SPECIAL REPORT

People For the American Way Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts

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PEOPLE FOR THE AMERICAN WAY

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Executive Summary

The record of Supreme Court nominee John Roberts demonstrates that his confirmation to the nation's highest court would undermine Americans' rights and freedoms and limit the role of the federal courts in upholding them. People For the American Way calls on the Senate to reject John Roberts' nomination.

The opinions he has issued during his short tenure on the federal bench, the documents from his tenure in senior positions in the Reagan Administration, and what we know of Roberts' tenure as principal deputy solicitor general in the first Bush administration combine to make a compelling case against confirmation.

For much of the past 25 years, Roberts worked to impede or undermine progress toward realizing the Constitution's promise of equal justice under law. He has been an active participant in efforts to advance a legal and judicial ideology grounded in a narrow view of constitutional rights and a restricted role for the federal courts in protecting and enforcing them. As a federal judge, he has indicated support for an approach to the Constitution that would undermine the authority of Congress to take action for the common good in areas such as environmental protection.

As special assistant to the Attorney General in the Reagan Administration, and later as a key legal strategist in the Reagan White House counsel's office, Roberts was an aggressive participant in the administration's attempts to restrict fundamental constitutional and civil rights. In fact, Roberts often came down to the right of ultraconservative legal luminaries, including Robert Bork, William Bradford Reynolds, and Ted Olson. He supported the legality of radical proposals to strip the courts of jurisdiction over certain school desegregation remedies, abortion, and school prayer. He denigrated what he referred to as the "so-called" right to privacy, resisted attempts to fully restore the effectiveness of the Voting Rights Act, and worked against measures aimed at increasing gender equity. As the *Washington Post* has reported, at times he was "derisive, using words such as 'purported' and 'perceived' to describe discrimination against women."

When Roberts became top deputy to solicitor general Kenneth W. Starr in 1989, he continued to advance a right-wing agenda. He urged the Court to limit the remedies women could seek when their rights under Title IX were violated. And he asked the Court to overturn *Roe v. Wade*, saying it has "no support in the text, structure or history of the Constitution."

In his limited time as a federal appeals court judge, Roberts has shown enormous deference to the executive branch, with a broad and expansive view of presidential power that threatens the system of checks and balances. A key dissent by Roberts suggests that he has embraced the ideology of a legal and political movement that seeks to weaken Congress' ability to protect Americans' rights and interests, potentially threatening decades of progress made since the New Deal in safeguarding air, water, and public health, and protecting individual rights and liberties.

Among the aspects of Roberts' record documented in this report:

- Roberts supported a restrictive interpretation of Title IX, which bans sex discrimination in any educational program receiving federal financial assistance, a position that would have restricted the reach of other important civil rights laws as well.

- Roberts played an important role in an unsuccessful Reagan Administration effort to make it harder to prove violations of the Voting Rights Act.

- Roberts referred dismissively to the "so-called 'right to privacy;'" his record strongly suggests that he does not believe that the Constitution guarantees or protects a right to privacy, a position that threatens reproductive choice, gay rights, and families' medical decision-making. He signed a brief on behalf of the first Bush Administration arguing that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled."

- Roberts' record indicates he would allow government endorsement of and favoritism towards religion. His confirmation could open the door to a range of activities that threaten religious liberty, including coercive religious practices in public schools.

- Roberts took the position that Congress could constitutionally strip the Supreme Court of the authority to rule on cases regarding school prayer, abortion, and other issues, a position to the right of that advanced by Theodore Olson and adopted by the Reagan administration.

- Roberts criticized the Supreme Court for overturning a Texas law designed to keep undocumented immigrant children from getting a public education.

- While in the White House, Roberts urged that the administration should "go slowly" on proposed fair housing legislation, claiming that such legislation represented "government intrusion."

- As a judge Roberts has signaled that he subscribes to the ideas of the new "federalism" that would limit the federal government's power under the Constitution's Commerce Clause to act on behalf of the common good. In *Rancho Viejo, LLC v. Norton*, Roberts issued a troubling dissent from a decision upholding the constitutionality of the Endangered Species Act. Roberts's dissent

suggested that Congress lacked the power under the Commerce Clause to protect endangered species in this case. The consequences of such a radical view, if held by a Supreme Court majority, would extend far beyond the Endangered Species Act to many areas of Congressional authority, including such longstanding programs as Medicare and Social Security.

- Roberts has written that affirmative action programs were bound to fail because they required "recruiting of inadequately prepared candidates." As deputy Solicitor General he unsuccessfully opposed a federal government agency's affirmative action program designed to diversify media ownership.

The White House has broken with precedent and unfortunately continues to deny the Senate access to key documents from Roberts' time as second-in-command to Ken Starr in the solicitor general's office in the Bush I Administration. In the absence of such documents, we must assume that the views expressed in the briefs Roberts signed during his tenure are in fact his own.

Conclusion

John Roberts has spent much of the past two decades in political and legal positions of great influence. The public record that has been revealed over recent weeks demonstrates that Roberts has consistently advocated positions that would undermine Americans' fundamental rights and liberties under the Constitution and federal law.

The confirmation of John Roberts to replace Justice Sandra Day O'Connor would bring dramatic change, move the Supreme Court significantly to the right, and shift the balance of the court to the great and lasting detriment of Americans and the constitutional principles and legal safeguards that protect their families and communities. We urge senators to vote against his confirmation.

People For the American Way Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts

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This report documents People For the American Way's conclusion that, based on the evidence of his 25-year record, John Roberts does not meet the standards for elevation to the Supreme Court and the Senate should reject his nomination. An even more comprehensive report analyzing his legal record and judicial philosophy will be released prior to the beginning of his confirmation hearing.

Introduction

When Justice Sandra Day O'Connor announced her resignation on July 1, People For the American Way called it "a critical moment for the Constitution and a crucial test for President Bush."[1] We hoped that President Bush would work with senators from both parties to identify a consensus nominee to replace O'Connor, who has played a crucial role at the center of the Court. Such a move, in the spirit of Ronald Reagan's choice of O'Connor more than 20 years ago, could have spared a closely divided nation from a contentious confirmation battle and bolstered Americans' confidence that cases involving their rights, liberties, and legal protections would be considered on the merits, not by a Court that has become a partisan political prize for those already holding power in Congress and the White House.

We have consistently urged President Bush, in regard to judicial nominations, to consider the important criteria for confirmation to federal judgeships suggested by more than 200 law professors in a letter to the Senate Judiciary Committee in July 2001. As these professors explained, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, nominees must demonstrate that they meet appropriate criteria for confirmation by the Senate, which is entrusted by the Constitution with the

[1] Press Release, People For the American Way, "O'Connor Resignation a Critical Moment for Constitution, Crucial Test for President Bush and Senate," July 1, 2005, http://www.pfaw.org/pfaw/general/default.aspx?oid=19125.

duty to make an independent evaluation of the president's nominees. According to the law professors' letter, these criteria include "an exemplary record in the law," a "commitment to protecting the rights of ordinary Americans and [not placing] the interests of the powerful over those of individual citizens," a "record of commitment to the progress made on civil rights, women's rights and individual liberties," and a "respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached."[2] These criteria are even more important in the case of someone nominated to our nation's highest court.

