MALDEF

Mexican American Legal Defense and Educational Fund

Written Testimony of Ann Marie Tallman,
President and General Counsel of MALDEF,
Regarding the Nomination of John G. Roberts, Jr.
as Chief Justice of the United States of America

September 15, 2005

Mr. Chairman and Members of the Committee, thank you for the invitation to testify regarding the nomination of John G. Roberts, Jr. to the post of Chief Justice of the United States. I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund.

MALDEF was established in 1968 to advance the civil rights of Latinos. For the past 37 years, as the Latino community has grown to over 40 million people and become the largest ethnic minority group in America, MALDEF has provided legal advocacy on matters such as education, voting rights, immigrant rights, access to justice and fair employment - critical areas in which success leads to Latinos achieving our American dreams.

The Supreme Court's fundamental role within our federal constitutional framework is to protect the constitutional rights of all, including minority groups, against any unconstitutional majoritarian tendencies of the elected legislative and executive branches. After a thorough review of John Roberts's available record, we are not fully assured that he properly respects this crucial function of the Court. Judge Roberts's legal opinions in the areas of MALDEF's core mission often place him in opposition not only to equal justice for Latinos, but opposed to positions taken by bipartisan majorities in Congress and the Reagan Administration that he served. His legal record also raises serious questions about Roberts's willingness to subordinate the protection of fundamental civil rights to the maxim of "judicial restraint."

For example, as Special Assistant to the Attorney General, John Roberts criticized the 1982 U.S. Supreme Court decision in *Plyler v. Doe*. In *Plyler*, the U.S. Supreme Court, following two lower courts, struck down a Texas law that effectively barred undocumented children from the state's public school classrooms. Roberts criticized the U.S. Solicitor General's office for not standing up for what he described as "judicial restraint" and supporting the State of Texas's arguments on the Equal Protection Clause, which, he wrote, "could well have . . . altered the outcome of the case." The nominee, it is apparent from this memorandum, would not have used the constitutional authority of the Supreme Court to vindicate the constitutional rights of these immigrant children.

As Associate White House Counsel, Roberts wrote of his support for national identification cards and derided as "clinging to symbolism" civil liberty and privacy concerns surrounding them. In disagreeing with the Reagan Administration's opposition to a national identifier, he failed to recognize the potential for harmful discrimination in the pretextual singling out of Latinos and African Americans that would likely occur if such a system were in place. Again, Roberts failed to respect the constitutional interests of the minority whom the Court is designed to protect.

Regarding equal access to education, John Roberts wrote in support of curtailing the federal government's ability to investigate and eradicate discrimination by gender and disability in education programs that receive federal funds. Mr. Chairman, you and many members of this Committee led the way to overturning that interpretation in 1988. Further, the nominee was an architect of the Administration's unsuccessful proposals to

strip federal courts of their jurisdiction to establish remedies to end unlawful school segregation.

Regarding voting rights, Roberts mischaracterized the bipartisan efforts of the Chairman and other members of this Committee to restore the “effects test” in voting discrimination cases. He was wrong when he wrote in 1981 that your efforts "would establish essentially a quota system for electoral politics."

John Roberts is out of step with the American public on many issues of fundamental concern to Latinos and all Americans. If just a few of Judge Roberts's written legal views had been adopted and became settled federal law, 1) thousands of undocumented immigrant children may have been barred from American public schools through no fault of their own, left largely illiterate and without hope as members of a permanent American underclass; 2) a national system of identification cards might be in place, representing an unprecedented intrusion into Americans' privacy and placing minorities at a greater risk of racial profiling; and, 3) electoral empowerment of Latinos, African Americans, Asian Americans and Native Americans and election of a record number of minority elected officials that are currently serving the American people at the federal, state, and local level would likely not have been achieved.

This confirmation process is about more than a career record of opposition to important core principles of equality. The next Chief Justice will lead the Court in decisions that will have a lasting impact upon Latino and all American families well into the middle part of this century. We need men and women on the Court who will understand the changing nation. Strikingly, on official White House Counsel and Justice Department memoranda that we have reviewed, Judge Roberts displayed a disturbing pattern of dismissive, derisive, and flippant comments that demonstrate a possible lack of respect for Latinos, women, and Native Americans.

John G. Roberts, Jr. has consistently advanced extreme positions and displayed insensitive attitudes that compel us to oppose his confirmation to be Chief Justice of the United States of America.

