Mexican American Legal Defense and Educational Fund

MALDEF Report on and Statement of Opposition to the Confirmation of John G. Roberts to the United States Supreme Court

I. EXECUTIVE SUMMARY

This report provides information on the background, qualifications, and record of United States Supreme Court nominee John G. Roberts, Jr. and the basis for MALDEF's decision to oppose his confirmation.

Judge Roberts is impressively credentialed: he is an honors graduate of both Harvard College and Harvard Law School; was a law clerk to Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit and to then-Associate Supreme Court Justice William Rehnquist; has argued before the Court 39 times; and was confirmed by unanimous consent to the U.S. Court of Appeals for the District of Columbia Circuit in 2003.

Based on our review of Roberts's record, we believe that he does not meet the standards by which MALDEF evaluates candidates for the federal bench. These criteria, approved by the Board of Directors in April 2002, require a nominee to affirmatively demonstrate a commitment to protecting the rights of ordinary residents of the United States and to preserving and expanding the progress that has been made on civil rights and individual liberties. MALDEF's judicial nominee standards reflect a robust appreciation for those core constitutional protections and legal doctrines upon which many of the civil rights gains and successes of the Latino community have been predicated. Among these are the equal protection clause, due process protections, the First and Fourth Amendments, and the right to privacy. MALDEF also recognizes the importance of legal rights in the areas of education, voting, immigration and employment. MALDEF looks to the nominee's views on Congress' constitutional authority to pass civil rights or other protective legislation, whether the nominee has or is likely to take an unduly narrow view of the application of protective statutes, such as construing no private right of action under otherwise valid statutes or regulations or prohibiting recovery for otherwise illegal actions. MALDEF will look to a nominee's interpretation of statutes to determine whether the nominee has carved out exceptions not written into the law that disadvantage civil rights litigants, such as by negating a private right of action or preventing vulnerable individuals from availing themselves of the protection of the law. Honesty, integrity, respect, character, temperament and intellect are basic minimum requirements. No nominee is assumed to be eligible and qualified for confirmation but must show that he or she meets the standard to serve the public.

We reviewed Roberts's judicial record – which, because his tenure on the Court of Appeals has been so brief, is relatively thin. He has authored 60 opinions, of which 49 were majority opinions, five were concurrences, and six were dissents. During his two years on the

federal bench, he has decided relatively few cases that relate directly to MALDEF's program areas. Because Roberts's judicial record provides limited insight into his judicial philosophy or how he would approach the civil rights issues that are central to MALDEF's mission, we also conducted review of materials dating from his tenure as a political appointee during the early years of the Reagan Administration, first as a special assistant to Attorney General William French Smith, and later as Associate White House Counsel.

These documents reveal that Roberts played a key role in the Reagan Administration's efforts to roll back civil rights. Working directly for the Attorney General and later as Associate White House counsel, Roberts authored numerous memoranda on civil rights issues generally; on affirmative action, on stripping federal courts of jurisdiction to hear certain cases, on school desegregation remedies and on "judicial restraint," among other subjects. Perhaps most troubling of these, from MALDEF's perspective, is a memorandum Roberts authored faulting the Department of Justice for the outcome in the landmark case of *Plyler v. Doe*, which MALDEF litigated and which guaranteed, on equal protection grounds, the right of undocumented immigrant children to free public K-12 schooling. Roberts wrote that the Administration had missed an opportunity to intervene in *Plyler* for the purpose of urging judicial restraint, and to potentially change the outcome of the litigation. (A copy of Roberts's *Plyler* memorandum appears at the end of this document). When he was Associate White House Counsel, he expressed in a memorandum his personal view supporting a national identification card, was dismissive of the general civil liberties concerns as "symbolic" and did not recognize the historic and present-day racial and ethnic discrimination issues that ID cards involve.

Roberts also played a key role behind the scenes in crafting and advancing the Administration's campaign to limit minority voting rights under the Voting Rights Act: he was a passionate strategist, analyst, and advocate for the most extreme of the Reagan Administration's policies on this issue, and can be fairly described as one of the architects of the Administration's public and media approach in this area. He showed similar zeal in attacking affirmative action programs, the use of busing to effect school desegregation, and such core anti-discrimination laws as Title IX, which guarantees gender equity in education programs.

MALDEF also examined Roberts's record as a Deputy Solicitor General in the first Bush Administration and in private practice at the law firm of Hogan & Hartson. Our review of his work during this period was limited to publicly-filed briefs and other materials. The White House has refused to release any internal documents from Roberts's tenure with the Solicitor General's Office, basing its objection in deliberative process and attorney-client privileges. Although there is some caution associated with drawing too many conclusions from the positions Roberts took as a legal advocate for private clients and for the government, it bears noting that Roberts has frequently and successfully opposed plaintiffs seeking to vindicate their rights in such areas as employment/contracting, privacy, and voting. As Acting Solicitor General, Roberts filed the federal government's amicus brief against the FCC's preference for minority-owned firms seeking license renewals.

It is our view that John Roberts fails to meet the MALDEF judicial endorsement criteria. Our opposition to his confirmation is based upon his record on issues that are at the core of

MALDEF's mission – immigrant rights, political and legal access, affirmative action and education.

II. RECORD IN THE REAGAN JUSTICE DEPARTMENT AND WHITE HOUSE COUNSEL'S OFFICE

While serving in the Reagan Administration as Special Assistant to the Attorney General and later as Associate White House counsel, Roberts authored numerous memoranda on core civil rights issues that are central to MALDEF's mission. We place importance upon Roberts's Reagan Administration memos for numerous reasons. First, he authored these documents as a political appointee during the first Reagan Administration term, when Republicans won back control of the U.S. Senate and when much of the Reagan "revolution" reversing historic civil rights gains took place. Second, Roberts had the academic and legal credentials to work virtually anywhere. That he chose (and was chosen by) the Reagan Justice Department and White House speaks volumes about where he placed himself on the political and legal spectrum. Third, Roberts's policy memos were plainly intended to shape and influence policy, rather than merely reflect or support the Administration's position. In some cases, his statements suggest he is farther away from MALDEF's positions than was the actual position taken by the Reagan Administration. Finally, not to give his writings great weight minimizes the intellectual and legal force with which he thinks and writes. He was not simply a junior lawyer writing fact-based memoranda on individual cases. He was part of an inner circle of conservative ideologues who had direct access to the Attorney General and other key Administration opponents of civil rights. Unfortunately, we have little reason to believe that his views may have significantly changed or will change in the future.

A. Immigrants' Rights

Plyler v. Doe, 457 U.S. 202 (1982), is the landmark MALDEF class action in which the Supreme Court invalidated a Texas statute limiting free K-12 education to "citizens of the United States or legally admitted aliens." The 5-4 decision both guaranteed the right of undocumented children to attend school and recognized that undocumented immigrants may claim protection under the Equal Protection Clause of the Fourteenth Amendment. The ruling in *Plyler* was a careful and pragmatic decision with a significant public policy component; Justice Brennan, writing for the Court, emphasized that the denial of a basic education and the stigma of illiteracy "imposed a lifetime hardship on a discrete class of children not accountable for their disabling status."