When President Bush announced the nomination of John Roberts, he assured Americans that in Roberts he had found "a person who will faithfully apply the Constitution and keep our founding promise of equal justice under the law."[3] People For the American Way did not immediately oppose Roberts' confirmation, even though, as we stated at the time, we were troubled by some aspects of what was then known about his record.[4] It was evident that Roberts has had a very accomplished legal career, but also that much information about his record and judicial philosophy were not yet known.

Sadly, during the past several weeks, documents released from the Ronald Reagan Presidential Library and the National Archives pertaining to Roberts' service in the Reagan administration, coupled with what else is publicly known about Roberts' record, have made it emphatically clear that Roberts does not meet the standards outlined above. In particular he has not demonstrated a commitment to protecting constitutional safeguards, respecting the role of the Congress, and understanding the impact of the law and the Court on the lives of individual Americans. Throughout his career, Roberts has shown a pattern of working from powerful positions to undermine Americans' rights and liberties rather than uphold them.

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[2] Letter of Law Professors to Senate Judiciary Committee, July 13, 2001 (copy available from People For the American Way).

[3] White House Transcript, "President Announces Judge John Roberts as Supreme Court Nominee," July 19, 2005.

[4] Press Release, People For the American Way, "John Roberts: Sparse Record Raises Serious Concerns," July 19, 2005, http://www.pfaw.org/pfaw/general/default.aspx?oid=19265.

During the past 25 years, Roberts worked to resist the important progress America has made in realizing the Constitution's promise of equal justice under law. His confirmation to the Supreme Court would jeopardize many of the legal and constitutional protections that Americans enjoy and would undermine the nation's hard-won progress in civil rights and equal opportunity, privacy and reproductive choice, environmental protection, and religious liberty. He would strengthen the power of the presidency, already dangerously expanded by President Bush. If he were confirmed, Roberts could play a pivotal role in interpreting our Constitution and laws for more than 30 years. Confirming Roberts would shift the Supreme Court significantly to the right, threatening the rights and freedoms of individual Americans, their families, and their communities.

Roberts' own record, as documented by his writings and his actions as a high-level political appointee in the Reagan and first Bush administrations and throughout his career, makes a compelling case against his confirmation to a lifetime seat on the U.S. Supreme Court. Based on Roberts' consistent pattern of opposing the protection of individuals' rights, and his repeated support for efforts to restrict, undermine, or eliminate legal safeguards that protect those rights, People For the American Way calls on the Senate to reject the nomination of John Roberts to the U.S. Supreme Court. We will work with our 750,000 members and supporters and our coalition partners to educate Americans about what is at stake and to mobilize them into action.

Senators have a constitutional duty to the American people to insist that Roberts fully explain his record and judicial philosophy at his confirmation hearing, and they have the right to any information they believe will help them more fully understand how he would approach our Constitution and laws as a Supreme Court justice. There is an urgent need for a national conversation about Roberts' judicial philosophy and what it could mean to Americans' everyday lives if he were confirmed.

The Roberts Record: An Overview

After clerking for then-Associate Justice William Rehnquist, John Roberts served as a political appointee in the Reagan and first Bush administrations in a series of high-

level positions in the White House and Justice Department: as special assistant to the attorney general in 1981-1982, as associate counsel to the President from 1982-1986, and, after a short stint in private practice at a large corporate law firm, as principal deputy solicitor general from late 1989 to early 1993.[5]

In sharp contrast to the current Bush administration's carefully cultivated public image of John Roberts as a non-ideological mainstream conservative, the John Roberts documented in the Reagan administration archives, and by his later actions working as principal deputy to Solicitor General Ken Starr and as a federal appeals court judge, is an ideologue committed to an unduly narrow view of Americans' rights, liberties and legal protections.

Many Americans are unaware that during the twelve years of the Reagan and first Bush administrations, overwhelming bipartisan majorities in Congress:

- strengthened every major civil rights law;
- overturned more than a dozen Supreme Court decisions restricting the scope of civil rights laws;
- defeated (by the largest majority in Senate history) the Robert Bork Supreme Court nomination and several other key lower court nominations;
- and rebuffed the efforts of the right wing to eliminate affirmative action.

This period, most of which Roberts spent at the White House and in the Justice Department, was a time of significant civil rights progress, but it was progress most frequently made over the objections – and on occasion the vetoes – of Presidents Reagan and Bush.

During this same period, the Reagan and Bush administrations worked to overturn the pro-civil rights enforcement policies of the Johnson, Nixon, Ford, and Carter

[5] Federal Judges Biographical Database, "Roberts, John G. Jr.," Federal Judicial Center, http://air.fjc.gov/servlet/tGetInfo?jid=3001.

administrations. They were intent on advancing an ideology that would have turned back the clock and denied millions of Americans effective protections against discrimination.

Again, in sharp contrast to his supporters' public portrayal, recently released documents make it undeniably clear that Roberts was no passive observer in this assault on fundamental constitutional and civil rights. Rather, he was at the very center of these efforts. Roberts sometimes disagreed with his superiors – also ultraconservative political appointees – when he believed they were not sufficiently aggressive in promoting his ideological approach to restricting the reach and remedies of civil rights laws and the role of the federal courts in protecting Americans' rights. He supported the constitutionality of radical proposals to strip the courts of jurisdiction over certain school desegregation remedies, abortion, and school prayer.[6] Documents reveal that in the ideological and political debates within the Reagan administration, Roberts at times was positioned to the right of the right-wing movement's legal luminaries, including Robert Bork, William Bradford Reynolds, and Ted Olson.

Roberts' ideology is evident as well in his later actions as the principal deputy solicitor general. The solicitor general is the government's chief lawyer before the Supreme Court. Because of the special deference traditionally given to the solicitor general by the high court, this position is known as the "10th Justice." Midway through the Reagan administration, the solicitor general became the point person for a right-wing transformation in the law.[7] Indeed, in a 1982 memo to the attorney general, Roberts had called for just such a role for the solicitor general.[8] The position of principal deputy solicitor general, also called the "political deputy," was created during the Reagan administration specifically to advance the ideological agenda of the White House before the Supreme Court.[9] There was no doubt that the office would be used to advance a

[6] "Roberts Documents Reveal a Conservative," CNN Political Unit, Thursday, July 28, 2005.

[7] David G. Savage, "With Starr, Roberts Pushed Reagan Agenda," *Los Angeles Times*, August 5, 2005.

[8] Carolyn B. Kuhl and John Roberts, "Plyler v. Doe – 'The Texas Illegal Aliens Case,'" Memo to the Attorney General, June 15, 1982.

[9] Maralee Schwartz and Al Kamen, "The Federal Page," *Washington Post*, September 22, 1984

right-wing agenda when Roberts became the political deputy to solicitor general Kenneth Starr in the first Bush administration.[10] Nor was there any doubt that Roberts was ideologically in tune with the administration and with Starr.

Indeed, ultraconservative lawyer Bruce Fein, who served in the Reagan administration with Roberts, said they were among "a band of ideological brothers" and that the deeply held convictions Roberts demonstrated "aren't principles that evaporate or walk away."[11]

Although the current White House has broken with precedent[12] and refused to give senators access to key documents from Roberts' tenure in this top legal job – documents that could more fully reveal Roberts' thinking on crucial constitutional questions – the legal positions taken and briefs filed by the office during Roberts' tenure reflect the same restrictive view of individual rights and liberties and the same narrow role for the government and the courts in protecting them that he expressed while in the Reagan administration. In the absence of those internal memos, senators must assume that the views expressed in the solicitor general's briefs signed by Roberts are his own.

