BURDEN UNMET:

JOHN ROBERTS' CONFIRMATION HEARING FAILED TO DISPEL THE DISQUALIFYING CONCERNS ABOUT HIS RECORD

September 20, 2005

As we and others documented prior to John Roberts' confirmation hearing, Roberts' long record, particularly including his record of nearly ten years in the Reagan and first Bush Administrations as a political appointee in significant legal positions, is a record that makes him the wrong choice to sit on the Supreme Court, particularly as Chief Justice.[1] Throughout his career, Roberts has shown disregard for the laws and remedies that protect Americans from discrimination. He has also tried to restrict the role of the courts in upholding Americans' rights and legal protections. An individual with such a record simply cannot be entrusted with a lifetime appointment as this country's most powerful judicial officer.

At his confirmation hearing, Roberts failed to resolve the disqualifying concerns about his record. To the contrary, Roberts refused to answer scores of important questions about his views of the Constitution and our laws, and gave meritless excuses for doing so. In addition, Roberts attempted to dismiss his troubling record in the Reagan Administration as merely the work of a staff attorney parroting the views of the administration he served. Not only is such testimony belied by the positions in which Roberts served, but the record also shows that in memorandum after memorandum, Roberts was expressing his own views and advice regarding significant matters under consideration. And on particular substantive issues of great concern in Roberts' record, including privacy, women's rights, and civil rights, Roberts' testimony did nothing to dispel those concerns.

We discuss below the most problematic aspects of John Roberts' confirmation hearing. In light of Roberts' documented record, and his hearing testimony, John Roberts remains the wrong choice for Chief Justice.

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[1] See, e.g., PFAW, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court ("PFAW Pre-Hearing Report"), and John Roberts: The Wrong Choice for Associate Justice, an Even Worse Choice for Chief Justice, available at: <http://media.pfaw.org/stc/PH-report.pdf>, and <http://www.savethecourt.org/wrongchoice>.

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I. Making a mockery of advise and consent:
Roberts' wrongful refusal to answer questions

From the very outset of Roberts' confirmation hearing before the Senate Judiciary Committee, it was clear that the game plan worked out among the Administration, the Senate Republican leadership and Roberts was for Roberts to stonewall the Committee and indeed all of America by refusing to answer important questions about his record and his legal views to which Americans are entitled to answers. In their opening statements on September 12, 2005, a number of Republican members of the Committee set the stage for Roberts to refuse to answer questions. For example,

> HATCH: I'll be the first to admit that senators want answers to a great many questions. But I also have to admit that a senator's desire to know something is not the only consideration on the table. Some have said the nominees who do not spill their guts about whatever a senator wants to know are hiding something from the American people. Some compare a nominee's refusal to violate his judicial oath or abandon judicial ethics to taking the Fifth Amendment. These might be catchy sound bytes, but they are patently false.[2]

Even Committee Chairman Specter, who went on to ask Roberts important questions about his views of the Constitution, began the hearing by giving Roberts carte blanche not to answer them: "[S]enators have the right to ask whatever question they choose. And you, Judge Roberts, have the prerogative to answer the questions as you see fit, or not to answer them as you see fit."[3]

Roberts did exactly as the Republicans had openly encouraged him to do. Although in his own opening statement to the Committee Roberts likened the role of a judge to that of a baseball umpire, he then spent the next three days playing dodge ball with the Committee, evading or refusing to answer questions more than a hundred times, questions that would have shed light on his record and his jurisprudential views. These include, for example:

- "Do you then believe that this implied right of privacy applies to the beginning of life and the end of life?" [4]
- "[The Supreme Court] said, 'a woman's interest in having an abortion is a form of liberty protected by the Due Process Clause.' Do you agree with that?"[5]

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[2] Roberts Hearing, Opening Statement of Senator Hatch (Sept. 12, 2005). See also Opening Statements of Senators Grassley and Kyl (Sept. 12, 2005).

[3] Roberts Hearing, Opening Statement of Senator Specter (Sept. 12, 2005).

[4] Roberts Hearing, Question of Senator Feinstein (Sept. 13, 2005).

[5] Roberts Hearing, Question of Senator Specter (Sept. 14, 2005).

- "[D]o you believe ... that the federal courts should become involved in end-of-life decisions?"[6]

- "[Does Congress] have the power to terminate war?"[7]

- "Do you disagree with Justice Thomas' interpretation of the right to privacy in any decided case?"[8]

- "Do you have any concern or reservations about the constitutionality of the 1964 Civil Rights Act that outlawed racial discrimination in public accommodations, employment and other areas?"[9]

- "[President Kennedy] said, 'I believe in an America where the separation of church and state is absolute.' My question is: do you?"[10]

Roberts' refusal to respond to questions was groundless. There can be no question that a candidate or nominee for judicial office is free to respond to questions concerning specific legal issues, so long as the answers do not pertain to specific cases pending before the court to which the individual would sit if elected or confirmed. This was confirmed in a letter to Senator Schumer from judicial ethics expert Stephen Gillers of New York University Law School and signed by eleven other law professors.[11] As the law professors explained, a nominee is free to comment on "constitutional issues including views on decisions of the Supreme Court addressing those issues." Gillers Letter at 1. The letter went on to state that "it would be appropriate for a nominee to answer these questions so long as he or she does not 'with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.'" Id. (quoting ABA Model Code of Judicial Conduct, Canon 5A(3)(d) (2004)(emphasis added)).