On the day that this critically important ruling came down, John Roberts, then at the Reagan Justice Department, immediately co-authored a memorandum for the Attorney General entitled "*Plyler v. Doe* – 'The Texas Illegal Aliens Case.'" The memorandum quotes with approval from Chief Rehnquist's dissent in the case, which Roberts says "chastizes the majority" for manipulating Equal Protection doctrine to achieve an "'an unabashedly results-oriented approach.'"

Roberts faults the Solicitor General's office for not filing a brief in support of Texas to advance the values of "judicial restraint" and specifically opine on the applicability of the Equal

Protection Clause. Such a brief, Roberts adds, "could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case."

Plyler has had a nationwide impact and been tremendously important for immigrant children and their families during the 23 years since the ruling. Nonetheless, anti-immigrant groups have continually taken aim at the outcome in *Plyler*, perhaps most notably through California's Proposition 187 and initiatives in other states that we have and continue to oppose. Members of the Senate Judiciary Committee should thoroughly question him whether he believes that *Plyler* was decided correctly, whether he would apply *stare decisis* in the context of *Plyler*, and what his views are on the underlying legal bases for *Plyler*.

As Associate White House Counsel, Roberts took the opportunity of a routine clearance of INS testimony before a Congressional committee to expound upon his own personal views on immigration in 1983. In an October 21, 1983 memorandum to White House Counsel Fred Fielding regarding an INS official's testimony on law enforcement efforts to combat fraudulent documents, Roberts wrote,

> "I recognize that our office is on record in opposition to a secure national identifier, and I will be ever alert to defend that position. I should point out, however, that I personally do not agree with it. I yield to no one in the area of commitment to individual liberty against the spectre of overreaching central authority, but view such concerns as largely symbolic so far as a national I.D. card is concerned. We already have, for all intents and purposes, a national identifier – the social security number – and making it in form what it has become in fact will not suddenly mean Constitutional protections would evaporate and you could be arbitrarily stopped on the street and asked to produce it. And I think we can ill afford to cling to symbolism in the face of the real threat to our social fabric posed by uncontrolled immigration."

The ease with which Roberts dismisses civil liberties and privacy concerns surrounding national identification cards and his failure to reflect upon or demonstrate any recognition of the concerns of Latinos and other minorities regarding discriminatory law enforcement stops is disturbing as is his characterization of "uncontrolled" immigration as a "real threat to our social fabric."

In a September 30, 1983 memorandum that either highlights an attempt at humor or exposes a real insensitivity, Roberts suggested to Fielding that written remarks by President Reagan for a publication called "Spanish Today" include a reference to the legalization program in the Simpson-Mazzoli bill. Roberts wrote, "I think this audience would be pleased that we are trying to grant legal status to their illegal amigos." (emphasis in original)

B. Voting Rights

One of the most troubling issues to surface in our review of his record is Roberts's involvement in the Reagan Administration's concerted efforts to prevent Congress from countering the Supreme Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which dramatically weakened certain critical provisions of the Voting Rights Act. Roberts played a pivotal role in the Administration's public campaign and legislative strategy against efforts to strengthen the Act.

In 1980, a divided Court handed down its ruling in *Mobile v. Bolden*, narrowly interpreting the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the Constitution to require minority voters to prove racially discriminatory intent when litigating cases under Section 2. Previously, it had been sufficient to prove a discriminatory "result" under Section 2, which applies nationwide and addresses voting practices and procedures that discriminate against minority voters. Two years after *Bolden*, Congress, by overwhelming majorities in both the House and the Senate, legislatively overturned *Bolden*'s "intent" requirement and amended Section 2 to make clear that the provision extended to discrimination in both purpose and effect. It did so over the prolonged and vociferous objections of the Reagan Administration.

The internal memoranda make clear that Roberts played a key role in the Administration's campaign to prevent Congress from amending the Voting Rights Act to counter the holding of *Mobile v. Bolden*. Roberts authored not only legal analyses on the issue, but also talking points for the Attorney General, national and local op-ed pieces and letters to the editor (for publication under the name of Attorney General French), strategic guidance, and legal and policy recommendations. Indeed, it appears Roberts was at the center of crafting the Administration's policies and messaging during the bitter fight over reauthorization of the Act. The Reagan Administration's public strategy, as articulated by Roberts throughout these internal memoranda, was to loudly profess support for the Voting Rights Act "as is" – that is, without Congress' contemplated amendments to Section 2. Roberts – and the Reagan Administration – continually took the position that the Supreme Court had really changed nothing when it interpreted Section 2 to require minority voters to show proof of discriminatory intent. Of course, as civil rights advocates and the media noted at the time, *Bolden* had in fact dramatically weakened the protections of the Voting Rights Act, and now required minority voters to meet a virtually insurmountable burden of proof to proceed under Section 2. Congress' legislative reinstatement of the "effects" standard was a restorative measure, and not the dramatic departure that Roberts and Reagan Administration attempted to portray it as.

Among the many documents that Roberts authored on the Voting Rights Act during this period were the following:

- A November 17, 1981 memorandum to the Attorney General and others in the Department suggesting responses to a New York Times editorial by Vernon Jordan, which had criticized Reagan for his "sham" endorsement of the Voting Rights Act. Roberts's draft comments disingenuously characterized the proposed Congressional fix to Section 2 as a "radical

experiment" rather than a restoration of Congress's original intent and defended the Administration's endorsement of a "bailout" fallback provision.

- A December 22, 1981 memorandum to the Attorney General articulating the problems Roberts perceived with "switching" to an effects test, and expressing Roberts's urgent view that "something must be done to educate the Senators on the seriousness of this problem" (emphasis in original). The memorandum endorsed Justice Stewart's *Bolden* view that an effects test for Section 2 "would establish essentially a quota system for electoral politics by creating a right to proportional racial representation on elected governmental bodies" (emphasis in original).

- Several January 1982 drafts of "Qs and As" or talking points on the intent/effects question, for transmission to the Attorney General and to the White House, again equating an effects test with "quotas," and opining that such a system would be neither consistent with the intent of the Framers or the intent of Congress.

- January 1982 drafts of a letter to the editor responding to a critical editorial in the *Washington Post*, again refuting that the holding in *Mobile v. Bolden* changed previous understandings of the law, and opining that the proposed fix to Section 2 would introduce "uncertainty and confusion" into the provision.

- Various drafts of a February 1982 op-ed piece for submission to the *New York Times*, eventually published under the Attorney General's name. The piece called the reinstatement of the effects test a "dramatic change," again invoking the alarmist "quota" language and endorsing Griffin Bell's view that "overruling the *Mobile* decision by statute would be 'an extremely dangerous course of action under our form of government.'"