"Even if his internal memos from his days in the solicitor general's office are not released, the final briefs that Roberts approved are important evidence," according to American University law professor Susan Carle, who worked in the Justice Department during that period. "In his capacity as second-in-charge in the solicitor general's office, Roberts held a political appointment of great power. The briefs on which his name

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[10] David G. Savage, "With Starr, Roberts Pushed Reagan Agenda," *Los Angeles Times*, August 5, 2005.

[11] R. Jeffrey Smith, Amy Goldstein and Jo Becker, "A Charter Member of Reagan Vanguard," *Washington Post*, August 1, 2005.

[12] Save the Court, "Show Us the Paper: Precedents for the Release of Justice Department Documents in the Senate Confirmation Process," http://www.savethecourt.org/site/c.mwK0JbNTJrF/b.934577/k.A0F2/Show_Us_the_Paper.htm. See Also: Herman Schwartz, "Memorandum on the Senate Judiciary Committee Request for Memorandum by Judge John G. Roberts Jr. While Serving as United States Principal Deputy Solicitor General," http://media.pfaw.org/stc/schwartz8105.pdf

appeared reflect his considered and thoughtful use of that power….He can and should be held accountable for his views as expressed in the briefs on which his name appears."[13]

Additionally, in his limited time on the bench as a federal appeals court judge, Roberts has shown enormous deference to the executive branch, with a broad and expansive view of presidential power. He has shown troubling signs that he continues to embrace the ideology of a legal and political movement that uses terms like "federalism" to mask the radical nature of its goals – to weaken Congress' ability to protect Americans' rights and interests, potentially threatening decades of progress the nation has made since the New Deal in safeguarding air, water, and public health, protecting the right to vote, resisting discrimination, addressing poverty, and protecting students and others from religious coercion by the government.

This judicial philosophy is evident throughout Roberts' career at the Reagan Justice Department, the Reagan White House, and the Bush I administration's solicitor general's office. That is why the radical right leaders who loudly and aggressively demanded that President Bush select a nominee in the mold of the current Court's most extreme members – Justices Antonin Scalia and Clarence Thomas – are rejoicing over Roberts' nomination and trumpeting him as another Scalia or Thomas.[14]

Tony Perkins of the Family Research Council says President Bush "promised to nominate someone along the lines of a Scalia or a Thomas and that is exactly what he has done." [15] James Dobson, who like most religious right leaders has endorsed Roberts' confirmation, told reporters, "I think that we do know a lot about Judge Roberts, from his life, from his record, from the things he has stood for."[16] There's a reason these leaders believe they know where Roberts stands. The White House used Jay Sekulow – who

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[13] Susan Carle, "What Roberts Argued," *Legal Times*, August 1, 2005.

[14] People For the American Way, "In Their Own Words: Embraced by the Right," www.pfaw.org/pfaw/general/default.aspx?oid=19282

[15] Adam Nagourney, "Bush's Strategy for Court: Disarm the Opposition," *New York Times*, July 20, 2005.

[16] Steven Ertelt, "Pro-Life Leaders Say John Roberts is a Reliable Abortion Opponent," *LifeNews.com*, July 24, 2005.

heads Pat Robertson's legal arm – and Federalist Society Executive Vice President Leonard Leo to build support for Roberts on the far right. They spent more than a year convincing religious right leaders that Roberts' actions did not just reflect a government lawyer doing his job, but reflected his "heart" and his judicial philosophy.[17]

It is noteworthy that some senators from both parties have described Roberts as non-ideological at the same time Roberts' supporters are praising his commitment to their intensely ideological agenda. Administration officials seem committed to keeping senators in the dark about Roberts' approach to the same constitutional questions that so interest Dobson, Sekulow and their allies. Additionally, Bush administration front groups like Progress for America and right-wing pundits are urging Roberts to refuse to answer important questions about his judicial philosophy, as he did during his confirmation hearing for the appellate court.[18] But if people like Pat Robertson, James Dobson, and Jay Sekulow can say with confidence what Roberts' approach to the Constitution would be, thanks to assurances and briefings from the White House and its surrogates, certainly U.S. senators who are fulfilling their constitutional obligation should get the information they want to more fully understand Roberts' judicial philosophy. Based on all the available evidence, we believe radical right leaders are correct that Roberts would shift the Supreme Court significantly to the right.

What is at Stake

The emerging debate over the Roberts nomination will test this country's commitment to core American values. It presents an opportunity for senators to stand with the American people on these widely shared values and constitutional principles – fairness, equal opportunity, religious liberty, voting rights, the right to privacy and a government that serves all Americans.

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[17] David Kirkpatrick and Robin Toner, "A Year of Work to Sell Roberts to Conservatives," *New York Times*, July 22, 2005.

[18] Progress for America's "Up or Down Vote," "The Ginsburg Precedent," http://www.judgeroberts.com/epresskit/ginsburg_precedent.pdf

The confirmation of John Roberts would create a Supreme Court more likely to deferentially uphold executive power, even when key individual liberties are at stake; to restrict the ability of Congress to protect Americans' health, safety, civil rights, and the environment; and to limit the ability of individual Americans to seek justice in the courts when their rights and the interests of their families have been threatened by powerful corporations or government agencies.

Sandra Day O'Connor was the swing justice on the Rehnquist Court for more than a decade. While often voting with her more conservative colleagues, she also frequently was the crucial vote on behalf of Americans' rights and liberties (*see* Appendix). The evidence is strong that Roberts would not play such a role, but would be a reliable and aggressive member of the Court's right wing. This conclusion is discussed below in four key areas.

Civil Rights, Equal Opportunity, and Freedom from Discrimination

Even though the White House is refusing to release documents relating to Roberts' tenure as principal deputy solicitor general, information that is now public demonstrates a pattern of Roberts taking positions that would restrict civil rights protections and limit the role of the courts in protecting individual rights. As a political appointee in the Reagan and first Bush administrations, Roberts was an energetic proponent of overturning the bipartisan civil rights enforcement policies of the Johnson, Nixon, Ford, and Carter administrations and limiting the scope of the civil rights laws, cutting back on remedies for discrimination, and watering down the Voting Rights Act.

Regarding Roberts' tenure in the solicitor general's office, former colleague Susan Carle writes, "He had very strong ideological views about the law, and he saw his mission in life as bringing these conservative views to bear on civil rights and anti-discrimination laws."[19]

[19] David G. Savage, "With Starr, Roberts Pushed Reagan Agenda," *Los Angeles Times*, August 5, 2005.

Voting Rights

The federal Voting Rights Act of 1965 was a crowning achievement of the civil rights movement, but as a special assistant to Attorney General William French Smith, Roberts fought hard against congressional efforts to restore its full effectiveness. A response to decades of brutal, systematic disenfranchisement of black Americans by many southern states, the law contained provisions for federal officials to exercise oversight over local registration procedures and changes in state laws related to voting. It led to a tremendous increase in civic participation among African American voters. In 1980, however, a divided Supreme Court weakened the Voting Rights Act by upholding a system of at-large districts that effectively prevented blacks from being represented on the Mobile, Alabama city council. The Court ruled in the *City of Mobile v. Bolden* case that the system was not created with the intent of discriminating against black voters and therefore did not violate the Act.

