

**Report of the American Civil  
Liberties Union on the  
Nomination of District of  
Columbia Circuit Court Judge  
John Roberts Jr., to be  
Associate Justice on the  
United States Supreme Court**



August 2005

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**THE AMERICAN CIVIL LIBERTIES UNION** is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

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# Report of the American Civil Liberties Union on the Nomination of District of Columbia Circuit Court Judge John Roberts Jr., to be Associate Justice on the United States Supreme Court

## Introduction

In accordance with ACLU Policy 519, this report summarizes the civil liberties and civil rights record of Judge John Roberts, who was nominated by President Bush on July 19, 2005 to replace retiring Justice Sandra Day O'Connor as an Associate Justice of the United States Supreme Court. The policy provides:

Whenever a Supreme Court nomination is sent to the Senate, the ACLU will prepare a summary of the candidate's past judicial record (if any), writings, speeches, etc., in regard to civil liberties for use by the Senate as well as by the press and other members of the public in evaluating the nominee.

Judge Roberts has served as a member of the United States Court of Appeals for the District of Columbia Circuit since May 2003. In preparing this report, we reviewed his judicial opinions on civil liberties and civil rights, including his concurrences and dissents. We also reviewed some of the significant cases in which Judge Roberts joined the opinions of other judges. In addition, we reviewed his record as an advocate, both in private practice and as Principal Deputy Solicitor General from October 1989 to January 1993. We reviewed his work for the Reagan Administration – where he served as an assistant to Attorney

General William French Smith for one year and in the White House Counsel's Office for more than three years – based on records available as of August 24, 2005. Finally, we reviewed his published articles, which are few, along with press reports and media programs in which he was featured.

We are confident that this summary presents a fair and accurate portrayal of the Roberts' record, as we know it today. However, it is important to note that the White House has so far declined to produce any of the memos that Roberts wrote while he worked in the Solicitor General's Office. And, it is certainly possible that the Senate confirmation hearings, which are scheduled to begin on September 6, 2005, will produce new insights regarding Roberts' attitude on key civil liberties and civil rights questions.

As one of the most experienced and respected Supreme Court advocates of his generation, Roberts clearly possesses the intellectual qualifications to sit on the Supreme Court. That is certainly a necessary condition for confirmation, but it ought not to be a sufficient one. The larger question is what kind of Justice will John Roberts be if confirmed? What are his views on the role of the Constitution in preserving individual rights, and on the role of the judiciary in interpreting the Constitution? Those questions provide the framework for this report.

Over the past several weeks, there has been much discussion about whether it is fair to

assume that the views Roberts advocated as a lawyer on behalf of his clients, both in private practice and in government practice, represent his personal views as well. We agree that is a fair question and hope that the Senate hearings will provide an opportunity to explore that issue further. But many of the memos that have now come to light from Roberts' years in the Reagan White House were clearly expressions of his own personal views and, where appropriate, we have indicated as such in the accompanying report.

Both as a judge and an advocate, Roberts has taken positions that are supportive of civil liberties and civil rights. In private practice, for example, he brought a due process challenge on behalf of welfare recipients as a cooperating attorney for the ACLU. He provided pro bono advice in *Roemer v. Evans*, an ACLU case that upheld the right of gay men and lesbians to participate in the political process on an equal footing. He also successfully asserted a double jeopardy claim in his first appearance before the Supreme Court. As a lawyer in the White House counsel's office, Roberts argued against proposals to limit protest signs at Reagan/Bush campaign rallies, and to deny White House press passes to "fringe" organizations that were considered unsympathetic to the Administration. As a lawyer in the Solicitor General's Office, he submitted a brief supporting the ACLU's claim that the Eighth Amendment protects a prisoner against abuse even in the absence of a "significant injury." As an appellate judge, he reversed a trial judge for imposing too harsh a sentence on a defendant and declined to join another judge's opinion narrowly interpreting the power of Congress under the Spending Clause.

More generally, however, Roberts has relied on notions of "judicial restraint" and "states' rights" throughout his career to advocate positions that the ACLU has opposed. For example:

- He ruled that the Geneva Conventions are not judicially enforceable and upheld the military commissions established by President Bush through executive order.
- He argued that Congress has the power to strip the Supreme Court of jurisdiction to hear cases involving abortion, school prayer and busing, although he also argued against exercising that power as a matter of policy.
- He opposed efforts to reinstate the "effects" test under the Voting Rights Act, arguing that federal law should only protect minority voting rights against acts of intentional discrimination.
- He opposed affirmative action.
- He signed a brief while in the Solicitor General's Office urging that *Roe v. Wade* be overruled. (During his confirmation hearings for the D.C. Court of Appeals, Roberts described *Roe* as "the settled law of the land.")
- He argued that female prisoners could be given fewer services than male prisoners and opposed any judicially enforced notion of comparable worth.
- He sought to limit access to the courts by advocating a narrow view of standing and arguing against implied rights of action.
- He sought to place restrictions of federal habeas corpus long before Congress acted to put those restrictions in place.
- He argued that plaintiffs should be required to prove coercion in order to prevail on an Establishment Clause

claim, and expressed no objection to a proposed constitutional amendment authorizing a moment of silence in schools.

- He suggested that *New York Times v. Sullivan* had tilted First Amendment law too far in favor of journalists and that public figures should be allowed to recover for libel based on nothing more than negligence so long as they were willing to forego any claim to punitive damages.

These issues are discussed in more detail in the report that follows. On many of these issues, Justice O'Connor provided a moderating voice and a critical swing vote on the current Supreme Court. In considering her replacement, we firmly believe that the Senate has both a right and a responsibility to fully consider the nominee's judicial philosophy and approach to decisionmaking as part of its advise-and-consent function under the Constitution.

## **Biographical Background**

John Roberts was born in 1955 in Buffalo, New York. He received his B.A. from Harvard College in 1976 and his J.D. from Harvard Law School in 1979. After law school, Roberts clerked for Judge Friendly on the Second Circuit from 1979 to 1980, and for then-Justice Rehnquist on the Supreme Court from 1980 to 1981.

After finishing his Supreme Court clerkship, Roberts served as a Special Assistant to U.S. Attorney General William French Smith. From 1982 until 1986, he served as an Associate Counsel in President Reagan's White House Counsel's office. From there, he worked as an associate at the Washington, D.C. law firm of Hogan & Hartson LLP until 1989. In 1989, Roberts returned to government serving as Principal Deputy Solicitor General in the Justice Department during George H.W. Bush's presidency. In 1993, shortly after President Clinton's election, Roberts returned to Hogan & Hartson as a partner in their appellate practice division.

Roberts was initially nominated to the D.C. Circuit by George H.W. Bush in 1992, but his nomination lapsed. He was nominated by President George W. Bush to the D.C. Circuit in 2001. Roberts' nomination did not progress to a hearing while the Democrats controlled the Senate. After the Republicans regained control of the Senate in January 2003, the Senate Judiciary Committee voted 16-3 to send Roberts' nomination to the full Senate with a favorable recommendation. Senator Edward M. Kennedy (D-Mass), Senator Charles E. Schumer (D-NY) and Senator Richard J. Durbin (D-Ill) were the three committee members who voted against Roberts. Roberts was confirmed by the Senate on May 8, 2003 in a unanimous voice vote.



## Substantive Record

### I. First Amendment

During his career as an advocate, Judge Roberts has taken several positions on freedom of speech and religion that raise serious civil liberties questions. But, as with many other issues that will be discussed throughout this report, that observation is subject to two caveats. First, it is impossible to determine from the currently available record whether the views that Roberts expressed as an advocate also reflect his personal views, other than the general fact that he obviously chose to work for Administrations whose stance on many of these issues was either known in advance or could have been fairly anticipated. Second, while many of the positions that Roberts articulated as an advocate were contrary to positions taken by the ACLU on these issues, that was not uniformly so, as detailed below.

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. 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 religion is more one-sided. Representing the government in an ACLU case, Roberts 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. He also co-

authored a Supreme Court brief for the government defending the constitutionality of the Equal Access Act, which guarantees religious clubs the same after-school access to school facilities as other student clubs, and which the ACLU opposed as an Establishment Clause violation.

As a judge, Roberts appears not to have authored or joined any significant First Amendment, religious liberty, or Establishment Clause cases.

#### A. Freedom of Speech

As a Deputy Solicitor General, Roberts co-authored the government's brief in *United States v. Eichman*, 496 U.S. 310 (1990), which unsuccessfully argued that a congressional statute prohibiting flag-burning was constitutional. Kenneth Starr argued the case for the government. The ACLU authored an *amicus* brief arguing that the Flag Act was unconstitutional.

In the prior term, the Court had ruled that a Texas statute prohibiting intentional desecration of the flag was a content-based restriction on political expression that was subject to strict scrutiny, and that the State's asserted interests in preventing flag desecration were not compelling. *See Texas v. Johnson*, 491 U.S. 397, 410 (1989). In light of *Johnson*, Congress replaced its existing flag-burning statute with the Flag Protection Act of 1989, which provided criminal sanctions for "whoever knowingly mutilates, defaces, physically defies, burns, maintains on the floor or ground, or tramples upon any flag of the United States." *Eichman*, 496 U.S. at 314 (quoting 18 U.S.C. § 700).

The Court, in an opinion written by Justice Brennan and joined by Justices Marshall, Blackmun, Scalia and Kennedy, found that while the Act contained no explicit content-based limitation it was clear from its language

that the Government's interest is "related 'to the suppression of free expression'...and concerned with the content of such expression." 496 U.S. at 315-16 (quoting *Johnson*, 491 U.S. at 410). The majority concluded that, as in *Johnson*, the government interest in preserving the symbolic value of the flag could not provide a justification for infringing on First Amendment rights, nor could the existence of a "national consensus" favoring a prohibition on flag burning. *Id.* at 318. The Court also declined the government's invitation to reconsider the holding in *Johnson*.<sup>1</sup>

While in private practice, Roberts filed an unsuccessful petition for certiorari in *Hardy v. Jefferson Community College*, 290 F.3d 671 (6<sup>th</sup> Cir. 2001), taking a cramped view of academic freedom that the ACLU has opposed in other contexts. The case arose when two college administrators were sued after refusing to renew the contract of an adjunct professor who used and encouraged the use of gender and racial slurs to promote a class discussion on how language was used to marginalize oppressed people. *See id.* at 675. In asking the Supreme Court to review the denial of qualified immunity, Roberts argued that other circuits had found that teachers acting in their professorial capacity are speaking not as private citizens but as public employees, and that "'academic freedom'—insofar as it exists as a distinct First Amendment category—defines protections afforded to educational institutions, rather than to their employees." *See* Petition for Writ of Certiorari, available in 2002 WL 32135526, at \*2. The Supreme Court denied the petition.

On the other hand, Roberts took the same side as the ACLU when he co-authored an *amicus* brief for Time Magazine in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), arguing against the constitutionality of a state scheme taxing general interest magazines but

exempting newspapers and religious, professional, sports, and trade journals. The Court, in an opinion written by Justice Marshall, agreed with both Roberts and the ACLU that the State's selective application of its sales tax to magazines was unconstitutional. *See id.* at 233.

As an attorney in the White House Counsel's office, Roberts expressed a preference for making it easier for public figures to prevail under libel laws, a view not shared by the ACLU. Roberts' statement came in the context of a request for the White House to weigh in on a House bill that would bar punitive damages in libel cases and allow media defendants to avoid damages in libel claims by public figures (under the proposal, damages claims could be converted to declaratory relief).<sup>2</sup> Roberts suggested that the White House refrain from intervening in the issue, but noted that: "My own personal view is that a legislative trade-off relaxing the requirements for public figures to prevail (a return to the pre-Sullivan standards) in exchange for eliminating punitive damages would strike the balance about right, and would satisfy the First Amendment concerns of Sullivan."<sup>3</sup>

Roberts took a view more in line with ACLU policy in a matter involving whether to charge news organization for processing White House press passes. Some in the Administration sought to charge for the passes in order to limit access by "fringe" groups. Reviewing the applicable precedent, Roberts concluded that charging a fee to recover the reasonable and identifiable costs of the process of issuing a pass was constitutionally permissible, but that "limiting requests for the passes [to exclude "fringe" groups]" was not.<sup>4</sup> Roberts also concluded that it would be a bad idea as a policy matter to charge fees because the Administration was "acquiring the image of being opposed to press freedoms."<sup>5</sup>

Roberts co-wrote another memo that presents an accurate First Amendment analysis of the rules governing a proposed ban on signs at Reagan-Bush campaign rallies. According to the memo, a total ban on all public signs at public events to further the government's interest in easing entry would not be likely to pass constitutional muster. The memo recommended allowing hand-held signs and forbidding those on sticks.<sup>6</sup> It also finds that a ban on signs at ticketed, private events is "constitutionally defensible," but cautions that those events must be truly private: large ticketed events might be considered "quasi-public" and thus subject to the First Amendment.<sup>7</sup>

As a law student, Roberts wrote a brief commentary on *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) which held that a broadcasting company had no right of access to a prison beyond the access enjoyed by members of the general public. See Comment, *First Amendment — Media Right of Access*, 92 HARV. L. REV. 174 (1978). The article analyzed the opinion in detail, and suggests that the decision was largely right in holding that the press enjoy no special access rights.<sup>8</sup> But the Comment argued that the general public might enjoy some First Amendment protection in accessing prisons, the contours of which were not defined by the *Houchins* decision.

## B. Establishment Clause

Roberts co-authored the United States' *amicus* brief in *Lee v. Weisman*, 505 U.S. 577 (1992), which unsuccessfully sought to defend a local school district's policy permitting schools to invite clergy members to offer nonsectarian prayers at graduation ceremonies. Kenneth Starr argued the case for the United States as *amicus*. The ACLU represented the student plaintiffs in the case.

The brief for the United States began by arguing that history allows ceremonial prayers in public settings, and that "sanitized separation between Church and State was alien in the Founding generation's vision of the Establishment Clause." Brief for United States as *Amicus Curiae* Supporting Respondents, available in 1990 U.S. Briefs 1014.<sup>9</sup> According to the Government's brief, the Establishment Clause was designed primarily "to protect religious liberty, not to expunge religion from the Nation's official life." *Id.* The United States also urged the Court to reverse three decades of well-settled law by holding that plaintiffs needed to prove coercion in order to prevail on their Establishment Clause claim. Finally, the government argued that there was no coercion on these facts in any event because students were not required to attend graduation.

Writing for the majority, Justice Kennedy rejected the Government's factual premise, noting that few students want to miss their high school graduation even if their attendance is not strictly mandatory. In separate concurrences, the other members of the majority went even further, rejecting the proposition that the government is free to promote religion as long as no one is compelled to participate in a religious ceremony.<sup>10</sup>

Roberts also helped write the Government's brief in *Westside Community School District v. Mergens*, 496 U.S. 226 (1990), which successfully argued that prohibiting religious groups from meeting on school grounds violated the Equal Access Act, and that allowing them access did not violate the Establishment Clause.

