



September 9, 2005

Senator Arlen Specter, Chairman
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510

Senator Patrick Leahy, Ranking Member
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Specter, Senator Leahy and Members of the Judiciary Committee,

We write to you regarding the nomination of Judge John G. Roberts, Jr. to fill the position of Chief Justice of the United States Supreme Court. EPIC is a public interest research organization in Washington, DC that focuses on emerging privacy and civil liberties issues. We routinely file amicus briefs in the Supreme Court in cases that concern the application of the Fourth Amendment in new settings and the interpretation of federal privacy statutes. We have reviewed the relevant memos, briefs, opinions, and transcripts of arguments before the Supreme Court.

We urge you to explore the views of Judge Roberts on the right to privacy, particularly as they may relate to the future of the Fourth Amendment and the role of the Congress in establishing statutory safeguards. Although Judge Roberts is a distinguished lawyer and a brilliant jurist, we believe that he may have a very limited view of both the Court's role in protecting Constitutional rights and of the ability of the Congress and the states to defend privacy through legislation.

In focusing on other important issues, one disturbing and well-documented aspect of Judge Robert's past opinions and memos has been substantially ignored. In the contemporary environment, Constitutional and statutory protections of privacy are more vital than ever. Fear of terrorism has prompted a substantial increase in government surveillance. Technological change and lax corporate data security have made privacy a matter of pressing legislative concern.

Given the dramatic expansion of the government's surveillance capabilities during the last several years and the likelihood that the issues the Supreme Court will face in the next few decades will be heavily influenced by the advance of technology, we believe it is important to understand how the nominee views the relationship between Constitutional principles and emerging threats to privacy. This is not simply the question of whether the Supreme Court broadly applies Constitutional principles; it includes also whether the Justices are prepared to defer to the Congress and the states when they seek to protect the privacy rights of individuals. On this point as well, we are concerned about the views of Judge Roberts.

EPIC's Interest

The Electronic Privacy Information Center (EPIC) was established in 1994 to focus public attention on emerging civil liberties and privacy issues. We are a non-partisan organization that neither supports nor opposes political candidates or judicial nominees. Over the past decade, we have participated in many of the critical privacy issues facing the country, from the Clipper Chip and the FBI wiretap proposal to Total Information Awareness and now to identity theft and Privacy Act enforcement. EPIC routinely testifies before Congressional committees, files comments with federal agencies, and participates in rulemakings before the Federal Communications Commission and the Federal Trade Commission.

We have a particular interest in the proceedings before the Supreme Court that concern the future of privacy. EPIC has filed several amicus briefs in federal courts and the Supreme Court on emerging civil liberties issues.¹ Legal scholars, technical experts, and civil liberties organizations often join these briefs. For example, in Watchtower Bible v. Village of Stratton, 536 U.S. 150 (2002), EPIC filed an amicus brief in which we supported the rights of Jehovah's Witnesses against an Ohio ordinance requiring all individuals going door-to-door to register and identify themselves prior to expressing their political and religious views. We believe that the right to control the disclosure of one's identity will be a critical privacy safeguard in the years ahead. EPIC argued in that case that the ordinance forced individuals to sacrifice their anonymity and chilled activity protected by the First Amendment. The Court agreed with this reasoning and invalidated the statute. We believe that this case also demonstrates how privacy interests help protect other Constitutional values, such as freedom of association and freedom of expression.

EPIC is likely to file similar briefs in future cases before the Supreme Court, and therefore has a significant interest in the views of Supreme Court nominees on privacy rights. As Senator Leahy indicated in his public remarks on August 29, 2005, a central consideration for the Judiciary Committee should be whether a nominee to the Supreme Court comes to a matter with an open mind as to the possible outcome. Newsmaker: Senator Patrick J. Leahy, Online Newshour, Aug. 29, 2005. See also, Office of Senator Patrick Leahy, "The Supreme Court: Nomination of John G. Roberts, Jr." <http://leahy.senate.gov/issues/SupremeCourt/index.html>.

¹ See, e.g., Hibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177 (2004) (EPIC and a group of legal scholars and technical experts argued that a Nevada law permitting the arrest of a person who appeared suspicious and failed to present identification was unconstitutional); Smith v. Doe, 538 U.S. 84 (2003), (EPIC argued that the Alaska Sex Offender Registration Act was too invasive of the privacy rights of individuals); Doe v. Chao, 540 U.S. 614 (2004) (EPIC argued that the award of liquidated damages under the Privacy Act for the disclosure of Social Security Numbers should be triggered not by a showing of special monetary damages, but by a showing of adverse affect to the individual); Bureau of Alcohol, Tobacco, and Firearms v. City of Chicago, 537 U.S. 1229 (2003) (EPIC's amicus brief argued that the competing claims of privacy and open government could be addressed through the use of technology that can encode personal information before releasing it, thereby permitting public oversight of government activities while protecting individual privacy rights).

