Nomination of John G. Roberts to be Chief Justice of the United States

Hearings before the Committee on the Judiciary, United States Senate

Testimony of Patricia L. Bellia*

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It is an honor to appear before you in support of the President's nomination of Judge John Roberts to be Chief Justice of the United States.

By way of background, I am a law professor at the University of Notre Dame, where I teach and research in the areas of constitutional law and law and information technology. Before joining the Notre Dame faculty, I served from 1997 to 2000 as an attorney-adviser in the Office of Legal Counsel of the United States Department of Justice, which advises the Attorney General and the President on various "structural" constitutional issues, including questions about the scope of Congress's legislative authority and separation of powers. Prior to my service in the Justice Department, I had the great privilege of clerking for two of our nation's most respected jurists: Judge José A. Cabranes of the United States Court of Appeals for the Second Circuit, whose fair-mindedness and commitment to legal principle long ago set the bar in my mind of attributes that a worthy Supreme Court nominee must possess; and Justice Sandra Day O'Connor, whom Judge Roberts was initially nominated to replace and for whom I have the deepest admiration.

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I have never worked with Judge Roberts; indeed, I have never met him. I have had the privilege, however, to know Judge Roberts' work as an advocate before the Supreme Court and, more recently, his work as a judge on the United States Court of Appeals for the D.C. Circuit. During my time in Washington, I witnessed Judge Roberts' advocacy before the Court first-hand on several occasions. As an advocate before the Supreme Court, Judge Roberts was an extraordinary legal craftsman. His arguments were brilliant, his temperament even, and his responsiveness to the concerns of each Justice genuine. No one who followed Judge Roberts' career as a Supreme Court advocate could plausibly deny that he stands among the very best lawyers of his generation.

I will not focus in this testimony, however, on the record of John Roberts as an advocate for his clients before the Supreme Court and other courts; rather, I will focus on his record as a judge, a record with which I am thoroughly familiar. In my view, the best evidence of how a nominee will perform as a judge is how he has performed as a judge. I have read all of the opinions that Judge Roberts has written in his time on the United States Court of Appeals for the D.C. Circuit. His service on that court demonstrates that he resolves cases with competence, care, impartiality, and fair-mindedness. Most importantly, his jurisprudence on the Court of Appeals demonstrates in decided fashion that Judge Roberts does not seek in his decisions to advance the platform of any current political ideology. Judge Roberts has joined and written opinions upholding claims of criminal defendants and joined and written opinions denying such claims. He has accepted challenges to Executive agency action claimed to be arbitrary and capricious, in violation of due process, lacking substantial evidence, or otherwise unreasonable; and he

has rejected such challenges when he believes that an agency has faithfully discharged its duty under the law. He has interpreted statutes with great care, with a primary focus on the text that Congress has enacted, but never categorically dismissing any evidence that is probative of congressional intent. Across the board, his opinions reveal no bias or political agenda—no desire merely to manipulate the law in the service of a politically predetermined result.

His opinions, be they for the court or himself, display no rancor; rather, they are notable for the respect and care with which they outline any disagreement he might have with the positions of litigants or his colleagues on the court. Nor do his opinions betray any impatience for the claims of any class of litigants. The occasional hints of exasperation in Judge Roberts' opinions are reserved for the district court judge or the administrative agency that has decided upon the rights and claims of individuals without providing the considered explanation to which he believes all persons who find themselves before our tribunals are entitled. It is therefore no surprise to find in Judge Roberts' opinions an extensive, careful scrutiny of the individual claims that each case squarely presents—no more and no less.

There is not the time here for me to specifically analyze each opinion that Judge Roberts has written or joined on the Court of Appeals. I therefore will focus on two substantive areas in which Judge Roberts' work on the Court of Appeals has been subject to criticism. Both areas involve structural constitutional issues. The first concerns Judge Roberts' approach to questions of congressional power under the Constitution. A claim has been made that Judge Roberts takes an unduly narrow view of Congress's power under the Commerce Clause—one that endangers a variety of civil rights statutes, labor

standards, and environmental regulations that Congress has justly designed to protect the equal rights of all Americans, the conditions under which we work, and the environment in which we live. The second issue concerns Judge Roberts' approach to questions of Executive power. The critical claim is that Judge Roberts is unduly deferential to assertions of presidential prerogative, particularly in the area of foreign affairs. In my view, these claims are unfounded, dependent as they are upon a misreading of Judge Roberts' opinions.

A fair explanation of why these claims are unfounded does not make for gripping political rhetoric. Rather, a fair explanation demands a considered analysis of the cases in light of the complexity, measure, and nuance of the governing law that the facts of these cases implicated—in other words, a legal analysis.

The concern regarding congressional power stems from Judge Roberts' dissenting opinion in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (*Rancho Viejo II*). In this case, the court was called upon to address whether the U.S. Fish and Wildlife Service could, under the Endangered Species Act, impose certain restrictions on a proposed housing development on the theory that the development would result in the so-called "taking" of the arroyo southwestern toad. The developer challenged the restrictions on the ground that application of the Endangered Species Act to protect the arroyo toad and thereby restrict the housing development exceeded the authority of the federal government under the Commerce Clause. A panel of the D.C. Circuit rejected that claim, and the developer petitioned for rehearing by the full Court of Appeals.