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Specific findings from MALDEF’s research into the legal record of John G. Roberts, Jr. follow.

I. Roberts's Reagan-Era Record

A. Immigrants' Rights

1. *Plyler v. Doe*

The Supreme Court's 1982 ruling in *Plyler v. Doe* affirmed the constitutional right of undocumented immigrant children to participate in K-12 public education programs on an equal basis with other children. In striking down a Texas law that effectively prevented undocumented children from attending the state's public schools, the *Plyler* Court held that the Fourteenth Amendment and its guarantee of "equal protection of the laws" apply to undocumented immigrants. The Court then ruled that Texas had no substantial interest in preventing these children from becoming educated, productive members of society. MALDEF represented the schoolchildren in *Plyler*.

The *Plyler* Court recognized that upholding the Texas statute would, in effect, sanction the creation of a permanent underclass of American residents who are "encouraged by some to remain here as a source of cheap labor, but nevertheless denied benefits that our society makes available to citizens and lawful residents." The Court noted with concern that "[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." Further, the Court noted that the children at issue in *Plyler* bore no responsibility for their immigration status and that to punish them for a condition that is beyond their control offends fundamental American conceptions of justice.

A memorandum co-authored by John Roberts on the day of the *Plyler* decision raises serious questions about his views on the equal protection principle established in *Plyler v. Doe* and the fundamental conception of justice that it reflects. This memorandum expresses regret over the fact that the Solicitor General's Office failed to submit a brief "supporting the State of Texas – and the values of judicial restraint – [that] could well have . . . altered the outcome of the case."

The *Plyler* decision has permitted undocumented children to have a considerable positive impact upon American society. The effect of the landmark ruling in *Plyler* has been to allow undocumented children to earn an education at their local primary and secondary schools, participate more fully in their communities, and contribute more to American society and the national economy than they would have if the discriminatory Texas statute had been upheld. Roberts's evident disappointment at the government's failure to change the outcome in *Plyler* is therefore deeply concerning.

2. National Identification Cards

As Associate White House Counsel, Roberts took the opportunity of a routine Justice Department clearance of INS testimony before a Congressional committee to offer his personal views on immigration. In an October 21, 1983 memorandum, Roberts wrote:

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

The ease with which Roberts dismisses civil liberty and privacy concerns surrounding national identification cards and his failure to credit the valid concerns of Latinos and others regarding discriminatory law enforcement stops is as disturbing as his characterization of "uncontrolled" immigration as a "real threat to our social fabric." Further, while Roberts is often portrayed as supporting a limited role for the federal government, here he endorses an unprecedented intrusion by the federal government in the private sphere of Americans.

3. "Illegal amigos"

In a September 30, 1983 memorandum that offers an apparent attempt at ethnic humor, the nominee recommends that written remarks for publication in the periodical "Spanish Today" refer to a legalization program in the pending immigration legislation. Roberts wrote, "I think this audience would be pleased that we are trying to grant legal status to their illegal amigos" (emphasis in original). The nominee's willingness to ascribe a single perspective to all Latinos fails to capture the reality that the Latino community is as rich and varied as any other American community. Further, that Roberts would draft, initial, and circulate within the Justice Department a memorandum containing an apparent ethnic joke about Hispanics is greatly troubling.

B. Minority Voting Rights

Judge Roberts's record from his service under President Reagan reveals his involvement in Reagan's efforts to prevent Congress from restoring the Voting Rights Act (VRA) following the Supreme Court ruling in *City of Mobile v. Bolden*. In *City of Mobile*, a divided Court held that minority voters must prove racially "discriminatory intent" when litigating cases under Section 2 of the VRA. (Previously, it was sufficient to show "discriminatory effects" to make a claim under Section 2.) Two years later, Congress, by overwhelming majorities in both the House and the Senate, legislatively overturned *City of Mobile's* discriminatory intent requirement and amended Section 2 to make clear that the provision extends to discrimination both in intent and effect. It did so over the prolonged and vociferous objections of the Reagan Administration.

