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Re: Nomination of John Roberts, Jr. to the United States Supreme Court

Dear Chairman Specter and Senator Leahy:

The American Civil Liberties Union would like to express its deep concern over some of the civil liberties and civil rights positions advocated by Judge John Roberts, Jr., President Bush's nominee to replace retiring Justice Sandra Day O'Connor on the Supreme Court. In addition to this letter summarizing our concerns, the ACLU has written a comprehensive report on the civil liberties and civil rights record of Roberts, which is enclosed with this letter and is also available at www.aclu.org.

We appreciate the difficulty of assessing the record of a nominee whose many years as an advocate overshadow his short tenure on the bench, but we urge the Senate, at minimum, to determine the extent to which the civil liberties positions advanced by Roberts as an advocate or lower court judge reflect the approach he would take in deciding cases if confirmed. The Senate cannot fulfill its constitutional obligation of advise and consent unless Roberts provides clear answers to specific questions on his civil liberties record, and the Executive Branch provides all documents that relate to his work on civil liberties issues. Given the importance of the nomination and the Senate's obligation of advise and consent, the President should waive any claims of privilege over these documents.

Roberts has been nominated to replace a justice who often was a moderating voice and critical swing vote on civil liberties issues. The Senate must fully consider Roberts' legal and judicial philosophy, approach to decision-making, and possible impact on the role of the Court as a protector of civil liberties in determining whether he should replace Justice O'Connor.

Overview

As a law firm attorney and as Principal Deputy Solicitor General in the first Bush Administration, Roberts argued more than thirty cases before the Supreme Court. His advocacy sometimes concerned significant civil

liberties issues including civil rights, access to the courts, reproductive rights, and government funding or endorsement of religion. The challenge in reviewing John Roberts' record is that, as with any advocate, his litigation positions may not necessarily reflect his personal views. However, several of the recently released internal memoranda from his service as an attorney in the office of the Attorney General during the Reagan Administration clearly express his personal views, and can provide the Committee with insights into his perspectives on civil liberties.

Judge Roberts' judicial opinions provide a fairly clear and very recent window into the legal positions that he might take on the Supreme Court. However, he has been a judge on the D.C. Circuit for just over two years and he has only a handful of cases that substantially implicate civil liberties.

As a judge, Roberts has decided a few cases supporting civil liberties and several cases in which his positions raise concerns. For instance, Roberts joined the D.C Circuit's recent decision holding that Guantanamo Bay detainees could be tried by military commissions. The decision rested, in part, on a holding that the Geneva Conventions are not judicially enforceable and that they do not apply in any event to the conflict in Afghanistan. He has adopted a broad view of executive power in a case involving the Foreign Sovereign Immunities Act. On the other hand, Roberts has ruled that Congress can use its Spending Clause power to authorize federal civil rights lawsuits against states. In addition, he recently joined a decision that reversed a trial court for imposing too harsh a sentence on a defendant.

Roberts' work in private practice as an associate and then as a partner at Hogan & Hartson involved primarily the representation of corporate clients, though he was active in *pro bono* litigation. Several of Roberts' cases from private practice raise civil liberties concerns, while others advanced civil liberties. Perhaps his most troubling cases from this period were his series of briefs and appearances for the Associated General Contractors in challenges to federal affirmative action programs and his successful argument before the Supreme Court that a federal statute protecting the privacy of student records was not privately enforceable. However, in two other important matters while in private practice, he co-counseled with the ACLU of the National Capital Area in its representation of individuals whose welfare benefits were terminated, and he advised the attorney representing gay men and lesbians in a critical case on protecting the rights of gay men and lesbians to lobby their state and local governments for civil rights protections.