- Memoranda articulating a "fallback" or compromise position on Section 2 of the Act, both for internal use and for circulation to Senators. This proposed fallback position would have involved writing into Section 2 that discriminatory purpose could be shown through indirect or circumstantial evidence and would not require a "smoking gun." Roberts acknowledged, in a February 16, 1982 memo to William Bradford Reynolds, Kenneth Starr, David Hiller, and Chuck Cooper on the "fallback position," that Section 2 "does not by its terms require proof of purpose and any effort to introduce the concept directly will hardly be viewed as a compromise."

- Background materials for the Attorney General's speeches to both conservative and progressive groups on the Voting Rights Act.

- March 1982 drafts of op-ed pieces on Section 2, which Roberts intended to be tailored for publication in as many regional newspapers as possible.

- March 1982 talking points for Reagan's use on an Alabama trip with Senator Heflin, a "critical vote in the Judiciary Committee," asserting that an effects test in the Act would lead to the invalidation of "any electoral system, no matter how long in place, that is not neatly tailored to achieve proportional representation along racial lines."

What is abundantly clear from the internal memoranda and other available documents is that Roberts was not on the sidelines during the debate over the Voting Rights Act and the Administration's aggressive campaign to roll back minority voting rights; he was a passionate strategist, analyst, and advocate for Reagan's policies on this issue, and one of the architects of the Administration's public relations strategy.

C. Federal Civil Rights Law Enforcement

1. Title IX (Gender Equity in Educational Programs) and other Federal Civil Rights Law Enforcement

Both while working with Attorney General Smith and later with White House Counsel Fielding, Roberts authored several memoranda that advocated limiting the scope of Title IX, which guarantees gender equity in education programs. Roberts's writings suggest a tendency to take an unduly narrow view of Congress' authority to pass such protective legislation, and to take an unduly narrow view of the application of protective statutes themselves – and therefore implicate one of MALDEF's most important criteria for evaluating nominees to the federal bench. The rationale to limit Title IX's protection to only those areas that are funded by the federal government would have applied equally to the enforcement of other civil rights laws. That is why overturning the *Grove City* decision was one of MALDEF's highest legislative priorities. With bipartisan majorities, Congress did so by passing the Civil Rights Restoration Act.

Specifically, Roberts drafted the following notable materials during his time at the Reagan Administration:

- A July 24, 1985 memorandum to White House Counsel Fred F. Fielding re: "Correspondence from [Secretary of Education] T.H. Bell on *Grove City* Legislation." The 1984 Supreme Court decision in *Grove City College v. Bell*, held that 1) federal student aid loans and grants constitute federal financial assistance to the institution attended by the beneficiary students such that they trigger coverage of the institution under Title IX; and 2) Title IX applies only to the specific program within the institution that receives the funds (in this case the college's admissions office) rather than the institution as a whole.

Roberts's memo to Fred Fielding, White House Counsel, suggests strong personal support for limiting the coverage of Title IX to the program that receives federal financial assistance. He wrote: "There is a good deal of intuitive sense to the argument. Triggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions program is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students."

Roberts's view on the proper coverage of Title IX was rejected by Congress with enactment of the Civil Rights Restoration Act, which countered the holding of *Grove City College* and ensured that Title IX applies to the entire institution receiving federal aid. In his memorandum, Roberts noted with apparent displeasure that a bill that counters the holding of

Grove City College would "radically expand the civil rights laws to areas of private conduct never before considered covered."

- A December 8, 1981 memorandum to the Attorney General regarding a "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance,'" in which he urged support for such an amendment in regulations issued under Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973. The effect of the amended definition that Roberts endorsed would be to limit the scope of these civil rights statutes. Although Roberts recognized that there were strong legal arguments to be made in opposition to his position, he wrote that "the case has not been made that the legislative history clearly bans Education's proposed change, and therefore I recommend acceding to it." In other words, his view was that if the proposed limitation on the scope of these civil rights statutes was not clearly contrary to the relevant authorities, the scope of the civil rights protections should be abridged.

- A February 12, 1982 memorandum to Attorney General Smith Re: "Proposed Intervention in *Canterino v. Wilson*," in which Roberts recommended against intervention in a sex discrimination case against the Kentucky state prison system. The suit sought to remedy disparities in vocational training programs available to men and women in the prison and was based in the Equal Protection Clause and Title IX.

Roberts's memo countered Assistant Attorney General for Civil Rights William Bradford Reynolds, who had recommended that DOJ intervene in the case. Roberts offered the following justifications in support of his recommendation to not intervene:

> 1) "Private plaintiffs are already bringing suit, so there is no need for involvement by the Civil Rights Division";
> 2) Intervention would be "inconsistent with [] themes in your judicial restraint effort: . . . relief could well involve judicial interference with state prison programs, and you have stressed leaving such matters to the state authorities whenever possible"; and, most disturbingly,
> 3) "Many reasonable justifications for the Kentucky practices can be readily advanced, such as economies of scale calling for certain programs for the male prisoners but not for the many fewer female prisoners. If equal treatment is required, the end result in this time of tight state prison budgets may be no programs for anyone."

- An August 31, 1982 memorandum to the Attorney General regarding "*University of Richmond v. Bell*, in which Roberts argued that the U.S. Department of Education was constrained in its investigations of Title IX violations in that it could only investigate programs which directly receive federal funds: "I strongly agree with [Assistant Attorney General for Civil Rights Brad Reynolds's] recommendation not to appeal [a lower court ruling that limited the investigations.] Under Title IX federal investigators cannot rummage wil-nily [*sic*] through institutions, but can only go as far as the federal funds go." Roberts's views on this issue have since been rejected (see below).

2. School Desegregation / Busing / "Court-Stripping"

In the debate over the separation of powers in the arena of school desegregation, Roberts, as both Special Assistant to Attorney General French and as Associate White House Counsel, advanced ideological positions that were even more extreme than those held by many of his colleagues in the Reagan Administration. Perhaps most notably, Roberts was a vigorous proponent of proposals to strip lower federal courts of the power to order busing as a remedy, thereby reducing the role of the courts in remedying unlawful discrimination. These memoranda can fairly be described as advocacy pieces in support of his view that busing is not a required remedy for school desegregation. Among the memoranda that Roberts authored on this issue were the following:

- An April 6 (no year noted, likely 1982) note to the Attorney General and Letter re: "Bill to Restrict Busing." In a "redraft" of a section of a letter to House Judiciary Committee Chairman Rodino, Roberts argued in favor of the constitutionality of a federal bill that would have stripped the lower federal courts of the authority to order busing as a remedy to segregation in the schools. In his prefatory "note for the Attorney General," Roberts noted that his analysis borrowed from an earlier Office of Legal Counsel opinion on this matter "without focusing as that opinion did on the view that busing may be constitutionally required." He further noted that the organization of his piece was "best suited to obscuring possible conflicts" regarding the constitutionality of the statute.

- An August 25, 1981 memorandum to the Attorney General regarding "Summary of Material Sent by Arthur Flemming, Chairman of the U.S. Commission on Civil Rights," in which Roberts characterized Flemming's memo as "subject to serious criticism as failing to recognize the actual effect of race-conscious remedies." One of Roberts's primary critiques was that "the memorandum stresses the importance of busing without even confronting the fact that it has been ineffective in redressing racial imbalance, a fact increasingly reflected in judicial opinions."