Based on our review of the record of Judge Roberts, it is not clear that he comes to these matters with an open mind.

Memo for the White House – The Exclusionary Rule

Judge Roberts considered a wide range of controversial matters when he worked for the White House in the early 1980s. We will focus on only two issues – Judge Roberts's views on unlawful searches and Judge Roberts's support for a National ID card.

The exclusionary rule was established to provide a meaningful remedy in those circumstances where the police obtain evidence in violation of the Constitution. Not only does the rule help prevent police misconduct, it may also play an increasingly important role in ensuring the accuracy and reliability of the databases on which the police rely. Although it has been described as a “judge-made rule,” Congress has also established exclusionary rules by statute. See, e.g., 18 USC § 2710(d). Moreover, the rule has been supported by groups across the political spectrum. See, e.g., Timothy Lynch, “In Defense of the Exclusionary Rule,” Cato Policy Analysis No. 319, Cato Institute (Oct. 1, 1998).

In a January 4, 1983 memo for the White House, Judge Roberts made clear that he opposed the exclusionary rule. Forwarding a news article about a report from the National Institute of Justice, Judge Roberts wrote, “This study should be highly useful in the campaign to amend or abolish the exclusionary rule.” Memorandum from John G. Roberts, Associate Counsel to the President, to T. Kenneth Cribb Jr., Assistant Counsellor to the President (Jan. 4, 1983), available at <http://www.reagan.utexas.edu/roberts/Box24JGRExclusionaryRule1.pdf>. Attorney General William French Smith subsequently testified before the Senate Judiciary Committee on January 27, 1983 that:

The exclusionary rule has substantially hampered our law enforcement efforts. The suppression of evidence has freed the clearly guilty, diminished public respect for the law, distorted the truth-finding process, chilled legitimate police

conduct, and put a tremendous strain on the courts. . . . It is time to bar the use of the exclusionary rule when a law enforcement officer has acted in good faith, reasonably believing his action to have been legal.

Over the years, the Supreme Court has narrowed the scope of the exclusionary rule, recognizing for example that a "good faith" reliance on a warrant that is nonetheless infirm does not vitiate the search. United States v. Leon, 468 U.S. 897, 926 (1984). However, concern about the need to ensure the effective application of Constitutional principles remains, particularly as the police make use of new techniques that expand the government's ability to initiate searches and seizures. Significantly, Justice Sandra Day O'Connor wrote separately in Arizona v. Evans, a case that considered this problem, to express concern about police reliance on error-prone recordkeeping systems. 514 U.S. 1, 16 (1995) (O'Connor, J., concurring).

In that case, the Supreme Court, by a vote of 7 to 2, reversed an Arizona Supreme Court ruling throwing out evidence that was seized by police as a result of an error in a computer database. 514 U.S. at 16. The Arizona Supreme Court had ruled that there should be no distinction between the police officer and the employees of the court for the purposes of the application of the exclusionary rule. 866 P.2d 869, 871 (Ariz. 1994). As the goal of the exclusionary rule was to prevent police misconduct, the Arizona Supreme Court said, "it is useful and proper to do so where negligent record keeping (a purely clerical function) results in an unlawful arrest. Such an application will hopefully serve to improve the efficiency of those who keep records in our criminal justice system." Id. at 872.

The Supreme Court, following Leon, held that the evidence could be admitted. 514 U.S. at 14. According to the Court, the suppression of the evidence would not deter clerical workers from such errors in the future. Id. There was a dissent by Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, in which Justice Stevens said that the suppression of evidence based on clerical errors would have some impact on how many errors are made in the future. 514

U.S. 1, 18-19 (Stevens, J., dissenting). He said also, as did the Arizona Supreme Court, that application of the exclusionary rule might serve to prevent unconstitutional arrests. Id. at 21.

Considering the dramatic expansion of law enforcement technology over the past decade, there can be little doubt today that error-prone record systems pose a real threat to the rights of Americans. Not only has there been a dramatic expansion in government record keeping, but federal agencies now frequently seek to exempt themselves from Privacy Act obligations that help ensure data accuracy and reliability.²

For the purposes of the upcoming hearing on the nomination of Judge Roberts, the most significant opinion in Arizona v. Evans was the concurrence of Justice O'Connor. She wrote separately to express concern about police on error-prone recordkeeping systems. "While the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance on the recordkeeping system itself. Surely it would not be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed)." 514 U.S. at 16-17 (O'Connor, J., concurring) (emphasis added).