The plaintiffs in the case were high school students who sought permission from their principal to form a Christian club. The purpose of the proposed club was to allow students to study

the Bible and pray together. The students asked that they be allowed to meet on school grounds after school hours on the same terms and conditions as other student clubs, except that they did not seek a faculty sponsor. After their request was denied, the students sued under the Equal Access Act, 20 U.S.C. §§ 4071-4074, which prohibits public secondary schools that receive federal financial assistance and maintain a “limited open forum” from denying some student clubs access to that forum based on the religious, philosophical and political content of their speech. The United States’ brief maintained that the school had created a limited public forum by allowing clubs whose activities were unrelated to the school curriculum to meet. *See* Brief for the United States, available in 1988 U.S. Briefs 1597. On the Establishment Clause question, the United States argued that allowing student-initiated religious speech in a limited public forum did not violate the Establishment Clause because it was not coercive of students and “communicate[d] no message, neither one of endorsement nor one of disapproval.” *See id.*

Disagreeing with the position taken by the students and the government, the ACLU submitted an *amicus* brief arguing that the Equal Access Act was unconstitutional under the Establishment Clause because it failed to distinguish between school-sponsored prayer meetings with other school sponsored activities. The Supreme Court, however, ruled otherwise.

While working as a lawyer in the Reagan White House Counsel’s office, Roberts wrote a memo in which he described the Supreme Court’s opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985) — holding 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.”<sup>11</sup>

Also in the memo, Roberts stated that he would have no objection to a White House statement of support for a constitutional amendment authorizing silent prayer in public schools.<sup>12</sup> In another memorandum, however, Roberts appeared to respect Establishment Clause principles. President Reagan was asked by a Professor at the University of Louisville to support a resolution in the Kentucky Legislature requiring the placement in Kentucky public schools of plaques containing the National Motto “In God We Trust” and the Preamble to the Kentucky Constitution (which begins, “We, the people...are grateful to Almighty God for the civil, religious and political liberties we enjoy.”). Roberts wrote that it would be “inappropriate” for the President to weigh in on a state matter of this sort, and that “the resolution raises First Amendment establishment clause concerns, cf. *Stone v. Graham*, 449 U.S. 39 (1980).”<sup>13</sup>

Finally, as a lawyer in private practice, Roberts successfully argued that a religious school’s exemption from a county zoning ordinance did not violate the Establishment Clause. *See Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283 (4<sup>th</sup> Cir. 2000). In the case, a Catholic girls’ school sought to construct additions to its school building. *Id.* at 285. The school was located in a residential area, and the county’s zoning ordinance required that private educational institutions and nonresidential buildings obtain a “special exception” before constructing improvements or additions in residential areas. *Id.* at 286. The “special exception” requirement, however, exempted private educational institutions and parochial schools located in buildings owned or leased by churches and religious organizations.

The plaintiffs, who lived across the street from the school, argued that the exemption violated the Establishment Clause. *Id.* at 284. The

National Capital Chapter of the ACLU filed a brief supporting the plaintiffs. A panel of the Fourth Circuit – in a decision written by Judge Niemeyer, joined by Judge Widener, and from which Judge Murnaghan dissented – applied the *Lemon* test<sup>14</sup> and upheld the exemption. According to the majority, the ordinance had the plausible secular purpose of allowing the school to carry out its religious mission without unwarranted intrusion by the government. *See id.* at 289 (“This exemption... relieves Connelly School from having to justify its religious or religion-related needs before civil authorities and convince those authorities that the school’s renovations and additions satisfy such subjective requirements as, for example, ‘architectural [] compatib[ility]’ or conformity with ‘the present character . . . of the community.’”).<sup>15</sup> The court next found that the exemption did not have the “principal or primary effect” of advancing religion, because the accommodation simply allowed a religious school to further its own mission while “[a]n unconstitutional effect occurs when ‘the government itself has advanced religion through its own activities and influence.’” *Id.* at 291 (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987)). Finally, the majority found no excessive entanglement as there was no direct financial subsidy provided to the parochial school or to its teachers. *See Ehlers-Renzi*, 224 F.3d at 292.

Judge Murnaghan in dissent, argued that the exemption was unconstitutional because the enforcement of generally applicable zoning rules would not significantly interfere with the school’s ability to carry out its religious program. Murnaghan also argued that the ordinance’s exemption of secular schools operated on property owned or leased by religious institutions provided further support for the argument that the ordinance was not aimed at pre-

venting interference with the mission of the religious schools. *Id.* at 293.

## II. Civil Rights

### A. Race and Affirmative Action

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. 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 has repeatedly written briefs on behalf of a group opposed to federal affirmative action for minority contractors in transportation and defense programs. At the same time, he wrote a brief supporting a program which – though not strictly speaking an affirmative action program – favored Native Hawaiians. None of Roberts’ cases as a D.C. Circuit judge provides much indication of how he would approach questions of race.

#### 1. *School Desegregation*

As Deputy Solicitor General, Roberts co-authored the United States *amicus* brief in *Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1990), arguing that the Court of Appeals had imposed too stringent a standard for dissolving an injunctive decree in a school desegregation case. Roberts did not argue the case for the government. (Kenneth Starr argued the case). The ACLU joined an *amicus* brief in support of the respondents.

In *Dowell*, the Court of Appeals applied a standard that would require a desegregation decree to remain in effect until a school district can

show (as in other federal injunction cases) a “grievous wrong evoked by new and unforeseen conditions” and “dramatic changes in conditions unforeseen . . . that impose extreme . . . hardships.” *Id.* at 244 (quoting *United States v. Swift & Co.*, 286 U.S. 106 (1932)) (quotes omitted). The Court in an opinion written by Chief Justice Rehnquist and joined by Justices White, O’Connor, Scalia and Kennedy held that the *Swift* standard was too stringent for a desegregation case because federal supervision was intended as a temporary measure. *Id.* at 247. The proper standard, the Court held, was whether the school district was now operating in compliance with the Equal Protection Clause and, if so, whether “it was unlikely that the school board would return to its former ways.” *Id.*

Justice Marshall dissented, joined by Justices Blackmun and Stevens, disagreeing with the majority on what must be shown to demonstrate that the desegregation decree’s purpose had been realized. *Id.* at 257 (Marshall, J., dissenting). Marshall’s dissent noted that Oklahoma had operated a dual school district for 65 years, resisted school integration for 18 years after *Brown* was decided, and yet sought to evade court supervision only three years into operating its desegregation plan. *Id.* at 254-55. Marshall argued that a school system remains responsible for the effects of past discrimination, and a remedial decree should be in place until those effects have been eliminated. *Id.* at 262.

Two years later Roberts co-authored a brief on behalf of the United States in *Freeman v. Pitts*, 503 U.S. 467 (1992) in support of a school system seeking to be declared unitary. Again, Kenneth Starr, and not John Roberts, argued the case. The ACLU represented the parents and students seeking further desegregation remedies. At issue was whether a district court could relinquish supervision and control over

some aspects of a school system that have complied with a desegregation decree even where other parts of the school system are not in compliance. *Id.* at 486. The Court held that it could in an opinion written by Justice Kennedy.

As a lawyer in the White House Counsel’s office during the Reagan years, Roberts took the view that Congress could prohibit courts from ordering busing as a desegregation remedy based on what Roberts described as plausible evidence that busing had been ineffective in remedying desegregation.<sup>16</sup> While others in the Administration (including Ted Olson) argued that Congress lacked the power to prohibit courts from ordering busing when they find it necessary to remedy intentional racial segregation, Roberts argued that Congress would have authority under Section 5 of the Fourteenth Amendment:

Congress has authority under Section 5 to enforce the Fourteenth Amendment, and can conclude – the evidence supports this – that busing promotes segregation rather than remedying it, by precipitating white flight.... I would conclude that it is within Congress’s authority to determine that busing is counterproductive and to prohibit federal courts from ordering it.<sup>17</sup>

According to documents obtained by the Alliance for Justice, when the U.S. Commission on Civil Rights issued a report advocating mandatory busing and affirmative action to achieve school desegregation, Roberts, while serving as Special Assistant to Attorney General Smith, advised Smith that the Justice Department’s policy was that desegregation remedies should simply be limited to ending “official discrimination on the basis of race.”<sup>18</sup> If adopted, this position would have effectively prevented governments from reme-

dying prior discrimination. Whether he was advocating a position or just reflecting official policy is not clear.

## 2. *Voting Rights*

While working as a Special Assistant to U.S. Attorney General William French Smith, Roberts played a role in the Reagan Administration's efforts to prevent amendments to the Voting Rights Act that would have helped minority plaintiffs.<sup>19</sup> 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, the Reagan administration resisted Congress's ultimately successful efforts to allow claims under Section 2 of the Voting Rights Act based on the theory that a challenged voting practice has a disproportionate effect on minority voting rights even in the absence of proof of discriminatory intent. In one memorandum, Roberts developed talking points for the Attorney General to use at a meeting with the White House. The talking points argue that the results test would "introduce confusion" by "throw[ing] into litigation existing electoral systems at every level of government nationwide when there is no evidence of voting abuses nationwide supporting the need for such a change."<sup>20</sup> Roberts' talking points also stated that "[a]n effects test for §2 could also lead to a quota system in electoral politics, as the President himself recognized."<sup>21</sup>

It should also be noted that after the Act was amended, Roberts suggested approval of a Section 2 suit by the Civil Rights Decision in Chicago.<sup>22</sup> The case, as Roberts noted, was apparently not solely an effects case because there was substantial evidence of intentional discrimination. Roberts supported involvement

to help "giv[e] meaning to the vague terms of the new section 2, and help courts avoid the outcomes which we argued against and which the proponents of an amended section 2 assured us were never intended."<sup>23</sup>

## 3. *Affirmative Action*

As a partner at Hogan & Hartson, Roberts wrote several *amicus* briefs in related cases on behalf of the Associated General Contractors of America, in which he argued against two federal affirmative action programs. In 1995, Roberts authored an *amicus* brief in *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995), in which the Supreme Court, in a 5-4 decision, found unconstitutional the Department of Transportation (DOT)'s Disadvantaged Business Enterprise (DBE) Program that provided highway contracts to businesses created by socially and economically disadvantaged individuals. The Court in *Adarand* held that federal affirmative action programs, like those run by states and localities, must satisfy strict scrutiny, rather than intermediate scrutiny, overruling a prior Supreme Court decision. *See id.* at 226. Justice O'Connor authored the opinion and she was joined in the central holding by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas. Justices Stevens, Souter, Ginsburg and Breyer dissented.

Roberts' *amicus* brief argued that strict scrutiny was warranted, contending that:

"[s]uch preferences should not be labeled benign and subject.... to intermediate scrutiny, in the absence of a societal benefit from the racial preference apart and distinct from the benefit bestowed on the favored class." *See* Brief of *Amicus Curiae* Associated General Contractors of America, Inc. (No. 93-1841), available in 1993 U.S. Briefs 1841.<sup>24</sup> The brief also argued that Congress can only satisfy a

compelling interest by showing that specific industry practices were discriminatory; a showing of racial disparities is insufficient. *Id.* Finally, Roberts' brief contended that the program failed strict scrutiny because there was no finding of past discrimination in the federal contracting process, and the "scope of the racial preference" – a goal that 10 percent of subcontracting work be awarded to minority firms – was not linked to identified discrimination. *See id.* The Supreme Court agreed with Roberts that strict scrutiny was warranted, but did not decide whether the program satisfied strict scrutiny. *See Adarand*, 515 U.S. at 238.

Although the Supreme Court remanded the case to the lower court rather than invalidating the program, *see id.*, Roberts was quoted after the decision as saying: "The problem with this particular program was that the multimillionaire son of a Hong Kong banker could qualify... It wasn't narrowly tailored to benefit victims of discrimination... But the court reaffirmed that people who show they are discriminated against are entitled to relief."<sup>25</sup>

On remand, the Tenth Circuit applied strict scrutiny and upheld DOT's program as supported by compelling governmental interests and as narrowly tailored. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000). Roberts, again representing Associated General Contractors, filed an *amicus* brief to the certiorari petition. *See Brief of Amicus Curiae Associated General Contractors of America et al.*, available in 2000 WL 3409182. In addition to claiming that there was a circuit disagreement on the proper application of strict scrutiny, Roberts' brief claimed that the Tenth Circuit had applied a "watered-down version of strict scrutiny" in upholding a "racially discriminatory federal contracting preference based on evidence that clearly would not have survived strict scrutiny had it

been offered in support of a race-based program enacted by a state or locality." *Id.* at \*5. In a footnote, the *amicus* brief also cast doubt on whether barriers faced by minority contractors were race-specific:

Some of the allegedly discriminatory barriers facing minorities cited by the Tenth Circuit are actually race-neutral, such as "old boy networks," the "lack of familial connections," the fact that few minorities "have families from whom they can inherit a construction business," and the difficulties encountered by "new entrants" in the market.

*Id.* at \*9 n. 6

The Supreme Court granted review, but then dismissed the petition as improvidently granted, since the Court would have had to pass on issues decided by the Court of Appeals but not presented in the petition for certiorari. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, (2001). Roberts wrote an *amicus* brief for the Associated General Contractors supporting reversal on the merits, which elaborated on the arguments made in the certiorari petition. *See Brief of Amicus Curiae Associated General Contractors of America, Inc. et al.*, at \*3-4, available in 2001 WL 649830. The brief argued that the program failed to satisfy strict scrutiny because Congress had compiled insufficient evidence of pervasive racial discrimination in the construction industry. *See id.* at \*15-16

In another affirmative action case, *Rothe Development Corporation v. United States Department of Defense*, 194 F.3d 622 (5<sup>th</sup> Cir. 2001), Roberts filed an *amicus* brief on behalf of Associated General Contractors arguing that the Department of Defense's affirmative action program was unconstitutional. *Rothe* involved



the constitutionality of the 1207 program, which encouraged the Department of Defense to prefer bids by small businesses run by “socially and economically disadvantaged individuals.” The Fifth Circuit transferred the case to the Federal Circuit. *Id.* at 624. A district court had sustained the program, but the Federal Circuit reversed, holding that, in light of *Adarand v. Peña*, 515 U.S. 200 (1995), the district court should have applied strict scrutiny to the program, rather than intermediate scrutiny. *See Rothe Development Corporation v. United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001). The court then found that the evidence of discrimination before Congress at the time the program was authorized was insufficient to justify the racial classification, *see id.* at 1323, and that the district court had inappropriately relied on post-authorization evidence, *id.* at 1328. The court remanded for a determination of whether the program satisfied strict scrutiny and was narrowly tailored. *Id.* at 1331-32.

Our records indicate that Roberts wrote a brief on the substance to the Fifth Circuit, and argued. We have no indication that he wrote an *amicus* brief when the case was before the Federal Circuit. Roberts’ *amicus* brief to the Fifth Circuit argued that the district court should have applied strict scrutiny, and that the program was not narrowly tailored. *See Brief of Amicus Curiae Associated General Contractors of America, Inc. et al.*, 1999 WL 33623709. The brief stated that the 1207 program was created “not as a remedy for discrimination in the defense procurement industry, but by ‘simple racial politics.’” *Id.* (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989)).<sup>26</sup>

Roberts has defended a program that provides benefits on the basis of ethnicity as a partner in private practice. In *Rice v. Cayetano*, 528 U.S.

495 (2000), Roberts defended a statute before the Supreme Court that favored native Hawaiians. At issue in *Rice* was the constitutionality under the Fourteenth and Fifteenth Amendments of a Hawaii law that permitted only Native Hawaiians and descendants of people inhabiting the Hawaiian Islands in 1778 to vote for the trustees responsible for administering certain trusts established for the benefit of Native Hawaiians. *Id.* at 498-99.