Civil rights advocates and legislators of both parties agreed that this decision violated the intent of Congress and previous court decisions and would make effective enforcement of voting rights much more difficult. "Local officials don't wallpaper their offices with memos about how to restrict minority-group members' access to the polling booth," noted Vernon Jordan, Jr., then-president of the National Urban League.[20] In October, 1981, the House of Representatives passed by an overwhelming margin of 389 to 21 a renewal of the Voting Rights Act that restored the effects test in section 2 of the Act.[21] In response to concerns raised by some, both the text of and the House Report on the bill made clear that the legislation "does not create a right of proportional representation" and that "the fact that members of a racial or language minority group

[20] See R.Toner and J. Glater, "Roberts Helped to Shape '80s Civil Rights Debate", *New York Times* (Aug. 4, 2005)("8/4 NYT")(quoting Jordan)

[21] Id. Under the House bill and as approved by Congress, section 2 prohibits practices that improperly discriminate with or without proof of discriminatory intent.

have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation."[22]

Until then, the Administration had not taken a position on the issue or on the Voting Rights Act. Documents reveal that Roberts urged the Administration to oppose the House bill and promoted efforts to do so because of the "effects" language.[23] In early November, 1981, he praised the *Mobile* decision to the Attorney General and complained that the House bill would improperly "give courts far broader license to interfere with voting practices" with discriminatory effects.[24] He wrote numerous op-eds and talking points to promote the opposition to the House bill.

In what could have been a precursor to later views about "federalism" and "states' rights", Roberts wrote that the effects test would produce a "drastic alteration of local governmental affairs" which should be disfavored "under our federal system."[25] He used charged language in claiming that "[a]s Justice Stewart correctly noted in his opinion in *City of Mobile v. Bolden*, incorporation of an effects test in sec. 2 would establish essentially a quota system for electoral politics by creating a right to proportional racial representation." (emphasis in original)[26] This was despite the fact that the House language and report were directly to the contrary, and that Justice Stewart never used the word quota in his opinion. Roberts continued to use such language throughout his advocacy in 1981-82.[27]

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[22] H.R. Rep. 97-227 (1981) at 29-30, quoted in Washington Council of Lawyers, Reagan Civil Rights: The First Twenty Months (1982), reproduced in Hearings before the Senate Judiciary Committee, Nomination of William Bradford Reynolds to be Associate Attorney General (99th Cong., 1st Sess.)(June 4,5, and 18, 1985)("WCL Report") at 678-79.

[23] See generally D. Savage and R. Schmitt, "Portrait of Nominee as a Young Lawyer," *Los Angeles Times* (Aug. 7, 2005).

[24] Memorandum from John Roberts to the Attorney General re Section 2 of the Voting Rights Act and City of Mobile v. Bolden (Nov. 6, 1981) at 2,

[25] Memorandum from John Roberts to the Attorney General re the Voting Rights Act: Section 2 (Dec. 22, 1981)(Attachment at 3).

[26] Id. at 2.

[27] See, e.g., Memorandum from John Roberts to the Attorney general re Voting Rights Act Testimony: Questions and Answers (Jan. 21, 1982) (Attachment at 4)(suggesting that Attorney General state that the House bill "would establish a quota system for electoral politics")(emphasis

As the debate continued, however, it was clear that conservatives as well as progressives disagreed with the Administration's position. For example, James Sensenbrenner and Newt Gingrich voted for the House bill, while Dan Quayle was an original Senate co-sponsor of the same language. Roberts was asked to prepare "fallback" or compromise positions. In each such effort reflected in the files, however, Roberts stubbornly insisted on requiring some form of proof of intent; even when proposing language allegedly adopting the "effects test in the House bill", Roberts proposed that the challenged voting practice must be proven to have been "used invidiously" to harm minorities.[28] Roberts apparently never suggested that the intent of the House bill to avoid proportional representation simply be spelled out in the language of the legislation.

In May, 1982, however, language was agreed upon in the Senate and by the Administration that incorporated the effects language from the House bill and did make even more explicit the language and intent of that bill that it did not create a right to proportional representation.[29] No indication has been found of any involvement by or specific approval by Roberts of this language. Several later memoranda by Roberts indicate continued skepticism, however. In a later 1982 memorandum, he supported Department of Justice intervention in a voting case to help give meaning to the "vague terms of the new section 2" and help "avoid the outcomes which we argued against and which the proponents of an amended section 2 assured us were never intended."[30] While at the White House in 1984, he tartly responded to a state attorney general's complaint about a proposed section 2 action by stating that "I do not recall him leading the opposition to the 1982 amendments to the Voting Rights Act that compel the bringing of

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in original); Memorandum from John Roberts to Attorney General re: today's meeting on voting rights (March 12, 1982)(Attachment at 2)(suggesting that the Attorney General advise the President to state that the effects test "could lead to a quota system in electoral politics.")

[28] Memorandum from John Roberts to the Attorney General re Voting Rights Act (March 24, 1982). See also Memorandum from John Roberts to Brad Reynolds et al. re compromise position on section 2 of the Voting Rights Act (Feb. 16, 1982).

[29] See WCL Report at 680-682.

[30] Memorandum from John Roberts to the Attorney general re attorney general certification to authorize intervention in voting rights case (Sept. 14, 1982).

such suits."[31] In June, 1982, after the Senate language was agreed to, a Roberts memorandum referred specifically to the "clear philosophical opposition to the effects test by the Department, most clearly articulated in the voting rights area."[32]

In any event, it is clear that Roberts' arguments against the effects test threatened to severely harm voting rights progress. "[H]ad the Roberts view prevailed," one election law specialist has commented, "we would have many fewer minority elected representatives in Congress and in state and local governments."[33]

Employment Discrimination and Affirmative Action

Roberts took an extremely restrictive view concerning employment discrimination and affirmative action while serving as a special assistant to the Attorney General in the Reagan Justice Department. He derided arguments in favor of affirmative action, arguing that such programs were bound to fail because they required the "recruiting of inadequately prepared candidates,"[34] a comment that is not only false but also demonstrates a cavalier attitude toward the effects of discrimination and a lack of interest in effective remedies.

While at the Justice Department in 1981, Roberts tried to undermine a long-standing Executive Order supported by Republican and Democratic presidents calling for affirmative action by government contractors. Reagan Secretary of Labor Raymond Donovan and his staff, including the Office of Federal Contract Compliance Programs (OFCCP), had made clear their intent to continue to carry out the order. But Roberts complained to the Attorney General that DOL and OFCCP were promoting "offensive

[31] Memorandum from John G. Roberts to Fred F. Fielding re Justice Department Actions (Dec. 5, 1984).

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

[33] 8/4 NYT (quoting election law specialist Richard Hasen of Loyola Law School).

