggests that Judge Roberts holds a limited view of Congress' authority to enact key worker, civil rights and environmental protections and a similarly narrow view of the vital role our courts and our government play in safeguarding individual rights, especially civil and women's rights. In contrast, Judge Roberts holds an expansive view of presidential power and law enforcement authority. If transformed into decisional law, these views, taken together, could produce a government with little power to protect its citizenry and a citizenry with greatly reduced power to protect itself from the abuses of government and other powerful interests. In other words, they could produce a national order contrary to the promises of our Constitution and the rights it guarantees.

Congress' authority to correct nationwide problems. In his very first opinion on the bench, Judge Roberts dissented to express an exceedingly restrictive view of Congress' authority to enact important regulatory legislation. He suggested that Congress did not have the power, under the Constitution's Commerce Clause, to protect what he called a "hapless toad" through endangered species laws. No court has ever declared an application of the Endangered Species Act unconstitutional. Judge Roberts' apparent view of Congress' authority potentially threatens a wide swath of legislation rooted in the Commerce Clause, including civil rights safeguards, minimum wage and maximum hour laws, clean air, clean water, and workplace safety protections.

Judicial authority to protect individual rights. During his years of service in the administrations of Presidents Reagan and George H.W. Bush, under the banner of so-called "judicial restraint," Judge Roberts helped push legal policies that sought to weaken the vital, historic role of the federal courts as an enforcer of individual rights, including, prominently, the rights of racial minorities and women.

Judge Roberts has shown a lack of appreciation for the importance of remedying this country's shameful legacy of racial discrimination. Less than twenty years after the enactment of the Voting Rights Act, he opposed reinvigorating Section 2 following the Supreme Court's decision

in *Mobile v. Bolden*, characterizing the revision as a "radical experiment."[1] Judge Roberts argued that "violations of § 2 should not be made too easy to prove" since doing so would "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[2] Fortunately, Congress overwhelmingly rejected Judge Roberts' position, leading to increased minority representation in state and local governments. Judge Roberts also defended the constitutionality of legislation stripping the Supreme Court of its ability to hear desegregation cases and legislation stripping the lower federal courts of their authority to remedy school desegregation with busing. In addition, he condemned a key Supreme Court decision striking down a Texas law allowing schools to deny admission to the children of undocumented aliens; called the Fair Housing Act "government intrusion"; advised the Justice Department not to seek standard remedies in job discrimination cases – offers of employment and backpay – calling them "staggering"; criticized a long-standing executive order requiring federal contractors to set flexible, reasonable goals and timetables, not "quotas," for hiring more minorities to correct unlawful workplace disparities; asserted that an affirmative action program failed because it "required the recruiting of inadequately prepared candidates"; and as Acting Solicitor General, with final decision-making authority over the government's position, sought to invalidate the Federal Communication Commission's affirmative action program in broadcast licensing, an extremely rare move given that the Solicitor General's Office, pursuant to its statutory mandate, almost always defends federal government policy.

Judge Roberts has similarly taken positions that would undermine women's rights, particularly in the areas of sex discrimination and reproductive choice. While in the Reagan Justice Department, he advocated several positions that would have limited the effectiveness and scope of Title IX, the law barring discrimination against women in education. He also asserted a cost defense to gender discrimination and argued that the Constitution's equal protection clause should not give heightened constitutional protection to women facing government-sponsored sex discrimination – positions the Supreme Court had rejected. As associate White Counsel in the Reagan White House, Judge Roberts derided bipartisan state and national efforts to fix what he referred to as the "purported gender gap"[3] in job pay, confidently dismissing men's pay advantage over women as attributable to factors like seniority and women leaving the workforce for family reasons. Later, as deputy Solicitor General, he co-authored a brief arguing that Title IX did not permit a girl who was repeatedly sexually harassed by her teacher to sue for compensatory damages, an argument the Supreme Court rejected, in part for leaving the girl "no remedy at all."

Judge Roberts' record on reproductive choice is also of great concern. In a brief and on public television, he argued, as principal deputy Solicitor General, that a civil rights law did not protect women from harassment by violent anti-abortion demonstrators at abortion clinics. He also wrote in a government brief that *Roe v. Wade "was wrongly decided and should be overruled."*

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[1] Memorandum from John Roberts to The Attorney General, Edward Schmultz, W. Bradford Reynolds, Stan Morris, Bruce Fein, Kenneth Starr, Thomas DeCair, and Tex Lezar re: "Response to Vernon Jordon on the Voting Rights Act", attaching draft article, (Nov. 17, 1981) (on file with Alliance for Justice).

[2] Memorandum from John Roberts to The Attorney General re: "Voting Rights Act: Section 2", attaching a statement entitled "Why Section 2 of the Voting Rights Act Should Be Retained Unchanged" (Dec. 22, 1981) (on file with Alliance for Justice).

[3] Memorandum from John G. Roberts to Fred F. Fielding re: Draft "Status of the States" 1982 Year End Report (Jan. 17, 1983) (on file with Alliance for Justice).