Internal memoranda from this period show that Roberts played a key role in the development of the Reagan Administration's policies on the Voting Rights Act. The Reagan Administration's public strategy, as articulated by Roberts throughout these internal memoranda, was to loudly profess support for the Voting Rights Act "as is" – that is, without Congress' contemplated amendments to Section 2. Roberts – and the Reagan Administration – adopted the position that the Supreme Court had changed nothing when it interpreted Section 2 to require minority voters to show proof of discriminatory intent. As civil rights advocates, legal experts, and the media noted at the time, however, *City of Mobile* had in fact dramatically weakened the protections of the Act by requiring minority voters to meet a virtually insurmountable burden of proof to proceed under Section 2. Congress' legislative reinstatement of the "effects" standard was a restorative measure, and not the dramatic departure that Roberts and the Reagan Administration attempted to portray using deceptive and alarmist rhetoric.

Among the writings authored by Roberts on the Voting Rights Act during this period are:

- A November 17, 1981 memorandum in which Roberts mischaracterizes the proposed Congressional fix to Section 2 as a "radical experiment" rather than a restoration of Congress's original purpose. Roberts also defends the Administration's endorsement of a "bailout" fallback provision.

- A December 22, 1981 memorandum articulating the problems that Roberts perceived with "switching" to an effects test, and containing Roberts's urgent exhortation that "<u>something</u> must be done to educate the Senators on the seriousness of this problem" (emphasis in original). The memorandum endorses the false view that an effects test for Section 2 "would establish essentially a <u>quota system for electoral politics</u> by creating a right to proportional racial representation on elected governmental bodies" (emphasis in original).

- Several January 1982 drafts of talking points on the intent/effects question, again equating an effects test with "quotas."

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

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

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

It is quite clear from these memoranda and other available documents that Roberts was not on the sidelines during the debate over the Voting Rights Act and the administration's aggressive campaign to roll back minority voting rights; he was a passionate strategist, analyst, and advocate for Reagan's policies on this issue, and one of the architects of the Administration's public relations strategy. If Roberts's view in this area had prevailed, the electoral gains that Latinos and other minority groups have made in the past decades may not have been achieved.

C. Affirmative Action

Roberts's Reagan-era writings on affirmative action demonstrate apparent opposition to affirmative action programs. Although Roberts's memoranda in this area focus primarily upon affirmative action in government contracts, the views that he espouses in this context raise concerns with respect to his potential views towards affirmative action in higher education and other areas as well. We are concerned that the nominee's legal opinions in this area may be in conflict with Justice O'Connor's majority opinion in *Grutter v. Bollinger*, which held that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the narrowly tailored use of race in university admissions decisions.

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

Among Roberts's writings on this issue were:

- An August 25, 1981 memorandum regarding a report from Chairman of the U.S. Commission on Civil Rights. Chief among Roberts's critiques of the report was that "[t]he reverse discrimination involved in affirmative action quotas is simply dismissed as 'benign.'" The nominee does not, it seems, distinguish between race-based preference systems developed to remedy past discrimination and invidious forms of racial discrimination based in stereotype.

- A December 22, 1981 memorandum summarizing a U.S. Commission on Civil Rights report on affirmative action. Roberts characterizes the report, which found that structural discrimination continued to affect American society, as "self-serving," and derides the logical basis of affirmative action as "perfectly circular." Roberts argues that the defects of an affirmative action program described in the report are the necessary effect of affirmative action

programs: "There is no recognition of the obvious reason for the failure: the affirmative action program required the recruiting of inadequately prepared candidates" (emphasis in the original). Roberts argues, in effect, that affirmative action programs necessarily fail because the minority candidates who qualify for the programs lack sufficient skills to meet the job requirements. Many well-qualified minorities would disagree with the nominee's position.

D. Judge Roberts's Support for Limiting Executive Branch Enforcement of Federal Civil Rights Statutes

During his tenure in the Reagan Administration, Roberts authored memoranda that advocated limiting the scope of Title IX, which guarantees gender equity in education programs, and he supported narrow interpretations of disability rights legislation. Roberts's writings in these areas suggest a strong tendency to take an exceedingly narrow view of Congress's authority to pass such protective legislation and an extremely narrow view of the application of the civil rights statutes themselves. In effect, Roberts would have limited executive powers to remedy discrimination.

Roberts drafted the following notable materials in these areas:

- A December 8, 1981 memorandum in which Roberts urges the President to support an amendment to federal regulations severely curtailing the coverage of educational institutions under Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973. The effect of such a revision would have been to limit the scope of executive branch civil rights enforcement.