[34] "Roberts Documents Reveal a Conservative," CNN Political Unit, Thursday, July 28, 2005.

preferences" based on race and gender, questioning even affirmative action recruitment programs.[35] He claimed, even though the Supreme Court had ruled voluntary affirmation action to be legal under federal law in the *United Steelworkers v. Weber* case, that *Weber* "has only four supporters on the current Supreme Court" and that "[we] do not accept it as the guiding principle in this area."[36] Roberts suggested that under his view, "there will be no need for an OFCCP at all."[37]

Also in 1981, in a memo to civil rights division chief William Bradford Reynolds and his assistant Charles Cooper, Roberts strongly challenged a proposed settlement for a job discrimination case, saying that lawyers in the civil rights division had gone too far by advising school systems to offer jobs and back pay not only to those who had been turned down for work due to discriminatory policies but also to those who could show they were deterred by bias from applying for jobs. Roberts called the requirement "staggering."[38] In this case, Roberts was more resistant to civil rights remedies than was Reynolds, whom a Republican-majority Senate Judiciary Committee later rejected for promotion to associate attorney general based largely on his restrictive approach to enforcing civil rights laws.[39]

Roberts' approach to affirmative action continued later in his career. As acting Solicitor General in the first Bush administration, Roberts took the unusual step of directing that the federal government oppose a federal affirmative action plan – the Federal Communications Commission's affirmative action program with regard to applications for new broadcast licenses. Documents concerning this case, *Metro Broadcasting, Inc. v. Federal Communications Commission*, are among those being

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[35] Memorandum from John Roberts to the Attorney General re Meeting with Secretary Donovan on Affirmative Action, December 2, 1981.

[36] Id.

[37] Id.

[38] R. Jeffrey Smith, Amy Goldstein and Jo Becker, "A Charter Member of Reagan Vanguard; Court Nominee Was Part of Legal Team Seeking to Shift Course on Civil Rights Laws," *Washington Post*, August 1, 2005.

[39] See "Nomination of William Bradford Reynolds to be Associate Attorney General of the United States," Hearings Before the Senate Judiciary Committee (99th Cong., 1st Sess. (SHrg.99-3374) (June 4, 5, and 18, 1985).

sought by the Judiciary Committee Democrats in their document request to the administration.[40]

Women's rights, gender discrimination, and federal funding of institutions that discriminate

Recently released documents about Roberts' work in the Reagan administration have "reinforced a picture of Roberts as a vigorous conservative, particularly on issues involving women's rights. At times he was derisive, using words such as 'purported' and 'perceived' to describe discrimination against women."[41]

Perhaps that attitude explains why throughout his tenure in the Reagan and first Bush administrations, Roberts supported or advocated positions that were harmful to efforts to achieve equality for women and to protect women – and other Americans – from institutionalized discrimination. Roberts' support during the Reagan administration for a narrow "program-specific" interpretation of Title IX[42] would not only have severely limited the law's scope, but it also had potential impact far beyond educational institutions. Other civil rights statutes prohibiting discrimination on the basis of race, disability, and age in federally funded programs would have been similarly at risk.

Specifically, as special assistant to Attorney General Smith, Roberts staked out a position on Title IX that would have effectively gutted the statute by allowing schools that receive federal funds in one program (*e.g.*, scientific research) to engage in sex discrimination in another (*e.g.*, athletics). Title IX had been passed a decade earlier, a critical civil rights law essential to ensuring that women and girls are not discriminated against in educational institutions receiving federal funds. Every administration prior to the Reagan administration had taken the position that federal funding of one part of an

[40] Associated Press, "Roberts Hearing May Focus on Government Work," August 5, 2005.

[41] Joan Biskupic and Toni Locy, "Roberts Argued for U.S. ID Card, Against Women's Rights Act," *USA Today*, August 18, 2005.

[42] Memorandum from John Roberts to the Attorney General Regarding *University of Richmond v. Bell,* August 31, 1982

educational institution triggered Title IX coverage for the whole school, prohibiting sex discrimination throughout. When a federal district court ruled in 1982 against this decade-long policy of applying the anti-discrimination requirements to the institution as a whole, Roberts took the position that the administration should not appeal the ruling, making it clear, in a memorandum, that he supported this extremely limited interpretation of Title IX. Writing to the Attorney General in support of a recommendation by William Bradford Reynolds that the government not appeal the district court's ruling, 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.[43]

The case in question was *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), and the court's ruling prevented the U.S. Department of Education from investigating a claim of sex discrimination in the university's athletics program, since that specific program did not receive federal funds. A later memorandum by Roberts stated that Clarence Pendleton, President Reagan's appointee to head the U.S. Commission on Civil Rights, had sent a letter to Attorney General Smith "urging that the Department appeal in the *Richmond* case."[44] Roberts' memo further noted that "[w]e decided not to appeal . . ."[45]

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[43] Id.

[44] Memorandum from John Roberts to the Attorney General Regarding Meeting with Clarence

Administration officials were well aware of the destructive impact of the interpretation they were advocating. An internal memorandum from Education Secretary Terrel Bell to Ed Meese, Counselor to the President, underscores that the Reagan administration knew that adopting the narrow, program-specific interpretation of Title IX would not only be a reversal of prior governmental policy, but would have drastic consequences for Title IX and other civil rights laws. As Bell put it, referring to the *University of Richmond* case and a similar ruling:

> If the decision is to apply the *Richmond* and *Hillsdale* cases nationwide, we must understand that this is a very far-reaching action that turns radically from the position of the past. The withdrawal of coverage of Title IX, Title VI, and Section 504 will be very dramatic. (There is virtually no Federal financial assistance to athletic programs if one accepts that student aid applies only to the student aid program and not to the athletic program . . . .)[46]

The Reagan administration litigated the issues concerning the scope of coverage of Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984). Grove City College was a private school that did not receive federal funds, except in the form of financial aid to students. The college had sued rather than certify that it complied with Title IX, and argued that the statute did not apply to it because it did not receive federal funds. Before the Supreme Court, the Reagan administration did contend that federal financial assistance to students triggered Title IX coverage, but in a reversal of the position taken by three prior administrations, contended that the law's coverage extended only to the

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Pendleton, September 15, 1982.

[45] Id. (emphasis added). Reynolds wrote to Pendleton: "While we found ourselves in disagreement with your recommended course of action on this occasion, the wise counsel of the Civil Rights Commission is always valued and we trust that you will continue to share your thoughts and analysis with us on future issues of similar importance." Letter from Wm. Bradford Reynolds to Clarence M. Pendleton, Jr., at 1, September 16, 1982.

[46] Memorandum from T.H. Bell to Edwin Meese, III, December 21, 1982 (emphasis added).

specific program within the school receiving that aid, not the entire school.[47] As we know from Roberts' 1982 memorandum discussed above, he agreed with this narrow, program-specific interpretation of Title IX.[48]

In *Grove City*, the Supreme Court held unanimously that the college was a recipient of federal financial assistance by virtue of the federal funds granted to its students. However, by a vote of 6-3, the Court also held -- as the administration had contended -- that this financial assistance did not trigger Title IX coverage of the entire college, but only the specific "education program or activity" of the school that was receiving the funds -- the financial-aid program. The dissenting opinion by Justice Brennan, joined by Justice Marshall, called the Court's decision an "absurdity," explaining that it would allow students given federal financial aid in order to attend the college to then be discriminated against in its academic departments and in athletic programs. 465 U.S. at 601.