Roberts was retained to brief and argue the case before the Supreme Court. *See Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, Part 1, 108th Cong., 1st Sess. 315 (2003) [hereinafter *Hearings*, Part 1]. The gravamen of Roberts’ argument was that the classification was not race-based, but was intended to benefit “*indigenous* Hawaiians, the once-sovereign people who—as Congress has repeatedly recognized—enjoy unique ties to aboriginal lands and a special trust relationship with the United States.” Brief for Respondent, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818) available in 1999 WL 557073, at \*1.<sup>27</sup> Roberts also contended that the Fifteenth Amendment does not apply to “special purpose elections,” *id.* at \*15, and that the classification was based on the congressionally recognized legal and political status of Native Hawaiians, *id.* at \*14.

The Court, 7-2, rejected Roberts’ argument, holding that Hawaii classified on the basis of ancestry as a proxy for race. *See* 528 U.S. at 514. The majority’s opinion (delivered by Justice Kennedy and joined by Chief Justice Rehnquist, and Justices O’Connor, Scalia and Thomas) rejected Roberts’ attempts to distinguish Hawaii’s law from other race-based classifications. *See id.* at 517. The Court held that the ancestry served merely as a proxy for race, which was impermissible under the

Constitution, *see id.* at 514, and that the “ancestral inquiry mandated by the States is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve,” *id.* at 517. The Court also rejected the argument that the exclusion of non-Hawaiians from voting is permitted under Supreme Court cases allowing differential treatment of members of certain Indian tribes. According to the Court, tribal elections were elections of a quasi-sovereign, while the elections in the instant case were elections of the State, elections to which the Fifteenth Amendment applied. *See id.* at 521-22. Justices Breyer and Souter concurred in the Court’s judgment on the ground that the electorate of the trust as defined in Hawaii’s statute did not sufficiently resemble an Indian tribe. *See id.* at 525 (Breyer, J., concurring in the judgment). Only Justices Stevens and Ginsburg took Roberts’ side, arguing that Hawaii’s law was constitutional in light of Hawaii’s unique history. *See id.* at 527-28, 547-48 (Stevens, J., dissenting).

In his Senate confirmation hearing, Roberts noted that both the State Attorney General and Governor who hired him were Democrats stating “[i]t is one of several cases that I have found particularly gratifying, where Democratic State attorneys general have retained me to represent their State in the Supreme Court.” *See Hearings*, Part 1, *supra*, at 55.

According to several news accounts, in 1981, while serving as Special Assistant to Attorney General William French Smith, Roberts wrote a memo criticizing a report prepared by Arthur Fleming, the outgoing chair of the Civil Rights Commission. Fleming’s report had praised affirmative action and minimized its failures. Roberts wrote, in response: “There is no recognition of the obvious reason

for failure: the affirmative action program required the recruiting of inadequately prepared candidates.”<sup>28</sup>

#### 4. *Fair Housing*

While 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.”<sup>29</sup> 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.”<sup>30</sup>

#### 5. *Employment Discrimination*

Roberts again assailed the effects test, this time in the area of employment. The context was a memorandum from Roberts to the Attorney General urging the Solicitor General to work more closely with the Civil Rights Division when arguing cases referred from the EEOC. Roberts expressed concern that when representing the EEOC the SG, at least on two occasions, took positions that were as Roberts put the matter, “totally inconsistent not only with general Administration policies but with specific and announced priorities of your own.”<sup>31</sup> Roberts cited two cases: one in which the SG argued in favor of expansion of the effects test and in another in which the SG argued against giving *res judicata* effect to state court decision

in discrimination cases.<sup>32</sup> “Fortunately,” Roberts wrote “the Solicitor General and the EEOC lost in these cases, each time by a vote of 5-4.”<sup>33</sup>

### B. Gender and Title IX

As a partner at Hogan & Hartson, John Roberts represented the petitioner NCAA in *NCAA v. Smith*, 525 U.S. 459 (1999), in which the Supreme Court held that the NCAA was not subject to the requirements of Title IX simply because it received federal financial assistance from its members. The underlying claim in the case involved an NCAA rule allowing postgraduate students to participate in intercollegiate athletics only at the institution that awarded them their undergraduate degree. *Id.* at 463. The plaintiff, Smith, sought a waiver from the rule and was denied by the NCAA. She brought suit, claiming, among other things, that the NCAA grants more waivers from eligibility restrictions to male than to female postgraduate students in violation of Title IX. The district court dismissed the complaint on the ground that the NCAA was not a recipient of federal financial assistance, as required by Title IX. *Id.* at 464. The Third Circuit reversed.

On review, the Supreme Court unanimously sided with the NCAA. In an opinion written by Justice Ginsburg, the Court held that the NCAA was not a “recipient” of Title IX funds within the meaning of the Department of Education’s regulations. According to the Court, a private membership organization’s receipt of dues from federally funded members was “insufficient to trigger Title IX coverage.”<sup>34</sup> The United States also supported the Respondents’ petition but on narrower grounds. It argued that the case should be remanded to determine whether the NCAA received federal funds.

The ACLU joined an *amicus* brief supporting the plaintiff/respondent along with several national women’s organizations. The brief argued that because member schools delegate operation of their sports programs to the NCAA and the NCAA receives dues from member schools, the NCAA was an intended beneficiary within the meaning of Title IX. Brief for *Amici* National Women’s Law Center *et al.* supporting Respondent, 1998 WL 847226, at \*10.

Roberts also adopted a cramped interpretation of Title IX while working for the Reagan Administration. In a 1982 memo to Attorney General William French Smith, 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,<sup>35</sup> Congress ultimately made clear that Title IX in fact applied to the entire university regardless of which program received funding. But before Congress acted, Roberts had written in what could be described as either political statement or a legal opinion on a matter of statutory interpretation: “The women’s groups pressuring us to appeal would have regulatory agencies usurp power denied them by Congress to achieve an anti-discrimination goal . . . [T]he Department is committed to opposing such legislation by the bureaucracy . . .” See R. Jeffrey Smith, Jo Becker and Amy Goldstein, *Documents Show Roberts Influence in Reagan Era*, WASH. POST, at A1. In a 1985 memorandum, Roberts expressed disfavor with legislative proposals to overturn the Supreme Court’s ruling, but suggested that the Administration (which had already gone on record supporting the legislation) should not revisit the matter because it “would precipitate a firestorm of criticism, with little if any chance of success.”<sup>36</sup>

In another gender issue, Roberts was highly critical of the doctrine of comparable worth, which sought to assure that pay in traditionally female jobs was equal to those in comparable (though not identical) traditionally male jobs. In a memorandum that Roberts drafted to Fred Fielding while working in the White House Counsel's office, Roberts had harsh words for three Republican women who had asked the Administration not to intervene in a decision upholding the comparable worth doctrine. Roberts writes: "I honestly find it troubling that three Republican representatives are so quick to embrace such a radical redistributive concept. Their slogan may as well be 'From each according to his ability, to each according to her gender.'" <sup>37</sup>

In another memo written while Roberts was serving as a Special Assistant in the Justice Department, Roberts recommended that the Attorney General reject the request by Brad Reynolds, then head of the Civil Rights Division, for permission to intervene in a case challenging disparities between the vocational training programs available to male prisoners and those available to female prisoners in a Kentucky State Prison. Roberts argued that private plaintiffs were already bringing suit so there was no need for Department of Justice involvement and, more disturbingly, that intervention was inconsistent with the Attorney General's positions against heightened scrutiny for gender-based classifications and against federal court intervention in state institutions. Roberts also argued that a requirement of equal treatment might, in a time of tight state budgets, result in the elimination of all training programs. <sup>38</sup>

Finally, while working at the White House Counsel's office, Roberts offered a response to the request by the head of a Republican women's organization to work with the

Administration to craft a new version of the Equal Rights Amendment. Roberts' memorandum suggests that her offer be rejected. The Administration's opposition to the ERA, Roberts argues, is not based on concerns about specific language, rather the concern is that "[a]ny amendment would ipso facto override the prerogatives of the States and vest the federal judiciary with broader powers in this area." <sup>39</sup>

### C. Disability Discrimination

While a partner at Hogan & Hartson, 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. *See Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). John Roberts became involved in the case when it reached the Supreme Court; he argued the case and is listed as counsel of record. *See* Brief for Petitioners, *Toyota Motor Manufacturing v. Williams* (No.00-1089), available in 2001 WL 741092.

The ADA defines "disability" as an impairment that substantially limits one or more major life activities. *See Toyota Motor Manuf'g*, 534 U.S. at 187. Ella Williams, the plaintiff-respondent in the case, worked at a Toyota manufacturing plant in Kentucky. As a result of her work, she developed carpal tunnel syndrome and a physician ordered her to refrain from repetitive motion, use of certain tools, performing overhead work, and carrying objects weighing more than 20 pounds. *See id.* at 188. The plaintiff filed suit claiming that the employer had refused to accommodate her as required by the ADA. The district court ruled in favor of the company on summary judgment finding that Williams was not disabled within the meaning

of the ADA because she was not substantially limited in any major life activity. *See id.* at 190. The Sixth Circuit reversed. *See id.*

On certiorari to the Supreme Court, John Roberts argued that Williams was not substantially limited in any “major” life activity within the meaning of the Act. The brief argued that Williams had only demonstrated her inability to perform repetitive manual functions necessary to perform certain jobs, but was not restricted in using her “hands to perform a broad range of basic functions needed to meet the essential demands of everyday life.” *See* Brief for Petitioners, 2001 WL 741092, at \*13-14. Roberts’ brief also argued that Congress meant to limit ADA coverage to people with severe restrictions on their ability to perform important basic functions, *see id.* at \*25, and that interpreting the Act to cover people with lesser afflictions would “harm the truly disabled,” *id.* at \*30.

The Supreme Court in a unanimous opinion written by Justice O’Connor substantially agreed with Roberts’ arguments. According to the Court, to be disabled under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives [and the] impairment’s impact must also be permanent or long term.” *Toyota Motor Manuf’g.*, 534 U.S. at 198. According to the Court, the Sixth Circuit also erred by focusing on whether Williams was able to perform the tasks associated with her specific job, rather than on whether she was able to “perform the variety of tasks central to most people’s daily lives.” *Id.* at 201-2. The Court remanded the case to the Sixth Circuit. *See id.* at 202.

#### D. Sexual Orientation

According to press accounts, Roberts, while

a partner at Hogan & Hartson, provided *pro bono* assistance to the plaintiffs’ lawyers in the *Romer v. Evans* case.<sup>40</sup> In *Romer*, the Supreme Court struck down a state constitutional amendment forbidding the passage of legislation protecting gays. *See Romer v. Evans*, 517 U.S. 620 (1996). Roberts did not write any of the briefs in the case, but he reviewed filings, provided advice on strategy, and helped prepare the lawyers for oral argument.<sup>41</sup>

#### E. Employee Privacy

Judge Roberts authored a unanimous opinion that a Department of Commerce employee had no reasonable expectation of privacy in documents that she had stored in a safe, where the employee had no control over access to the office containing the safe or to the safe itself. *See Stewart v. Evans*, 351 F.3d 1239 (D.C. Cir. 2003). The employee, Sonya Stewart, had filed an employment discrimination complaint with the Equal Employment Opportunity Commission alleging discrimination, abuse and retaliation by some of her superiors. After the EEOC completed its investigation, Stewart kept the Record of Investigation and notes concerning the allegation in a locked drawer in her office. Subsequently, the Commerce Department received a FOIA request from the Washington Post about the documents as well as a request by a U.S. Senator. *See id.* at 1241. Stewart was reluctant to turn the documents over, fearing that her unit would become aware of the content of her allegations. After some negotiation, Stewart agreed to transfer the documents to John Sopko—head of a Department unit responsible for handling requests from Congress—on the condition that no one in the General Counsel’s office would have access to them and that they would be kept in a locked safe. *See id.* at 1242. While Stewart and Sopko were on vacation, however, the Chief of the Employment Division at the Department got

into the safe, reviewed the documents, and turned them over to Congress.

Judge Roberts rejected Stewart's claim that her Fourth Amendment rights, enforceable through a *Bivens* claim<sup>42</sup>, had been violated. According to Judge Roberts, reasonable expectation of privacy enjoyed by public employees was limited to the contents of their offices and desks. *See id.* at 1243-44. Moreover, Judge Roberts found persuasive that the employee had voluntarily turned over the documents. *See id.* at 1244. Judge Roberts' opinion was joined by Judges Randolph and Williams.

#### F. Welfare Rights

While a partner at Hogan and Hartson, John Roberts served as a *pro bono* ACLU cooperating attorney in *Barry v. Little*, 669 A.2d 115 (D.C. 1995), a challenge to the District of Columbia's administration of public benefits. This case was brought in D.C. Superior Court as a class action on behalf of hundreds of individuals who received General Public Assistance benefits in the District of Columbia prior to July, 1991. After that time, a statutory amendment changed the medical eligibility criteria, and the City discontinued some recipients based on an administrative determination that their disabilities were no longer severe enough to qualify.

The ACLU's suit claimed that each recipient, under *Goldberg v. Kelly*, 397 U.S. 254 (1970), was constitutionally entitled to an individualized notice of why he or she was found to be ineligible, to a pretermination hearing if he or she contested that determination, and to retroactive payment of unconstitutionally withheld benefits. The Superior Court ordered the government to resume paying benefits to certain categories of people whose benefits had been discontinued without notice or opportunity for a hearing, and ordered that these individ-

uals receive retroactive benefits. On appeal, the D.C. Court of Appeals unanimously reversed, ruling that the plaintiffs had no property interest in receiving continued benefits, and therefore no entitlement to due process when benefits were terminated. 669 A.2d at 121-123.

Roberts co-wrote the brief and argued the appeal to the D.C. Court of Appeals. He also co-authored the unsuccessful certiorari petition to the United States Supreme Court. *See Little v. Barry*, 519 U.S. 1108 (Feb. 18, 1997) (order denying cert). In response to questioning at his April 2003 confirmation hearing before the United States Senate, Roberts stated that *Barry* "was a case where the law had a very real and direct impact on the most needy citizens in our country, and I was happy to take that case on behalf of that class of welfare recipients."<sup>43</sup>

On the other hand, Roberts, in a memorandum written while he was serving as Special Assistant to William French Smith, listed *Shapiro v. Thompson* – in which the Supreme Court held that states could not constitutionally impose residency requirements on welfare recipients – as an example of judicial activism.<sup>44</sup> Noting that the Court had relied on a right to travel that is not explicitly mentioned in the Constitution, Roberts wrote: "It's that very attitude that we are trying to resist."<sup>45</sup>

#### G. Section 1983

In *Hedgepeth ex rel. Hedgepeth v. Washington Metropolitan Area Transit Authority*, 386 F.3d 1148 (D.C. Cir. 2004), Judge Roberts, joined by Judges Henderson and Williams, rejected Fourth Amendment and Equal Protection Clause challenges to the arrest and detention of a twelve-year old girl for eating a single french fry in a Metrorail station. The girl was arrested, searched and handcuffed, and transferred to a juvenile processing facility where she was fingerprinted. *See id.* at 1152.

Judge Roberts noted in the first line of his opinion, that “[n]o one is very happy about the events that led to this litigation.” *Id.* at 1151. Nevertheless, Judge Roberts rejected the plaintiff’s claim that WMATA’s policy of arresting juveniles for certain violations while only issuing citations to adults who commit the same offense violated Equal Protection. Classifications based on youth do not trigger heightened scrutiny, Judge Roberts held, nor does an infringement on movement where there is probable cause to arrest. *See id.* at 1154-56. Applying rational basis review, Roberts found that the policy was rationally related to a legitimate goal of promoting parental awareness and involvement with children who commit delinquent acts. *See id.* at 1156. Judge Roberts also rejected the plaintiff’s claim that the arrest violated her rights under the Fourth Amendment. Roberts relied on the Supreme Court’s decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) upholding a warrantless-arrest for an offense for which the punishment was only a fine. *See id.* at 1157-59.