Clarifying this further, Professor Gillers stated: "Of course, a candidate for judicial office should not say how he or she would decide particular cases. But speaking specifically, even critically, about decisional law is quite different from a commitment to how the nominee would decide particular cases." Gillers Letter, at 3.

Furthermore, in Republican Party of Minnesota v. White, 536 U.S. 765 (2002), the Supreme Court held that a law requiring the silence of judicial candidates on such matters was unconstitutional under the First Amendment. In White, a candidate seeking election for

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6 Roberts Hearing, Question of Senator Feinstein (Sept. 13, 2005).

7 Roberts Hearing, Question of Senator Leahy (Sept. 13, 2005).

8 Roberts Hearing, Question of Senator Schumer (Sept. 14, 2005).

9 Roberts Hearing, Question of Senator Kennedy (Sept. 13, 2005).

10 Roberts Hearing, Question of Senator Feinstein (Sept. 13, 2005).

11 Letter from Stephen Gillers, *et al.* to Hon. Charles E. Schumer (July 7, 2005), hereafter "the Gillers Letter."

a judgeship wished to criticize opinions of the court to which he was seeking election, and which he would be in a position to overturn if elected. Minnesota law prohibited him from commenting on those decisions. Justice Scalia wrote the opinion of the Supreme Court, stating, "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." 536 U.S. at 777.

Justice Scalia specifically addressed the concern that Roberts expressed regarding maintaining open-mindedness in specific cases, and rejected it as an illegitimate reason for silence: "This quality [open-mindedness] in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." Id. at 778.

Responding to a statement made by Justice Stevens in dissent, Justice Scalia contemplated with approval the fact that prospective judges may speak to specific issues during Senate confirmation hearings:

> [I]f making . . . statements (of honestly held views) with the hope of enhancing one's chances with the electorate displayed lack of fitness for office, so would similarly motivated honest statements of judicial candidates made with the hope of enhancing their chances of confirmation by the Senate, or indeed of appointment by the President. Since such statements are made, we think, in every confirmation hearing, Justice Stevens must contemplate a federal bench filled with the unfit.

Id. at 781 n.8 (emphasis in original).

Roberts, however, refused to comment specifically on any decisional law that, to his mind, had any chance of coming before the Supreme Court, despite White and despite the fact that judicial ethics permitted him to do so. At his hearing, Roberts gave a variety of excuses in an attempt to justify his refusal to answer specific questions. He invoked the canons of ethics, he issued a blanket refusal to answer any question regarding anything at all that he thought might come before the Court, and he claimed that he was only following the lead of other nominees to the Court who had also refused to answer questions. These excuses are meritless.

Perhaps the most slippery of Roberts' excuses for declining to answer specific questions was his assertion that the questions concerned issues that might come before the Court. Since of course virtually any legal issue of importance could come before the Supreme Court, this excuse enabled Roberts selectively and unilaterally to pick and choose those questions that he wanted to answer and those he did not.

For example, in response to a question from Senator Kohl, Roberts did say that he agreed with the holding of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), that married couples have a right to privacy that includes having access to

contraception.[12] He testified that he felt "comfortable commenting on Griswold and the result in Griswold because that does not appear to me to be an area that is going to come before the Court again."[13] But he refused to answer other important questions put to him regarding the extent and contours of the right to privacy, claiming that the issues could come before the Court. This excuse enabled Roberts to decline to say, for example, whether a woman has the constitutional right to terminate a pregnancy, or whether any American has the constitutional right to refuse unwanted medical treatment at the end of life.

Apart from the fact that any issue considered by the Court could come up again, Roberts' invocation of the "it might come up again" excuse was hypocritical. For example, when Senator Kohl asked Roberts his views of Bush v. Gore, 531 U.S. 98 (2000), in which the Supreme Court decided the 2000 presidential election, Roberts refused to answer, improbably claiming that the issue could come up again:

> KOHL: I asked you what your opinion of that decision was at that time.
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> ROBERTS: Well, that's an area where I've not been -- I've not felt free to comment whether or not I agree with particular decisions or...
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> KOHL: Well, it's not likely to come up again.
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> ROBERTS: Well, I do think that the issue about the propriety of Supreme Court review in matters of disputed electoral contests, it is a matter that could come up again. Obviously, the particular perimeters [sic] in that case won't, but it is a very recent precedent. And that type of a decision is one where I thought it inappropriate to comment on whether I think they were correct or not.[14]

Significantly, the Court itself in Bush v. Gore recognized the uniqueness of the case, stating:

> The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

531 U.S. at 109 (emphasis added).

And in 2003, Roberts testified at his confirmation hearing for the D.C. Circuit that Roe v. Wade was "settled law,"[15] yet now refused to answer whether, as Chief Justice

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12 Roberts Hearing, Response to Senator Kohl (Sept. 13, 2005).