The program-specific aspect of *Grove City* was a critical blow to Title IX, significantly limiting the scope of the statute by allowing a school to receive federal funds in one program while engaging in sex discrimination in another. As the *Washington Post* described the ruling the next day, "The Supreme Court, in a triumph for the Reagan administration, yesterday sharply limited the reach of the federal law barring sex discrimination in schools and colleges receiving federal aid."[49]

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[47] As the *New York Times* reported, in *Grove City*, the Reagan administration "had reversed the interpretation that three previous administrations had given to the law at issue, Title IX of the Education Amendments of 1972. The previous administrations had regarded Title IX as covering an entire institution once any program received federal funds." Linda Greenhouse, "High Court Backs Reagan's Position on a Sex Bias Law," *New York Times*, February 29, 1984.

[48] Memorandum from John Roberts to the Attorney General Regarding *University of Richmond v. Bell*, August 31, 1982.

[49] Fred Barbash, "Court Restricts Application of Sex Bias Law," *Washington Post*, February 29, 1984. Shortly thereafter, Roberts and two White House colleagues prepared questions and answers regarding *Grove City* for President Reagan's use at an upcoming Women State Legislators Luncheon, attempting to make the ruling look like something positive for women, when in fact it had significantly narrowed Title IX:

> This case is just not clearly understood and has been misportrayed. Rather than narrowing the scope of enforcement in the Grove City case, we succeeded in broadening its reach. If we hadn't won the case, we would not be able to extend enforcement at all to

Members of Congress reacted immediately to *Grove City* with bipartisan efforts to overturn the "program-specific" holding. Various legislative proposals to overrule the restrictive aspects of the decision were immediately introduced. These proposals were largely opposed by the Reagan administration. In 1985, Roberts, then associate counsel to the President, wrote that "we are engaged in a struggle to prevent the dramatic expansion of civil rights coverage proposed by some under the guise of overturning *Grove City*."[50]

Eventually, a large bipartisan majority of both houses of Congress overrode President Reagan's veto and passed legislation – the Civil Rights Restoration Act of 1987 (which was passed in 1988) – that codified the original commonsense understanding of Title IX, as well as of parallel civil rights laws such as Title VI, that institutions receiving federal funds in one program must comply with federal anti-discrimination laws throughout the institution.[51]

While serving in the Reagan Justice Department as special assistant to Attorney General William French Smith, Roberts opposed the government's intervention in a sex discrimination case (*Canterino v. Wilson*) involving disparities between training programs available to male and female prisoners in Kentucky.[52] In doing so, he urged Attorney General Smith to disregard the views of ultra-conservative Civil Rights Division head William Bradford Reynolds, who recommended that the government intervene on behalf of the women.[53] Among the reasons Roberts gave for not intervening

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colleges like Grove City.

Memorandum from Lee L. Verstandig to Richard G. Darman, March 1, 1984.

[50] Memorandum from John G. Roberts to Fred Fielding re Grove City -- Civil Rights Legislation, April 12, 1985.

[51] Public Law 100-259.

[52] Memorandum from John Roberts to the Attorney General, re Proposed Intervention in Canterino v. Wilson, February 12, 1982.

[53] Id. As noted earlier, being to the right of Reynolds on a civil rights case was no mean feat; Reynolds' nomination to be associate attorney general was rejected in 1985 by the Republican-controlled Senate Judiciary Committee in large part based on his restrictive approach to enforcing civil rights laws.

was his contention that providing equality to female prisoners might be too costly. The disturbing notion that cost should trump equality is the kind of reasoning that, if accepted, would make it difficult to address entrenched discrimination. Fortunately, Roberts' advice was not taken, the government did intervene, and the court ruled for the women.[54]

In addition, in a 1984 memo Roberts ridiculed the gender pay equity theory of equal pay for comparable work as a "radical redistributive concept" and mocked the three women Republican members of Congress who had asked the administration not to intervene in a district court ruling that had embraced the theory. Roberts wrote, "Their slogan might as well be 'from each according to his ability, to each according to her gender.'"[55]

Roberts' efforts to limit protection against sex discrimination continued later in his career. When he was principal deputy solicitor general to Ken Starr, Roberts tried to limit remedies for discrimination against women under Title IX. In *Franklin v. Gwinnett County Public Schools*, Roberts urged the Supreme Court to hold that victims of sex discrimination in violation of Title IX cannot obtain monetary damages,[56] a view that would have left some victims – including the plaintiff in this case – without any remedy at all for sex discrimination in violation of federal law. A unanimous Supreme Court, including Justices Scalia and Thomas and Chief Justice Rehnquist, rejected Roberts' arguments.[57] Documents concerning this case are among those being sought by the Judiciary Committee Democrats in their document request to the administration.[58]

In addition, also as the political deputy solicitor general, Roberts urged the Supreme Court to interpret Title VII, federal law prohibiting sex discrimination in

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[54] *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982).

[55] Memorandum from John G. Roberts to Fred F. Fielding re Nancy Risque Request for Guidance on Letter from Congresswoman Snowe et al., February 20, 1984.

[56] Brief for the United States as *Amicus Curiae, Franklin v. Gwinnett County Public Schools*, No. 90-918, May 1991.

[57] *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

[58] Office of Senator Leahy, "Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee," July 29, 2005.

employment, in a manner that would allow employers to deny certain jobs to fertile women even though they are fully qualified to perform them, on the basis that the jobs could be harmful to fetuses if the women were pregnant.[59] One woman who worked for the company involved in the case, *UAW v. Johnson Controls*, actually chose to be sterilized so that she could keep her job.[60] The Supreme Court rejected this view of Title VII, explaining that it was contrary to the language of the statute and its legislative history.

Discrimination and segregation in education and housing

While serving in the Reagan and first Bush administrations, Roberts repeatedly took positions that would have had the effect of limiting the ability of people to turn to the federal courts to challenge state and local laws and policies that resulted in unequal access to educational opportunities.

Thirty years ago, as part of a wave of anti-immigrant sentiment and activity, the Texas legislature passed a law designed to keep undocumented immigrant children from attending public schools in the state. In 1982, in its ruling in *Plyler v. Doe*, the Supreme Court struck down the Texas law as unconstitutional. 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. "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."[61]

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

[59] Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* Supporting Petitioners, *UAW v. Johnson Controls*, No. 89-1215, 1989 U.S. Briefs 1215, June 1, 1990.

[60] *UAW v. Johnson Controls*, 499 U.S. 187, 192 (1991).

[61] *Plyler v. Doe*, 457 U.S. 202 (1982).

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 government barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[62]

But as special assistant to Attorney General William French Smith, Roberts criticized the Supreme Court's ruling in *Plyler*. In an internal memo, Roberts and a colleague complained that the Reagan administration should have weighed in on the case and "could well have" changed the outcome.[63]

Also while serving in the Reagan administration, Roberts contended that Congress could pass a law preventing all federal courts from ordering busing to achieve school desegregation under any circumstances, a position even more extreme than that advanced by Theodore Olson and adopted by the Reagan administration. [64]

This restrictive view of equal educational opportunity and school desegregation by Roberts continued. As political deputy to Ken Starr in the Solicitor General's office, Roberts argued in an *amicus* brief against the efforts of black families to pursue claims that schools in a district that had been ordered to desegregate would become resegregated without further court action.[65] Also as principal deputy solicitor general, Roberts urged the Supreme Court to reverse a Court of Appeals ruling and order the partial termination of a school district's desegregation decree. Documents concerning these cases, *Board of Education of Oklahoma City v. Dowell* and *Freeman v. Pitts*, are among those being

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[62] Id.