As a Special Assistant to William French Smith, Roberts took an extremely cramped view of the rights enforceable under Section 1983, and specifically urged a narrow interpretation of *Maine v. Thiboutot*, 448 U.S. 1 (1980), in which the Court held that certain provisions of the Social Security Act were enforceable pursuant to Section 1983<sup>46</sup>. In the memo, Roberts approved of an appellate court decision that only those statutory rights “akin to fundamental rights protected by the Fourteenth Amendment” should be enforceable under section 1983.<sup>47</sup> Even as the Supreme Court has narrowed the ability to enforce statutory rights under Section 1983 in recent years, it has not gone so far as to adopt this view.

### III. Reproductive Rights

As Deputy Solicitor General, Roberts co-authored the Bush administration brief in defense of the “gag” rule, which also argued that *Roe* was wrongly decided. Also as a lawyer in the Solicitor General’s office, Roberts argued that Operation Rescue could not be sued under federal civil rights laws for its organized blockades of clinics that provide abortions. The Bush Administration’s position was to argue that the holding of *Roe* should be revisited, so Roberts may have simply been advocating on behalf of his clients. 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.”<sup>48</sup> When asked his position on *Roe*, Roberts stated:

I don’t – *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*.<sup>49</sup>

Roberts provided this answer in the context of his appointment to a lower court where he would be 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.

As a Special Assistant in the Reagan Justice Department, Roberts drafted an article on “judicial restraint” for Attorney General Smith which was highly critical of the Court’s fundamental rights jurisprudence.<sup>50</sup> The draft article, which was never published, specifically referenced the Court’s decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which articulated a right to privacy in the context of a married couple’s right to access contraception. The draft article states:

All of us, for example, may heartily endorse a “right to privacy.” That does not, however, mean that courts should discern such an abstraction in the Constitution, arbitrarily elevate it over other constitutional rights and powers by attaching the label “fundamental” and then resort to it as, in the words of one of Justice Black’s dissents, a “loose, flexible, uncontrolled standard for holding laws unconstitutional.” *Griswold v. Connecticut*, 381 U.S. 479, 521 (1965).<sup>51</sup>

#### A. Rust v. Sullivan

While working in the Solicitor General’s office, John Roberts co-authored the Bush administration brief in *Rust v. Sullivan*, 500 U.S. 173 (1991), successfully arguing that the Bush Administration’s Title X regulations prohibiting federally-funded family planning programs from providing abortion-related counseling or services were consistent with congressional intent and constitutional. Solicitor General Starr argued the case. The plaintiffs were represented by the ACLU and Laurence Tribe.

The case concerned a regulation promulgated under Title X, which provides federal funding for family planning services but excludes the use of funds for programs where “abortion is a method of family planning.” *Id.* at 176. In

1988, the Secretary of Health and Human Services adopted regulations, popularly known as the “gag rule,” forbidding federal grantees from counseling patients about abortion, referring them to providers that provide abortion, and from engaging in activities that encourage or advocate abortion in the federal program. *See id.* at 180. The regulations also required that Title X projects be physically and financially separate from prohibited abortion activities. *See id.* Plaintiffs, Title X grantees and doctors, challenged the regulations on the grounds that they were not authorized by Title X and that they violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers. *See id.* at 181.

The Supreme Court in a 5-4 ruling, rejected the plaintiffs’ arguments. The opinion was authored by Chief Justice Rehnquist and joined by Justices White, Scalia, Kennedy and Souter.

First, the Supreme Court rejected the argument that the regulations were not authorized by the statute. According to the Court because the language of Title X (“None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning”) was ambiguous on the issues of counseling, referral, advocacy, and program integrity, the agency’s regulatory interpretation of the statute was entitled to deference. *Id.* at 184-86. The Court found the Secretary’s justification for changing its longstanding agency policy permitting counseling and referral was reasonable and responsive to changing circumstances. Specifically, the Court accepted the Secretary’s arguments that the new policy was more consistent with the original intent of the Title X statute, and was supported by a “shift in attitude against the “elimination of unborn children by abortion.” *Id.* at 187. The Court also upheld the Secretary’s regulations mandating separate facilities, personnel, and records



for Title X programs as a permissible interpretation of the legislative history of Title X. *See id.* at 188-90. Finally, the Court held that the regulations promulgated by the Secretary did not raise “the sort of grave and doubtful constitutional questions” that would warrant invalidation of the regulations. *Id.* at 191.

Second, the Court rejected the argument that the regulations impermissibly discriminated based on viewpoint (by prohibiting discussion of abortion), and that they violated the free speech rights of the health care organizations and their staff. According to the majority, the government was simply exercising its constitutional authority to subsidize childbirth over abortion. *See id.* at 192. The Court read the regulations, however, to permit a Title X project to refer a woman whose pregnancy places her “life in imminent peril” to a provider of abortions, because the regulations only bar abortion counseling as a “method of family planning.” *Id.* at 196.<sup>52</sup> The Court also rejected the argument that the regulations were impermissible because they conditioned the receipt of a benefit – Title X – on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. According to the Court, the government was not denying a benefit to anyone, it was simply directing how public funds are used – recipients could still use their other funds for abortion counseling and services. *See id.* at 197-98.

Third, the Court found that the regulations did not impermissibly burden a woman’s Fifth Amendment right to choose whether to terminate her pregnancy. *See id.* at 201. For the majority, the woman had no right to receive a government subsidy for abortion counseling, and “Congress’ refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all.” *Id.* at 201-202. Similarly, the Court

ruled that the regulations do not impede a doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services outside of the context of a Title X program. *Id.* at 202-203.

Justices Blackmun, Marshall, Stevens and O’Connor dissented. Justices Blackmun and O’Connor would have invalidated the regulations by construing the statute to avoid serious constitutional problems. *Id.* at 207 (Blackmun, J., dissenting). Justices Blackmun, Marshall and Stevens would have found that the statute violated the First and Fifth Amendments. *See id.* at 216, 217-18 (Blackmun, J., dissenting). Justice Stevens also would have held that the regulations were not authorized by the statute. *Id.* at 222 (Stevens, J., dissenting).

The government’s brief, co-authored by Roberts, went beyond the issues presented to contend, in its opening argument, that *Roe* was wrongly decided:

We continue to believe that *Roe* was wrongly decided and should be overruled. As more fully explained in our briefs, filed as *amicus curiae*, in *Hodgson v. Minnesota*, 100 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 416 (1983), the Court’s conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure or history of the Constitution. If *Roe* is overturned, petitioners’ contention that the Title X regulations burden the right announced in *Roe* falls with it. But even under *Roe*’s

strictures, the Title X regulations at issue do not violate due process.<sup>53</sup>

The Supreme Court did not address this argument, nor was the fundamental holding of *Roe* affected by the decision in *Rust*.

#### B. Clinic Access

Roberts also co-authored the government's *amicus* brief and argued before the Supreme Court in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1999), in which the Court held that Operation Rescue could not be sued under federal civil rights law for blocking access to abortion clinics. The opinion in the case was written by Justice Scalia and joined by Chief Justice Rehnquist, and Justices White, Kennedy and Thomas. Justice Souter concurred in the judgment, and Justice Stevens, Blackmun and O'Connor dissented.

Clinics that perform abortions and several membership organizations that support choice sued Operation Rescue, arguing that it organized and coordinated demonstrations to trespass on and obstruct access to clinics that perform abortions in violation of 42 U.S.C. § 1985(3). *See Bray*, 506 U.S. at 267. That statute forbids private conspiracies to violate civil rights. To prove a violation a plaintiff must show: (1) a class-based, invidiously discriminatory animus behind the conspirator's actions and (2) that the conspiracy is aimed at interfering with rights that are protected against private as well as official encroachment. *See id.* at 268. The Court held that neither standard had been satisfied.

As to the first, the majority found that Operation Rescue's actions were motivated by the desire to block access to abortion, and not by an opposition to women, *see id.* at 273, and that a decision to favor childbirth over

abortion was not "invidiously discriminatory." *id.* at 274. The court then rejected the argument that Operation Rescue's actions constituted a conspiracy to deprive women of their constitutionally protected right to interstate travel. *See id.* at 275. According to the Court, any restriction on the right to travel was only incidental, as Operation Rescue's goal was to prevent abortion not travel. *See id.* at 278. Finally, the Court rejected the argument that the blockades interfered with the "right to an abortion." According to the Court, the right to abortion is protected only against state infringement and not against private infringement, thus impairment of that right does not violate § 1985(3).

The government's asserted interest in writing an *amicus* brief was that a finding that opposition to abortion was a form of gender-based discrimination would call into question federal laws excluding abortion services from coverage under federal medical assistance programs. *See* Brief of *Amicus Curiae* United States Supporting Petitioner, available in 1990 U.S. Briefs 985.<sup>54</sup> In rejecting the plaintiffs' claims, the Court relied in part on cases holding that government abortion-funding restrictions are not subject to the heightened scrutiny standard required for gender-based discrimination. *See id.* at 761. The government's *amicus* brief discussed the issue presented and did not raise the question of whether *Roe* was correctly decided.<sup>55</sup>

Prior to his work on the *Bray* case, assistant White House Counsel Roberts drafted a letter from the Administration to Congressman Mazzoli condemning clinic violence. Congressman Mazzoli had expressed concerns about reports suggesting that President Reagan intended to pardon those convicted in connection with the bombing of abortion clinics. The letter, which was drafted on behalf of the Deputy White House Counsel, states:

The President unequivocally condemns such acts of violence and believes that those responsible should be prosecuted to the full extent of the law. No matter how lofty or sincerely held the goal, those who resort to violence to achieve it are criminals.... The President has no intention of granting special treatment in the pardon process to those convicted of violence against abortion clinics.<sup>56</sup>

#### IV. Rights of Immigrants

We know little about how John Roberts would approach immigrants' rights. In two memos written while working in the Reagan Administration, however, he took positions that raise concern. While working as a Special Assistant to Attorney General Smith, Roberts criticized the Supreme Court's landmark decision in *Plyer v. Doe*, 458 U.S. 1131 (1982), which held that a state's failure to grant undocumented school children equal access to K-12 public education violates the Constitution. In a memorandum to Attorney General Smith which Roberts co-authored with his colleague Carolyn Kuhl, Roberts suggests that the Administration might have obtained a contrary result in the 5-4 decision if the Solicitor General had written a brief supporting the State of Texas. The memo states:

The briefs for the State of Texas were quite poor. It is our belief that a brief filed by the Solicitor General's Office supporting the State of Texas – and the values of judicial restraint – could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case.

In sum, this is a case in which our supposed litigation program to encourage

judicial restraint did not get off the ground, and should have.<sup>57</sup>

Roberts is also on record as supporting a national identification card, which the ACLU has long opposed as potentially harmful to immigrants and as an unnecessary intrusion into privacy. In an October 1993 memorandum to White House Counsel Fielding, Roberts stated:

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 specter of overreaching central authority, but view such concerns as largely symbolic so far as a national ID 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.

#### V. International Law and National Security

Judge Roberts recently joined an opinion supporting the right of the President to try an Al-Qaeda captive by military commission, and denying the prisoner's claims that he was entitled to be tried pursuant to the protections of the Geneva Convention. In another ruling holding that veterans of the first Gulf War had no cause of action against the government of Iraq and various officials for torture, Judge Roberts authored a separate concurrence further limiting federal court jurisdiction.

A. Military Commissions – Hamdan case

Judge Roberts joined a panel decision by Judge Randolph, in which Judge Williams concurred, that upheld the authority of the Secretary of Defense to try an Al-Qaeda captive by a military commission. *See Hamdan v. Rumsfeld* (No. 04-5393), 2005 WL 1653046 (D.C. Cir. July 15, 2005).

Salim Ahmed Hamdan was captured by Afghani military forces in Afghanistan in November 2001. Those forces turned Hamdan over to the American military, who kept him at the Guantanamo Bay Naval Base in Cuba. *Id.* at \*1. On July 3, 2004, the President determined “that there is reason to believe that [Hamdan] was a member of Al Qaeda or was otherwise involved in terrorism directed against the United States.” *Id.* Consequently, Hamdan was designated for trial before a military commission.” *Id.*

Hamdan petitioned for *habeas corpus* review challenging the military commission’s authority to try him. While the petition was pending in district court, the government formally charged Hamdan with conspiracy to attack civilians, terrorism and other offenses. The charges also alleged that Hamdan was Osama bin Laden’s personal driver in Afghanistan between 1996 and November 2001, an allegation Hamdan subsequently admitted. *See id.*<sup>58</sup> The district court granted Hamdan’s petition, holding that he could not be tried by a military commission unless a “competent tribunal determined that he was not a prisoner of war under the 1949 Geneva Convention governing the treatment of prisoners.” *Id.*

At the appellate level, Hamdan’s claim involved four main issues: (1) whether the district court should have abstained from *habeas corpus* review, *see id.*; (2) whether the President had authority to establish military

commissions, *see id.* at \*2; (3) whether Hamdan could bring claims to enforce the Geneva Convention, *see id.* at \*4, which Hamdan invoked in order to obtain better due process protections, *see Hamdan v. Rumsfeld*, 344 F. Supp.2d 152, 160 (D.D.C. 2004); and (4) the procedures required by the military commission, *see id.* at \*9.

As to the first, the court held that *habeas* review was proper under an exception to the general rule of abstention in cases where substantial arguments are raised challenging a military tribunal’s jurisdiction. *See id.* at \*2. On the second issue, the court of appeals rejected Hamdan’s contention that the establishment of the military commission ran afoul of the separation of powers. *See id.* Hamdan had argued that only Congress, not the President, had authority to establish military commissions and that Congress’s joint war resolutions failed to authorize such commissions. *See id.* The court did not decide whether the President had such authority, ruling instead that Congress’s war resolutions and two congressional statutes authorized the President to establish a military commission. *See id.* at \*4.

The court next considered and rejected Hamdan’s claims under the Geneva Convention. First, the court concluded that the Geneva Convention was simply a treaty between nations and did not provide a private cause of action in domestic courts. *See id.* Second, the court held that even if the convention were judicially enforceable, none of its protections applied to Hamdan. Hamdan invoked, among other provisions, Common Article 3, which applied to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. . .” *Id.* at \*7. Red Cross commentary on Common Article 3 suggests that it applies only to armed conflicts confined to a “single country.” *Id.*<sup>59</sup> The district court had concluded that

the actions in Afghanistan – involving hostilities against the Taliban – constituted a single conflict in one country, but the court of appeals deferred to the President’s determination that the conflict against the Taliban was not separate from the actions against Al-Qaeda and that the Al-Qaeda conflict was “international in scope.” *See id.*<sup>60</sup> The court then held that even if Common Article 3 were applicable, because question as to its coverage did not constitute a jurisdictional objection to the military commissions’ authority, this question could only be considered by a court *after* the military proceedings. *See id.*

Finally, the court disagreed with the district court on the kinds of procedures that should apply in the event that Hamdan should appear before a military commission. The district court had concluded that the military commission must comply with the Uniform Code of Military Justice (UCMJ) which applies to court-martials, but the Court of Appeals disagreed. *Id.* at \*8. The Court of Appeals also held that the military commission need not comply with Army Regulation 190-8, which affords prisoners of war Geneva Convention protections until a “competent authority determines otherwise.” *Id.* at \*9. The court held that the President’s determination that Hamdan was not a prisoner of war, was the determination of a “competent authority.” *Id.* The court noted that even if the regulation required a “competent tribunal” to determine his prisoner of war status, the military commission sufficed as that tribunal. *See id.*

Judge Roberts did not write a separate concurring opinion. Judge Williams wrote a separate concurrence disagreeing with the panel’s conclusion that Common Article 3 did not apply to Al-Qaeda personnel captured in the Afghanistan conflict. *See id.* at \*9. Williams agreed, however, that the Convention was not enforceable in court, and that any claims

brought under Common Article 3 should be deferred until the military proceedings had ended. *See id.*

### B. Individual Rights Claims Against Foreign States

As a judge, Roberts wrote a separate concurrence in a unanimous ruling denying the claims of seventeen veterans of the first Gulf War who brought suit against Iraq for torture. *See Acree v. Iraq*, 370 F.3d 41 (2004). The plaintiffs in the case were captured and held as prisoners during the first Gulf War. They brought suit in April 2002 in district court against the Republic of Iraq, the Iraqi Intelligence Service and Saddam Hussein in his official capacity seeking compensatory and punitive damages for “horrific acts of torture they suffered during their captivity.” *Id.* at 43. Plaintiffs’ suit was based on the terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a) (FSIA). FSIA grants foreign states immunity from suit in American courts, unless the damages are sought for injury or death caused by torture or terrorism, and the foreign state was designated as a state sponsor of terrorism when the acts occurred. *Id.* at 44.