13 Id.

14 Roberts Hearing, Response to Sen. Kohl (Sept. 14, 2005).

15 Hearings Before the Committee on the Judiciary, 108th Cong., 1st Sess. (Apr. 30, 2003).

Rehnquist framed the issue in Casey, "'a woman's interest in having an abortion is a form of liberty protected by the Due Process Clause.'"[16]

Equally meritless was Roberts' effort to rely on the alleged refusal of other Supreme Court nominees, particularly Ruth Bader Ginsburg, to answer questions. Indeed, on the first day of questioning, Senator Biden exposed Roberts' disingenuous reliance on the mythical "Ginsburg precedent" to deflect Senators' questions. Senator Biden observed that then-Judge Ginsburg at her own Supreme Court confirmation hearing had in fact responded to a question as to whether a state was free to pass a law that prohibited abortion. Senator Biden recounted that Ginsburg had answered, "Abortion prohibition by a state controls women and denies them full autonomy and full equality with men. It would be unconstitutional." Senator Biden then asked Roberts what his view on the issue was. Roberts refused to answer, drawing the dubious distinction -- or "distinction without a difference," as Senator Biden put it -- that Ginsburg felt more at liberty to discuss issues about which she had previously written.[17]

Senator Biden then followed up by asking Roberts his opinion of Moore v. City of East Cleveland, 431 U.S. 494 (1977), in which the Court in a divided ruling struck down a city ordinance that prohibited a grandmother from living with her two grandsons (who were cousins) on the ground that they were not a "family." Senator Biden explained to Roberts that Ginsburg had never written about this case but she nonetheless gave her views about it when asked at her own Judiciary Committee confirmation hearing, specifically stating that she agreed with the majority. Roberts, however, when asked by Senator Biden would not say whether he did as well.[18]

At his confirmation hearing, John Roberts refused to give his views regarding some of the most important legal issues facing America today, despite the ethical permissibility of doing so. His reluctance to do so causes concern because his views on such issues are critically important in evaluating his suitability for confirmation as Chief Justice of the United States, and because of legitimate fears that his silence is not, as he intimated, due to ethical concerns, but instead because the American people might find his views extreme and troubling.

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16 Roberts Hearing, Question of Senator Specter (Sept. 14, 2005) (referring to Planned Parenthood v. Casey, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)).

17 Roberts Hearing (Sept. 13, 2005). Roberts' distinction without a difference also ignored the fact the he too had written about Roe, urging the Supreme Court while Principal Deputy Solicitor General in 1990 to overturn it and claiming that it "find[s] no support in the text, structure, or history of the Constitution." Brief for the Respondent, Rust v. Sullivan, Nos. 89-1391, 89-1392, 1989 U.S. Briefs 1391 (1990), at *7.

18 Roberts Hearing (Sept. 13, 2005).

II. Roberts' meritless attempts to dismiss
his disturbing record on civil rights and other issues

Roberts served as a political appointee during the Reagan and first Bush Administrations in three important positions: Special Assistant to Attorney General William French Smith, Associate Counsel to the President, and Principal Deputy Solicitor General. That Roberts specifically chose to serve administrations committed to rolling back civil rights protections, overturning Roe v. Wade, limiting access to the federal courts, and undermining the separation of church and state, tells us a great deal about his views of the law and the protection of Americans' legal rights. And his own writings during his nearly ten years serving those Administrations and the actions he took tell us a great deal more. As we have already shown, Roberts has a career-long pattern of opposing fundamental legal protections for all Americans and promoting his legal views without regard to their impact on individuals' lives and liberties.[19] Indeed, ultraconservative lawyer Bruce Fein, who served with Roberts in the Reagan Justice Department, has acknowledged that Roberts was among "a band of ideological brothers," and that the deeply held convictions that Roberts demonstrated "aren't principles that evaporate or walk away.[20]

Not surprisingly, Roberts was questioned at his confirmation hearing about the disturbing legal positions he had taken during his decade of service in the Reagan/Bush Administrations. In his answers, Roberts attempted to dismiss his record by claiming that he was merely a staff attorney doing his job and advancing the views of the administrations for which he worked. This is simply untrue.

First, the significant positions that Roberts held belie such a claim. In addition, while the refusal by the current Bush Administration to provide documents from Roberts' tenure as Principal Deputy Solicitor General during the elder Bush's Administration as requested by Judiciary Committee Democrats has prevented review of such documents, other documents written by Roberts during the Reagan Administration contain numerous examples in which Roberts clearly was putting forth his own views. Moreover, in some of these instances, Roberts' views did not coincide with those of the Administration -- they were farther to the right. The following are a number of instances in which Roberts plainly was stating his own views concerning important matters in issue:

- **Gender Discrimination**

  In December 1981, Roberts wrote, "*I* recommend acceding to" a Department of Education proposal to narrow the coverage of several civil rights laws by redefining the definition of "federal financial assistance," a proposal that not even the Civil

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19 See, e.g., PFAW Pre-Hearing Report.