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

[64] Jo Becker and Amy Argetsinger, "The Nominee as a Young Pragmatist," *Washington Post*, July 22, 2005.

[65] Brief for the United States as *Amicus Curiae*, *Board of Education of Oklahoma City v. Dowell*, No. 89-1080, 1989 U.S. Briefs 1080 (June 1, 1990).

sought by the Judiciary Committee Democrats in their document request to the administration.[66]

And in a case in which the U.S. had taken the side of black citizens protesting segregation and inequality, a Roberts-filed brief significantly retreated from that position. In *U.S. v. Fordice*, the Justice Department had earlier argued that Mississippi could not remedy segregation and inequality in higher education simply by offering all students so-called "freedom of choice", in light of the historic and continuing segregation and inferiority of the state's historically black colleges.[67] Yet the brief supervised and approved by Roberts asserted that the state had no obligation to correct severe disparities harming historically black schools.[68] The Supreme Court rejected the Roberts position and held that so-called freedom of choice was not enough and Mississippi must fully dismantle all policies and practices that continued to foster segregation.[69]

Roberts also took a position in support of dramatically weakening the Education for All Handicapped Children Act. In *Hendrick Hudson Dist. Bd. of Educ. v. Rowley***,** the case of a deaf student who got by in school by lip-reading and using a hearing aid to boost her minimal residual hearing, lower federal courts ruled that her achievement was well below her potential and she was qualified under the Act to receive the services of a sign-language interpreter in the classroom. The solicitor general's office supported the student's claim in the Supreme Court, but in a majority opinion written by Justice Rehnquist, the Court reversed the lower court's ruling, saying the student was entitled only to an adequate education and that states were not required to "maximize the potential of handicapped children commensurate with the opportunity provided to other children." In a dissent, Justice White noted the law's guarantee of a "free and appropriate education," and its definition of special education and "specifically designed instruction,

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[66] Office of Senator Leahy, "Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee," July 29, 2005.

[67] Susan Carle, "What Roberts Argued," *Legal Times*, August 1, 2005.

[68] Brief for the United States as Petitioner, United States v. Fordice, Nos. 90-1205 and 90-6588, 1990 U.S. Briefs 1205, at *31-*33 (July 1, 1991)

[69] United States v. Fordice, 505 U.S. 717,729 (1992).

at no cost to parents or guardians to meet the unique needs of a handicapped child." After the ruling, Roberts wrote a memo to the attorney general denouncing the lower court rulings as "an effort by activist lower court judges" and saying the solicitor general had been wrong to support the student's claims.[70]

While in the White House, Roberts also sought to slow progress on combating discrimination in housing. He argued that the administration should "go slowly" on proposed fair housing legislation, claiming that such legislation represented "government intrusion."[71] In 1988, President Reagan proudly signed far reaching fair housing legislation, which was enacted with overwhelming bipartisan support.[72]

PRIVACY AND REPRODUCTIVE FREEDOM

Roberts' record strongly suggests that he does not believe that the Constitution guarantees or protects a right to privacy. In a 1981 memo that Roberts wrote as special assistant to Attorney General William French Smith, Roberts referred dismissively to the "so-called 'right to privacy'" that formed the basis of the Supreme Court's *Roe v. Wade* decision.[73] And an article that Roberts apparently drafted for the attorney general derided the Court's earlier *Griswold v. Connecticut* ruling that privacy is a fundamental right protected by the Constitution.[74]

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[70] Memorandum from John Roberts to the Attorney General re government participation and Supreme Court decision in Bd. of Educ v. Rowley, July 7, 1982.

[71] Memorandum from John Roberts to Fred Fielding re Fair Housing, January 31, 1983.

[72] National Council on Disability. "Reconstructing fair housing" 11/6/01 at www.ncd.gov.newsroom publications/2001/fairhousing.htm.

[73] Memorandum from John Roberts to the Attorney General, re Erwin Griswold Correspondence, December 11, 1981.

[74] Draft Article on Judicial Restraint, and Mike Allen and R. Jeffrey Smith, "Judges Should Have 'Limited' Role, Roberts Says" *Washington Post*, August 3, 2005 (quoting Roberts' Reagan administration colleague, Bruce Fein, re the draft article: "my judgment is yes, that John wrote it.").

During his confirmation hearing for the appeals court, Roberts refused to say whether he believes there is a constitutional right to privacy,[75] even though more than two-thirds of Americans believe a Supreme Court nominee should be required to tell senators the answer to that question.[76] Roberts' refusal to answer questions about a right to privacy stands in stark contrast to the testimony of then-Supreme Court nominee Ruth Bader Ginsburg. When asked a specific question about a right to privacy, Ginsburg said:

> There is a constitutional right to privacy composed of at least two distinguishable parts. One is the privacy expressed most vividly in the fourth amendment: The Government shall not break into my home or my office without a warrant, based on probable cause; the Government shall leave me alone. The other is the notion of personal autonomy. The Government shall not make my decisions for me. I shall make, as an individual, uncontrolled by my Government, basic decisions that affect my life's course. Yes, I think that what has been placed under the label privacy is a constitutional right that has those two elements, the right to be let alone and the right to make basic decisions about one's life's course.[77]

Justice Ginsburg's clear and direct answer is particularly relevant given that Progress for America is citing a supposed "Ginsburg Precedent" to justify Roberts' refusal to answer questions on important constitutional issues.[78]

Roberts' apparent belief that the Constitution does not protect a right to privacy is extraordinarily troubling and would potentially have a very damaging impact on Americans' freedom to live their lives free of government intrusion into the most intimate

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[75] Senate Judiciary Committee Confirmation Hearing, April, 30, 2003.

[76] Richard Morin, Charles Babington, "Nominee Supported by a Majority in Poll" *Washington Post*, July 23, 2005.

[77] Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Hearing Before the Committee on the Judiciary, United States Senate, July 20-23, 1993

[78] Progress for America's "Up or Down Vote," "The Ginsburg Precedent," http://www.judgeroberts.com/epresskit/ginsburg_precedent.pdf

decisions made by individuals and families, including decisions regarding medical treatment. Roberts' writing about *Griswold* indicates that he would see no constitutional barrier to laws prohibiting even married couples from using contraception. And his hostility to the notion of a constitutional right to privacy certainly suggests that he would not have supported the Court's 2003 decision in *Lawrence v. Texas,* which overturned state sodomy laws applying to consenting adults in private. Such laws had a devastating impact on peoples' lives because they were used to justify depriving them of jobs and even custody of their children.