Iraq failed to appear and the District Court entered judgment for the plaintiffs, awarding them damages of \$959 million. Two weeks after judgment was entered, the United States filed a motion to intervene to contest the District Court’s subject matter jurisdiction. The District Court denied the motion to intervene as untimely.

In an opinion written by Judge Edwards, the court held that the district court abused its discretion in not allowing the United States to intervene. Judge Edwards joined by Judge Tatel found that the district court had subject matter jurisdiction. The court concluded, however, that the suit should be dismissed because FSIA does not create a cause of action against

foreign states; rather it simply waives sovereign immunity in certain circumstances. *Id.* at 428-29. Judge Roberts concurred in the dismissal of the suit, but would have found that the district court lacked subject matter jurisdiction. This argument – the central one advanced by the United States rested on the claim that Congressional and Presidential actions made FSIA’s terrorism exception inapplicable to Iraq.

The court’s discussion focused on the meaning and scope of Congress’ Iraq war authorization and the powers that it granted to the President. In April 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act (EWSAA) which appropriated additional funds for military operation in Iraq, suspended sanctions of Iraq, and provided that “the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law that applies to countries that have supported terrorism.*” *Id.* at 415 (quoting 117 Stat. 559, at § 1503). On May 7, 2003, President Bush exercised the authority granted to him by Congress by issuing a Presidential Determination making “inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961. . . and any other provision of law that applies to countries that have supported terrorism.” Presidential Determination No.2003-23 of May 7, 2003, 68 Fed. Rep. 26,459 (May 16 2003).

The majority found it an “exceedingly close” question but held that EWSAA’s legislative history was aimed at removing obstacles to funding the new Iraqi Government and not at the jurisdiction of the federal court. *Id.* at 420. Judge Roberts in concurrence believed however that the EWSAA made clear that FSIA did not apply to Iraq. According to Roberts, the statute’s broad language (“any other provision of law”) should be given broad application. *See id.* at 429 (Roberts, J., concurring).

### C. Terrorism Designation

In an opinion joined by Judges Henderson and Garland, Judge Roberts denied an Iranian dissident organization’s petition for a review of a State Department order designating it a foreign terrorist organization (FTO) under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *See Nat’l Council of Resistance of Iran v. Dep’t of State*, 373 F.3d 152 (D.C Cir. 2004).

The case stemmed from the Secretary of State’s designation of the Mojahedin-e Khalq Organization (MEK) and its aliases a terrorist organization. In 1999 and in 2001, the Secretary of State determined that the National Council of Resistance of Iran (NCRI) was an alias of MEK and accordingly also designated it an FTO. NCRI challenged the designation and, in a prior case, the D.C. Circuit on review remanded to the Secretary of State to cure due process problems with the designation. *See National Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001). The Secretary on remand left in place the designation of NCRI as a terrorist organization.

Judge Roberts’ opinion more than once emphasized that the statute governing FTO designation offers limited judicial review. *See id.* at 154, 158 According to Roberts, the Secretary of State’s evidence that NCRI was an alias of MEK was supported by the administrative record: the classified and public record showed that NCRI was dominated and controlled by MEK, shared the same leadership structure, and was in fact the political branch of MEK. *Id.* at 159.

## VI. Access to Justice

As a Deputy Solicitor General and again in private practice, Roberts has sought to limit the ability of individuals to privately enforce fed-

eral statutes. More recently as a judge, however, Roberts supported the right of an individual to sue a state agency, joining a court decision in *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004), discussed in the section on congressional power, that WMATA lacked immunity against private suit under § 504 of the Rehabilitation Act.

#### A. Federal Court Jurisdiction

According to documents from Roberts' 1981-1982 tenure as a special assistant to Attorney General William French Smith, Roberts argued in support of bills that would have stripped the Supreme Court of jurisdiction over abortion, busing and school prayer cases. In one instance, Roberts handwrote notes in opposition to the view, advanced by then-Assistant Attorney General Theodore B. Olson, that the bills were unconstitutional.<sup>61</sup> In a memorandum – written on the recommendation of Kenneth Starr – Roberts “marshals arguments in favor of Congress’ power to control the appellate jurisdiction of the Supreme Court.”<sup>62</sup> The memorandum states that “it is 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.”<sup>63</sup> In the context of his analysis, Roberts approvingly cited comments by then-University of Chicago law professor Antonin Scalia at a conference on the 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.”<sup>64</sup> 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.” *Id.* It appears from several articles that there are other memoranda by Roberts – which we have not seen – that suggest he personally believed that stripping the federal courts of jurisdiction was constitutional.<sup>65</sup> The Administration, in the end, opposed the bills.

Roberts’ view seems to have been that the court stripping positions were constitutional, but that they were not good policy. In a memo written by Roberts in his subsequent position as a lawyer in the White House Counsel’s office, Roberts wrote to then-White House Counsel Fred Fielding that Congress should *not* strip federal courts of jurisdiction in cases involving school prayer. In this May 6, 1986 memo, Roberts 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... I also concluded that such bills were bad policy and should be opposed on policy grounds. My views did not carry the day. . . The bills were, accordingly, opposed on constitutional grounds.

*See* Memorandum from John Roberts to Fred Fielding, Regarding S.47 “Voluntary School Prayer Act of 1985,” (May 6, 1985).

In other work at the Justice Department, Roberts exhibits skepticism about some aspects of institutional reform litigation. As a Special Assistant in the Reagan Justice

Department, Roberts drafted an article on “judicial restraint” for Attorney General Smith which, though it was never published, was critical of what it termed “extraordinary equitable decrees...[-] the all too familiar problem of judges taking over the running of state institutions, most notably prisons and schools.”<sup>66</sup> In another memorandum, Roberts noted with seeming approval Erwin Griswold’s criticism of federal institutional reform litigation involving the Alabama Mental Health system, litigation which in Roberts’ words was “like most institutional litigation... interminable.”<sup>67</sup>

### B. Private Rights of Action

In his work as a government lawyer and in private practice, Roberts has consistently sought to limit private enforcement of federal statutes.

As a Deputy Solicitor General in the Bush Administration, Roberts co-authored an *amicus* brief in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 501 (1990), in which the Supreme Court held 5-4 that the Medicaid Act’s requirement that the State provide payments to health care providers and make “assurances satisfactory to the Secretary, [that the rates] are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities” was privately enforceable under Section 1983. Roberts’ brief argued that the statute did not create enforceable rights under Section 1983. See Brief for the United States as *Amicus Curiae* Supporting Petitioners, at \*10-11 available in 1989 WL 1127049.

Roberts also co-authored an *amicus* brief and participated in oral argument in support of the petitioner in *Suter v. Artist M.*, 503 U.S. 347 (1992). The underlying issue in *Suter* was the private enforceability of the Adoption Assistance and Child Welfare Act which requires States, as a condition of federal fund-

ing to take “reasonable efforts” to prevent removal of children from their homes and to facilitate reunification where removal has occurred. Seven members of the Court (Rehnquist, White, O’Connor, Scalia, Kennedy, Souter, and Thomas) held that the Act did not create enforceable rights within the meaning of Section 1983. *Id.* at 353. According to the Court, the Act’s requirement of “reasonable efforts” did not impose any specific substantive requirements, but rather required only the submission of a plan by the States to the Secretary of Health and Human Services on how it would implement reasonable efforts. *Id.* at 358. Justices Blackmun and Stevens dissented, arguing that the majority’s ruling was inconsistent with a prior decision finding similar provisions of the Medicaid Act requiring “reasonable” reimbursements to health care providers, enforceable under Section 1983. *Id.* at 365 (Blackmun, J., dissenting).

Roberts in the brief that he co-authored for the United States argued that the “reasonable efforts” language was too vague to create an enforceable right under Section 1983, see Brief for United States as *Amicus Curiae* Supporting Petitioners at 18, and that the legislative history of the Act suggests that Congress intended to grant States substantial discretion in implementing the reasonable efforts provisions, see *id.* at 21. Moreover, according to Roberts’ brief, applying § 1983 to the Act would “launch[] the federal courts into a field [—domestic relations—] in which they have little institutional competence.” *Id.* at 22.

Also as Principal Deputy Solicitor General, Roberts co-authored the government’s *amicus* brief in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) arguing that damages were not available for intentional violations of Title IX because there was no showing of affirmative congressional intent to supply a remedy. See Brief of United States as *Amicus*



*Curiae* Supporting Respondents, available in 1999 WL 11009217. The Supreme Court rejected the argument holding unanimously (though the Justices were split on the reasoning) that damages were available to individuals bringing private suit under Title IX. The majority held that in the absence of clear direction to the contrary, the federal court had the power to award any appropriate relief. *See Franklin*, 503 U.S. at 76. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas concurred in the judgment, finding that a subsequent congressional enactment implicitly acknowledged that damages were available under Title IX (as well as Title VI and the Rehabilitation Act). *See id.* at 78 (Scalia, J., concurring in the judgment).

As an attorney at Hogan & Hartson, Roberts represented Gonzaga University, arguing successfully that the Family Educational Rights and Privacy Act (FERPA) could not be enforced under §1983. *See Gonzaga v. Doe*, 536 U.S. 273 (2002). The case was brought by a student at Gonzaga University who planned to become a public elementary schoolteacher in the State of Washington. The State required that all new teachers obtain an affidavit of good moral character from their colleges. Roberta League, a school administrator responsible for teacher certification, overheard one student tell another that the plaintiff had engaged in sexual misconduct. *See id.* at 277. League then launched an investigation of the student. She also contacted the state agency responsible for teacher certification, identified the plaintiff by name, and discussed the allegations with them. *See id.* Neither the League nor the University informed the plaintiff student about the investigation, nor did they tell him that information about him had been disclosed until he was told by League and others that he would not receive an affidavit of good moral conduct. *See id.*

The plaintiff sued the University in state court for violating, among other things, FERPA, which prohibits federal funding of schools that permit the release of students' education records without the written consent of parents or students over 18. A jury awarded the plaintiff compensatory and punitive damages. The Washington Court of Appeals reversed, holding that FERPA did not create individual rights and could not be enforced under § 1983. The Washington Supreme Court disagreed and reinstated the FERPA damages holding that FERPA could be enforced under §1983.

In an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor, Kennedy, Scalia and Thomas, the U.S. Supreme Court reversed and held that the statute did not create unambiguous rights necessary for enforcement under § 1983. *See id.* at 283. According to the Court, the statute lacked the necessary "rights creating language" its provisions were focused on the duties of the Secretary of Education, and prohibitions of the statute prohibiting nondisclosure had an aggregate rather than an individual focus. *See id.* at 287-88. Moreover, according to the majority, the fact that Congress had provided a detailed administrative mechanism for enforcing violations of the Act suggested that private enforcement was precluded. *See id.* at 289-90. Justice Breyer and Justice Souter concurred in the judgment, agreeing that the statute was not privately enforceable, but disagreeing with the Court's requirement that private enforceability depends on whether the right is "unambiguous" in the statute. *See id.* at 292 (Breyer, J., concurring in the judgment). Justice Stevens and Justice Ginsburg dissented in the case, arguing that multiple sections of FERPA detailed rights of both students and parents, and suggesting that the Court had heightened the necessary standard of proof. *See id.* at 294-97 (Stevens, J., dissenting).

In his brief and in oral argument, Roberts and his co-counsel advanced arguments that went further than what the Court majority ultimately accepted. Roberts argued that creating private rights of action is a “quintessential legislative judgment” and agencies were given the primary responsibility for enforcement of FERPA and that therefore a broad reading of §1983 rights would implicate federalism and separation of power concerns. *See* Brief for Petitioners, available in 2002 WL 332055, at \*18.<sup>68</sup> Finally, Roberts also argued that FERPA, as Spending Clause legislation, conferred no enforceable rights under § 1983 because it was simply a contract, and not law, and at the time §1983 was enacted contracts were not enforceable by third parties. *See id.* at \*40-41. Roberts relied on a controversial district court case that held that Spending Clause legislation was not privately enforceable, *see id.* at \*41-42, a decision that generated alarm in some quarters<sup>69</sup> and that has since been reversed by the Sixth Circuit as inconsistent with decades of Supreme Court precedent.<sup>70</sup>

### C. Standing

As Deputy Solicitor General, Roberts represented the government in *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 883 (1990), which tightened limits on standing to bring private suits against the federal government for actions that harm the environment. In *Lujan*, the National Wildlife Federation alleged that the federal government had violated environmental law when it decided to open thousands of acres of public lands to mining activity. The Federation brought suit under the relevant citizen-suit provisions, arguing that their members had used the land for recreation in the past and intended to do so in the future. The Court in a 5-4 opinion authored by Justice Scalia held that the group lacked standing, because they had not presented sufficient evidence that they would be adversely affected by the government’s activities.

In 1993, Roberts authored a short piece in the Duke Law Journal in which he supported Justice Scalia’s majority opinion. *See* John G. Roberts Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

### D. In Forma Pauperis Suits

As Deputy Solicitor General, Roberts wrote an *amicus* brief arguing for the reversal of a Ninth Circuit standard that allowed courts to dismiss a prisoner’s *in forma pauperis* lawsuit under 28 U.S.C. § 1915(d) complaint as frivolous only if the allegation conflicts with judicially noticeable facts. *See Denton v. Hernandez*, 504 U.S. 25 (1992). In an opinion written by Justice O’Connor – with Justice Stevens and Blackmun dissenting – the Supreme Court agreed that the Ninth’s Circuit’s test was too stringent and remanded the case. The ACLU wrote an *amicus* brief in the case urging affirmance of the Ninth Circuit’s rule.

## VII. Criminal Law

As a judge, Roberts has consistently ruled against Fourth Amendment claims, most notably dissenting recently from a panel ruling that would have suppressed evidence found by police in a car trunk. 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 of the ACLU in a case involving the Eighth Amendment rights of prisoners.

### A. Fourth Amendment

Since he joined the D.C. Circuit, Roberts has ruled against Fourth Amendment claimants in several cases. All are quite fact-specific: while they contain hints that Roberts might be

inclined to defer to the judgments of police officers, they are written quite narrowly.