We have found nothing in the record of Judge Roberts to suggest a similar regard for the Constitutional rights of Americans concerning the possibility that the government may misuse powerful databases or ignore significant obligations under the Privacy Act. His opposition to the exclusionary rule, expressed in a memo for the White House in 1983 and reiterated in a dissenting opinion on the DC Circuit less than two months ago, United States v. Jackson, 415

² See, e.g., various Department of Justice and Department of Homeland Security notices exempting systems of records from crucial Privacy Act protections: Privacy Act of 1974; Implementation, 68 Fed. Reg. 14140 (Mar. 24, 2003) (National Crime Information Center); Privacy Act of 1974; System of Records, 69 Fed. Reg. 57345 (Sept. 24, 2005) (Secure Flight Test Records); Privacy Act of 1974; System of Records, 68 Fed. Reg. 45265 (Aug. 1, 2003) (second generation Computer Assisted Passenger Prescreening System (CAPPS II)); Privacy Act of 1974; System of Records, 70 Fed. Reg. 20156 (Apr. 18, 2005) (Homeland Security Operations Center Database); Privacy Act of 1974; System of Records, 70 Fed. Reg. 43715 (July 28, 2005) (Terrorist Screening Records System).

F.3d. 88 (D.C. Cir. 2005), suggests that he may be less willing to question faulty government recordkeeping systems that lead to improper arrest than was Justice O'Connor. In fact, during his time at the White House, Judge Roberts strongly favored a controversial proposal to expand the government's ability to monitor the activities of Americans.

Memo for the White House – National ID

A second area of concern regarding Judge Roberts's political views relate to his support for the creation of a national ID card in the United States. In an October 21, 1983 memo to White House Counsel Fred F. Fielding, Roberts wrote, "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." Judge Roberts went on to say, "We already have, for all intents and purposes, a national identifier — the Social Security number.... And I think we can ill afford to cling to symbolism in the face of the real threat to our social fabric by uncontrolled immigration." Charlie Savage and Rick Klein, Roberts, as Reagan Aide, Backed National ID Card, Boston Globe, Aug. 19, 2005, at A1.

At the time that Judge Roberts wrote that memo, Section VII of the Privacy Act regulated the collection and use of the Social Security Number in the United States. Pub. L. No. 93-579, § 7, 88 Stat. 1909. Far from symbolic, that provision required all federal agencies that sought to make use of the Social Security Number to provide the legal basis for the request, indicate how the SSN would be used, and also indicate whether the disclosure was mandatory or voluntary.³

³

(a)

(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to--

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

Federal, state, and local governments were expressly prevented from denying to any individual "any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." Id. That provision was a direct result of efforts earlier by Congress to regulate the collection and use of the SSN by the government and to prevent the misuse of personal information by government agencies. Report of the Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Department of Health, Education, and Welfare, Records, Computers, and the Rights of Citizens 125-35 (1973) ("Recommendations Regarding Use of the Social Security Number").

Proposals for a national ID card continue to be extraordinarily controversial in this country. For example, in the creation of the Department of Homeland Security, members of Congress made clear their opposition to creation of a national ID card. Section 554 states directly "Nothing in this Act shall be construed to authorize the development of a national identification system in card." Pub. L. No. 107-296. And there is now the very real possibility that challenges may be brought to Real ID Act, a law that was passed without a vote or single hearing, that will require the state to make the state drivers license into a federally approved ID card. Pub. L. No. 109-13. Will Judge Roberts's views on the national ID card expressed in a 1983 memo be reflected in his opinion on the Supreme Court, if he is confirmed as Chief Justice, as his 1983 views on the exclusionary rule were recently reflected in his opinion in a case before the DC Circuit Court of Appeals? We believe, given the fact that Judge Roberts has previously expressed his views on this matter, it would be appropriate for the Judiciary Committee to explore this question at the nomination hearing.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.
Pub. L. No. 93-579 § 7.

Argument for the Solicitor General –Smith v. Doe (2002)

As we indicated above, EPIC filed an amicus brief in Smith v. Doe, 538 U.S. 84 (2003), a case challenging the decision of the state of Alaska to make a sex offender registry available on the Internet. It was our concern that this stigmatizing information, made widely available to the public, would exceed the statutory purpose of informing the community about the possible risk.