- A February 15, 1984 memorandum to White House Counsel Fred F. Fielding re: "Proposed Justice Report on S. 139," in which Roberts described an "extended internal debate" during his time at the Justice Department over Congress's role in devising remedies for unlawful segregation in the schools (and expresses his support for a more limited role for the courts). Roberts noted that Ted Olson "reads the early busing decisions as holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation." After noting that Congress "can conclude – evidence supports this – that busing promotes segregation rather than remedying it, by precipitating white flight," Roberts opined that "it is within Congress's authority to determine that busing is counterproductive and to prohibit the federal courts from ordering it."

3. Reorganization / Dismantling of U.S. Department of Education

While at the Department of Justice, Roberts drafted materials endorsing the dismantling of the U.S. Department of Education or a severe limitation upon its powers. These materials also urged continuing efforts to weaken the monitoring and enforcement powers of the Department's Office for Civil Rights (OCR). Roberts co-authored a November 10, 1981 memorandum to the Attorney General, re: Talking Points Regarding Proposed Department of Education Reorganization, describing two proposals for the reorganization of the U.S. Department of Education: 1) the creation of a sub-cabinet "National Education Foundation" and 2) the dismantling of the Department entirely.

"As you know," the memorandum noted, "the President's own goal all along has been to dismantle the Department of Education, taking the opportunity to review each function and to terminate those which involve unduly intrusive federal regulation and which are better handled at the state level" (emphases in the original). The memo acknowledged the lack of public support for a wholesale dismantling of the Department, but recommended that the Administration should nonetheless attempt to "restructure" (i.e., limit) the federal role in education as much as possible.

Troublingly, the memo also urged that the Administration not "abandon our efforts to reduce costly and unnecessary OCR monitoring and administrative functions. For example, amendments to Title VI (gender) and Title IX (race) regulations to narrow the scope of federal civil rights jurisdiction over educational institutions would reduce these monitoring activities." This raises concerns regarding Roberts's commitment to the continued federal role in reducing discrimination in educational settings.

D. Affirmative Action in Contracting

Roberts's memoranda on affirmative action from his 1981-82 stint in the Attorney General's office demonstrate an apparent hostility towards affirmative action programs. Although Roberts's memoranda focused on affirmative action in government contracts, the views he endorsed raise concerns with respect to the education context as well. They appear to be in tension with Justice O'Connor's majority opinion in *Grutter v. Bollinger*, which held that the Equal Protection Clause does not prohibit the narrowly tailored use of race in university admissions decisions.

Roberts attempted to discredit affirmative action programs and their underlying rationales with a zeal that suggests that these memoranda may well reflect personal views on the subject, not merely the work product of a government attorney/advocate.

Among Roberts's most troubling writings on this issue were:

- An August 25, 1981; memorandum to the Attorney General Regarding "Summary of Material Sent by Arthur Flemming, Chairman of the U.S. Commission on Civil Rights." Chief among Roberts's critiques of Fleming's report was that: "[t]he reverse discrimination involved in affirmative action quotas is simply dismissed as 'benign.'" Roberts's analysis did not distinguish between race-based preference systems developed to remedy past

discrimination and other forms of racial discrimination. The memorandum concluded that "[i]f a meeting is held with Mr. Flemming, a strong response to his view of civil rights enforcement could be made."

- A December 2, 1981 set of talking points for the Attorney General, prepared for an upcoming meeting with the Secretary of Labor on the subject of affirmative action in the Department of Labor's dealings with government contractors. Roberts began by noting the Administration's position that: "Under our view of the law it is not enough to say that blacks and women have been historically discriminated against as groups and are therefore entitled to special preferences."

- A December 22, 1981 memorandum to the Attorney General, summarizing the U.S. Commission on Civil Rights's 1981 report on affirmative action. He characterized the report, which found that structural discrimination continued to affect American society, as "self-serving," and its logic in support of affirmative action as "perfectly circular." Roberts attacked the failures of certain affirmative action programs, which the Commission's report had attributed to structural discrimination within the programs, as the necessary effect of affirmative action: "There is no recognition of the obvious reason for the failure [of the affirmative action program]: the affirmative action program required the recruiting of inadequately prepared candidates" (emphasis in the original). In other words, Roberts reasoned that affirmative action programs would necessarily fail because the minority candidates who qualify for the programs would lack sufficient skills to meet the job requirements.

Further, in an "innocuous" (as he described it) response to the Commission's Chairman drafted for the Attorney General's signature, Roberts neatly summarized the Reagan Administration's position on affirmative action: "[The administration] will not . . . answer discrimination with more discrimination by according preferential treatment based on race or sex to those who have not been proven to be victims of specific acts of unlawful discrimination."

E. Disability Rights

In a July 7, 1982 memorandum to the Attorney General regarding "Government Participation and Supreme Court Decision in *Board of Education v. Rowley*," Roberts summarized a disability rights case brought under the Education for All Handicapped Children Act. The issue presented in this case was whether the federal statute required a school board to provide a free sign language interpreter for a hearing-impaired child.

At the outset, Roberts's memo noted that the child "was an excellent lip reader" and that the school board had decided that a sign language interpreter was not needed. After opining that the federal statute was vague, Roberts wrote that the lower courts engaged in "judicial activism [by using] the vague statutory language [of the Act] to overrule the [school] board and substitut[ing] their own judgment of appropriate educational policy." Roberts concluded approvingly that "[i]n this case a conservative majority of the Supreme Court turned back an effort by activist lower court judges to impose potentially huge burdens on the states."

III. RECORD AS DEPUTY SOLICITOR GENERAL IN THE FIRST BUSH ADMINISTRATION

The White House has withheld from public review and disclosure to the Senate Judiciary Committee records from Roberts's tenure as principal deputy Solicitor General in the first Bush Administration. Senate Judiciary Committee members immediately denounced this move and made specific requests for documents related to 16 cases on which Roberts worked; these cases involved affirmative action, redistricting, equal opportunity in education, the First Amendment, school prayer, and voting rights. The White House continues to refuse to disclose the requested information, arguing that internal deliberations require an assurance of confidentiality in order to be effective. The argument that confidentiality is necessary to allow attorneys to express freely their own legal views runs counter to the Administration's argument that Roberts's memos and filings do not necessarily express his own views but are those of his client alone.

Based upon public reports and publicly-filed briefs, we have been able to ascertain that Roberts had involvement in the following key cases:

- *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), in which Roberts, serving as Acting Solicitor General, submitted an amicus brief in support of a broadcaster that challenged certain FCC affirmative action programs as unconstitutional violations of the equal protection doctrine. The FCC programs granted preferences to minority-owned firms in the awarding of broadcast licenses. Roberts argued that the FCC's use of a racial classification required that the Court review the programs using a "strict scrutiny" analysis and find that the classification was "narrowly tailored" to achieve a "compelling government interest" in order to rule that the programs passed constitutional muster. Roberts contended that the affirmative action program at issue here neither satisfied a compelling government interest nor was narrowly tailored. Roberts's brief further declared that the Court "has endorsed only one sufficiently compelling justification for a racial classification: remedying the effects of identified present or past discrimination."