Roberts' work as a Principal Deputy Solicitor General in the first Bush Administration – where he was a political appointee and second in command – as well as his work in the Reagan administration raise the most concerns. As Deputy Solicitor General, Roberts co-wrote a brief defending

the federal "gag rule" limiting the ability of federal grantees to provide abortion-related counseling and referral. His brief included an argument that *Roe v. Wade* was wrongly decided and should be reversed--even though *Roe* was not at issue. Roberts also successfully argued for the government that Operation Rescue could not be sued under federal civil rights laws for its organized blockades of clinics. On behalf of the government, Roberts also argued that prayer was permitted at a public school graduation ceremony as long as students were not subject to coercion, an argument the Court rejected. Roberts successfully argued to prevent individuals from bringing suit to require states to comply with certain federal child welfare requirements. Finally, documents from Roberts' tenure in the Reagan Administration indicate that Roberts sought to limit busing as a desegregation remedy, and argued against legislation that eventually passed (and that the ACLU vigorously supported) to restore a key interpretation of the Voting Rights Act after the Supreme Court's adverse decision in *City of Mobile v. Bolden,* 446 U.S. 55 (1980).

Read in its entirety, Roberts' record, as disclosed up to this point, reflects a narrow view of federal court jurisdiction and a narrow view of the judiciary's role in construing the Constitution, especially with regard to unenumerated rights. This has led Roberts to take some very troubling positions – again, more often as an advocate than as a judge – on core civil liberties such as those relating to race, government funded or endorsed religion, and reproductive rights. His actual views on those issues matter enormously because it is on precisely those issues that Justice O'Connor often provided a moderating voice and a critical swing vote on the current Supreme Court. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action in college admissions); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (overturning a state abortion ban); *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005) (finding certain Ten Commandment displays in courthouses unconstitutional).

International Law and National Security

Earlier this summer, Judge Roberts joined the troubling appellate court opinion in Hamdan v. Rumsfeld, the military commissions case. The court held that the President has the power to detain and try a captive from the war in Afghanistan in *ad hoc* military commissions that provide even less due process protections than military courts martial. Hamdan, a detainee at Guantanamo Bay, had asked the court to rule that he could not be tried in these commissions until a fair and impartial tribunal determined he should not be treated as a prisoner of war, as required under the Geneva Conventions.

The district court agreed with Hamdan, but—in what the media is calling a "significant victory" for the Bush administration—the D.C. Circuit reversed, holding that Hamdan could not use the court to enforce the Geneva Convention's protection of a fair and impartial tribunal to determine whether

he is a prisoner of war, and affirming the President's power to determine who is to be tried in a military commission. Judge Roberts did not write a separate opinion in the case. The ACLU has opposed the military commissions at Guantanamo Bay because they unconstitutionally deny due process rights to the detainees.

In addition to the military commission case, Judge Roberts also wrote a separate concurrence in another recent national security case implicating civil liberties. In Acree v. Iraq, several American troops, captured and tortured by the Iraqis in the 1991 Gulf War, brought suit in 2004 against Saddam Hussein, Iraqi intelligence and the country itself. The lawsuit, however, conflicted with a directive from President Bush granting post-Saddam Iraq immunity from legal action. The majority of the court found the main legal dilemma in the case an "exceedingly close question." Judge Roberts issued a separate concurrence, saying that the president clearly had the power to exempt Iraq from liability. The Senate must determine whether this decision is indicative of a broad view of presidential power in national security cases.

Freedom of Speech and Freedom of Religion

During his career as an advocate, Judge Roberts has taken several positions on freedom of speech and religion that raise serious civil liberties questions. For example, Roberts and the ACLU were on opposing sides when he argued as a government lawyer that a federal act prohibiting flag burning did not violate the First Amendment's free speech guarantees, even after the Supreme Court had declared a nearly identical state statute unconstitutional the previous year. While working as an attorney in the Reagan White House Counsel's office, Roberts wrote a memorandum critical of an important free speech case, *New York Times v. Sullivan,* stating that it was his "personal view" that returning to the pre-*Sullivan* standards for libel in exchange for eliminating punitive damages "would strike the balance about right." As a lawyer in private practice, however, Roberts co-authored a brief to the Supreme Court on behalf of *Time* magazine claiming that an Arkansas statute violated the First Amendment because it exempted certain magazines from sales tax based on their content, a position that the ACLU also advocated.