As we wrote:

The Alaska Megan’s Law statute permits the internet dissemination of stigmatizing information collected from released offenders by the state by mandating that the information in the registry be available "for any purpose . . . to any person." (citation omitted). Because government posting of registry information makes this information widely available to individuals not living in geographic proximity to the registrant, the punishment imposed by the statute is excessive.

Brief of EPIC as Amicus Curiae Supporting Respondents at 1, Smith v. Doe, 538 U.S. 84 (No. 01-729).

Though he was in private practice at the time, Judge Roberts argued the case for the Solicitor General before the Supreme Court on November 12, 2002. In his oral argument, Judge Roberts said about the publication of a person's sex offender status on the Internet, "It is also passive. It's not displayed to people who have no interest in the information, and in that sense is far less invasive." (Oral Arg. Tr. 9:1-3, Nov. 12, 2002). In other words, he believed that there would be no heightened privacy concern resulting from the publication of stigmatizing personal information online.

In the rebuttal argument, Judge Roberts went on to say, "There's no way in which this law can be regarded as too excessive. It simply makes available information that is already a matter of public record, and publicly available because criminal trials under our system have to be public." (Oral Arg. Tr. 54:1-5).

The Court sided with Judge Roberts in this case and held that because the Alaska Sex Offender Registration Act is non-punitive, its retroactive application does not violate the Ex Post Facto Clause. Smith v. Doe, 538 U.S. 84 (2003). On the issue of Internet publication, Justice Anthony Kennedy wrote for the Court:

The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

Id. at 99 (emphasis added).

In other words, the Supreme Court agreed with Judge Roberts that the statute was permissible but did not agree that there was no heightened privacy interest resulting from the Internet publication.

Argument for the Solicitor General – Gonzaga University v. Doe (2002)

In Gonzaga Univ. v. Doe, 536 U.S. 273 (2002), the United States Supreme Court considered the question of whether the Family Educational Rights and Privacy Act (FERPA) provides for a private right of action. That law prohibits the federal funding of schools that have a policy or practice of permitting the release of students' education records without their parents' written consent. The Washington Supreme Court had held the nondisclosure provision in the FERPA creates a federal right enforceable under section 1983. 24 P. 3d 390, 401 (Wa. 2001).

Although EPIC did not file an amicus brief in this case, we were very interested in the outcome as we routinely cite FERPA in student privacy matters and have elsewhere filed briefs

in support of damages for privacy violations.⁴ Gonzaga raised a broad question about the appropriate scope of section 1983 and a specific question of how best to enforce federal privacy statutes. Nearly all of the Federal Courts of Appeal expressly addressing the question had concluded that FERPA creates federal privacy rights enforceable under section 1983.⁵

Judge Roberts, again returning from law firm practice to argue a case with significant implications for personal privacy, argued successfully before the Court that the FERPA provided no private right of action, and the decision of the Washington State Supreme Court was overturned. Under his view, and the view that was adopted by the Supreme Court, the obligations of the statute are directed toward the Secretary of Education and do not provide for an individual right of action. Id. at 287. However, Judge Roberts also showed little regard for the privacy rights of students and little familiarity with the Congressional efforts to safeguard privacy by statute. During the oral argument when Judge Roberts attempting to distinguish the Title IX statutory scheme that provided for a private right of action from the FERPA scheme, he said:

It would have been a radical notion, even in 1974, for Congress to confer individual rights on every student from kindergarten to graduate school in a way that would directly implicate the day-to-day running of schools across the country, and there's no evidence to suggest that that's what Congress had in mind.

(Arg. Tr. 52: 13-18, Apr. 24, 2002).

In fact, 1974 was the exact year that Congress passed the Privacy Act, the most comprehensive privacy law in the United States. Not only did that law confer individual rights on every American across the country, that law directly implicated the day-to-day record-management procedures of every federal agency across the country. Every federal agency that

⁴ The Privacy Law Sourcebook 2004: United States Law, International Law and Recent Developments (Marc Rotenberg, ed., EPIC 2005); Brief of EPIC et al. as Amicus Curiae Supporting Petitioner, Doe v. Chao, 540 U.S. 614 (2004) (No. 02-1377); Brief of EPIC et al. as Amicus Curiae Supporting Plaintiff-Appellant, Kehoe v. Fidelity Federal Bank and Trust, 2005 U.S. App. LEXIS 18406 (11th Cir. Aug. 26, 2005) (No. 04-13306-BB).