20 R. Jeffrey Smith, Amy Goldstein and Jo Becker, "A Charter Member of Reagan Vanguard," *Washington Post* (Aug. 1, 2005).

Rights Division headed by ultraconservative William Bradford Reynolds supported.[21]

In August 1982, Roberts wrote, "*I* strongly agree with Brad's recommendation not to appeal" a district court ruling holding that Title IX coverage extended only to the specific program within a school that received federal financial assistance.[22]

Responding to a letter from three female Republican members of Congress on equal pay for equivalent work, Roberts wrote "*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.'"[23]

- **Civil Rights**

Characterizing the Fair Housing Act as "government intrusion [that] quite literally hits much closer to home in this area than in any other civil rights area," Roberts advised, "*I* do not think that there is a need to concede all or many of the controversial points . . . [about proposed fair housing legislation] to preclude political damage."[24]

In a memo urging the Attorney General to step up efforts to oppose proposed voting rights legislation, which was ultimately approved with overwhelming bipartisan support, Roberts wrote, "*My own view* is that *something* must be done to educate the Senators on the seriousness of this problem."[25]

Urging William Bradford Reynolds to water down proposed settlements in job discrimination cases, Roberts -- misstating the law -- wrote, "*I* do not . . . believe that [the proposed language] accurately reflects the requirements of Title VII or even what can reasonably be demanded of the defendants in a consent decree."[26]

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[21] Memorandum from John Roberts to the Attorney General (Dec. 8, 1981) and Background Paper "prepared by John Roberts," attached to Memorandum from Kenneth W. Starr to William Bradford Reynolds (Mar. 8, 1982). (Emphasis has been added to this memorandum and the other memoranda cited here to underscore Roberts' use of the first person singular.)

[22] Memorandum from John Roberts to the Attorney General re University of Richmond v. Bell (Aug. 31, 1982).

[23] Memorandum from John G. Roberts to Fred F. Fielding re Nancy Risque Request for Guidance on Letter from Congresswomen Snowe, *et al*. (Feb. 20, 1984).

[24] Memorandum from John G. Roberts to Fred F. Fielding re Fair Housing (January 31, 1983).

[25] Memorandum from John G. Roberts to the Attorney General re Voting Rights Act Section 2 (Dec. 22, 1981).

[26] Memorandum from John G. Roberts to William Bradford Reynolds and Chuck

Expressing dismay that the EEOC and the Solicitor General had taken pro-civil rights positions in cases before the Supreme Court, Roberts counseled the Attorney General, "*I* think it would be helpful in avoiding such problems in the future if the Civil Rights Division were fully involved in EEOC cases reaching the Solicitor General's office."[27]

- **Immigrants' Rights**

  In a memo criticizing the failure of the Solicitor General's office to file a brief on behalf of the State of Texas supporting a law that denied public education to children of undocumented immigrants, Roberts wrote, "It is *our* belief" that a brief filed by the Solicitor General supporting Texas could well have "altered the outcome of the case."[28]

- **Religious Liberty**

  In a memorandum concerning Justice Rehnquist's dissent in an important religious liberty case, Roberts wrote, "Thus, as *I* see it, Rehnquist took a tenuous five-person majority and tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided. In the larger scheme of things what is important is not whether this law is upheld or struck down, but what test is applied."[29]

- **Civil Liberties**

  In response to a note from Fred Fielding in which Fielding stated that "*I* am adamantly opposed to a Nat'l I.D. process," Roberts wrote to Fielding: "*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."[30]

When asked about such examples, Roberts gave extremely troubling answers. He failed to acknowledge that he was doing much more than repeating the Administration's views, and failed to recognize more than two decades later the disturbing real-world

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Cooper re Employment Discrimination Suits Against Clayton and Gwinnett Counties (Oct. 26, 1981).

[27] Memorandum from John G. Roberts to the Attorney General re Solicitor General Briefs in EEOC cases (June 16, 1982).

[28] Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re Plyler v. Doe -- "The Texas Illegal Aliens Case" (June 15, 1982).

[29] Memorandum from John G. Roberts to Fred F. Fielding re Wallace v. Jaffree (June 4, 1985).

[30] Memorandum from John G. Roberts to Fred F. Fielding re National I.D. Comments (Oct. 21, 1983).

consequences of the positions he had advocated. Three areas illustrate this problem: sex discrimination, voting rights, and educational opportunity for immigrant children.