The Court disagreed with Roberts's position and held that Congress and the FCC implemented the programs at issue primarily to promote programming diversity, which was an "important government objective that can serve as a constitutional basis for the policies." Further, the Court found that the programs were "substantially related" to the achievement of this government objective and did not impose "impermissible burdens on nonminorities."

The Court rejected Roberts's argument that the affirmative action programs at issue necessarily triggered a "strict scrutiny" analysis because they relied upon racial classifications. The Court recognized, in effect, that all racial classifications are not equal and that certain limited circumstances exist in which the government may permissibly implement affirmative programs that employ racial classifications in order to meet "important government objectives." Examples of such objectives have included achieving diversity in broadcasting and in higher education (*See Regents of University of California v. Bakke*; *see also Grutter v. Bollinger*). Roberts's reasoning would disallow these objectives.

- *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), in which Roberts co-authored an amicus brief that argued against granting relief to African American students challenging segregation in their local schools. In 1972, the district court found that the Oklahoma City School District had failed to eliminate *de jure* segregation in its schools and entered a decree imposing a school desegregation plan. In 1977, finding that the school district has achieved "unitary" status, the district court issued an unpublished order freeing the district from the desegregation plan and terminating the case. This order was not appealed. In 1984, the school district adopted a "Student Reassignment Plan" that would have the effect of re-segregating many of the previously desegregated schools.

Roberts argued for the United States that "court-ordered desegregation of a school district is a process with both a beginning and an end" and argued against "perpetual [desegregation] decrees -- and accompanying judicial supervision -- as a general rule." The brief further argued that once a school district is declared unitary, it should once again governed only by "traditional equal protection standards, which prohibit only intentional acts of discrimination."

Robert L. Dowell and other minority students in Oklahoma City countered that the school district should not be fully released from its desegregation plan only to take actions that would result in the subsequent "re-segregation" of district schools.

The Court, in a majority opinion written by Chief Justice Rehnquist, agreed with Roberts's position and held that a desegregation case may not be re-opened once the school district has been released from a court-ordered desegregation plan. The Court further held that the district court must provide affected parties with notice of the dissolution of a decree but that once the desegregation plan has been terminated the district's actions with respect to school segregation will be based solely upon whether they violate the Equal Protection Clause, irrespective of the terms and conditions of the desegregation plan.

The effect of the Court's holding was to limit the relief available to students who attend segregated schools that have formerly been subject to desegregation decrees and are in the process of being re-segregated. Roberts's position and the Court's ruling favor the legal fiction that the dissolution of a desegregation decree is equal to desegregation itself, while ignoring that the effect of this reasoning is to allow the re-segregation of the public schools.

- *Freeman v. Pitts*, 503 U.S. 467 (1992), in which Roberts co-authored an amicus brief arguing that the Court should incrementally release a Georgia school district from its court-imposed desegregation decree because the district had substantially complied with many of its terms. The district court found that the school district was a "unitary" system in regards to four of six relevant factors and ruled that it would offer no other relief in these four areas while continuing to monitor the remaining two facets of the desegregation plan. The district court, in effect, released the district from its desegregation plan incrementally, element by element. The Court of Appeals for the Eleventh Circuit reversed, holding that the district court should retain full remedial authority over the school system until it achieved unitary status in all areas at the same time for several years.

In his brief for the United States, Roberts argued that a federal court may require no further remedial action with respect to a particular facet of a school system once that facet is fully desegregated, and that the district court should thus release the school district from the components of the plan whose terms have been met. The Court agreed with Roberts's position and held that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." The Court noted that "[t]he term 'unitary' is not a precise concept" and it "does not confine the discretion and authority of the District Court."

- *Rust v. Sullivan*, in which Roberts co-authored the government brief in support of new regulations preventing family planning programs that receive federal aid from providing education or services related to abortion. Although *Rust v. Sullivan* did not directly implicate *Roe*, Roberts's brief specifically noted that "[w]e continue to believe that Roe was wrongly decided and should be overruled. . . . [T]he Court's conclusion[] in Roe that there is a fundamental right to an abortion . . . find no support in the text, structure, or history of the Constitution." This position highlights Roberts's apparent willingness to scale back clearly established rights, tendency toward a textualist approach to the Constitution, and views on the right to privacy that inheres in the due process clause of the Fourteenth Amendment. The *Rust* brief points toward a reluctance to invoke substantive due process doctrine to preserve and protect established individual rights, including the right to privacy. While this doctrine is often discussed in the context of choice, it implicates a wide range of areas including child-rearing, school curricula, contraception, and marriage (for example, the ruling in *Loving v. Virginia*, in which the Supreme Court struck down an anti-miscegenation statute prohibiting interracial marriage, was based in part of substantive due process doctrine).

IV. PRIVATE PRACTICE AT HOGAN & HARTSON

During the hearings on his confirmation to the District of Columbia Circuit, Judge Roberts attempted to head off questions about his work in private practice by warning against ascribing the beliefs of a lawyer's client to the lawyer himself. It is true that a lawyer is ethically bound to zealously represent his client whether he or she agrees with that client's position or not, so Roberts's position is not wholly unjustified. However, it is not irrelevant that Roberts almost invariably chose, for 13 years of his career, to represent large corporate and business interests, often against individuals seeking to assert their statutory or constitutional rights.

During his tenure at Hogan & Hartson, Roberts worked on the following notable cases:

- *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). As counsel for the Associated General Contractors of America, Inc., Roberts filed a brief in support of a nonminority subcontractor who argued that certain Department of Transportation affirmative action programs were unconstitutional violations of equal protection. Congress created these programs to remedy past discrimination in federal transportation contracting practices.

While Roberts conceded that "remedying the effects of past or present discrimination is a compelling government interest that would justify a racial preference in an appropriate case," he argued that Congress did not produce evidence of past discrimination sufficient under prior Supreme Court precedent (*Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-6 (1989)) to justify the affirmative action programs at issue. Roberts's brief contended that under applicable law, the programs in question should be struck down because of an absence of "evidence of discrimination in every sector of the construction industry, in every geographical market, against every racial group covered by the [preference] program." In arguing that Congress did not make sufficiently specific findings, Roberts's brief dismissed the body of evidence cited by Congress in support of these programs as conclusory, amorphous, irrelevant, inaccurate, and readily explainable by "nonracial factors."

- *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002). Roberts represented the petitioner Toyota Motor Manufacturing, Kentucky, Inc. which was sued by a former employee under the Americans with Disabilities Act (ADA) of 1990 for failure to provide her with reasonable accommodations required by the Act. The Court held that the lower court did not apply the proper standard to determine if the employee was disabled under the ADA because it only analyzed a limited class of manual tasks and failed to ask whether the employee's impairments prevented her from performing tasks of central importance to people's daily lives.