⁵ See, e.g., Falvo v. Owasso Indep. Sch. Dist. No. 1-011, 233 F.3d 1203 (10th Cir. 2000), rev'd, 534 U.S. 426; Brown v. City of Oneonta Police Dep't, 106 F.3d 1125 (2d Cir. 1997); Lewin v. Med. Coll. of Hampton Roads, 931 F. Supp. 443 (E.D. Va. 1996), aff'd, 131 F.3d 135 (4th Cir. 1997); Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990); Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989).

collected any personally identifiable information about an American citizen or permanent resident was required to safeguard the information and prevent misuse. Moreover, in those instances where the law was violated, individuals were entitled to recover monetary damages.

It is distressing to consider that a future Chief Justice of the Supreme Court, arguing a privacy case before the Court, would either not be familiar with this history or would choose to mock it. While there is no necessary reason that Judge Roberts would have discussed the Privacy Act in the context of seeking to determine whether FERPA provided for section 1983 relief, the fact that he seemed to go out of his way to dismiss the history of the law that confers enforceable privacy rights for millions of Americans is difficult to ignore.

Today, students across the country face a wide range of privacy concerns. Commercial brokers routinely obtain personal information from schools that are used to sell everything from magazine subscription to high-interest credit cards. The Department of Defense has recently revealed that a plan to promote military recruiting through a joint marketing arrangement with a private commercial marketing firm that obtains personal information on students from government agencies and schools. In part to address these concerns about the privacy rights of students, the No Child Left Behind Act specifically gave parents information about the collection and use of information concerning their children in school. Pub. L. No. 107-110, 115 Stat. 1425.

In this effort as well others, Congress has sought to safeguard the privacy rights of Americans through legislative means. In the FERPA case, Judge Roberts argued against the effective enforcement of a federal privacy statute and appeared to go out of his way to dismiss the most important privacy statute in the United States. This does not bode well for Judge Roberts's views of the authority of Congress to protect privacy by legislative means.

The Opinion in WMATA v. Hedgepeth (2004), the "French Fry" Case

A comparison between Judge Roberts's opinion for the United States Court of Appeals for the District of Columbia Circuit in Wash. Metro. Area Transit Auth. v. Hedgepeth, 386 F. 3d 1148 (D.C. Cir. 2004), and Justice O'Connor's dissenting opinion for the Supreme Court in Atwater v. Lago Vista, 532 U.S. 318 (2001), also reveals a troubling difference in Fourth Amendment jurisprudence similar to the concerns described above about the exclusionary rule. In Hedgepeth, a 12-year-old girl was arrested for eating a French fry inside a subway station. 386 F.3d 1148. According to the Washington Metropolitan Area Transit Authority's (WMATA) "zero tolerance policy," the only punishment available for offending minors was arrest. Id. at 1150. Hedgepeth brought suit against WMATA claiming, among other things, an unreasonable seizure under the Fourth Amendment. Id. at 1157. Judge Roberts affirmed the dismissal of Hedgepeth's Fourth Amendment claim. Id. at 1159.

In Atwater, on facts similar to Hedgepeth, Justice O'Connor reached a different result. 532 U.S. 318. There, a driver was arrested, handcuffed, and jailed after being pulled over for failing to wear a seatbelt – a violation punishable by a maximum \$50 fine. Id. at 318. Justice O'Connor, writing in dissent, argued that this "pointless indignity" was "inconsistent with the explicit guarantee of the Fourth Amendment" to be free from unreasonable seizures. Id. at 360.

In Hedgepeth, Judge Roberts read the Atwater majority broadly to allow for an arrest for any violation, no matter how minor, when an officer has probable cause to believe a violation has been committed. 386 F.3d at 1157. Judge Roberts argued that "the most natural reading of Atwater is that [the court] cannot inquire further into the reasonableness of a decision to arrest when it is supported by probable cause." Id. at 1159. Judge Roberts did not see what makes the situation in Hedgepeth unreasonable and distinguishable from Atwater: WMATA's zero tolerance policy is a rigid policy of arrest with no room for officer discretion. Id. at 1157-58.

The concern driving the Atwater Court was that "every discretionary judgment in the field [would] be converted into an occasion for constitutional review." 532 U.S. at 347.

Judge Roberts clearly went beyond the majority decision in Atwater. He claimed that "[t]here is no reason to suppose that the Atwater Court's conclusion ... was restricted to the burden on the officer in the field." 386 F.3d at 1158. He said that "[a]t the same time, ... law enforcement discretion is also exercised at more removed policymaking levels..." Id. This allows blanket policies of arrest the same deference as a heat-of-the-moment decision that an officer must make in the field.