- **Sex discrimination**

Roberts was questioned by Senator Biden about a memorandum that he had written to Attorney General William French Smith recommending that, contrary to the views of the Civil Rights Division, the government should not intervene in a case on the side of women prisoners who were being denied equal opportunities with male prisoners to participate in vocational education programs. Roberts' testimony about this memo was that he was "a lawyer on [the Attorney General's] staff" and writing to his boss that intervention "is inconsistent with what you have said. . . I would regard this as good staff work."[31]

In fact, a review of the memorandum reveals that it was plainly stating Roberts' own views as to why the government should not intervene in the case, including Roberts' belief that intervention was unwarranted essentially because the price of achieving equality for the women would be too high, a dangerous view of equal protection and of civil rights laws that could effectively preclude progress toward equality for women and minorities. According to Roberts:

> Many reasonable justifications for the Kentucky practices can be readily advanced, such as economies of scale calling for certain programs for the male prisoners but not for the many fewer female prisoners. If equal treatment is required, the end result in this time of tight state prison budgets may be no programs for anyone.[32]

Similarly, when Roberts was questioned at his hearing about his disturbing record on Title IX, he specifically sought to convey the impression that he had done no more on this issue than convey the positions of the Reagan Administration. This is not correct. For example, Senator Kennedy questioned Roberts about a memorandum that he had written in 1985 stating that there was "a good deal of intuitive appeal to the argument" that federal aid to students should not trigger Title IX coverage of an entire school.[33] According to Roberts, "[t]riggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions program is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students."[34] In responding to Senator Kennedy's concern that Roberts obviously considered it "too onerous" for a school that accepts federal financial aid to students not to discriminate against its female students, Roberts claimed that

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[31] Roberts Hearing, Response to Senator Biden (Sept. 13, 2005).

[32] Memorandum from John Roberts to the Attorney General, re Proposed Intervention in Canterino v. Wilson (Feb. 12, 1982) (emphasis in original).

[33] Memorandum from John G. Roberts to Fred Fielding re Correspondence from T.H. Bell on Grove City Legislation (July 24, 1985); Roberts Hearing (Sept. 13, 2005).

[34] Memorandum from John G. Roberts to Fred Fielding re Correspondence from T.H. Bell on Grove City Legislation (July 24, 1985).

"I was not formulating policy. I was articulating and defending the administration's position."[35]

What Roberts would not acknowledge in responding to Senator Kennedy, however, is that this was also his own narrow view of the law, plainly expressed by him in an earlier memorandum supporting a recommendation by William Bradford Reynolds that the government not appeal a district court ruling holding that Title IX coverage extended only to the specific program within a school that received federal financial assistance, thus allowing schools that received federal funds in one program (e.g., admissions) to discriminate in all others (e.g., athletics).[36] In that memorandum Roberts stated:

> I strongly agree with Brad's recommendation not to appeal. Under Title IX federal investigators cannot rummage wily-nily [sic] through institutions, but can only go as far as the federal funds go. Congress elected to make the anti-discrimination provisions of Title IX program-specific, and the arguments properly rejected by the district court -- which we would repeat if we appealed -- would essentially nullify this limitation. The women's groups pressuring us to appeal would have regulatory agencies usurp power denied them by Congress to achieve an anti-discrimination goal. Under your leadership the Department is committed to opposing such legislation by bureaucracy, and the commitment should continue in this case.[37]

- **Voting rights**

Roberts was questioned extensively about his opposition to the "effects" test enacted by Congress to restore the effectiveness of the Voting Rights Act in 1982. As Senator Kennedy explained during his initial questioning of Roberts, a divided Supreme Court in 1980 had erroneously interpreted Section 2 of the Act to require proof of discriminatory intent, seriously threatening the ability of the law to combat voting discrimination, and large bipartisan majorities in both houses voted to include language making clear that a violation could be established without proof of intent. Roberts claimed his extensive work in opposition to the "effects" test in 1981-82 simply reflected the view of the Administration, despite memoranda showing that he played a significant role in helping develop as well as advocate that view.[38]

In addition, Senators Kennedy and Feingold asked Roberts to look back with the perspective of time and state whether he still believed that the "effects" test was wrong and proof of discriminatory intent should be required, especially in light of his vigorous advocacy on that issue. Roberts declined to do so, simply stating that "I haven't followed the issue."[39]

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35 Roberts Hearing, Response to Senator Kennedy (Sept. 13, 2005).

36 Memorandum from John Roberts to the Attorney General re University of Richmond v. Bell (Aug. 31, 1982).

37 Id. at 2 (emphasis added).

38 See PFAW Pre-Hearing Report at 53-54.

39 See Roberts Hearing, Response to Senator Feingold (Sept. 13, 2005).

This testimony was troubling not only to Senators at the hearing but also to civil rights pioneer Representative John Lewis. Testifying at Roberts' hearing, Representative Lewis explained that while the harm that would have been caused by the continuation of the intent test may be "less obvious than the violence and intimidation of 1965," it was "no less harmful to our nation's principles of inclusive democracy."[40] As enacted by Congress with the effects test in 1982, he noted, Section 2 "has been successful in reducing barriers and has increased the number of minority elected officials."[41] There is "no doubt in my mind," he testified, that "had Judge Roberts' narrow reading of the Voting Rights Act prevailed, fewer people of color would be serving in Congress, and at both the state and local levels today."[42] Roberts' refusal to acknowledge that he was on the "wrong side of history," Lewis explained, was extremely troubling for a prospective Chief Justice of the United States and left Lewis with no choice but to oppose Roberts' confirmation. Lewis' answer to a question from Senator Durbin about whether Roberts' views could have changed was particularly revealing.

