Leadership Conference on Civil Rights

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The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

August 3, 2005

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest and most diverse civil and human rights coalition, we write to you to express serious concern regarding the nomination of Judge John G. Roberts, Jr. as associate justice of the Supreme Court of the United States. What is known to date regarding Judge Roberts' record, in the Reagan and Bush I administrations and as a judge on the U.S. Court of Appeals for the D.C. Circuit, raises significant questions regarding his commitment to the protection of individual rights, freedoms and legal safeguards.

LCCR strongly urges that all Senators exercise their full "advice and consent" responsibility by engaging in a searching and thorough review of Judge Roberts' record and his judicial philosophy. We call upon the Senate Judiciary Committee to engage in full and fair hearings in which all requested documents are produced and examined, and committee members are permitted to adequately question Judge Roberts and receive full and complete answers. Before the full Senate considers acting on the nomination of Judge Roberts, the American people have a right to know precisely how his appointment to the Supreme Court would impact their rights, their freedoms and their lives.

Since Judge Roberts' record on many issues remains unclear, the American people are entitled to learn far more about his views on key constitutional and other legal issues in order to determine whether he should be confirmed by the Senate. The burden lies with Judge Roberts to demonstrate his commitment to an independent Court, not to a political agenda that will move the Court further to the right. His confirmation should depend on his willingness to answer questions about his judicial philosophy and the White House's willingness to open his long record in the Reagan and Bush I administrations as a high-level political appointee. There is no automatic right to a Supreme Court confirmation, even for someone who was previously confirmed for a lower federal court.

The Court is the final arbiter of our laws, and its rulings can drastically impact the lives and the rights of all Americans. As such, we believe that every nominee to the Supreme Court must be carefully evaluated on the basis of his or her entire record, including whether he or she has demonstrated a strong commitment to the protection of civil rights and liberties, human rights, the environment, worker protections, privacy, and religious freedom. We believe that in these areas, there are aspects of Judge Roberts' record that

have already emerged and which raise serious concerns that must be closely scrutinized by the Judiciary Committee before the Senate can determine his suitability to serve on the Supreme Court. For example, LCCR concerns include:

- **Judge Roberts' efforts to shape civil rights policies, including court-ordered desegregation of public schools, voting rights and Title IX, during his tenure in the Reagan administration.** According to reports,[1] Judge Roberts' legal memoranda released thus far, dating from his tenure in the Department of Justice from 1981 to 1982 and the office of White House Counsel from 1982 to 1986, reveal troubling statements on civil rights issues. For example, Roberts argued that Congress was not only able to, but also justified in, enacting legislation that would strip the federal courts of jurisdiction to desegregate public schools. In another memorandum, Roberts argued in favor of slowing down the consideration of a housing discrimination bill. Another report points out that Roberts also wrote materials promoting the Reagan administration's unsuccessful efforts to require plaintiffs in Voting Rights Act cases to prove that election rules were intentionally discriminatory, a requirement that would have allowed many discriminatory voting schemes to go unchallenged. In other memoranda, Roberts argued for the narrowest possible interpretation of Title IX of the Education Amendments of 1972,[2] and justified unequal treatment of women on the ground that it saves money. These arguments have dangerous implications for other civil rights laws as well as the laws against sex discrimination.

  These memoranda raise serious questions about Judge Roberts' views on matters of utmost importance to the civil rights community, particularly given the fact that Roberts was serving as a political (rather than a career) appointee and was attempting to influence administrative actions and policies. As such, the Committee should 1) require the White House to produce all documents relevant to these and other civil rights matters and 2) require Judge Roberts to clarify whether they represent his current views on the very important civil rights issues they raise.

- **Judge Roberts' narrow interpretation of Title IX is troubling.** In addition to Roberts' efforts to narrow Title IX of the Education Amendments of 1972 during his years in the Reagan administration, noted above, he later took positions that would have seriously weakened Title IX. In *Franklin v. Gwinnett County School District*,[3] Roberts co-authored a brief as Deputy Solicitor General in which he tried to prevent a high school student from obtaining damages for sexual harassment and sexual abuse by her coach. Roberts' overly restrictive view of proper remedies under Title IX was rejected unanimously by the Supreme Court, which found that sexual harassment is an intentional violation of Title IX and that its victims can recover money damages. Roberts' position in the case raises questions about whether he would narrow long-standing interpretations of Title IX in ways that would limit the ability of women to fully vindicate their legal rights.