Judge Roberts's broad reading of Atwater is a step back for privacy in comparison to Justice O'Connor's strong Atwater dissent. To Justice O'Connor, the jailing of a driver for a minor infraction was "inconsistent with the explicit guarantee of the Fourth Amendment" to be free from unreasonable seizures. 532 U.S. at 360. (O'Connor, J., dissenting). Justice O'Connor stated that "[b]ecause a full custodial arrest is such a severe intrusion on an individual's liberty, its reasonableness hinges on 'the degree to which it is needed for the promotion of legitimate governmental interests.'" Id. at 365 (quoting Wyo. v. Houghton, 526 U.S. 295, 300 (1999)). Justice O'Connor would have devised a rule requiring that "when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those fact, reasonably warrant [the additional] intrusion' of a full custodial arrest." Id. at 366 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

In Atwater, Justice O'Connor takes issue with the majority's insistence on a "bright-line rule focused on probable cause [as] necessary to vindicate the State's interest in easily administrable law enforcement rules." Id. at 366. Justice O'Connor cautions that "[w]hile clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no

means trumps the values of liberty and privacy at the heart of the Amendment's protections." Id. Justice O'Connor emphasizes "the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment." Id.

However, even without reliance on Atwater, Judge Roberts would have reached the same result in Hedgepeth. Judge Roberts contends, "Even if Atwater were not controlling, [Hedgepeth] has not made the case that her arrest was unconstitutional." Id. at 1159. Judge Roberts argues that Hedgepeth "has not made an effort to defend [the assertion that officer discretion is a necessary element of a valid seizure under the Fourth Amendment, at least for some minor offenses] under the usual first step of any analysis of whether particular government action violates the Fourth Amendment – asking 'whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.'" Id. (quoting Wyo. v. Houghton, 526 U.S. 295, 299 (1999)).

The Opinion in United States v. Jackson (2005), the “Broken Tag Light” Case

In United States v. Jackson, 415 F.3d 88, 2005 U.S. App. LEXIS 14951 (D.C. Cir. July 22, 2005), a recent opinion from the United States Court of Appeals for the District of Columbia circuit, Judge Roberts was asked to consider whether evidence should be excluded in a case where the police searched the trunk of car stopped for a routine traffic violation. Id. at *2. The panel held 2-1 that the police lacked probable cause to search the trunk, and reversed the conviction. Id. Judge Rogers said for the panel, “The government's first justification -- that the officers had probable cause to search for contraband -- is readily dismissed. There can be no serious argument that the existence of stolen tags affixed to a car gives rise to probable cause to believe that additional contraband, particularly additional stolen tags, would be in the car trunk.” Id. at *10. Judge Rogers concluded that “because the officers lacked probable cause to search the car trunk for additional contraband, such as additional stolen tags, other evidence concerning the

driver's probable criminal activity, or documentation that the driver was an unauthorized user of the car, the district court erred in denying the motion to suppress the evidence seized from the trunk, and we reverse the judgment of conviction” Id. at *29.

In that case, Judge Edwards wrote in a concurrence:

There is always a temptation to turn a blind eye to invasions of citizens' Fourth Amendment rights in the face of potentially inculpatory evidence . . . But judges must resist the temptation to ignore unconstitutional conduct by police officers, because it is our sworn obligation to show "jealous regard for maintaining the integrity of individual rights" and resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. Mapp v. Ohio, 367 U.S. 643, 647 (1961) (quoting I Annals of Cong. 439 (1789) Remarks of John Madison)).

Id. at *36. (Edwards, J., concurring). Judge Edwards concluded, "It is our duty to maintain the sanctity of the constitutional right to privacy free from unreasonable government intrusion." Id. at *37.

Judge Roberts dissented. In his view, the "cumulation of suspicious circumstances suggesting the car may been stolen, the officers, reasonably in my view, turned their attention to the trunk." Id. at *40 (Roberts, J., dissenting). Judge Roberts provided a point-by-point rebuttal to the argument advanced in the majority opinion that the police lacked probable cause to search the trunk. However, there is a dismissive comment, similar to his remark in the argument over the FERPA matter discussed above, in which Judge Roberts writes about the underlying claim:

Sometimes a car being driven by an unlicensed driver, with no registration and stolen tags, really does belong to the driver's friend, and sometimes dogs do eat homework, but in neither case is it reasonable to insist on checking out the story before taking other appropriate action.

Id. at *50 (Roberts, J., dissenting).

In fact, Jackson was driving the car of his girlfriend, which had been purchased at an auction a month earlier. Id. at *4. And as the opinion of Judge Rogers stated, when considering all of the facts the officer encountered, there was simply not probable cause that “would have led

a 'prudent, reasonable, cautious police officer' to open the trunk.” Id. at *2. “Otherwise, borrowing a friend's car becomes a very risky undertaking.” Id. at *15.