The record on government funded or endorsed religion is more one-sided. Representing the government in an ACLU case, Roberts unsuccessfully argued in support of the constitutionality of school prayer at graduation ceremonies, and in favor of a narrow interpretation of the Establishment Clause that emphasized the need to prove coercion. Earlier in his career, while working as a lawyer in the Reagan White House Counsel's office, Roberts wrote a memo in which he described a Supreme Court opinion that held that a one-minute period of silence in public schools,

enacted by the legislature to return prayer to the public schools, was unconstitutional—as "indefensible." Roberts further stated in the memo that he would have no objection to a White House statement of support for a constitutional amendment authorizing silent prayer in public schools.

All of these positions were taken when Roberts was a lawyer for the government or in private practice. Although he had a somewhat mixed record on speech cases, his one-sided record on government funded or endorsed religion is more troubling. The Committee needs to determine whether his representation of the government or a client reflects his own perspective on these critical issues.

Civil Rights

Roberts advised or represented the federal government or private industry in undermining school desegregation and workplace affirmative action programs, while also defending a Hawaii state program that favored native Hawaiians. While working in the solicitor general's office, Roberts co-authored briefs arguing for standards that made it easier for school systems to get out from under desegregation decrees, which were imposed based on findings of intentional race discrimination. Recently released memos also indicate that, while working in the Reagan White House Counsel's office, Roberts opposed busing as a desegregation remedy and supported the right of Congress to bar busing as a remedy in desegregation cases, even if courts thought it necessary. In private practice, Roberts repeatedly wrote briefs on behalf of a group opposed to federal affirmative action for minority contractors in transportation and defense programs. At the same time, he also wrote a brief supporting a program, which, although not strictly speaking an affirmative action program, favored native Hawaiians.

In the area of voting rights, while working as a Special Assistant to U.S. Attorney General William French Smith in the Reagan Administration, Roberts participated in the Reagan Administration's efforts to fight against improving the Voting Rights Act to help minority voters. Specifically, the Supreme Court ruled in *Mobile v. Bolden*, 446 U.S. 55 (1980), that plaintiffs bringing vote dilution claims under the Voting Rights Act must prove intentional discrimination. After the decision, Congress amended the statute to allow claims based on a "results" theory, because of this difficulty of proving intent especially against longstanding voting practices. Roberts had a role in the Reagan Administration's efforts to oppose the legislative proposal.

Applying a similar rationale in the context of fair housing protections while serving as a lawyer in Reagan's White House Counsel's office, Roberts wrote a memorandum to White House Counsel Fred Fielding in which he provided an account of the Administration's work in the area of fair housing, but also suggested that the Administration should not support an amendment

to the Fair Housing Act that would codify an "effects test. " The memorandum argues that: "[g]overnment intrusion (though (sic), e.g., an "effects test") quite literally hits much closer to home in this area than in any other civil rights area." Roberts argued that despite the fact that the Administration was "burned" the prior year by not supporting an effects test in voting rights, "I do not think there is a need to concede all or many of the controversial points (effects test, national administrative remedy) to preclude political damage." These internal efforts raise the serious question of whether Roberts would limit the scope of civil rights protections to ban only the most overt discrimination.

Roberts argued on behalf of the government or private clients, and advised the government, on important matters affecting the rights of women. While in the Attorney General's office in 1982, Roberts urged the Justice Department not to contest a court ruling that the anti-discrimination provisions of Title IX only apply to the specific university program receiving federal funds and not to the university as a whole. In response to a subsequent Supreme Court ruling, Congress ultimately made clear that Title IX in fact applied to the entire university, regardless of which program received funding. He also argued against the doctrine that pay in traditionally female jobs should be equal to those in comparable traditionally male jobs. While in the same position, he also recommended against having the Justice Department intervene to challenge a state prison's policy of excluding women from many vocational training programs. Roberts argued that intervention was against the Attorney General's positions against heightened scrutiny for gender-based discrimination and against federal court intervention in state programs. Later in his career, while at the Reagan White House Counsel's office, he outlined arguments against the proposed Equal Rights Amendment to the Constitution.