Judge Roberts dissented from a panel decision in *United States v. Jackson* (No. 04-3021), available in 2005 WL 1704843 (D.C. Cir. July 22, 2005) finding that the police lacked probable cause to search the trunk of a car stopped for a traffic violation. The case arose out of a traffic stop based on the absence of a tag light. Police conducted a records check indicating that the car and temporary license tags that had been reported stolen. The officers arrested the driver. The driver lacked a registration or a driver's license and the officers upon conducting an additional records check discovered that his driving privileges had been suspended. They also discovered that the car was not properly registered, but there was no report that the car had been stolen. The police handcuffed the driver, placed him in their vehicle and searched the passenger compartment of the car. They found no evidence of criminal activity. Police then searched the trunk of the car where they found a loaded gun. *Id.* at \*2-3. The driver was indicted for unlawful possession of a firearm, and, after the district court denied his motion to suppress the evidence seized from his car trunk, he was convicted and sentenced to nearly two years in prison. *Id.*

Under governing Fourth Amendment law, police are allowed to search a vehicle passenger compartment incident to a lawful arrest, *id.* at 4, but they can search a trunk “only if they had probable cause to believe that the trunk contained contraband or evidence of a crime.” *Id.* at \*5 (citing *California v. Acevedo*, 500 U.S. 565, 579-80 (1991)). The panel majority, in an opinion written by Judge Rogers and joined by Judge Edwards, concluded that on the facts of the case no probable cause of contraband or crime existed warranting the search. The government argued that the officers had probable cause to believe that the trunk might contain

additional stolen tags, additional related criminal evidence, or evidence of documentation or ownership. The panel's opinion, going through the evidence in great detail, finds the government's arguments unconvincing. According to the panel: the stolen tags should not lead one to believe that additional stolen tags would be in the trunk (distinguishing it from finding drugs, for instance) *id.* at \*7; it was “implausible” that the trunk would contain additional evidence supporting the charges on which the defendant was arrested, *id.* at \*8; and there was no evidence that the car was stolen justifying a need to document ownership, *id.*

In dissent, Roberts argued that there was sufficient evidence to conclude that contraband or evidence of a crime would be found in the trunk. According to Roberts, the officers had good grounds for believing the car was stolen. Given that, the officers acted reasonably in searching the trunk: one of the officers had testified that on several occasions involving stops of vehicles with stolen tags the real tags had been found in the trunk, and the trunk might contain identification or belongings of the real owner. *Id.* at 2-3 (Roberts, J., dissenting).

In three other Fourth Amendment cases, Judge Roberts wrote for unanimous panels. In *United States v. Lawson*, 410 F.3d 735 (D.C. Cir. 2005) Judge Roberts – joined by Judges Randolph and Garland – rejected several challenges by a bank robber to his conviction, including the claim that the warrantless search of a car that the defendant had loaned to his brother violated the Fourth Amendment. The car, which was searched shortly after the defendant's arrest, revealed evidence of another uncharged robbery. Roberts rejected the Fourth Amendment claim on the ground that the car matched eyewitnesses' description of the getaway car, and that latex gloves were located in the right front passenger area.

In *United States v. Holmes*, 385 F.3d 786 (D.C. Cir. 2004), Judge Roberts (joined by Judge Sentelle and Judge Tatel) upheld the pat-down of the defendant and subsequent seizure of a scale containing cocaine residue from his pocket. The defendant was stopped by the police for a traffic infraction. According to the police, the defendant was initially reluctant to pull over, behaved nervously once he was pulled over, reached under his driver's seat, and – when asked to get out of the car – reached several times for his pocket. The defendant was then subjected to a pat down frisk, during which officers felt a small hard object in his pocket, which the defendant identified as a scale. When the officers removed the scale from the defendant's pocket, he assaulted them. After the defendant was subdued, a search revealed cocaine on his person, and a gun and ammunition under his seat. *See id.* at 788.

In holding that the removal of the scale from defendant's pocket did not violate the Fourth Amendment, Roberts concluded that the officer was justified in checking that the object was indeed a scale and not a weapon. *See id.* at 790. Significantly, Roberts ruled that even though the officers testified that they did not subjectively believe that the scale was a weapon, the question under *Terry* was whether a reasonable police officer might have objectively believed there was a weapon. Moreover, Roberts found, *Terry* stops were not limited to searches for weapons, but could also include hard objects like the scale that could be used as weapons. *Id.*

As a lawyer in the White House Counsel's office, Roberts penned a memo purporting to provide support for the Administration's campaign to "amend or abolish the exclusionary rule."<sup>71</sup> The memo attaches a study from the National Institute of Justice of felony drug arrestees that according to Roberts, "shows that

the exclusionary rule resulted in the release of 29% of felony drug arrestees in Los Angeles in one year – a far cry from the highly misleading 0.4% figure usually bandied about."<sup>72</sup> Roberts' memo does not explain why the lower figure is misleading, or question the strikingly high figure in the Institute of Justice survey.<sup>73</sup>

## B. Fifth Amendment

In 1989, while working as an associate at Hogan & Hartson, Roberts successfully represented a defendant before the Supreme Court in a double jeopardy challenge to the government's civil prosecution. *See United States v. Halper*, 490 U.S. 435 (1989). At issue in *Halper* was whether and under what terms, a civil penalty could constitute "punishment" for double jeopardy analysis. *Halper*, a manager of a medical services company for Medicare patients, was convicted of submitting false reimbursement claims to the government. *Id.* at 436. The government then, on the same facts, brought a civil claim against *Halper* under the False Claims Act. The trial court, relying on the criminal conviction, granted summary judgment to the defendant. *Id.* at 438. The statute had a fixed-penalty regime requiring the defendant to pay \$130,000 but the District Court construed the statute to allow a smaller remedy of \$1,170 on the theory that the statutory remedy would in effect constitute punishment in violation of the Double Jeopardy Clause. *Id.* at 439-40.

On direct appeal, the Supreme Court unanimously held, in an opinion by Justice Blackmun, that in a case such as this "where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused," the civil remedy constitutes "punishment" within the meaning of the Double Jeopardy Clause. *Id.* at 449. The Court then remanded for an assessment of the monetary value of the harm actually incurred by the government. *Id.* at 452.

*Halper* was Judge Roberts' first argument to the Supreme Court, and he argued, *pro bono*, by invitation of the Court. At his D.C. Circuit confirmation hearing, Roberts stated that: "[t]he first case I argued in the Supreme Court was on a *pro bono* basis on behalf of an individual facing the almighty might of the U.S. Government, going after him criminally and civilly." *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, Part 3, 108th Cong., 1st Sess. 54 (2003).

The holding in *Halper* was abrogated by the Supreme Court's subsequent decision in *Hudson v. United States*, 522 U.S. 93, 98-99 (1997), that the double jeopardy clause only applies to multiple *criminal* punishments in successive prosecutions.<sup>74</sup>

### C. Sixth Amendment

In *United States v. Toms*, 396 F.3d 427 (D.C. Cir. 2005), Judge Roberts – joined by Judge Tatel and Chief Judge Ginsburg – rejected a number of defendant's claims that his lawyer failed to provide effective assistance when the lawyer, among other things, failed to call a witness and stipulated to a conviction that had been expunged. Judge Roberts found that some aspects of the challenged conduct were strategic choices that were not unreasonable, and that the erroneous stipulation was not remotely prejudicial.

### D. Eighth Amendment

As Deputy Solicitor General, John Roberts represented the United States as *amicus curiae* in *Hudson v. McMillian*, 503 U.S. 1 (1992), supporting the Eighth Amendment claims of a prisoner. The prisoner, represented by the ACLU, was beaten by prison guards while shackled, resulting in the loosening of his teeth, a cracked partial dental plate and minor

bruises and swelling in his face, mouth and lip. *See id.* at 4. The Fifth Circuit had rejected Hudson's claims, applying a "significant injury" requirement and finding that the injuries were not significant enough to violate the Eighth Amendment. On review, the Supreme Court reversed in a 7-2 decision, holding that "[t]he absence of serious injury is ... relevant to the Eighth Amendment inquiry, but does not end it." *Id.* at 37. Justices Thomas and Scalia dissented.

Roberts' name does not appear on the brief but he argued the case for the United States. At oral argument, Roberts characterized the Fifth Circuit's "significant injury" test as an "extra-constitutional construct with no basis in the text or history of the Eighth Amendment or in the [Supreme] Court's decisions interpreting it" and stated that "[t]he Fifth Circuit's test will, we think, weed out frivolous claims, but at too high a price." Transcript of Oral Argument, available in 1991 WL 636251, at \*16, \*18 (Nov. 13, 1991). Roberts, in response to questioning, adopted a broad reading of the Eighth Amendment protections as applying to pre-trial detainees. *Id.* at \*23.

### E. Sentencing Guidelines

On the D.C. Circuit, Judge Roberts has shown some willingness to scrutinize a district court's application of the federal Sentencing Guidelines.

For instance, in *United States v. Mellen*, 393 F.3d 175 (D.C. Cir. 2004), Judge Roberts found that the district court had erred in attributing to the defendant, for purposes of calculating his sentence, the value of all of the goods stolen by his wife and stored in their shared home. In the case, Elizabeth Mellen was convicted of defrauding the government of electronic goods and giving most of them to her relatives. Her husband, Luther, took no part in the conspiracy except for helping to procure a laptop and

using some of the stolen goods. Judge Roberts, while affirming Luther's conviction, held that mere knowledge was insufficient to render the defendant responsible for all of his wife's stolen goods, particularly since the wife sought to conceal some of those goods from the defendant. The panel remanded to the district court for resentencing based solely on the laptop and the goods that the defendant had actually used. Judge Henderson's dissent contended that the majority should have shown more deference to the district court's findings of fact, and that the district court sentenced the defendant based on stolen property that was a foreseeable part of the conspiracy.

In another case, however, Judge Roberts faulted a district court for failing to apply the sentencing guidelines in order to avoid what the district court considered to be an unjust result. *See United States v. Tucker*, 386 F.3d 273 (D.C. Cir. 2004). The defendant in the case pled guilty to selling more than 5 grams of cocaine, and, after application of the "safety valve" provision for offenders without aggravating circumstances, was in the guideline range of 57 to 71 months of imprisonment. Prior to his sentencing, the defendant had been on supervised release, subject to a curfew and drug tests. He repeatedly violated curfew, and failed two drug tests, yet he also secured a full-time job that allowed him to support his children and begin computer courses. At the time of sentencing, the district court expressed frustration that the Sentencing Guidelines required a sentence of 5 years, which the judge thought would thwart the defendant's path towards rehabilitation. The judge, concerned that five years would be unjust, issued a downward departure sentencing the defendant to five years probation, without identifying the specific reasons for departure.

Judge Roberts, joined by Chief Judge Ginsburg and Judge Edwards, held that the trial judge had failed to provide any adequate legal bases

for departing downward. Roberts faulted the district court for failing to make even a good faith effort at applying the sentencing guidelines, finding that the sentencing court "seemed intent on defying them." *Id.* at 278.

In *United States v. Smith*, 374 F.3d 1240 (D.C. Cir. 2004), Judge Roberts – writing for a unanimous panel (Judge Garland and Judge Rogers) – upheld a sentencing enhancement based on the facts that: defendant had committed perjury during the trial; the defendant's crime involved vulnerable victims; and, defendant had taken a leadership role in the conspiracy. The court also upheld a sentencing enhancement based on an uncharged offense.

#### F. Conditions of Probation

In a case in which the ACLU filed an *amicus* brief, Judge Roberts considered the validity under the First Amendment of a condition of probation restricting internet use. However, the court did not reach the merits of the issue. In *United States v. Stanfield*, 360 F.3d 1346 (D.C. Cir. 2004), the defendant in the case had been sentenced to five years probation after pleading guilty to identity theft and distribution of methamphetamine. *See id.* at 1349. As a condition of probation, the district court imposed a number of requirements including barring the defendant from using the internet "in any way, shape or form until further order of the Court." *Id.* The condition was apparently in response to the defendant's history of identify theft, although the court conceded that the defendant had not used the internet in committing those crimes. *See id.*

The defendant subsequently violated a number of his probation restrictions, including violating the internet restriction by posting poetry and his email address on a website. *See id.* at 1350. In response, the district court resentenced the defendant to nine months in prison

and issued new conditions on his subsequent release. The new conditions revised the absolute ban on the use of the internet – which the government now conceded was too broad, *see id.* at 1352 n.2 – allowing defendant to use the internet “as any employer legally directs, so long as he has no access to personal information including bank account numbers, credit card numbers, social security numbers and birth dates” and forbidding him from “view and use of internet sites” that provide the aforementioned personal information. *See id.* at 1352. The district court also authorized the probation office to search the defendant’s email accounts and his computers, and required that if the defendant used the computer or email accounts of a friend or employer these also would be subject to full search. *See id.*

On appeal, the defendant challenged the restriction on internet use as beyond the district court’s authority under 18 U.S.C. § 3583, which requires that any condition of supervised release be “reasonably related” to the offense, the history of the defendant, providing treatment or training for the defendant, or to protecting the public from further crimes. *See id.* The defendant also argued that the restriction violated the First Amendment. The National Capital Area chapter of the ACLU wrote an *amicus* brief supporting the defendant in both arguments. *See id.*

The panel did not reach the merits of the issue, remanding the case to the district court to clarify the scope of the restriction. *See id.* at 1354. The defendant and the ACLU claimed that the restriction was vague – the language did not, for instance, state that the defendant may use the internet *only* as an employer legally directs. *See id.* at 1352. The defendant also claimed that the restriction was too broad and would restrict use of newspaper websites that contain birth dates in death notices, and – Judge Roberts offered in his opinion – “the restriction

could bar [the defendant] from reading an encyclopedia... online.” *Id.* By contrast, the government argued that the restriction would not prohibit use of newspapers online and allowed the defendant to have a personal computer and personal email account. *Id.* at 1353. The lack of clarity as to the meaning of the restriction, Judge Roberts held, “counsels restraint on our part before attempting to consider the validity of the restriction under 18 U.S.C. § 3583 and the First Amendment.” *Id.* at 1354.

### G. Habeas Corpus

In the area of habeas, Roberts authored a memorandum while working as a Special Assistant to Attorney General Smith suggesting ways to limit the use of federal *habeas corpus*. The memorandum opens with the statement that “[t]he current availability of federal *habeas corpus*, particularly for state prisoners, goes far to making a mockery of the entire criminal justice system.”<sup>75</sup> Roberts argues in the memo 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,”<sup>76</sup> Congress has the power to abolish federal *habeas corpus* entirely.<sup>77</sup> The memo then suggests potential Congressional limitations on *habeas*: enacting a limitations period, limiting successive petitions, and eliminating Supreme Court review of federal petitions.<sup>78</sup>

## VIII. Federalism and Congressional Power

John Roberts’ single case as a judge in the area of congressional power under the Commerce Clause suggests that he may take a narrow view of Congress’ commerce power – at least in the context of certain environmental regulations. At the same time his opinion in a Spending Power case does not suggest an inclination to radically narrow Congress’s power in that area, at least given Supreme Court precedent.

A. Commerce Clause Power

In *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), Judge Roberts was one of only two judges to dissent from a denial of rehearing *en banc* in a case challenging Congress' power under the Commerce Clause to enact the Endangered Species Act. In the case, the United States Fish and Wildlife Service determined that a real estate company's project was likely to jeopardize the continued existence of the endangered arroyo southwestern toad. *Id.* at 306. The company sued, arguing that the application of this provision to its planned development exceeded Congress' power under the Commerce Clause because the object of the regulation – the endangered toad – involved purely non-economic activity. In making its argument, Rancho Viejo relied heavily on the Supreme Court's rulings in *United States v. Morrison*,<sup>79</sup> which held that Congress exceeded its authority under the Commerce Clause when it provided a federal civil remedy for victims of gender-motivated violence, and *United States v. Lopez*<sup>80</sup>, which held that Congress lacked power under the Commerce Clause to regulate the possession of guns within school zones.