- *Nat'l Collegiate Athletic Assoc. v. Smith*, 525 U.S. 459, 119 S.Ct. 924 (1999) – Roberts argued for petitioner National Collegiate Athletic Association (NCAA) which was sued under Title IX by a student athlete who alleged that the NCAA discriminated against her based on her sex by denying her permission to play intercollegiate volleyball at a federally assisted institution. The court held that the NCAA was not amenable to a private action under Title IX because NCAA's receipt of dues from federally funded member institutions did not suffice to hold the NCAA, the dues recipient, under the Title.

- *Gonzaga University v Doe*, 536 U.S. 273, 122 S.Ct. 2268 (2002) – Roberts represented petitioners Gonzaga University and Roberta S. League, the university's teacher certification specialist, against charges brought by a former student to enforce the Family Educational Rights and Privacy Act (FERPA) of 1974, which prohibits federal funding of educational institutions that have a practice of releasing education records to unauthorized persons. The court held that the action was foreclosed because FERPA does not create personal rights to enforce under 42 U.S.C. § 1983.

- *Rice v. Cayetano*, 528 U.S. 495 (2000). While in private practice, Roberts represented the Governor of Hawaii in an action brought by a Hawaii citizen who had been barred from voting in certain Hawaiian elections by a voting qualification that restricted voting rights in these elections to certain native Hawaiians (those descended from ancestors who were on the island in 1778). Roberts argued in his brief that "the case presents the question whether Congress and the State of Hawaii . . . may honor the special obligation to indigenous Hawaiians, in the same fashion Congress and many States have for centuries attempted to do with respect to America's other indigenous people." Central to Roberts's position was the contention that

Hawaiians must not be treated "differently from all other indigenous people" or given "second-class status among the Nation's indigenous people.

While Roberts's position in *Cayetano* has been scrutinized as a potential measure of his views regarding affirmative action, Roberts clearly characterized the case as one "about Congress' authority to recognize and deal with the Nation's indigenous people." In fact, he argued that the classification at issue is not one that distinguishes on the basis of race, but on the basis of "rather unique legal and political status" of indigenous Hawaiians. The Court disagreed, holding that Hawaii's denial of the vote to those not in the favored class of indigenous Hawaiians was a "clear violation of the Fifteenth Amendment" because the classification used ancestry as a proxy for race.

V. JUDICIAL RECORD/NOTABLE CASES

Given the limited judicial record, it is difficult to discern definite patterns or ideological tendencies in Judge Roberts's jurisprudence. However, it is fair to say that a number of his decisions raise concerns with respect to certain of MALDEF's standards for evaluating judicial nominees – specifically, our inquiries into whether a candidate's record shows 1) an insensitivity or hostility to rights protected by key provisions of the Constitution, including the Equal Protection Clause, the Due Process Clause, the First and Fourth Amendments to the U.S. Constitution, and the right to privacy; 2) an insensitivity or hostility to statutory provisions that protect the rights of Latinos; 3) a tendency to take an unduly narrow view of Congress' authority to pass such protective legislation, or to take an unduly narrow view of the application of protective statutes themselves; and 4) a lack of commitment to protecting litigants' right of access to the courts under applicable statutory and constitutional provisions.

A. Commerce Clause

In *Rancho Viejo, LLC v. Norton*, 357 U.S. App. D.C. 336 (2003), a developer filed suit in federal court alleging that application of the Endangered Species Act of 1973 ("ESA") to protect the arroyo toad (an endangered species located entirely within the state of California) exceeded Congress's powers under the Commerce Clause under the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating in part the Gun Free School Zone Act) and *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating in part the Violence Against Women Act). The district court granted summary judgment in favor of the defendants (government agencies and the Secretary of Interior), finding that the regulation was constitutional and Congress had the authority under the Commerce Clause to regulate private lands in order to protect the toad. The district court relied on the "taking" provision of the ESA to conclude that "taking" of the arroyo toad in order to build homes was an economic activity that substantially affected interstate commerce. In its ruling, the lower court noted that the regulated activity in this case was economic in nature (unlike the activities challenged in *Lopez* and *Morrison*), and that federal Courts of Appeals have upheld the ESA as constitutional under the Commerce Clause.

Rancho Viejo appealed the decision and petitioned for rehearing en banc. The petition was denied, with Judge Roberts dissenting from the denial of rehearing and arguing that the

district court's approach to Commerce Clause analysis was flawed. Judge Roberts's dissent maintained that the district court had inappropriately focused upon whether the challenged regulation (i.e., building of homes) substantially affected interstate commerce, rather than whether the activity being regulated (i.e., taking of arroyo toads) did so, a position that he described as in conflict with the Supreme Court's rulings in *Lopez* and *Morrison*. Roberts would have granted a rehearing en banc in order to "consider alternative grounds for sustaining application of the [Endangered Species] Act that may be more consistent with Supreme Court precedent."

The Commerce Clause is a critically important instrument for Congress to enact legislation protective of individual rights and freedoms. Judge Roberts's opinion in *Rancho Viejo* suggests a willingness to contract the scope of Congress' power under the Commerce Clause. This represents a narrower view of the Commerce Clause than that endorsed by the rest of the D.C. Circuit, other circuits, and by the Supreme Court; the Court essentially repudiated Judge Roberts's interpretation in *Gonzales v. Reich*, 2005 U.S. LEXIS 4656, at *29, which upheld the government's authority under the Commerce Clause to prosecute individuals growing marijuana (an act that was legal under state law) for their own use, on the advice of a physician – even where such activity was purely local. Although it is possible that the final line of Roberts's dissent, urging consideration of "alternative grounds for sustaining application" of the ESA, may mitigate the balance of his dissent, the opinion is sufficient to raise serious concerns about Roberts's judicial philosophy and its implications for MALDEF's work and mission. In the context of environmental justice, Judge Roberts's view would drastically reduce or even terminate federal environmental protection efforts that are not near other state land borders. For Latinos, this would have a devastating effect on the effort against environmental degradation along the Southwest border, all of Puerto Rico, and much of Florida.

B. Individual Rights/Access to the Courts

Judge Roberts's position in *Taucher v. Brown-Hruska*, 396 F.3d 1168 (2005) raises serious concerns regarding his philosophy on access to the courts and whether he has an anti-plaintiff bias or tendency in civil rights cases. In *Taucher*, the Court of Appeals reversed and vacated an award for attorneys' fees that were granted under the Equal Access to Justice Act (EAJA). EAJA is a critical tool for public interest attorneys that work to enforce and vindicate civil rights, and opens the courthouse doors for plaintiffs who might not otherwise be able to raise and litigate their claims.

EAJA allows for an award of attorneys' fees in cases where a plaintiff is a prevailing party against the U.S. government, unless the government's legal position is "substantially justified." Judge Roberts, writing for the majority in *Taucher*, vacated the award for attorneys' fees by finding that the Commission's defense was a reasonable one on the merits. The Commission, Roberts wrote, did not "act in defiance of a string of losses" or in conflict with an "unbroken line of authority."