> Well, I think it's possible and conceivable, senator, that people can change. But when you believe and feel and know from your experience, or maybe from the law and from history, that you've been wrong, you show some sign. And you're not afraid to talk about it. You're not afraid to go on the record. Judge Roberts has been afraid to show or demonstrate any signs that he has changed.[43]

Roberts' failure to acknowledge his key role in developing as well as implementing Reagan Administration policy, and his failure to recognize even now the harm that his view would have caused if it had been the law over the last twenty years, raise even more serious concerns about his nomination.

- **Educational opportunity for immigrant children**

Roberts was questioned by several Senators about a memorandum that he had co-authored in 1982 concerning the ruling by the Supreme Court in Plyler v. Doe, 457 U.S. 202 (1982), striking down a Texas law designed to keep the children of undocumented immigrants from attending public schools.[44] In its ruling, the Court majority said it was "difficult to conceive of a rational justification for penalizing these children" for being in the U.S. based on the actions of their parents.[45] "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[46]

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40 See Roberts Hearing, Testimony of Rep. John Lewis (Sept. 15, 2005).

41 Id.

42 Id.

43 Id.

44 Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re "Plyler v. Doe - 'The Texas Illegal Aliens Case'" (June 15, 1982).

45 457 U.S. at 220.

46 457 U.S. at 223.

The decision was a major victory for the constitutional principle of equal protection under the law, and made a huge difference in the lives of thousands -- if not millions -- of children and their families. The notion that the government would choose to marginalize a generation of young people was viewed by Justice William Brennan as "an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[47]

Nonetheless, on the day that Plyler was decided, John Roberts and a colleague in the Reagan Justice Department wrote an internal memorandum to the Attorney General criticizing the ruling.[48] The memo complained that the Reagan Administration should have weighed in on the case on the side of the state of Texas and "could well have" changed the outcome.[49] In fact, the Justice Department had supported the children in the lower courts, and had already retreated by its non-action in the Supreme Court.[50]

This disturbing memorandum was the subject of intense questioning of Roberts by a number of Senators at his confirmation hearing, and Roberts steadfastly refused to disavow the position he had taken about Plyler, insisting that the question was not about denying children an education but rather about the legal issues involved.

For example, Senator Durbin noted in questioning Roberts that this memorandum was written on the day that Plyler was decided, that it was not in response to a request for an opinion about the case and thus appeared to be gratuitous, and also that Roberts was not "arguing the Reagan administration's position."[51] Senator Durbin also observed that "the major Hispanic organizations feel that this showed real insensitivity to who they were and what their children needed."[52] This exchange with Roberts then took place:

> DURBIN: Well, did you agree with the decision now -- or, pardon me, then? Or do you agree with it now?
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> ROBERTS: I haven't looked at the decision in Plyler v. Doe in 23 years, Senator. And there's nothing gratuitous about the memorandum. It obviously came out because the decision came out. That would have been why I was advising the attorney general with respect to it. Obviously, the importance of the availability of education for all is vital. That's a different question than the legal issues involved in whether a state law should be struck down...

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47 457 U.S. at 221-22.

48 Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re "Plyler v. Doe - 'The Texas Illegal Aliens Case'" (June 15, 1982).

49 Id. at 2.

50 Leadership Conference on Civil Rights, Without Justice (Feb. 1982) at 20.

51 Roberts Hearing (Sept. 14, 2005).

52 Roberts Hearing (Sept. 14, 2005).

DURBIN: So let me say this. Twenty-three years later, millions of children have benefited from this decision. They have been educated in America. Many have gone on to become citizens. Some are business people, some are professionals, some are serving in our military today because Plyler was decided in a way that you apparently disagreed with 23 years ago. So my question to you, for the Hispanic groups that oppose your candidacy at this point -- or your nomination, I should say -- what is your feeling? Is this settled law, as far as you are concerned, about our commitment in education...

ROBERTS: Senator, as I said, I have not looked at the decision in Plyler v. Doe in 23 years. It's not an area that I focused on. And the issue is not my policy view about what is a good idea for educational policy or national policy or whether what the Texas legislators determined was a good idea for Texas policy. The question was a particular legal issue.[53]

Senator Feinstein also questioned Roberts at length about his memo, stating to Roberts, "I just don't understand why you would say this. And, you know, perhaps you'd believe today it was wrong."[54] But Roberts never would say his memo was wrong. The most he would say was that "I certainly believe every child should be educated."[55] Even then, Roberts made it clear that he was only expressing a personal view, and that the legal issues were different:

ROBERTS: I certainly believe every child should be educated.

FEINSTEIN: Regardless of immigration status?

ROBERTS: My own view is that if you have a child, he or she should be educated. We'll worry about status later.