The district court dismissed the company's complaint, and a panel of the D.C. Circuit, consisting of Judges Garland, Edwards and Douglas Ginsburg, unanimously upheld the dismissal. *See* 323 F.3d 1062 (D.C. Cir. 2003). The court relied heavily on D.C. Circuit precedent upholding congressional authority to protect endangered species where the object of the regulation substantially affects commercial activity which is interstate.<sup>81</sup> According to the court, *Lopez* holds that Congress has power to regulate three categories of activity: (1) the channels of interstate commerce; (2) the instrumentalities of person or things in interstate commerce; and (3) activities having a substan-

tial relation to interstate commerce. In this case, the court reasoned, the relevant regulated activity was the company's planned commercial development, not the arroyo toad. Thus, the Act fell into *Lopez*'s third category: it regulated activity – commercial development—that was plainly economic and thus substantially affected interstate commerce. *Rancho Viejo*, 323 F.3d at 1072-73.

Justice Ginsburg wrote a separate concurrence to make clear that where an endangered species is not an article in interstate commerce and does not affect interstate commerce, the harming or taking of the species can only be regulated where the “take itself substantially affects interstate commerce.” *Id.* at 321 (Ginsburg, J., concurring).

Rancho Viejo petitioned for rehearing *en banc* but by a vote of 7-2, the D.C. Circuit denied the petition. The only dissenters were Judges Roberts and Sentelle. Judge Sentelle, who had dissented in the prior circuit case, argued that the economic nature of the “take” was not sufficient to satisfy *Lopez* and *Morrison*, which he read to require that the toad itself affect interstate commerce. *See Rancho Viejo v Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (denial of rehear'g *en banc*) (Sentelle, J., dissenting). Judge Roberts also dissented from rehearing on similar grounds:

The panel's opinion in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so. Thus, the panel sustains the application of the Act in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce . . . .



Such an approach seems inconsistent with the Supreme Court’s holdings in [*Lopez*] and [*Morrison*].

*Id.* at 1160 (Roberts, J., dissenting)

Roberts argued that “[t]he panel’s approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating ‘Commerce . . . among the several States.’ U.S. CONST. art. I §8 cl.3.” *Id.*

Roberts’ view that rehearing *en banc* was appropriate does not definitely suggest that he would find the Endangered Species Act unconstitutional. His opinion concluded by noting that *en banc* review “would also afford the opportunity to consider grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent.” *Id.* With that, he cited other rationales, referenced in the panel decision, that depend on the finding that the protection of the endangered species itself has an effect on interstate commerce. *See id.*

## B. Spending Power

Judge Roberts joined a decision written by Judge Garland, *see Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004), which held that the Washington Metropolitan Area Transit Authority (WMATA) was not immune from suit in federal court under section 504 of the Rehabilitation Act. Judge Sentelle dissented in the case.

The case arose out of WMATA’s firing of Adam Barbour from his position as an electrician. Barbour charged that WMATA fired him because he suffers from a mental disability (bipolar disorder), and sued WMATA for, among other things, violating his rights under Section 504 of the Rehabilitation Act. That Act

forbids entities receiving federal funds from discriminating on the basis of disability.

WMATA claimed that it was immune from suit pursuant to the Eleventh Amendment, which provides states’ immunity from suit in federal court unless (1) they waive their immunity and consent to suit, or (2) Congress *abrogates* that immunity, without consent, pursuant to Section 5 of the Fourteenth Amendment. *See id.* at 1163. In 1986, Congress adopted the Civil Rights Remedies Equalization Act (CREAA) providing that states receiving federal funds “shall not be immune under the Eleventh Amendment of the Constitution of the United States for suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.” 42 U.S.C. §2000-d-7(a)(1).

WMATA argued that CREAA did not make clear that receipt of federal funds is conditioned on a waiver, but the court rejected that argument, holding that the above language—and language in the Rehabilitation Act itself—made unmistakably clear that states accepting federal funds lose their immunity to suit. *Id.* at 1165. The court also rejected the argument that CREAA was an attempt to *abrogate* immunity—something that can only be validly done for acts passed pursuant to Congress’ power under Section 5 of the Fourteenth Amendment. The court held that because CREAA refers only to states that accept federal financial assistance, it was a conditional waiver and not an attempted abrogation. *Id.*

Second, the court rejected WMATA’s arguments that it did not knowingly consent to a waiver because it reasonably believed that Congress had abrogated its immunity for disability suits under Title I of the Americans with Disability Act. This abrogation of immunity was subsequently declared unconstitutional by the Supreme Court in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). WMATA’s argu-

ment was essentially that in 1998 when it fired Barbour the agency believed it was properly subject to the ADA, and as a result did not fully consider the implications of waiving immunity to the Rehabilitation Act. Reading Supreme Court precedent as requiring only objective awareness of waiver and not subjective awareness, the court rejected WMATA's claim. The court also stated that several decisions prior to *Garrett* had cast doubt on the validity of Congress' abrogation of state immunity under the ADA. *Id.* at 1167. Moreover, CREAA's waiver of immunity was enacted in 1986, four years before the ADA. *Id.* at 1168.

Finally, the court rejected WMATA's argument that Congress lacked power under the Spending Clause to condition transportation funds on a waiver of immunity for disability suits. WMATA argued that there was an insufficient connection between the congressional goal – federal funding for transportation – and the spending condition – preventing disability discrimination – to satisfy the constitutional rule that conditions on federal funds “bear some relationship” to the purpose of the spending. *Id.* at 1168. The court, citing a recent Supreme Court Spending Clause case, found that Congress' goal of ensuring that taxpayer funds do not subsidize disability discrimination was sufficiently related to the federal interest in funding transportation. *Id.* at 1169-70.<sup>82</sup>

Judge Sentelle dissented, contending that Congress had exceeded its power under the Spending Clause by “conditioning acceptance of federal transportation funds on a state's acquiescence to private damages suits for disability discrimination in employment.” *Id.* at 1171 (Sentelle, J., dissenting). According to Sentelle, prohibiting disability discrimination was not germane to spending money for mass transit. *Id.* at 1172.

Note that in private practice, Judge Roberts suggested in a brief to the Supreme Court in *Gonzaga v. Doe*, 536 U.S. 273 (2002), discussed above, that Spending Clause legislation might never be enforceable under § 1983 because it is merely a contract. Judge Garland's opinion, which Roberts joined, implicitly rejects that argument.

## IX. Government Secrecy

Judge Roberts was one of the dissenters in the D.C. Circuit's 5-3 denial of a petition for rehearing *en banc* (with one judge not participating) filed by the Bush Administration in its effort to avoid releasing records pertaining to Vice President Cheney's energy task force. *See In re Cheney*, 334 F.3d 1096, (D.C.Cir. 2003), rehear'g and rehear'g *en banc* denied (Sep 10, 2003). The court of appeals' ruling was subsequently reversed in part by the Supreme Court.

The case involved litigation by Judicial Watch and the Sierra Club charging that the Vice President's National Energy Policy Development Group had violated federal law by not making its records public. The President established the energy task force, consisting of six cabinet secretaries and several agency heads and assistants to the President, to help develop national energy policy. *Id.* at 109. After the task force issued a final report and, according to the Government, terminated all operations, Sierra Club and Judicial Watch filed separate actions, later consolidated in the district court, alleging that the task force had not complied with the Federal Advisory Committee Act (FACA), which imposes a variety of open-meeting and disclosure requirements on entities meeting the definition of “advisory committee.” The complaint alleged that, because nonfederal employees and private lobbyists regularly attended and

fully participated in the task force's nonpublic meetings as de facto Group members, the task force was subject to FACA's requirements. The suit sought an injunction requiring the defendants – including the Vice President and the Government officials serving on the Group – to produce all materials subject to FACA's requirements.

The district court held that while there was no private cause of action under FACA, the Act was enforceable through mandamus. The court allowed plaintiffs' discovery to proceed, deferring ruling on whether application of FACA to the energy task force would violate separation-of-powers principles and interfere with the President and Vice President's constitutional prerogatives. The district court acknowledged that discovery itself might raise serious constitutional questions, but held that the Government could assert executive privilege to protect sensitive materials from disclosure.

The government then sought a writ of mandamus in the court of appeals to vacate the discovery orders, but the court in 2-1 decision (with Judge Tatel writing, joined by Judge Edwards and Judge Randolph dissenting) dismissed the mandamus petition on the ground that any potential harm could be cured by asserting executive privilege with particularity in the district court. *See id.* at 1104-1105. According to the court any separation-of-powers conflict remained hypothetical, since the government could invoke executive privilege to object to the discovery orders with detailed precision. *Id.* at 1105. The government petitioned for review *en banc*, but the D.C. Circuit denied the petition. Judge Roberts, along with Judge Randolph and Judge Sentelle, voted to grant rehearing, but none of the dissenters wrote an opinion. *See* 2003 U.S. App. Lexis 18831.

The Supreme Court then accepted review on *certiorari*. The Court reversed, holding that the court

of appeals had erred in concluding that it lacked authority to issue mandamus because the Government could protect its rights by asserting executive privilege in the district court. Justice Kennedy wrote the opinion which was joined in substantial part by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Breyer. (Justices Scalia and Thomas concurred in part and dissented in part and Justices Ginsburg and Justices Souter dissented). *See Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

On remand, the court of appeals *en banc* unanimously held that FACA did not apply to Cheney's Energy Task Force and issued a mandamus directing the district court to dismiss the complaints. *See In Re Cheney*, 406 F.3d 723 (D.C. Cir. 2005).

## X. Other Issues

### A. Takings and Environmental Regulation

As a law student, Roberts authored two law review articles in which he argued that the Supreme Court should expand the meaning of the Takings and Contract clauses to better protect private property and to limit government regulation. *See Developments in the Law – Zoning*, 91 HARV. L. REV. 1462 (1978); Comment, *Contract Clause—Legislative Alteration of Private Pension Agreements*, 92 HARV. L. REV. 86 (1978).

Yet, Roberts recently argued against a takings claim before the Supreme Court. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), John Roberts, as a partner at Hogan & Hartson represented a state regulatory agency before the Supreme Court that sought to limit property development in order to protect the Lake Tahoe area.<sup>83</sup> The Tahoe-Sierra Preservation Council had imposed a temporary moratorium on construction and develop-

ment in the Tahoe area while the agency worked out its long-term preservation plans. *Id.* at 310.

The plaintiffs argued that the mere enactment of the moratorium facially constituted a *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which requires compensation whenever a regulation deprives an owner of “all economically beneficial uses,” *id.* at 1019. Because the moratorium here was only temporary, Roberts characterized the plaintiffs’ claim as “extreme,” *see, e.g.*, Brief for Respondents, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (No. 00-1167), available in 2001 WL 1480565, at \*19, and devoted most of his brief to arguing that *Lucas* did not apply. According to Roberts’ brief, “[e]xpanding *per se* takings analysis to include temporary development moratoria would transform an approach designed to apply to only the most ‘extraordinary circumstance[s]’ to one that encompasses a well-established and widely used tool of land use planning.” *Id.* at \*23 (citation omitted). Roberts did not contend that temporary moratoria are completely beyond the Taking Clause’s reach, noting that “temporary moratoria – like the vast range of regulatory actions – are subject to scrutiny under the generally applicable *Penn Central* test.” *Id.* at \*41<sup>84</sup> The plaintiffs, however, had failed to pursue a *Penn Central* theory in the appellate court. *See* 535 U.S. at 319-20, 334.

The Court accepted Roberts’ analysis, *see id.* at 321, with only Justices Scalia, Rehnquist, and Thomas in dissent. The majority concluded that *Lucas* was ill-suited to cover mere temporary regulation, and that plaintiffs could not tailor *Lucas* by complaining of a “complete” elimination of value for a certain period of time. *See id.* at 330-31. The Court noted that

“the interest in ‘fairness and justice’ will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.” *Id.* at 342.

#### B. Writings and Public Statements on the Supreme Court

Apart from the writings already mentioned in this report, Roberts has written very little that we could locate on questions of civil liberties. Roberts wrote a review of the 1992-1993 Supreme Court term. *See* John G. Roberts, Jr., *Symposium: Do We Have a Conservative Supreme Court?*, 1994 Pub. Int. L. Rev. 107 (1994). The piece offers little in the way of commentary about the opinions except to note that the Court’s decisions, “belied the popular myth that the current Court is politically conservative,” citing the Court’s cases upholding the rights of religious minorities, allowing *Miranda* claims to be raised on *habeas corpus* review, and “deal[ing] severe blows to the federal government’s war on drugs by restricting the authority of prosecutors to seize the assets of convicted drug dealers.” *Id.*<sup>85</sup>

Roberts’ public statements, some of which have been noted in this Report, usually arise in the context of specific litigation and reveal fairly little about the approach he would take in civil liberties and constitutional cases. In at least two press articles, Roberts repeated the argument made in his writings that the Rehnquist Court cannot be characterized as “conservative.” In response to a question, Judge Roberts is quoted as saying “I don’t know how you can call the [Rehnquist] court conservative.”<sup>86</sup> In another article, Roberts responds to a question about the 1999-2000 Supreme Court term – in which the Court held that Congress exceeded its power in enacting a federal civil remedy for violence

against women and that the Age Discrimination in Employment Act was not enforceable against States but also affirmed *Miranda* – by stating that, “[t]aking this term as a whole, the most important thing it did was make a compelling case that we do not have a very conservative Supreme Court.”<sup>87</sup>

## Endnotes

<sup>1</sup> Justice Stevens authored a dissent, joined by Chief Justice Rehnquist and Justices White and O'Connor, arguing that the government had a legitimate interest in preserving the symbolic value of the flag, and that the Act did so without regard to the specific content of the flag burners' speech (because the "ideas expressed by flag burners are ... various and often ambiguous"). *Id.* at 321.

<sup>2</sup> See Memorandum to Fred Fielding from John Roberts re Libel Laws (Aug. 28, 1985) (available in Reagan Library Collection, Roberts Box 31).

<sup>3</sup> *Id.*

<sup>4</sup> Memorandum to Fred Fielding from John Roberts re Proposal to Charge Applicant Fees for White House Press Passes, at 2 (Apr. 13, 1983) (available in Reagan Library Collection, Roberts Box 57).

<sup>5</sup> *Id.*

<sup>6</sup> See Memorandum from Sherrie M. Cooksey & John G. Roberts to Fred F. Fielding re Draft Press Guidance Regarding Signs at Reagan-Bush Rallies (Aug. 29, 1984).

<sup>7</sup> *Id.* at 1.

<sup>8</sup> According to Roberts:

Although it may be argued that specific mention of the press in the first amendment entitles it to special rights, the press clause probably was intended not to afford the media any greater protection, but rather to ensure that the general freedom of expression guaranteed by the first amendment would not be forfeited by the act of publication. The assertion that the press has special rights as vindicator of the public right carries with it the danger that concomitant responsibilities might be recognized, responsibilities that would endanger a free press far more than the denial of privileged status as the public's representative. The privilege of using the airwaves granted to broadcast media has been cited as the justification for imposing duties of fair reporting and rights of reply. Recognizing a special privilege of access for the media might well provide the justification for imposing similar duties on journalists who avail themselves of special access. Finally, according to the press special rights presents the insoluble problem of determining who qualifies as "the press." Any meaningful definition of the press would involve the state in choosing among media representatives in a potentially unconstitutional manner.