- A February 12, 1982 memorandum in which Roberts recommends against intervening in a sex discrimination case filed by female prisoners against the Kentucky state prison system to remedy disparities in vocational training programs available to men and women in the prison. In support of his recommendation not to intervene, Roberts notes that private plaintiffs are bringing suit, intervention would be inconsistent with themes in the Administration's "judicial restraint effort," and further notes that guaranteeing rights for female prisoners may curtail the prison's ability to provide programs for men. The expense of providing equal facilities is not, however, a defense to constitutional violations of fundamental civil rights.

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

Once again, Roberts supports the most limited definition available for protective civil rights violations.

- A July 24, 1985 memorandum regarding the 1984 Supreme Court decision in *Grove City College v. Bell* in which Roberts offers personal support for limiting the coverage of Title IX to the program that receives federal financial assistance. He wrote: "There is a good deal of intuitive sense to the argument. Triggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions program is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students." Roberts's view on the proper coverage of Title IX was rejected by Congress with enactment of the Civil Rights Restoration Act, which countered the holding of *Grove City College* and ensures that Title IX applies to the entire institution receiving federal aid.

- A July 7, 1982 memorandum regarding *Board of Education v. Rowley*, a disability rights case brought under the Education for All Handicapped Children Act. The issue presented was whether the federal statute required the school board to provide a sign language interpreter for a hearing-impaired child. Roberts notes at the outset that the child "was an excellent lip reader" and writes that the federal district court engaged in "judicial activism [by using] the vague statutory language [of the Act] to overrule the [school] board and substitute their own judgment of appropriate educational policy." Roberts concludes approvingly that "[i]n this case a conservative majority of the Supreme Court turned back an effort by activist lower court judges to impose potentially huge burdens on the states."

- While at the Department of Justice, Roberts drafted memoranda endorsing the dismantling of the U.S. Department of Education or, as a fallback position, a severe limitation upon its power to investigate and remedy discrimination in federally-funded education programs. Roberts urged the Administration to not "abandon our efforts to reduce <u>costly and unnecessary</u> [Department of Education Office for Civil Rights] monitoring and administrative functions. For example, amendments to Title VI (race) and Title IX (gender) regulations to <u>narrow the scope of federal civil rights jurisdiction over educational institutions</u> would reduce these monitoring activities" (emphasis added). This statement raises serious concerns regarding Roberts's commitment to the continued federal role in reducing racial and gender-based discrimination in educational settings.

Roberts's writings in the area of executive branch enforcement of federal civil rights statutes demonstrate a troubling lack of commitment to the federal role in remedying discrimination. Had the nominee's views in this area prevailed, the power of the executive branch to remedy discrimination would be severely curtailed.

E. Judge Roberts's Support for Limiting Federal Judicial Authority to Remedy Violations of Federal Civil Rights Statutes

In debates over school desegregation and the separation of federal powers under the Constitution, Roberts, as both Special Assistant to Attorney General French and as Associate White House Counsel, advanced ideological positions more extreme than those held by many of his colleagues in the Reagan Administration. Notably, Roberts was a vigorous proponent of legislative proposals to strip lower federal courts of the power to order busing as a remedy, thereby reducing the role of the courts in remedying unlawful discrimination. These memoranda can fairly be described as advocacy pieces in support of his view that busing is not a required remedy for school desegregation. More broadly, these memoranda may be viewed as advocating a reduced role for the federal courts in remedying federal civil rights violations.

Among Roberts's writings on this issue is a February 15, 1984 memorandum in which he describes an "extended internal debate" that took place in the Justice Department over the separation of powers in fashioning remedies for unlawful segregation in the schools. Roberts noted that Ted Olson "reads the early [Supreme Court] busing decisions as holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation." Roberts, however, notes that he advocated the position that "it is within Congress's authority to determine that busing is counterproductive and to prohibit the federal courts from ordering it." If Congress is empowered to strip the Supreme Court of the power to devise remedies for constitutional violations, as Roberts believed, both the independence of the judiciary and the power of federal courts to remedy civil rights violations may be severely threatened.

II. Judge Roberts's Record as Deputy Solicitor General in the George H.W. Bush Administration

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

Public reports and publicly-filed briefs indicate that Roberts participated in the following key cases, among others:

- *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), in which Roberts, serving as Acting Solicitor General, submitted an amicus brief in support of a broadcasting company that challenged a federal policy to grant preferences to minority-owned firms in the awarding of broadcast licenses.