His record on disability rights is mixed. For example, while a law firm partner, Roberts successfully represented Toyota Motor Manufacturing in its claim that it had no duty to provide reasonable accommodation to an assembly line worker who was unable to perform her job because of carpal tunnel syndrome. However, as a judge, he joined a decision written by Judge Garland--over the opposition of Judge Sentelle--which held that the Washington Metropolitan Area Transit Authority was not immune from suit in federal court under section 504 of the Rehabilitation Act. The opinion upheld the right of a private person to sue a state government because Congress had properly used the Spending Clause as authority for applying the Rehabilitation Act to the states.

In his *pro bono* work as a law firm partner, he worked on cases in which he worked to protect civil rights. As a volunteer ACLU cooperating attorney, Roberts unsuccessfully challenged the denial of due process rights by the District of Columbia government to hundreds of individuals who lost their medical disability benefits without individualized notice or an opportunity for a hearing. Also, the *Los Angeles Times* recently reported that

Roberts, while a law firm partner, assisted the lawyer representing the gay men and lesbians who successfully challenged a state constitutional amendment barring all protections against sexual orientation discrimination.

Only last year, the Senate helped lead the nation in a celebration of *Brown v. Board of Education* and in an examination of the unfinished work of the civil rights movement. The Court has been too important to the elimination of unconstitutional and illegal discrimination to allow anyone to join the Court without a full examination of the nominee's commitment to protecting the civil rights of all.

Court-Stripping and Access to Federal Courts

On at least three occasions between 1982 and 1986, Roberts unsuccessfully argued within the government that Congress has the constitutional power to strip the Supreme Court of jurisdiction over issues such as busing, abortion, and school prayer. As a special assistant to Attorney General William French Smith in 1982, Roberts repeatedly argued in support of bills that would have stripped the Supreme Court of jurisdiction over abortion, busing and school prayer cases. Roberts wrote "NO!" in the margins of an April 12, 1982 memorandum then-Assistant Attorney General Theodore B. Olson sent to Smith. In the memo, Olson observed that opposing the bills would "be perceived as a courageous and highly principled position, especially in the press." Roberts underlined the words "especially in the press," and wrote in the margin: "Real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises and Brinks!" (Apparently referring to Harvard Law Professor Laurence H. Tribe, columnist Anthony Lewis and then-President of the American Bar Association David Brink, who all opposed the bills.) Roberts also added notes skeptical about Olson's position that the bills were unnecessary because the Supreme Court was now moving to the right.

In another memo-- written on the recommendation of Kenneth Starr—Roberts argued that Congress has the power to control the appellate jurisdiction of the Supreme Court. Roberts wrote that his memo was "prepared from a standpoint of advocacy of congressional power over the Supreme Court's appellate jurisdiction [and] does not purport to be an objective review of the issue, and should therefore not be viewed as such." In the context of his analysis, Roberts approvingly cited comments by then-University of Chicago law professor Antonin Scalia at a conference on court-stripping bills. At the conference, Scalia acknowledged that the bills may lead to non-uniformity in the interpretation of federal law, but, Roberts stated, "[g]iven the choice between non-uniformity and the uniform imposition of the judicial excesses embodied in *Roe v. Wade*, Scalia was prepared to choose the former alternative." Roberts also presented arguments that stripping the courts of jurisdiction in abortion and school prayer cases does not "directly burden the exercise of any fundamental

rights." The Administration, in the end, did not follow Roberts' advice and instead opposed the bills.

The *Washington Times* reported on a memo written by Roberts in his subsequent position as a lawyer in the White House Counsel's office, in which he wrote to then-White House Counsel Fred Fielding that Congress could, but should not, strip federal courts of jurisdiction in cases involving school prayer. According to the *Washington Times*, Roberts' May 6, 1986 memo indicated that he had looked into the issue while working as a special assistant for Smith, and that he had concluded "[s]uch bills were bad policy and should be opposed on policy grounds," but that they were not prohibited by the Constitution:

> After an exhaustive review at the Department of Justice, I determined that such bills were within the constitutional powers of Congress to fix the appellate jurisdiction of the Supreme Court... My views did not carry the day. . . The bills were, accordingly, opposed on constitutional grounds.