The active members of the D.C. Circuit declined to rehear the case en banc. Judge Roberts dissented from that denial of rehearing. Because Judge Roberts' dissent

has been characterized as evidencing a hostility to Congress's Commerce power, it is important to establish what the dissent shows, and what it does not show. Judge Roberts dissented not on grounds that the panel reached the wrong *result* in upholding congressional power, but that it employed the wrong *methodology*. Nowhere does the dissent suggest that the Endangered Species Act is unconstitutional, as applied in this case or in any other case. Rather than demonstrating a hostility to congressional power, the dissent demonstrates a concern that courts provide the right *reasons* for their decisions—even if the results remain the same. This concern is of course well founded, as the reasons that the courts provide in support of their decisions are central to the corpus of law that will guide judicial action in subsequent cases.

Specifically, what the dissent shows is a concern that the methodology the panel adopted in deciding the case is out of step with relevant Supreme Court doctrine. In evaluating the developer's claim that the federal government's action was unconstitutional, the panel examined whether the activity the federal government effectively precluded—namely, the housing development—had a substantial effect on interstate commerce. In doing so, the panel declined to consider an alternative ground in defense of the restrictions: that the loss of the toad would itself have a substantial effect on the ecosystem and likewise on interstate commerce. Nor did the panel consider similar rationales on which other circuits had relied to uphold endangered species regulations, including that protection of endangered species affects interstate commerce through tourism, trade, and scientific research. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067-68 n.2 (D.C. Cir. 2003) (*Rancho Viejo I*).

Judge Roberts' concern in dissent was that the panel opinion asked the wrong question. In particular, the panel asked not whether the *activity targeted by the statute* substantially affects interstate commerce, but rather whether the *consequences of targeting that activity* substantially affect interstate commerce. More specifically, the panel focused not on whether the taking of the arroyo toad affected interstate commerce, but rather on whether the restriction of the housing development affected interstate commerce. *See Rancho Viejo II*, 334 F.3d at 1160 (Roberts, J., dissenting). Judge Roberts perceived the panel's approach to be in tension with the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Had the Supreme Court in *Lopez* and *Morrison* taken the approach embraced by the panel majority in *Rancho Viejo I*, the Court would necessarily have had to reject facial challenges to the statutes at issue, because some applications of those statutes—i.e., those that would have resulted in some disruption of commercial activities—would have been constitutional.

What the dissent does *not* show is that Judge Roberts believes the Endangered Species Act to be unconstitutional. Indeed, in an important passage that has often been overlooked, Judge Roberts stated that en banc review would afford the court "the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent." *Rancho Viejo II*, 334 F.3d at 1160 (Roberts, J., dissenting). The "alternative grounds" to which Judge Roberts alluded were those that the panel opinion specifically declined to address, but that had formed the basis for other courts' conclusions that particular applications of the Endangered Species Act were constitutional. *See id.* (citing *Rancho Viejo I*, 323 F.3d at 1067-68 n.2).

The limited nature of Judge Roberts' opinion is perhaps best seen through comparison to Judge Sentelle's opinion also dissenting from denial of rehearing en banc. Judge Sentelle expressly concluded that application of the Endangered Species Act to restrict the housing development was unconstitutional. *Rancho Viejo II*, 334 F.3d at 1158 (Sentelle, J., dissenting). Moreover, Judge Sentelle adopted a narrow view of the Court's decision in *Lopez*: as permitting federal regulation only of activities that are themselves commercial. *See id.* at 1159 (Sentelle, J., dissenting). *Lopez*, to be sure, characterized a number of past cases sustaining Commerce Clause regulation on the ground that the regulated activity substantially affected interstate commerce as cases involving commercial activities. The *Lopez* Court, however, established no explicit rule that an activity must be commercial to have a substantial effect on interstate commerce. Importantly, Judge Roberts neither joined nor even pursued these lines of inquiry in *Ranch Viejo II*.

Other actions of Judge Roberts on the Court of Appeals confirm that he has not taken an overly narrow view of congressional power. In *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004), Judge Roberts joined the majority in an important case upholding congressional power under the Spending Clause. In *Barbour*, the court was called upon to address whether Congress could constitutionally condition federal transportation funds on a waiver of state sovereign immunity. After the Supreme Court's decision in *Lopez*, commentators, litigants, and lower courts questioned whether Congress's ability to attach conditions to the funds it disburses was in fact as broad as the Supreme Court suggested it was in its 1987 decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). Over a dissenting opinion

making precisely this point, *see* 374 F.3d at 1171 (Sentelle, J., dissenting), Judge Roberts joined Judge Merrick Garland in upholding Congress's action.