Although the Jackson case is very fact-specific, as Fourth Amendment cases invariably are, Judge Roberts's rejection of the suppression remedy, a view which he expressed in a White House memo 20 years earlier, coupled with his dismissive view of the Fourth Amendment claim is troubling.

The Future of the Fourth Amendment and The Right to Privacy

In the last several years, the Supreme Court has increasingly considered the application of Fourth Amendment principles in settings heavily influenced by the advent of new technology. See, e.g., Kyllo v. United States, 533 U.S. 27 (2001) (holding that the Fourth Amendment applies to the use of a thermal imaging device directed toward the interior of a home by the police). The Court has looked at the Constitutionality of a state statute that compels the disclosure of personal identity where there is no probable cause to search or arrest. Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177 (2004). The Court has also reviewed several significant privacy statutes. Doe v. Chao, 540 U.S. 614 (2004) (Privacy Act); Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002) (Family Educational Rights and Privacy Act); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (Family Educational Rights and Privacy Act).

There is no necessary reason that the President would nominate to the Supreme Court a person who has a strong commitment to the enforcement of federal privacy laws, the Fourth Amendment, or the right to privacy. However, it is worth considering how the views of Judge Roberts might compare with those of Justice O’Connor, who opposed suspicionless searches, or Justice Louis Brandeis, who has had such an enormous influence on the right to privacy in the United States.

Justice O'Connor, whom many have described as a moderate and a critical swing vote on the Court, also wrote important opinions for the Court upholding the right to privacy and wrote in dissent when she believed that the Supreme Court permitted searches that were inconsistent with the requirements of the Fourth Amendment. In Indianapolis v. Edmond, 531 U.S. 32 (2000). Justice O'Connor, writing for the majority, stated that drug checkpoints are in violation of the Fourth Amendment protection against unreasonable searches and seizure. She wrote:

We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in Prouse that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. 440 U.S. at 659, n. 18. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

531 U.S. at 41.

As we described above, in Atwater v. Lago Vista, 532 U.S. 318 (2001), Justice O'Connor, writing in dissent, said that the police officer's arrest of Atwater for a seatbelt violation was unreasonable.

The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures." The Court recognizes that the arrest of Gail Atwater was a "pointless indignity" that served no discernible state interest and yet holds that her arrest was constitutionally permissible. Because the Court's position is inconsistent with the explicit guarantee of the Fourth Amendment, I dissent. . . .

The majority gives a brief nod to this bedrock principle of our Fourth Amendment jurisprudence, and even acknowledges that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case." But instead of remedying this imbalance, the majority allows itself to be swayed by the worry that "every discretionary judgment in the field [will] be converted into an occasion for constitutional review." It therefore mints a new rule that "if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."

This rule is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment.

532 U.S. at 360-62 (O'Connor, J., dissenting).

Justice O'Connor showed particular concern about suspicionless searches and dissented in both cases where the Supreme Court permitted the drug testing of students. In Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995), she wrote:

But whether a blanket search is "better" than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment.

515 U.S. at 667-68. And in Bd. of Ed. v. Earls, 536 U.S. 822 (2002). Justice O'Connor dissented from the Court's opinion that allowed drug testing for high school students who participated in any extracurricular activity:

I dissented in Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995), and continue to believe that case was wrongly decided. Because Vernonia is now this Court's precedent, and because I agree that petitioners' program fails even under the balancing approach adopted in that case, I join JUSTICE GINSBURG's dissent. . . .

It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting "the schools' custodial and tutelary responsibility for children." Vernonia, 515 U.S. at 656. In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary obligations to their students require them to "teach by example" by avoiding symbolic measures that diminish constitutional protections. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 637, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).

536 U.S. at 842, 855. (O'Connor, J., dissenting)

It is also problematic to rely on an interpretation of the Fourth Amendment that protects only that which was protected at the time of the Amendment's framing. In the Hedgepeth opinion, discussed above, Judge Roberts wrote that the Washington Metro's mandatory arrest policy was not unconstitutional in part because it would not have been "regarded as an unlawful search or seizure under the common law when the Amendment was framed," that is, under the law as it stood in 1791. 386 F.3d at 1159. Justice Brandeis repeatedly cautioned against this view. As he wrote in a famous dissent:

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify -- a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life -- a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. Boyd v. United States, 116 U.S. 616, 630. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government.

Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting) (citing Boyd v. United States, 116 U.S. 616 (1886)).