FEINSTEIN: Just say yes, regardless of immigration status.

ROBERTS: As a personal view, yes. It's a separate issue as a legal question, as you know.[56]

Senator Sessions then asked Roberts about Plyler, giving Roberts another chance to make clear that he was in no way retreating from his memorandum nor endorsing the Court's ruling:

SESSIONS: I wanted to ask you about this Texas case. As I understand it, Texas decided that they would not fund education for illegal aliens that are here in the country. And that was challenged as being unconstitutional and went to the Supreme

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53 Roberts Hearing (Sept. 14, 2005).

54 Roberts Hearing (Sept. 14, 2005).

55 Roberts Hearing, Response to Senator Feinstein (Sept. 15, 2005).

56 Roberts Hearing (Sept. 15, 2005).

> Court. I know you have said that you, as a parent and as a person who believes in education, you absolutely believe in education for all children in some way, form or fashion. But you don't mean to suggest or prejudge, do you, the constitutionality of the right of the state of Texas to make that decision? That would be a matter of, I think, some importance perhaps again in the years to come.
>
> ROBERTS: Well, no, Senator. And I did try to be very careful when separating the personal views with respect to the importance of education from the legal question there. And the legal question, of course, was a close one.[57]

It is, quite frankly, nothing short of astonishing that nearly a quarter of a century later, with the benefit of hindsight, Roberts could not even bring himself to say that perhaps it was a good thing for America that his view of Plyler had not prevailed, and that the majority had gotten it right by holding that it was an affront to our Constitution to marginalize a generation of children by denying them an education and consigning them to illiteracy. That Roberts, even when questioned pointedly about this very issue, could today be so oblivious to the implications of his memorandum, speaks volumes about what kind of Chief Justice he would be. And America cannot afford such a Chief Justice.

In fact, the only clear example where Roberts disavowed one of his Reagan-era memoranda was testimony that he "no longer agree[d] with" a memorandum he had written expressing support for limiting the tenure of federal judges to fifteen year terms.[58] While this was humorous in light of the circumstances, there was nothing funny at all about Roberts' efforts in the Reagan/Bush Administrations to restrict and undermine women's rights, civil rights, and access to justice through the courts. In addition to not disavowing such efforts when given the opportunity to do so at his hearing, Roberts was misleading about his own views and role, as discussed above. Thus, following Roberts' hearing, the American people are left with Roberts' record, a record that shows he is the wrong choice for Chief Justice of the United States.

III. Roberts and Privacy: A Scalia/Thomas in Sheep's Clothing?

One of the most crucial roles of the Supreme Court is interpreting and enforcing constitutional provisions that protect individual liberty, including the fundamental right to privacy -- the right to be left alone and to be free of governmental intrusion into the most important and intimate aspects of human existence. Americans have good reason to be concerned about John Roberts' views on the right to privacy. In 1981, Roberts wrote a memorandum in which he referred dismissively to the "so-called 'right to privacy,'" suggesting that he did not think such a right exists.[59] The statement was made by Roberts in a memorandum he had written to the Attorney General concerning a lecture by Erwin Griswold, in which Roberts informed Smith that Griswold argued "as we have that such an

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[57] Roberts Hearing (Sept. 15, 2005).

[58] Roberts Hearing, Response to Senator Kohl (Sept. 13, 2005).

[59] Memorandum from John Roberts to the Attorney General re Erwin Griswold Correspondence (Dec. 11, 1981).

amorphous right is not to be found in the Constitution. He specifically criticizes Roe v. Wade."[60]

When questioned at his hearing about this memorandum, Roberts claimed that he was merely expressing the views of Dean Griswold. According to Roberts, "Those views reflected the Dean's speech. If you read his speech, he's quite skeptical of that right."[61] However, a review of Griswold's speech readily indicates that Griswold never referred to the right of privacy as "so-called;" this dismissive language was Roberts' own.[62]

At his confirmation hearing, Roberts testified that he does now believe that there is a right to privacy protected "as part of the liberty in the due process clause under the Constitution."[63] Although some might be reassured by this response, when Senators sought to elicit from Roberts the extent and contours of this critical right as he perceives them under the Constitution, he categorically refused to answer (except with respect to the right of married couples to access contraception, discussed above). Thus, Roberts would not discuss, for example, whether he believes that a woman has a privacy right to reproductive choice, or whether any individual has the right to refuse medical treatment, even at the end of life.

Moreover, Roberts' testimony regarding a constitutional right to privacy mirrored that of Clarence Thomas at his own confirmation hearing, suggesting that President Bush has kept his promise to nominate someone in the mold of Scalia or Thomas. At his hearing, Roberts testified that in his view "there is a right to privacy protected as part of the liberty guarantee in the due process clause."[64] Justice Thomas made a nearly identical statement at his own confirmation hearing in 1991, testifying that, "I, with respect to the privacy interests, would continue to say that the liberty component of the due process clause is the repository of that interest."[65] Since making that statement and being confirmed to the Supreme Court, Justice Thomas, like Justice Scalia, has gone on to interpret the scope of privacy protections in the due process clause as exceedingly narrow (as discussed below). Roberts gave no indication at his hearing that his view of the right to privacy is any broader.