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[1] Jo Becker and Amy Argetsinger, *The Nominee As a Young Pragmatist*, THE WASHINGTON POST, July 22, 2005, at A1; Charlie Savage, *Civil rights groups cite concerns over Roberts*, THE BOSTON GLOBE, July 22, 2005; R. Jeffrey Smith, Jo Becker and Amy Goldstein, Documents Show Roberts Influence In Reagan Era; THE WASHINGTON POST, July 27, 2005 at A1.

[2] P.L. 92-318 (86 Stat. 235), approved June 23, 1972.

[3] 503 U.S. 60 (1992).

- **Judge Roberts' aggressive approach to narrowing Congressional authority under the Commerce Clause, which serves as the basis for many critical federal laws.** In his dissent to the D.C. Circuit's denial of a rehearing *en banc* of *Rancho Viejo, LLC v. Norton*,[4] Judge Roberts questioned whether the Endangered Species Act[5] could be applied, under the Commerce Clause, to prohibit real estate developers – plainly operating in interstate commerce – from endangering a particular species whose habitat lies entirely within the boundaries of a single state. Roberts' opinion in *Rancho Viejo* raises legitimate questions about whether his views on Congressional power would call into question many other important laws, including, for example, the ban on discrimination in places of public accommodation in the Civil Rights Act of 1964. In light of his dissent, the Committee should carefully and thoroughly examine his views on the Commerce Clause as well as other provisions and doctrines that undergird federal guarantees of equal opportunity, environmental quality, and access to health care, education, and other essential government benefits.

- **Judge Roberts' expansive view of administrative power to suspend fundamental due process protections.** In *Hamdan v. Rumsfeld*,[6] Judge Roberts joined an opinion that gave broad leeway to the administration to try suspected terrorists in military tribunals that lack many of the important protections normally available to criminal defendants. Under the ruling, Hamdan would have no right to be present throughout his trial and would not have a right to see all of the evidence against him. Furthermore, the court ruled that Hamdan and similar detainees could not seek judicial relief under the Geneva Conventions. This decision raises serious questions not only about Judge Roberts' views on the separation of powers but also on basic principles of civil and human rights.

- **Judge Roberts' attempt to undermine the wall of separation between church and state.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Lee v. Weisman*.[7] He not only argued that it was constitutional for a public school to sponsor prayers at graduation ceremonies, but also urged the Court to scrap the long-standing test that federal courts have used to decide whether laws and practices violate the Establishment Clause. His argument was not only rejected by the Court but criticized by the majority for its erroneous First Amendment analysis. The Committee should determine whether Roberts, if confirmed, would respect the religious liberties of all Americans.

- **Judge Roberts' position in *Bray v. Alexandria* raises questions about his willingness to protect women from discrimination.** As Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in *Bray v. Alexandria Women's Health Clinic*[8] in support of Operation Rescue's tactics of trespassing and blockading women's access to health clinics, tactics that "present[ed] a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its

[4] 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).
[5] P.L. 93-205 (87 Stat. 884), approved December 28, 1973.
[6] 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005).
[7] 505 U.S. 577 (1992).
[8] 506 U.S. 263 (1993).

name."[9] What is most alarming about John Roberts' role in Bray is not only that he argued on behalf of the US government on the side of an organization that targeted women, he did so without renouncing the aggressive and dangerous tactics used to prevent women from accessing health care.

LCCR urges the Committee to carefully question Judge Roberts on whether he would respect precedent on matters of well-settled law, such as *Brown v. Board of Education*,[10] *Miranda v. Arizona*,[11] *Plyler v. Doe*,[12] *Baker v. Carr*,[13] *Roe v. Wade*,[14] *Lemon v. Kurtzman*,[15] *Swann v. Charlotte-Mecklenburg Board of Education*,[16] *Engel v. Vitale*[17] and *National Labor Relations Board v. Jones & Laughlin Steel Corporation*.[18] Our nation simply cannot afford to return to a pre-1930s interpretation of the U.S. Constitution or the rights and liberties that it guarantees.

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political agenda.

Thank you for your consideration. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2880. We look forward to working with you.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

[9] *Id.* at 313 (Stevens, J. dissenting).
[10] 347 U.S. 483 (1954).
[11] 384 U.S. 436 (1966).
[12] 457 U.S. 202 (1982).
[13] 369 U.S. 186 (1962).
[14] 410 U.S. 113 (1973).
[15] 403 U.S. 602 (1971).
[16] 402 U.S. 1 (1971).
[17] 370 U.S. 421 (1962).
[18] 301 U.S. 1 (1937).