  Recent news reports suggest that Roberts played a key role in the Administration's decision to intervene on behalf of the nonminority broadcaster instead of in support of the affirmative action programs. *The Washington Post* reported on September 8, 2005 that "a Jan. 9, 1990 handwritten memo found in the files of Associate White House Counsel Fred Nelson suggested that Roberts was behind the office's refusal to [intervene in support of the FCC]. 'John Roberts at [the Solicitor General's Office] handling. [He is] reluctant to defend [the FCC's] position,' the memo said."

- *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), in which Roberts co-authored an amicus brief that argued against granting relief to African American students challenging segregation in their local schools.

- *Freeman v. Pitts*, 503 U.S. 467 (1992), in which Roberts co-authored an amicus brief arguing that the Court should incrementally release a Georgia school district from its court-imposed desegregation decree because the district had substantially complied with many, but not all, of its terms.

- *Rust v. Sullivan*, in which Roberts co-authored the government brief in support of new regulations preventing family planning programs that receive federal aid from providing education or services related to abortion. Although *Rust v. Sullivan* did not directly implicate *Roe*, Roberts's brief nonetheless specifically notes that "[w]e continue to believe that Roe was wrongly decided and should be overruled."

While the nominee's legal record from this period is incomplete due to the Administration's refusal to release records relating to the nominee's government service during this period, the information that we have been able to gather presents a picture of a government official who is not committed to the federal government's role in remedying discrimination.

III. Judge Roberts's Record as a Federal Appellate Judge

While Judge Roberts's judicial record from his brief tenure as a member of the U.S. Court of Appeals for the D.C. Circuit is exceedingly limited, a number of his opinions from this period raise serious concerns regarding his commitment to the federal courts' constitutional role in protecting civil rights.

A. Commerce Clause

In *Rancho Viejo, LLC v. Norton*, a real estate developer filed suit in federal court alleging that application of the Endangered Species Act of 1973 ("ESA") to protect the arroyo toad, an endangered species, exceeded Congress's powers under the Commerce Clause. The district court granted summary judgment in favor of the defendants, finding that Congress has the constitutional authority under the Commerce Clause to regulate private lands in order to protect the toad. The district court relied on the "takings" provision of the ESA to conclude that "taking" of the arroyo toad in order to build homes was an economic activity that substantially affected interstate commerce.

The developer appealed the decision and petitioned for rehearing by a panel of judges of the Court of Appeals for the D.C. Circuit Court. This petition was denied, but Judge Roberts dissented from the denial of rehearing and wrote that the district court had inappropriately focused upon whether the challenged regulation (the building of homes) substantially affected interstate commerce, rather than whether the activity being regulated (the arroyo toad) did so. Roberts would have granted a rehearing order to "consider alternative grounds [other than the Commerce Clause] for sustaining application of the Act that may be more consistent with Supreme Court precedent."

The Commerce Clause is a critically important instrument for Congress to enact legislation protective of individual rights and freedoms. Judge Roberts's opinion in *Rancho Viejo* suggests a willingness to contract the scope of Congress' power under the Commerce Clause. Although it is possible that the final line of Roberts's dissent, urging consideration of "alternative grounds for sustaining application" of the ESA, may mitigate the balance of his dissent, the opinion is sufficient to raise serious concerns that the nominee may seek to promote a jurisprudence in which the Commerce Clause's role in enabling protective civil rights and environmental protection legislation is severely cut narrowed from its current state.

B. Individual Rights/Access to the Courts

Judge Roberts's opinion in *Taucher v. Brown-Hruska* raises serious concerns regarding his philosophy on access to the courts. In *Taucher*, the Court of Appeals reversed and vacated an award for attorneys' fees that was granted under the Equal Access to Justice Act (EAJA). EAJA is a critical tool for public interest attorneys who work to enforce and vindicate civil rights, and opens the courthouse doors for plaintiffs who might not otherwise be able to raise and litigate their claims.

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

Judge Harry T. Edwards issued a strong dissent from Roberts's majority opinion. Judge Edwards noted that a federal appellate court is bound to engage in a strictly limited review under an abuse-of-discretion standard. Further, he wrote that the "Government's positions bordered on frivolous" and that it was "absolutely clear on the record at hand" that the district court did not abuse its discretion in awarding attorneys' fees.

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

The appellate panel held that the district court abused its discretion in denying the United States's motion to intervene. Although the Court of Appeals rejected the government's argument that the FSIA was inapplicable to Iraq, it nonetheless vacated the district court's judgment for the soldiers and dismissed the lawsuit for failure to state a cause of action.