Judge Edwards, taking a starkly different view, issued a strident dissent from the majority opinion. Judge Edwards's opinion noted that a Court of Appeals is bound to engage in a strictly limited review under an abuse-of-discretion standard. Judge Edwards wrote further that the

"Government's positions bordered on frivolous" and that it was "absolutely clear on the record at hand" that the district court did not abuse its discretion in awarding attorneys' fees."

In *Acree v. Republic of Iraq*, 361 U.S. App. D.C. 410 (2005), American soldiers who were held as prisoners of war (POWs) by the Iraqi government while serving in the 1991 Gulf War brought suit in district court under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Plaintiffs sued defendants, including the Republic of Iraq and Saddam Hussein, for compensatory and punitive damages for the torture suffered during their captivity. The district court entered a default judgment for plaintiffs and awarded over $959 million in damages. Following judgment for plaintiffs, the United States filed a motion to intervene, contesting the district court's subject matter jurisdiction. The district court denied the motion as untimely.

The appellate panel held that the district court abused its discretion in denying the United States's motion to intervene. Although the Court of Appeals rejected the government's argument that the language in the Emergency Wartime Supplemental Appropriations Act (EWSAA) made the terrorism exception to the FSIA inapplicable to Iraq, it nonetheless vacated the district court's judgment for the soldiers and dismissed the lawsuit for failure to state a cause of action.

Judge Roberts concurred with the majority's judgment, but on a different basis. Rather than finding a failure to state a claim, Judge Roberts agreed with the government's argument that the EWSAA made FSIA inapplicable to Iraq, and that the Presidential Determination of May 7, 2003 stripped federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity. Thus, Judge Roberts would have dismissed the case for want of jurisdiction.

Judge Roberts, in his *Acree* analysis, acknowledged that the jurisdictional question was a close one, and conceded that the majority had case law on its side. Yet he opted in his opinion to accept, unlike the majority, the interpretation that was *more* restrictive of a plaintiff's right to sue to vindicate civil rights. Again, the ruling raises questions about whether Judge Roberts has shown an appropriate commitment to protecting litigants' right of access to the courts under applicable statutory and constitutional provisions.

Judge Roberts again blocked a civil rights litigant's access to the courts in *Int'l Action Ctr. v. United States*, 361 U.S. App. D.C. 108 (2004), this time invoking the doctrine of qualified immunity, which is often used to bar actions against government wrongdoers. In this case, Judge Roberts, writing for the majority, reversed and remanded the district court's decision that denied summary judgment for police supervisors based on qualified immunity grounds for the inaction theory of liability. Plaintiffs, in a §1983 action, claimed the supervisors were personally liable for constitutional torts because they failed to properly train and supervise subordinate officers, which led to tortious conduct. The supervisors sought interlocutory review of the district court's denial of qualified immunity as it pertained to this theory of liability. The Court of Appeals held that, absent an allegation that the supervisors had actual or constructive knowledge of past transgressions or were aware of "clearly deficient" training, the supervisors did not violate any constitutional right through inaction.

Finally, there is the case of *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (2004), which has received a great deal of attention in the media and from public interest organizations. Judge Roberts, writing for the unanimous panel, affirmed the judgment of the district court that the arrest of a 12-year-old girl who violated a zero-tolerance policy by eating a French fry at a Metrorail station did not violate the Fourth and Fifth Amendments of the Constitution. Because D.C. law did not provide for the issuance of citations for non-traffic offenses committed by juveniles under the age of 18, any delinquent act could be cause to be taken into custody. A juvenile citation policy was implemented following this incident.

The plaintiff's first claim was that her arrest constituted disparate treatment that violated the equal protection component of the Fifth Amendment. She argued that the policy's classification should be reviewed under heightened scrutiny because classifications based on status as a minor are "quasi-suspect," and because her arrest burdened a fundamental right to be free of physical restraint by the government. Roberts, writing for the court, concluded that classifications based on youth did not trigger heightened scrutiny, noting that the D.C. Circuit, along with other circuits, has historically reviewed classifications based on youth under a rational basis standard. The majority noted also that characteristics that define the young are not particularly obvious, distinguishing, or immutable. Thus, the Court of Appeals used rational basis review and found that the policy was rationally related to the legitimate governmental interest in ensuring parents are notified of their child's transgressions.

The plaintiff's second claim, that her arrest was an unreasonable seizure in violation of the Fourth Amendment, was rejected because police had probable cause to believe the girl had committed a criminal offense, however minor. The Court relied on *Atwater v. City of Lago Vista*, in which the Supreme Court upheld the custodial arrest of a woman for failing to fasten her seatbelt and those of her children.

As noted above, the facts of this case have generated significant discussion and attention in the media. Despite the lamentable circumstances of the girl's arrest (which Roberts acknowledged in the first line of his opinion), her civil rights claims were objectively weak under controlling Supreme Court precedent. Roberts's position may, however, provide some insight into how his approach on the Supreme Court might differ from that of Justice O'Connor. *Atwater v. City of Lago Vista*, on which Judge Roberts relied in *Hedgepeth*, was decided by a 5-4 margin, with Justice O'Connor expressing deep misgivings about the arrest in that case, and proposing a kind of proportionality test that would be applicable to Fourth Amendment analysis. O'Connor's view ultimately did not prevail, but her approach is in many ways a sharp contrast to that of Roberts, her would-be successor.

C. Employment/Labor Rights

In *Booker v. Robert Half Int'l, Inc.*, 2005 U.S. App. LEXIS 13124 (2005), Judge Roberts limited an employee's ability to effectively vindicate statutory rights in the area of labor and employment. The Court of Appeals affirmed a judgment compelling an employee to arbitrate his racial discrimination claim. Judge Roberts, writing for the majority, found that inclusion of a severability clause in the arbitration agreement and a "healthy regard for the federal policy favoring arbitration" supported severing the unenforceable punitive damages clause and

enforcing the remainder of the agreement. At the district court level, the EEOC as amicus curiae opposed enforcing the agreement.

The employee had argued that enforcing the modified arbitration agreement was inconsistent with the terms of the contract between the parties, did not provide for sufficient discovery, and limited his possibility of relief. The employee also argued that the modified agreement should be unenforceable based on public policy reasons. If modified agreements are enforced then employers are encouraged to "overreach," knowing that the illegal provisions may be struck down but that the arbitration agreement will still be enforced.

Judge Roberts rejected the employee's arguments, using a contract law analysis to conclude that severing and enforcing the arbitration agreement was consistent with the intent of the contracting parties. He described the employee's argument regarding limited discovery as "speculative," since the scope and tools of discovery were at the discretion of the arbitrator and no arbitrator had been chosen yet. He went on to distinguish cases in which the public policy rationale persuaded courts to strike arbitration clauses in their entirety, contending that those cases often involved agreements that did not contain severability clauses and were "pervasively infected with illegality."