Comment, *First Amendment — Media Right of Access*, 92 HARV. L. REV. 174, 178-79 (1978).

<sup>9</sup> This document, available on Lexis, is not separately paginated.

<sup>10</sup> Justice Scalia, joined by Chief Justice Rehnquist, Justice White and Justice Thomas, dissented. Agreeing with the position of the United States, they maintained that public ceremonies featuring prayers have long been part of our nation's history, *see id.* at 634-36 (Scalia, J., dissenting), and made light of the majority's suggestion that students were psychologically coerced to participate. *See id.* at 637-38.

<sup>11</sup> Memorandum from John Roberts to Fred Fielding re S.J. Res. 2—Constitutional Amendment to Permit Silent Prayer in Schools (Nov. 21 1985) (Reagan Library Documents, Box 49). The Court in *Stone v. Graham* found that posting the Ten Commandments in public schools violated the Establishment Clause.

<sup>12</sup> *Id.*

<sup>13</sup> Memorandum to Anita Bevacqua, Presidential Messages from John Roberts re Message for Kentucky Public Schools (May 24, 1985).

<sup>14</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>15</sup> The court relied heavily throughout its opinion on the Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), which found that Title VII's exemption for religious organizations did not violate the Establishment Clause.

<sup>16</sup> See Memorandum from John Roberts to Fred Fielding, re Proposed Justice Report on S.139 (Anti-Busing bill), Feb. 15, 1984, at 1, available at <http://media.washingtonpost.com/wp-srv/politics/documents/busing.pdf>.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> See Alliance for Justice, Preliminary Report on the Nomination of D.C. Circuit Judge Roberts to the United States Supreme Court, available at <http://www.supremecourtwatch.org/robertsreport.pdf>, at 16 (quoting Memorandum, John Roberts to Attorney General re Summary of U.C. Commission on Civil Rights Chairman Flemming Correspondence, October 5, 1981.)

<sup>19</sup> See Memorandum from John Roberts to Brad Reynolds re Material to Be Delivered Today to Senators on Voting Rights Act (Feb. 23, 1982) (suggesting changes to a draft piece: "Why Section 2 of the Voting Rights Act Should Be Retained Unchanged") (available in National Archives & Records, Accession #60-88-0498, Box 7). Memorandum from John Roberts to Attorney General Smith re Voting

Rights Act Testimony: Questions & Answers (Jan. 21, 1982) (marked “draft”) (available in National Archives & Records, Accession # 60-88-0495, Box 4); Memorandum from John Roberts to Attorney General Smith et al. re Regional Op-Ed Piece on Consequences of the Effects Test in § 2 of the Voting Rights Act (Mar. 1, 1982) (available in National Archives & Records, Accession # 60-88-0495, Box 4); Memorandum from John Roberts to Attorney General re Response to Vernon Jordan on the Voting Rights Act (Nov. 17, 1981) (draft response to Jordan’s Op-Ed criticizing the Administration’s “sham” endorsement of the Voting Rights Act.) (National Archives & Record Administration, Accession # 60-88-0495, Box 4).

<sup>20</sup> Memorandum from John Roberts to Attorney General Smith re Talking Points for White House Meeting on Voting Rights Act, at 1 (Jan. 26, 1982) (National Archives & Record Administration, Accession # 60-89-372, Box 30).

<sup>21</sup> *Id.* at 2.

<sup>22</sup> See Memorandum from John Roberts to Attorney General Smith re Attorney General Certification to Authorize Intervention in Voting Rights Cases (Sept. 14, 1982) (available in National Archives & Records Administration, Accession # 60-89-372, Box 30 of 190).

<sup>23</sup> *Id.*

<sup>24</sup> The brief is available on lexis, but is not paginated.

<sup>25</sup> Francine Knowles, *Minority Contractor Fears Loss of Opportunity*, Chicago Sun Times, June 13, 1995.

<sup>26</sup> This document is not paginated on Westlaw.

<sup>27</sup> Roberts argued that: “From our Nation’s founding, Congress and this Court have recognized a special obligation to America’s first inhabitants and their descendants – over whose aboriginal homelands we have extended our national domain – and have recognized that Congress is empowered to honor that obligation as it sees fit.” 1999 WL 557073, at \*2.

<sup>28</sup> See R. Jeffrey Smith, Jo Becker and Amy Goldstein, *Documents Show Roberts Influence in Reagan Era*, WASH. POST, at A1.

<sup>29</sup> See Memo from Roberts to Fielding (Jan. 31, 1983), at 1, available at <http://media.washingtonpost.com/wp-srv/politics/documents/fairhousing.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> Memorandum from John Roberts to Attorney General Smith re Solicitor General Briefs in EEOC Cases, at 1 (June

16, 1982), available at [http://www.nytimes.com/packages/pdf/politics/roberts\\_memos.pdf](http://www.nytimes.com/packages/pdf/politics/roberts_memos.pdf).

<sup>32</sup> *Id.* at 1-2

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.* at 469.

<sup>35</sup> *Grove City College v. Bell*, 465 U.S. 555 (1984).

<sup>36</sup> Memorandum from John Roberts to Fred Fielding re Correspondence From T.H. Bell on Grove City Legislation (July 24, 1985).

<sup>37</sup> See Memorandum from John Roberts to Fred Fielding re Nancy Risque Request for Guidance on Letter From Congresswomen (Feb. 20, 1984). The memorandum notes that the Department of Justice was reviewing whether to intervene in the case, and suggests thanking the members for their views.

<sup>38</sup> See Memorandum from John Roberts to the Attorney General re Proposed Intervention in *Canterino v. Wilson* (Feb. 12, 1982) (available in National Archives & Record Administration, Civil Rights Division, General Correspondence Files, Accession # 60-88-0495, Box 4).

<sup>39</sup> Memorandum from John Roberts to Fred Fielding re New Constitutional Amendment Proposed by the “Los Angeles Professional Republican Women, Federated” (Sep. 26, 1983) (available in Reagan Library Files, Roberts Box 58).

<sup>40</sup> See Richard A. Serrano, *Roberts Donated Help to Gay Rights Case*, L.A. TIMES (Aug. 4, 2005); Sheryl Gay Stolberg, *Court Nominee Advised Group on Gay Rights*, N.Y. TIMES (Aug. 5, 2005), at A1.

<sup>41</sup> See *id.*

<sup>42</sup> See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>43</sup> *Confirmation Hearings on Federal Appointments, Hearings Before the Senate Comm. On the Judiciary, Part 3*, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 53-54 (2003).

<sup>44</sup> Memorandum from John Roberts to Attorney General Smith re Judicial Activism Q & A’s: Specific Examples, at 2 (Nov. 25, 1981) (available in National Archives & Record Administration, Accession # 60-89-372, Box 30 of 190). The memorandum consists of potential questions that the Attorney General might face on judicial activism, and provides suggested answers.

<sup>45</sup> *Id.*

<sup>46</sup> See Memorandum from John Roberts to Steve Brogan, Office of Legal Policy re Development of Legislative Changes to 42 U.S.C. § 1983 (Aug. 9, 1982) (available in National Archives & Records Administration, Accession # 60-88-0495, Box 4).

<sup>47</sup> *Id.* at 2 (quoting *First National Bank of Omaha v. The Marquette National Bank of Minneapolis*, 636 F.2d 195, 198 (8<sup>th</sup> Cir. 1980), *cert.denied.*, 450 U.S. 1042,)

<sup>48</sup> *Confirmation Hearings on Federal Appointments, Hearings Before the Senate Comm. on the Judiciary, Part 3*, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 53-54 (2003), at 56.

<sup>49</sup> *Id.*

<sup>50</sup> See Draft Article on Judicial Restraint, at 5 (available in National Archives & Record Administration, Accession # 60-89-372, Box 30 of 190).

<sup>51</sup> *Id.*

<sup>52</sup> The Government does not appear to have conceded this point. When the issue of referral for medical necessary abortions arose in oral argument, the Government stated that a patient could have been referred for emergency services but the issue of abortion could not have been discussed. Oral argument, *available in* 1990 WL 10012655, at \*39.

<sup>53</sup> Roberts, who joined the Solicitor General's office in 1989, is not listed on the briefs in these prior cases.

<sup>54</sup> This document is available on Lexis but is not paginated.

<sup>55</sup> In oral argument, Justice Blackmun asked: "Mr. Roberts, in this case are you asking that *Roe v. Wade* be overruled?" Roberts responded, "No your honor, the issue doesn't even come up" to which the Justice responded, "Well that hasn't prevented the Solicitor General from taking that position in prior cases. Three or four of them in a row." Oral Argument of *Amicus Curiae* United States, *Bray v. Alexandria Women's Health Clinic*, 506 U.2. 263 (1991) (No. 90-985), *available in* 1992 WL 637112, at \*23; see Orlando Sentinel Tribune, October 17, 1991, at A14 (describing Justice Blackmun as "taunting a government lawyer").

<sup>56</sup> Memorandum from John Roberts to Dianna Holland Re Mazzoli Letter on Pardons for Abortion Clinic Bombers (Apr. 9, 1986).

<sup>57</sup> Memorandum from Carolyn Kuhl and John Roberts to The Attorney General re *Plyler v. Doe* – "The Texas Illegal Aliens Case" (June 15, 1982) (available at National Archives & Record Administration, Files of Carolyn B. Kuhl, 1981-82, Accession # 60-98-0832, Box 1).

<sup>58</sup> Also, in response to the Supreme Court decision's in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Hamdan received a hearing before a review tribunal which determined that he was an enemy combatant who should continued to be detained. *Id.* at \*1.

<sup>59</sup> See Int'l Comm. Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 37 (1960).

<sup>60</sup> The court stated that "[t]o the extent there is ambiguity about the meaning of Common Article 3 as applied to Al-Qaeda and its members, the President's reasonable view of the provision must therefore prevail." *Id.* at \*7.

<sup>61</sup> Roberts wrote "NO!" in the margins of an April 12, 1982 memorandum 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, Anthony Lewis and then-President of the American Bar Association David Brink, who all opposed the bills. *Id.*) Roberts also added notes skeptical about Olson's position that the bills were unnecessary because the Supreme Court was now moving to the right. See Memorandum by Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel to the Attorney General re Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases (Apr. 12, 1982), at 5, 8/

<sup>62</sup> See Memorandum by John Roberts, Special Assistant to the Attorney General *Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments*, at 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 17.

<sup>65</sup> See R. Jeffrey Smith, Jo Becker & Amy Goldstein, *Documents Show Roberts Influence in Reagan Era*, WASH. POST, July 27, 2005, at A1; David E. Rosenbaum, *An Advocate for the Right*, N.Y. TIMES, July 28, 2005, at A16.

<sup>66</sup> See Draft Article on Judicial Restraint, at 5 (available in National Archives & Record Administration, Accession # 60-89-372, Box 30).

<sup>67</sup> See Memorandum from John Roberts to Attorney General Smith re Erwin Griswold Correspondence, at 1 (Dec. 11, 1981) (available in National Archives & Record Administration, Accession # 60-89-372, Box 30).



<sup>68</sup> On the question of separation of powers, the brief argued that “[t]o the extent federal courts are loosed from the mooring of unambiguous congressional intent and obliged to pick and choose which federal requirements may be enforced in judicial actions and which may not ... they essentially assume a legislative role by supplanting congressional intent with their own.” Brief for Petitioners, 2002 WL 332055, at \*19.

<sup>69</sup> See Robert Pear, *Ruling in Michigan Bars Suits Against States Over Medicaid*, N.Y. TIMES, May 13, 2001, Sec. 1 (describing ruling as “shock[ing]” to some legal scholars and poverty advocates).

<sup>70</sup> See *Westside Mothers v. Haveman*, 289 F.3d 852 (6<sup>th</sup> Cir. 2002).

<sup>71</sup> Memorandum from John G. Roberts to T. Kenneth Cribb, Jr. Assistant Counsellor to the President re New Study on Exclusionary Rule (Jan. 4, 1983).

<sup>72</sup> *Id.*

<sup>73</sup> The 29% figure seems much higher than in other reports. For one, this figure only addresses drug arrests, where Fourth Amendment violations are among the highest. See ABA, *Criminal Justice in Crisis* (1988), available at <http://www.druglibrary.org/special/king/cjic.htm>. According to the ABA’s 1988 Report on the Exclusionary Rule: “Prosecutors screen out 2.4% of felony drug arrests (nowhere near the 30% claim of the National Institute of Justice), while the cumulative loss for drug arrests is probably in the range of 2.8% to 6% or 7.1%.” *Id.* The ABA report finds that “[i]n felony arrests for offenses other than drugs or weapons possession, including violent crime arrests, the effects of the rule are lower; prosecutors screen out less than 0.3% of these felony arrests because of illegal searches, and the cumulative loss is no more than 0.3% to 0.7% of such arrests.” *Id.*

<sup>74</sup> Chief Justice Rehnquist wrote the opinion in which Justices O’Connor, Scalia, Kennedy and Thomas joined. Justice Stevens, Souter, Breyer and Ginsburg concurred in the judgment.

<sup>75</sup> Memorandum from John Roberts re Possible Reforms of the Availability of Federal Habeas Corpus (Nov. 12, 1981), available at [http://www.nytimes.com/packages/pdf/politics/roberts\\_memos.pdf](http://www.nytimes.com/packages/pdf/politics/roberts_memos.pdf).

<sup>76</sup> Art. 1, §9 cl. 2

<sup>77</sup> See Memorandum re Habeas, *supra* note 79, at 3-4. Roberts asks : “[I]n light of the foregoing problems caused by the current status of *habeas corpus* law, and the fact that

the provision of federal *habeas corpus* is a matter of legislative grace, the question would seem to be not what tinkering is necessary in the system, but rather why have federal *habeas corpus* at all?” *Id.* at 4.

<sup>78</sup> *Id.* at 5-6.

<sup>79</sup> 529 U.S. 598 (2000).

<sup>80</sup> 514 U.S. 549 (1995).

<sup>81</sup> See *National Assoc’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (D.C. Cir. 1997) (holding that the Endangered Species Act was constitutional as applied to a construction project in an area containing the habitat of the endangered Delhi Sands Flower-Loving Fly).

<sup>82</sup> The majority relied on the Supreme Court’s 2004 decision in *Sabri v. United States*, 541 U.S. 600 (2004), which held that Congress has authority under the Spending Clause to make bribery of officials of state entities that receive more than \$10,000 in federal funds a federal crime, without requiring a connection between a given bribe and a federal grant.

<sup>83</sup> Roberts apparently offered his services *pro bono*. See Charlie Savage, *Environmentalists Study Roberts’s Rulings with Concern*, Boston Globe, July 21, 2005, at A1.

<sup>84</sup> The analysis in *Penn Central Transp. Co., v. New York City*, 438 U.S. 104 (1978), involves a “ ‘complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.’ ” *Lake Tahoe*, 535 U.S. at 315 n.10 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001))

<sup>85</sup> This document is not paginated.

<sup>86</sup> Lyle Denniston, *High Court’s Recent Rulings, Future Are Campaign Issues*, BALTIMORE SUN, JULY 2, 2000.

<sup>87</sup> *Power of Precedent Seen in High Court Decisions, Conservative View Lost in Abortion, Prayer and Miranda Rulings*.