All these accounts, it should be noted, suggest that Roberts believed that jurisdiction stripping was constitutional--a position that would undermine the Constitution's protection of checks and balances. Although these writings are roughly two decades old, they are so extreme that the Senate must determine whether they still represent Roberts' views on the constitutionality of removing the Supreme Court from the Constitution's system of checks and balances.

Reproductive Rights

As Deputy Solicitor General, Roberts argued that Operation Rescue could not be sued under federal civil rights laws for its organized blockades of clinics that provide abortions. In another case while in the Solicitor General's office, Roberts co-authored the Bush administration brief in defense of the "gag" rule, which also argued that *Roe* was wrongly decided, even though *Roe* was not before the Court. As a judge, he has not had occasion to rule in a reproductive rights or privacy case.

In response to questioning at his confirmation hearing about his argument that *Roe* should be overruled, Roberts stated that he was advocating a position for his client, and that the Bush Administration had, "articulated in four different briefs filed with the Supreme Court, briefs that I hadn't worked on, that *Roe v. Wade* should be overturned." When asked his position on *Roe*, Roberts stated:

> *Roe v. Wade* is the settled law of the land. It is not – it's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision. Accordingly, it's the settled law of the land. There's nothing in

> my personal views that would prevent me from fully and faithfully applying that precedent, as well as *Casey*.

Roberts provided this answer in the context of his appointment to a lower court where he is duty bound to follow the Supreme Court's rulings. The extent to which he believes in *Roe* or *Casey* personally, or whether, as a Supreme Court Justice, he would consider the constitutionality of reproductive choice "settled" law are open questions and must be considered by the Committee.

Criminal Justice

Roberts' record on criminal justice issues has been mixed. As a judge, Roberts has consistently ruled against Fourth Amendment claims, most notably dissenting recently from a panel ruling requiring the suppression of certain evidence found by police in a car trunk, but also joined in an opinion reducing another defendant's sentence. While working for the Attorney General during the Reagan Administration, Roberts had an extraordinarily narrow view of the constitutional right to federal *habeas* corpus. Roberts argued that despite the Constitution's prohibition against suspension of *habeas corpus* except "when in cases of rebellion or invasion the public safety may require it," Congress has the power to abolish federal *habeas corpus* entirely. While in private practice, Roberts' first argument to the Supreme Court was on behalf of an individual who accused the government of violating the double jeopardy clause, a case in which he was successful. As Deputy Solicitor General, Roberts argued on the same side as the ACLU in a case involving the Eighth Amendment rights of prisoners.

Need for Thorough Questioning

The nomination of Roberts comes at a critical moment for civil liberties and civil rights. With so much at stake, the Senate's inquiry must be deep, and the Executive Branch's disclosure of documents must be complete. Does Roberts believe that the Constitution protects a right to privacy and, if so, what are its contours? Does he believe that Congress can strip the courts of jurisdiction to resolve particular constitutional disputes? Does he believe that Congress can prevent the courts from ordering specific remedies in civil rights cases because Congress, not the courts, has found them to be ineffective? Can government endorse religion as long as it does not compel anyone to agree? What are Roberts' views on *stare decisis* – an issue on which he has said and written very little?

Given Roberts' 25-year record as a lawyer and judge, these and other questions need to be asked and answered. The Senate has both a right and a responsibility to fully consider the nominee's judicial philosophy and approach to constitutional decision-making as part of its advise-and-consent function under the Constitution.

Thank you for your attention to this matter, and please do not hesitate to call us at 202-675-2308 if you have any questions regarding this issue.

Very truly yours,

Caroline Fredrickson
Director

Christopher E. Anders
Legislative Counsel

Enclosure