Judge Roberts concurred with the majority's judgment, but on a different basis. Judge Roberts agreed with the United States's argument that the FSIA is inapplicable to Iraq, and held that the Presidential Determination of May 7, 2003 stripped federal courts of jurisdiction in the case. Thus, Judge Roberts would have dismissed the case for want of jurisdiction.

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

Judge Roberts again blocked a civil rights litigant's access to the courts in *International Action Center v. United States*, invoking the doctrine of qualified immunity, which is often used to bar actions against government wrongdoers. In this case, Judge Roberts, writing for the majority, reversed and remanded the district court's decision that denied summary judgment for police supervisors based on qualified immunity grounds for the inaction theory of liability. Plaintiffs, in a §1983 action, claimed the supervisors were personally liable for constitutional torts because they failed to properly train and supervise subordinate officers, which led to tortious conduct. The supervisors sought interlocutory review of the district court's denial of qualified immunity as it pertained to this theory of liability. The Court of Appeals held that, absent an allegation that the supervisors had actual or constructive knowledge of past transgressions or were aware of

"clearly deficient" training, the supervisors did not violate any constitutional right through inaction.

C. Criminal Justice/Prisoners' Rights

In *Hamdan v. Rumsfeld*, Judge Roberts joined in a recent D.C. Circuit decision that granted the Bush Administration extraordinary power to try suspected terrorists in special military tribunals without basic due process protections, denied these detainees the ability to enforce the provisions of the Geneva Convention in federal court, and undermined bedrock principles of international human rights law. In permitting the military tribunals to go forward, the majority gave an expansive reading to Congress's resolution authorizing the President to respond to the September 11 attacks.

The *Hamdan* decision is troubling both in its erosion of fundamental due process rights and in the tremendous deference and expansive wartime authority that the court bestows upon the executive branch of the federal government. Given that Latino immigrants and other members of the Latino community have become caught in the wide net cast by the "War on Terror," the *Hamdan* decision raises serious questions about how far Roberts would be willing to take that deference to executive power if his is confirmed as Chief Justice.

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

CONCLUSION

A thorough review and analysis of Judge Roberts's available legal record, as described in part above, has led MALDEF to oppose his confirmation to the post of Chief Justice of the United States. We are not convinced that Judge Roberts properly respects the crucial constitutional function of the Supreme Court in protecting the civil rights of the minority. Further, Judge Roberts has advanced legal opinions in areas of MALDEF's core mission that place him in opposition not only to equal justice for Latinos, but outside of the American mainstream.

We urge Senate Judiciary Committee Members and the full Senate to vote in opposition to the nomination of John G. Roberts, Jr. as Chief Justice of the United States.

Ann Marie Tallman, MALDEF President and General Counsel

Ann Marie Tallman is a native of Iowa, as are her parents. Her Mexican-American mother is the child of migrant farm workers, and her father is of German descent. Ms. Tallman graduated with honors from the University of Iowa and received her law degree from U.C. Berkeley's Boalt Hall School of Law.

Ms. Tallman began her legal career with the Denver law firm of Kutak Rock, where she specialized in public finance law. In 1993, she was appointed by Mayor Wellington Webb to the post of Deputy Director of the Planning and Community Development Agency of the City and County of Denver. In this capacity, she advised Mayor Wellington Webb on housing and community development matters. Between 1994 and 2004, Tallman served as an executive with the mortgage lender Fannie Mae.

Ms. Tallman began working with MALDEF as a law student at U.C. Berkeley, where she enlisted MALDEF's support in ensuring equal public funding for a student-edited law journal on legal issues affecting the Hispanic community. Upon receiving her law degree, Ms. Tallman collaborated with MALDEF during her tenure as Executive Director of the Colorado Hispanic League, where she spearheaded statewide Hispanic census outreach and was actively involved in MALDEF's reapportionment and political redistricting efforts. Ms. Tallman also recruited a team of private attorneys to support MALDEF's voting rights litigation strategies in Colorado.

Ms. Tallman was appointed to MALDEF's Board of Directors in 1998 and named President and General Counsel of MALDEF in 2004. Founded in 1968, MALDEF advances the civil rights of Latinos through advocacy, legal action, community education, and leadership development. MALDEF focuses on the program areas of education, employment, immigrants' rights, political access, public resource equity, and access to justice.

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