To the contrary, when Roberts was asked whether "there is a right of privacy to be found in the liberty clause of the Fourteenth Amendment," Roberts testified that "I do,

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60 Id.

61 Roberts Hearing, Response to Senator Specter (Sept. 13, 2005).

62 Erwin Griswold, "The John Randolph Tucker Lecture: Equal Justice Under Law," 33 Washington & Lee L. Rev. 813 (Fall 1976); see also Mike Allen and R. Jeffrey Smith, "Judges Should Have 'Limited Role,' Roberts Says," *Washington Post* (Aug. 3, 2005) ("The words 'so-called' do not appear in Griswold's lecture").

63 Roberts Hearing, Response to Senator Specter (Sept. 13, 2005).

64 Roberts Hearing, Response to Senator Schumer (Sept. 14, 2005).

65 Thomas' Response to Senator Simon (Sept. 13, 1991), Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., September 10, 11, 12, 13, 16, and 19 (1991).

Senator. . . . I think every justice on the court believes that, to some extent or another."[66] Roberts, therefore, committed to a right to privacy no broader than that espoused by Justices Scalia and Thomas, which is not much of a right at all.

According to Justices Scalia and Thomas, the right to privacy does not encompass a woman's right to reproductive choice, and both have argued that Roe v. Wade should be overturned.[67] For example, in a dissenting opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey, Justice Scalia, joined by Justice Thomas, stated "[t]he issue is whether it [a woman's right to terminate her pregnancy] is a liberty protected by the Constitution of the United States. I am sure it is not." 505 U.S. 833, 980 (1992).

The right to privacy, according to Justices Scalia and Thomas, also does not extend to the right of consenting, same-sex adults to engage in sexual intimacy in the privacy of their own homes. In the landmark case of Lawrence v. Texas, 539 U.S. 558 (2003), the Court struck down a Texas law that had criminalized just such conduct. Justices Scalia and Thomas (and Chief Justice Rehnquist) dissented. In his dissent, Justice Thomas made unequivocally clear his view of the right to privacy: "I can find neither in the *Bill of Rights* nor any other part of the Constitution a general right of privacy." Id. at 605-06 (internal quotations and brackets omitted).

And in Justice Scalia's view, the right of privacy does not give even a fully competent adult the right to refuse unwanted medical treatment, as reflected in his concurring opinion in Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990). According to Scalia, "even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored." 497 U.S. at 293. Under this view, the Constitution does not protect individuals from government action forcing them to submit to unwanted, intrusive, and expensive medical treatment, even if they have written a "living will" expressing their wishes.

Roberts had every opportunity at his hearing to disavow these cramped and frightening views of privacy, and chose not to take them. For example, when Senator Schumer asked Roberts whether he was willing "to differentiate [him]self from Justice Thomas' view on Lawrence," Roberts replied, "I don't think it's appropriate . . . to comment on whether that decision was correctly decided or not."[68] Even when Senator Schumer asked the question more broadly, giving Roberts the opportunity to distance himself in any way from Justice Thomas' disturbing views on privacy, Roberts refused to answer:

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66 Roberts Hearing, Response to Senator Biden (Sept. 13, 2005).

67 As Principal Deputy Solicitor General, Roberts also took the same position, co-authoring a brief to the Supreme Court stating, "[w]e continue to believe that Roe was wrongly decided and should be overruled . . . [T]he Court's conclusion[] in Roe that there is a fundamental right to an abortion . . . find[s] no support in the text, structure, or history of the Constitution." Brief for the Respondent, Rust v. Sullivan, Nos. 89-1391, 89-1392, 1989 U.S. Briefs 1391 (1990), at *7.

68 Roberts Hearing, Response to Senator Schumer (Sept. 14, 2005).

SCHUMER: Let me ask you a broader question. Do you disagree with Justice Thomas' interpretation of the right to privacy in any decided case?

ROBERTS: Senator, I'm not going to comment on whether I think particular cases were correctly decided or not . . .[69]

Roberts' carefully crafted and mostly evasive testimony concerning privacy was not lost on the Religious Right, which has continued enthusiastically to support his confirmation. For example, according to anti-choice activist Jay Sekulow of Pat Robertson's American Center for Law and Justice, Roberts "answered exactly the same way that Justice Thomas did and I think he holds the same position [regarding Roe v. Wade]."[70]

Roberts has given the American people no reason to believe that his views of privacy are any different than those of Justices Scalia and Thomas. Far too much is at stake concerning the most important and intimate aspects of American's lives, including the end of lives, for John Roberts to be confirmed as Chief Justice.

CONCLUSION

Roberts' testimony has failed to resolve the very serious concerns raised by his record. The Senate should decline to consent to his nomination to be Chief Justice of the United States.

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69 Roberts Hearing (Sept. 14, 2005).

70 700 Club, Sept. 14, 2005.