D. Criminal Justice/Prisoners' Rights

In *Hamdan v. Rumsfeld*, 2005 U.S.App. LEXIS 14315 (2005). Judge Roberts joined in a recent D.C. Circuit decision that granted the Bush Administration extraordinary power to try suspected terrorists in special military tribunals without basic due process protections; denied these detainees the ability to enforce the provisions of the Geneva Convention in federal court; and undermined bedrock principles of international human rights law. In permitting the military tribunals to go forward, the majority gave an expansive reading to Congress's resolution authorizing the President to respond to the September 11 attacks. The decision is troubling in both its erosion of fundamental due process rights, and the tremendous deference and expansive wartime authority it bestows upon the executive. Given that Latino immigrants and other members of the Latino community have become caught in the wide net cast by the "War on Terror," the *Hamdan* decision raises serious questions about how far Roberts would be willing to take that deference as a sitting Justice.

Roberts's participation in the *Hamdan* decision also raises the ethical question of whether he should have recused himself from the case, in which the Bush Administration was the party-defendant. The *Washington Post* has reported that White House aides were interviewing Roberts about his possible nomination to the Court during the same time that he sat on the panel for *Hamdan*. Under the applicable canons of judicial ethics, a "judge must recuse himself or herself in any case in which the judge's 'impartiality might reasonably be questioned.'" 28 U.S.C. § 455(a).

In *United States v. Lawson*, 2005 U.S. App. LEXIS 10798 (2005), the defendant was charged and indicted for aggravated bank robbery, aiding and abetting, and brandishing a firearm during a crime of violence. Judge Roberts, writing for the majority, affirmed the district court's rulings denying the defendant's motion to exclude out-of-court identifications and suppress other

evidence and rejected the defendant's claim that the search violated his Fourth Amendment rights.

Roberts found that the out-of-court identifications were admissible because the identification procedure was not impermissibly suggestive. The second identification, made from surveillance photographs, was arguably a suggestive medium, but the Court of Appeals found that its admission was harmless beyond a reasonable doubt; Judge Roberts wrote that the government had produced enough evidence of guilt. The Court of Appeals also found that the district court did not abuse its discretion in allowing the government to present evidence of other crimes given that the probative value of the evidence substantially outweighed the danger of unfair prejudice.

In *Nat'l Council of Resistance of Iran v. Dep't of State,* 373 F.3d 152 (2004), NCRI petitioned for review of the State Department's designation of the organization as a foreign terrorist organization (FTO), because NCRI was an alias of a known FTO. Judge Roberts, writing for the majority, denied the petition for review. Being designated an FTO allows various branches of the U.S. Government to sever financial support to the organization, primarily through freezing accounts and prosecuting people supporting the organization. The Secretary of State has the power to make these designations under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

In a previous case brought by NCRI, the D.C. Circuit Court of Appeals had remanded in order to provide the petitioners due process of law, allowing such designated organizations to respond to evidence in the State Department's administrative record, file evidence on its behalf, and be meaningfully heard by the Secretary of State. The State Department complied and made changes to its designation process to ensure constitutionality.

Judge Roberts defined alias status to be when "one organization so dominates and controls another that the latter can no longer be considered meaningfully independent from the former." The Court of Appeals found that the State Department had substantial evidence to come to the conclusion that NCRI was dominated and controlled by a known FTO, and thus NCRI was also an FTO.

Most recently, the USA PATRIOT Act amended the AEDPA to allow the Secretary of State to designate FTOs without disclosing why the classification was made and also criminalizing any acts that support a FTO. However this provision of the USA PATRIOT Act was declared unconstitutional in 2004 by a federal district court judge in Los Angeles.

VI. PUBLIC SPEECHES AND STATEMENT

John Roberts's documented public appearances and interviews are extremely limited, and his public comments almost invariably measured and careful. The most notable of these public statements have merely hinted at Roberts's personal conservative ideology. For example, in a July 2nd, 2000 appearance on WFAA's *Capital Conversation*, recently rebroadcast on ABC's *This Week with George Stephanopolous*, Roberts suggested that the Rehnquist Court was "not very conservative." In support of this view he cited the Court's decision to uphold *Miranda*,

which he described as a "defeat" for conservatives. In the same interview, Roberts pointed to the Court's ruling upholding the Boy Scouts' ban on gay troop leaders as an important First Amendment "victory."

VII. BIOGRAPHICAL BACKGROUND

Judge Roberts was born in 1955 in Buffalo, New York, and grew up in Long Beach, Indiana, where his father held a management position at Bethlehem Steel. He graduated first in his class from La Lumiere Boarding School, and went on to Harvard College and Harvard Law School. His wife, Jane Sullivan Roberts, is also a lawyer.

A. Educational Background

Judge Roberts is an honors graduate of Harvard College (1976) and Harvard Law School (1979), and was Managing Editor of the Harvard Law Review.

B. Employment History

Summarized below is Judge Roberts's employment history, beginning with the present and moving backward through his graduation from law school.

- 2003-Present: Judge, United States Court of Appeals for the District of Columbia Circuit
- 2001: Nominated to the Federal Bench by President George W. Bush
  - No Senate action.
- 1993-2003: Hogan & Hartson, Washington, D.C.
  - Senior Partner in charge of Corporate Appellate Practice;
  - Matters and clients included: the Lobbying Office of Management and Budget for the Cosmetic, Fragrance, and Toiletry Association; Toyota; U.S. Chamber of Commerce; and multiple health maintenance organizations;
  - In 2000, met with Florida Governor Jeb Bush to provide advice on legal aspects of election disputes during the Florida recount.
- 1992: Nominated to Federal Bench by President George H.W. Bush
  - No Senate action.
- 1989-1993: Principal Deputy Solicitor General of the United States
  - Worked under Solicitor General Kenneth W. Starr in first Bush administration.
- 1986-1989: Hogan & Hartson, Washington, D.C.
  - Developed Civil Litigation practice, with an emphasis on appellate matters.
- 1982-1986: Associate White House Counsel to President Ronald Reagan
- 1981-1982: Special Assistant to U.S. Attorney General William French Smith

- 1980-1981: Law Clerk to then-Associate Justice William Rehnquist, United States Supreme Court

  1979-1980: Law Clerk to Judge Henry J. Friendly, United States Court of Appeals for Second Circuit

C. **Significant Memberships/Affiliations**

- American Law Institute, elected October 1990.
- American Academy of Appellate Lawyers, elected August 1998.
- Edward Coke Appellate American Inn of Court, joined January 2001.
- Federalist Society (membership in dispute: Although Judge Roberts is reportedly listed as a member of the Society's Steering Committee in a 1997-1998 Leadership Directory, and he has addressed the Federalist Society on multiple occasions, the White House asserts that he did not pay the group's $50 membership fee and cannot recall being a member).
- National Legal Center for the Public Interest (unpaid advisor to non-profit organization with prominently conservative leadership, and whose mission, according to its website, includes the promotion of "individual rights, free enterprise, private ownership of property, balanced use of private and public resources, limited government, and fair and efficient judiciary." Resigned upon assuming the bench.)
- Republican National Lawyers' Association