Justice Brandeis's views on the right to privacy had an enormous impact on the development of privacy law in the United States. His dissent in Olmstead was embraced by the Supreme Court in Katz v. United States, 389 U.S. 347 (1967). His argument for the right to privacy in the 1890 Harvard Law Review article became the basis for the common law right to privacy. And significantly, the judicial opinions that established these privacy rights, were transformed into federal and state statutes that provided specific rights and specific remedies.

The views of Justice Brandeis on the right to privacy continue to resonate with the Court. Remarkably, in a case challenging the application of the federal wiretap act to the public disclosure of a telephone conversation, Bartnicki v. Vopper, 532 U.S. 514 (2001), the Justices

writing the majority, the concurrence, and the dissent all cited the views of Justice Brandeis. 532 U.S. at 534 (Stevens, J., opinion for the Court); 532 U.S. at 536, 538, 540 (Breyer, J., concurring); 532 U.S. at 553 (Rehnquist, J., dissenting).

Justice O'Connor never voted to allow a suspicionless search; Justice Brandeis argued that the right to privacy must be brought in line with the needs of a modern society. We hope that Judge Roberts, if he is confirmed, will be influenced by those who have shaped the right to privacy in the United States.

Conclusion

We urge the Judiciary Committee to consider carefully the impact that Judge Roberts ascension to the Supreme Court will have on the right to privacy in the 21st century. He is without doubt, a distinguished and accomplished lawyer and a brilliant jurist.

Nevertheless, Judge Roberts's political views, as expressed in his memos on the exclusionary rule and a national ID card, suggest too little regard for the legal mechanisms that limit police misconduct and little concern for the implications of a national ID system in the United States. The privacy cases that he has argued in the Supreme Court concerning databases maintained by the government agencies ignore concerns about the misuse of personal information and little regard for efforts by Congress to safeguard privacy by statutes. And his views of the Fourth Amendment, as expressed in cases such as Hedgepeth v. Wash. Metro. Area Transit Auth. and United States v. Jackson, suggest a view of the Fourth Amendment that would lead to a restrictive application of Constitutional rights.

We, as a country, are likely to face enormous challenges to personal privacy in the years ahead. A dramatic expansion of the government's surveillance capabilities coupled with ongoing public fear and a ratcheting downward of statutory safeguards creates dangerous circumstances for a Constitutional democracy. New law enforcement techniques will likely take advantages of

advances in datamining, secret algorithms used to make determinations about when to pursue searches and investigations, and new surveillance techniques that peer under clothing, through walls, beneath skin, perhaps even into the activity of the brain. See Jeffrey Rosen, "Roberts v. The Future," N.Y. Times Magazine, Aug. 28, 2005.

A recognition of the need to uphold Constitutional responsibilities to counterbalance law enforcement powers is crucial. Justice O'Connor made this point well when she wrote in Arizona v. Evans, 514 U.S. 17-18 (1995) (O'Connor, J., concurring):

In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

We urge a detailed and thoughtful exploration of Judge Roberts's views during the confirmation process. In the privacy area, his views are clear, extreme and disturbing. Given the importance of constitutional privacy protections in the delicate balance of civil liberties post 9/11, and the legal issues likely to be thrown off by the cavalier disregard of privacy interests, we can ill afford to move in the direction that some of Judge Roberts's statements have suggested. The first Justice to join the Supreme Court in the 21st century should have a strong commitment to apply the Constitutional principles and enforce the statutory rights that help safeguard privacy in the modern era. Accordingly, we respectfully ask that his views be probed diligently and carefully. Both the Senate and the American public deserve nothing less.

Respectfully,

Marc Rotenberg, President
EPIC

Hon. John B. Anderson
Fort Lauderdale, Florida

Professor Ann Bartow
Columbia, South Carolina

Professor Christine Borgman
Los Angeles, California

Professor James Boyle
Durham, North Carolina

Dr. David Chaum
Los Angeles, California

Professor Julie E. Cohen
Washington, DC

Simon Davies
London, Great Britain

Professor David J. Farber
Pittsburgh, Pennsylvania

Professor Oscar Gandy
Philadelphia, Pennsylvania

Deborah Hurley
Sherborn, Massachusetts

Judith F. Krug
Chicago, Illinois

Mary Minow
Cupertino, California

Dr. Peter Neumann
Palo Alto, California

Professor Pamela Samuelson
Berkeley, California

Dr. Bruce Schneier
Minneapolis, Minnesota

Dr. Barbara Simons
Palo Alto, California

Robert Ellis Smith
Providence, Rhode Island

Professor Frank Tuerkheimer
Madison, Wisconsin

Edward Viltz
Rockville, Maryland

(Members of the EPIC
Advisory Board)