The second area in which Judge Roberts has been subject to criticism concerns his approach to questions of Executive power. This criticism stems largely from Judge Roberts' concurring opinion in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004). In *Acree*, a group of American soldiers filed suit in federal court against the Iraqi government, alleging that they had been held as prisoners of war and tortured while serving in the Gulf War. The Court of Appeals unanimously dismissed the suit, with Judge Roberts diverging from the majority on one point of law. Again, it is important to establish what Judge Roberts' opinion shows and what it does not show. Judge Roberts' opinion demonstrates a narrow disagreement with his colleagues on a question of statutory interpretation that all agreed was a "close" one. *See id.* at 51; *id.* at 62 (Roberts, J., concurring in part and concurring in the judgment). The opinion says nothing about the scope of the Executive power that the Constitution grants the President, in the foreign affairs area or in any other area.

Among the central issues in the *Acree* case was how to resolve the interplay between two federal statutes. First, the Foreign Sovereign Immunities Act (FSIA) abrogates foreign states' immunity from suit in federal court with respect to certain claims, including those involving torture or other terrorist acts. 28 U.S.C. § 1605(a)(7). Second, a 2003 appropriations measure passed to facilitate the rebuilding of Iraq contained a proviso authorizing the President to suspend a specific statute restricting aid to Iraq, as well as to "make inapplicable" to Iraq "any . . . provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-71, § 1503, 117 Stat. 559, 579

(2003). While the soldiers' suit was pending in federal court, the President issued a Presidential Determination exercising the authority that Congress had granted.

The Court of Appeals thus had to address whether the terrorism exception under the FSIA was among the provisions that could be "ma[de] inapplicable" to Iraq by the President, thereby divesting the federal courts of subject matter jurisdiction in the soldiers' case. The majority concluded that the FSIA was not among the laws that the President could suspend. In particular, the majority reasoned that, based on the placement of the appropriation act's proviso among provisions governing assistance to Iraq, and in light of a legislative history reflecting Congress's desire to eliminate restrictions on aid and exports needed for Iraq's reconstruction, the proviso should be read narrowly: as permitting suspension only of those statutes creating obstacles to granting aid to Iraq, not of a statute conferring federal court jurisdiction over civil claims against Iraq.

What Judge Roberts' dissent shows is a disagreement with the majority on this rather technical question of statutory interpretation. Judge Roberts favored giving effect to the statute's broad language—allowing suspension of "any provision of law." While conceding that the statute was not entirely unambiguous, he believed that the majority's other evidence of Congress's intent, including a legislative history that did not squarely address the interplay between the two statutes, was insufficient to overcome the broad statutory language.

What Judge Roberts' concurrence does *not* say is anything about the scope of the President's powers under the Constitution with respect to foreign affairs. Judge Roberts' opinion alludes to the possibility that the President's interpretation of the scope of his

authority under an ambiguous *statute* may be entitled to deference under the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Acree*, 370 F.3d at 62 n.2. Although raising the issue, the opinion notes the debate surrounding it and does not purport to resolve it.

Judge Roberts also was a member of a panel that addressed the slightly different question of what deference a court owes to the President's interpretation of an international treaty. In *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), an enemy combatant claimed that he could not be tried by a military commission. Among a number of issues Judge Randolph's opinion for the court addressed was whether the 1949 Geneva Convention, under which Hamdan sought protection, applied to the United States' conflict with al Qaeda. *Id.* at 41. All members of the panel agreed that the only circumstance under which the Convention could arguably apply to Hamdan would be if the United States' conflict with al Qaeda were deemed, by terms of the Convention, an "armed conflict *not of an international character* occurring in the territory of one of the High Contracting Parties." Because Afghanistan was a "High Contracting Party," the question was whether the conflict with al Qaeda could be considered "not of an international character." Judge Randolph's majority opinion, which Judge Roberts joined, found that the President's determination that the conflict was international in scope was a reasonable one. *Id.* at 41-42. Judge Williams diverged from the majority on this point, concluding that, in the context of the treaty, "not of an international character" simply meant "not between nations," and that the treaty therefore could cover a conflict between a signatory and a non-state actor. Importantly, Judge Williams' dispute with the majority was a narrow one: all members of the panel fully agreed with the proposition

that the President's construction of a treaty is entitled to great weight. *Id.* at 44 (Williams, J., concurring).

In short, with respect to structural constitutional issues, the criticisms leveled against Judge Roberts' work on the Court of Appeals are unfounded. In addressing these two areas of controversy, I do not intend to detract from the remainder of Judge Roberts' judicial work, which consists of uniformly careful, evenhanded, and principled decisions.

In sum, I believe that Judge Roberts' jurisprudence on the Court of Appeals reflects the best of what we should expect of a nominee to the Supreme Court of the United States. His decisions defy categorization as conservative or liberal, Republican or Democrat. Indeed, Judge Roberts has refused to characterize himself as subscribing to any particular judicial philosophy, be it originalism or living constitutionalism, textualism or statutory dynamicism. He says that he simply decides every case as it comes before him according to the law, as best as he can discern it. What he has accomplished on the Court of Appeals thus far demonstrates that he has truthfully represented himself to the American public. Simply put, he has demonstrated that he possesses one of our Nation's foremost legal minds, that he employs that mind with full fairness and integrity, and, in all of this, that he well deserves our trust to lead our Nation's judiciary. It is an honor and privilege to testify today in support of his nomination to serve as Chief Justice of the United States.