Judge Roberts has taken similarly regressive positions on a host of other federal rights and protections. While in the Reagan Justice Department, he dismissed what he referred to as the "so-called right to privacy" and generally objected to the notion of "fundamental rights," with specific criticism of *Griswold v. Connecticut*. He also referred to litigation under 42 U.S.C. § 1983, a landmark law, as the "most serious federal court problem" and decried "the damage" wrought by the Supreme Court's holding that federal statutory rights were enforceable under Section 1983. As principal deputy Solicitor General, without invitation from the Supreme Court, he weighed in on two cases seeking to restrict Section 1983's scope, asserting in one that federal courts had no authority to enforce federal Medicaid law and, in the other, that they could not enforce the federal law requiring state child welfare agencies receiving federal funds to make reasonable efforts to keep or reunite foster children with their natural families. Judge Roberts also defended the George H.W. Bush administration's position that private citizens have limited rights to enforce environmental protections, even where Congress tries to provide them broader enforcement authority.

Expanding Executive Authority. On the bench and in the Reagan and George H.W. Bush administrations, Judge Roberts has accorded great deference to the authority of both the president and law enforcement. As to presidential power, he joined a D.C. Circuit decision adopting the Bush administration's position that detainees designated as "enemy combatants" may be tried for war crimes before military commissions lacking basic procedural safeguards, ruling that the Geneva Convention, which provides trial protections to prisoners of war, is unenforceable in U.S. courts and, alternatively, did not apply to the detainees. In addition, disagreeing with the other judges on a three-judge panel, Judge Roberts adopted the Bush administration's position that a presidential order validly eliminated lawsuits against Iraqi officials brought by American POWs for torture they suffered during the first Gulf War. During his service in the Reagan administration, Judge Roberts vigorously defended the unfettered exercise of presidential power. Among other things, he embraced the rather extreme libertarian fantasy of reconsidering the constitutionality of and abolishing independent regulatory agencies – like the Federal Reserve Board, the National Labor Relations Board, the Consumer Products Safety Commission and the Occupational Safety and Health Commission – on the theory that they usurp powers reserved for the president.

Judge Roberts' overly deferential view of law enforcement authority is also noteworthy. On the bench, he has rejected several significant claims of improper search and seizure, dissenting in one case where the majority reversed the conviction, breaking from precedent in another to justify the search, and denying relief in a third to a 12-year-old girl who was arrested and detained for eating a french fry on the subway, even though an adult caught doing the same thing would have been given a citation. This limited judicial record is a natural extension of what Judge Roberts advocated in the Reagan and first Bush administrations. As the principal deputy Solicitor General, according to the *Wall Street Journal*, "his office chose to get involved in dozens of state cases to limit the rights of criminal defendants."[4] For instance, the office sought to erect new procedural hurdles to federal *habeas corpus* review of state convictions and to bar certain kinds of *habeas* claims from being heard, including alleged *Miranda* violations and claims of actual innocence. As an advisor in the Reagan administration, Judge Roberts

[4] Jess Bravin, *Judge Roberts's Rules of Law and Order*, WALL STREET JOURNAL, Aug. 8, 2005 at A4.

advocated overriding the strong ethical and legal prohibitions on law enforcement officials directly communicating with criminal defendants known to be represented by counsel, limiting *habeas* relief, and curtailing the rule that requires exclusion of evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.

Expanding the role of religion in public institutions. In the Reagan administration, Judge Roberts approved a speech by Education Secretary Bill Bennett criticizing Supreme Court decisions barring religion in schools as antithetical to "the preservation of a free society"; defended the constitutionality of legislation stripping the Supreme Court of jurisdiction to hear school prayer cases; and called a Supreme Court decision invalidating a religiously-inspired moment of silence "indefensible." Judge Roberts applauded then-Associate Justice Rehnquist's dissent for seeking to overturn a landmark precedent – "the *Lemon* test" – which ensures government neutrality toward religion. As principal deputy Solicitor General, Judge Roberts joined efforts to do what he had tacitly praised Justice Rehnquist for attempting: Judge Roberts co-authored briefs asking the Court to scrap the *Lemon* test and uphold a school district's practice of paying clergy to deliver religious prayers at graduation ceremonies. The Supreme Court struck down the practice as impermissibly advancing religion.

* * *

Judge Roberts is a gifted lawyer with impressive professional qualifications. His existing record, however, demonstrates that he does not appreciate the important role that an independent judiciary plays in safeguarding individual rights and enforcing legal protections. Perhaps additional portions of his record, withheld by the current administration, would tell us something different. Judge Roberts' 1989-1993 service as principal deputy Solicitor General warrants close examination. The position of second-in-charge of the Solicitor General's Office was the most important, most influential position Judge Roberts held as a lawyer. And because the position gave him the opportunity to express his legal views on the most important issues facing the nation – voting rights, school desegregation, sex discrimination, access to justice, affirmative action, church-state separation, criminal justice – the limited set of documents sought by Judiciary Committee Democrats could potentially provide the best insight into how he would approach the law if confirmed. The White House's refusal to disclose these documents, however, leaves the Senate and the American people with the record set forth above.

Because Judge Roberts, if confirmed, will replace retiring Justice Sandra Day O'Connor, his views on the law are doubly significant. The current court is closely divided. Justice O'Connor has provided the swing vote in many landmark 5-4 decisions. If Judge Roberts steps into her shoes, he will wield enormous power to shape or reshape the law in many of the areas touched on above, including access to the courts, Congress' legislative authority, civil rights, women's rights, privacy rights and worker and environmental protections. Based on the existing record, it is evident that as Justice O'Connor's replacement, Judge Roberts would move the Court away from preserving these vital safeguards.

On the existing record, we do not believe that Judge Roberts warrants a lifetime seat on our nation's highest court, and we urge the Senate to withhold its consent to his confirmation.

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