Reviewing Roberts' record on privacy, a *USA Today* editorial questioned whether "few would want a nation in which there is no limit on government intrusion into personal lives" and noted, "Three current justices…have questioned whether a right to privacy exists. The court doesn't need a fourth, not least because the anti-privacy argument is a denial of history and basic American values."[79]

Reproductive Freedom

In 1990, as political deputy to Solicitor General Ken Starr, a Roberts brief urged the Supreme Court to overturn *Roe v. Wade,* the landmark decision protecting women's constitutional right to reproductive choice. He did so in a case that did not directly involve the validity of *Roe v. Wade* (Rather, it involved the validity under the First Amendment of an abortion "gag rule" regulation, which prohibited federally funded family planning clinics from discussing abortion with patients.) Roberts' brief proclaimed that "[w]e continue to believe that Roe was wrongly decided and should be overruled" and that the Court's ruling that a woman has a fundamental right to make her own reproductive choices about abortion has "no support in the text, structure or history of the Constitution."[80] Documents concerning this case, *Rust v. Sullivan,* are among

[79] Editorial, "Will Roberts Leave You Alone?," *USA Today*, August 15, 2005.

[80] Brief for the Respondents, *Rust v. Sullivan* No. 89 – 1391, 1989 U.S. Briefs 1391, September 7, 1990.

those being sought by the Judiciary Committee Democrats in their document request to the administration.[81]

In another Supreme Court case, *Bray v. Alexandria Women's Health Clinic*, Roberts as principal deputy solicitor general urged a narrow interpretation of a federal civil rights law that would prevent it from being used to protect women seeking abortions and reproductive health clinics that were under siege from a national campaign by Operation Rescue. The United States was not a party in the case and need not have chosen to weigh in, but nonetheless did so on the side of those who were engaged in unlawful and sometimes violent measures to prevent women from exercising their constitutional right to reproductive freedom. At issue was the applicability to the clinic blockaders of a law passed in 1871 to prohibit mobs from preventing Americans from exercising their constitutional rights – a law known as the Ku Klux Klan Act. A federal district court ruled in favor of the clinics and the appeals court affirmed. Roberts, while saying the Justice Department was not defending Operation Rescue's actions, argued against the application of the civil rights law because he contended that the blockade of the clinics did not amount to discrimination against women.[82]

While the *Bray* case was still pending in the Supreme Court, a federal judge in Wichita, Kansas ordered federal marshals to help keep clinics open in that city in the face of a massive blockade by Operation Rescue. Patients and staff were physically harassed by huge mobs designed to overwhelm the ability of small police forces to keep clinics open. Here again the Justice Department weighed in on the side of Operation Rescue to argue that the Ku Klux Klan Act did not apply and that the court had no authority to issue its order, and Roberts went on national television to defend the Department's action and arguments.[83] As he did in *Bray*, Roberts contended that the federal court had no role to play in upholding the rights of the clinic patients, one more example of Roberts arguing

[81] Office of Senator Leahy, "Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee," July 29, 2005.

[82] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985, 1990 U.S. Briefs 985, April 11, 1991.

[83] Transcript, "The MacNeil/Lehrer NewsHour," August 7, 1991.

to limit the scope of federal civil rights laws and the role of the federal courts in upholding them.

In *Bray*, a divided Supreme Court adopted Roberts' position, withdrawing federal protection for clinics and their patients. Justice O'Connor, one of the dissenters, stated that "[t]his case is not about abortion…Rather, this case is about whether a private conspiracy to deprive members of a protected class of legally protected interests gives rise to a federal cause of action."[84] O'Connor noted that "[Operation Rescue and its co-defendants] act in organized groups to overwhelm local police forces and physically blockade the entrances to respondents' clinics with the purpose of preventing women from exercising their legal rights. [The Ku Klux Klan Act] provides a federal remedy against private conspiracies aimed at depriving any person or class of persons of the 'equal protection of the laws,' or of 'equal privileges and immunities under the laws.' In my view, respondents' injuries and petitioners' activities fall squarely within the ambit of this statute.[85]

Congress responded to *Bray* in 1994 by overwhelmingly passing the Freedom of Access to Clinic Entrances Act to protect women and health care providers from harassment and violence. Recognizing the importance of federal enforcement of a woman's right to choose, Congress made it a federal offense to obstruct access to abortion clinics and provided a cause of action in federal court for those whose rights under FACE have been violated.[86]

Deborah Ellis, an attorney who represented the clinics in Bray, acknowledges that Roberts made clear in his Supreme Court argument that the Justice Department was defending what it saw as the proper interpretation of the 1871 law, not Operation Rescue's unlawful conduct. "But no courtroom caveat can erase the impact of the federal

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[84] 506 U.S. 263.354.55 (O,Connor, J., dissenting).

[85] Id.

[86] National Abortion Federation. FACE Act fact sheet. 2004 at www.prochoice.org/about_abortion/facts/face_act.html.

government's lending its weight on the side of the mob intent on stopping women from exercising a constitutional right," Ellis writes, "It was a devastating blow."[87]

Religious Liberty and Separation of Church and State

Roberts has a record of hostility to the separation of church and state, which protects all Americans' religious liberty. Recently released documents from his years in the Reagan administration include his endorsement of a speech attacking "four decades of misguided" Supreme Court decisions on the role of religion in public life,[88] a formulation that reflects Radical Right leaders' hostility to landmark decisions upholding church-state separation and affirming government neutrality toward religion.

Just this June, the Supreme Court barely reaffirmed the key constitutional principle of government neutrality toward religion by a 5-4 vote, with Justice O'Connor casting a decisive vote. Jay Sekulow, who heads Pat Robertson's legal arm, the American Center for Law and Justice, recently told archconservative journalist Hugh Hewitt in regard to that case, "I definitely think that a John Roberts on the Court, with his view of the Establishment Clause, would have come out the other way on that. We would have carried the day."[89] Indeed, Roberts' record clearly indicates that he would allow government endorsement and favoritism of religion; his confirmation could open the door to a range of activities that threaten religious liberty, including coercive religious practices in public schools.

Roberts' record in this area spans a large portion of his career. In 1985, while serving in the Reagan White House, Roberts wrote a memo in which he referred approvingly to then-Justice Rehnquist's effort to "revolutionize Establishment Clause jurisprudence" by overturning the Supreme Court's long-established criteria for

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[87] Deborah Ellis, "Questions for John Roberts," *Washington Post,* August 17, 2005.

[88] Amy Goldstein, R. Jeffrey Smith and Jo Becker, "Roberts Resisted Women's Rights," *Washington Post,* August 19, 2005.

[89] Jay Sekulow appearing on the Hugh Hewitt Show, August 16, 2005, http://hughhewitt.com/archives/2005/08/14-week/index.php#a000085

determining when government laws and policies violate the Establishment Clause (the *"Lemon* test*").*[90] The Rehnquist dissent came in a case in which the Supreme Court overturned an Alabama law authorizing public schools to being the day with a minute of silence for "meditation or voluntary prayer" (*Wallace v. Jaffree*), a ruling that Roberts said "seems indefensible."[91]

In another internal memo, Roberts reviewed a proposed speech by Education Secretary William Bennett, which depicted the Supreme Court's efforts to uphold church-state separation as betraying "a hostility to religion not demanded by the Constitution."[92] Among the cases Bennett singled out for criticism was a 1980 decision *(Stone v. Graham)* striking down a Kentucky law requiring that every public school classroom in the state post a copy of the Ten Commandments. Roberts said he had "no quarrel with Bennett on the merits."

Later in his career, as political deputy to then Solicitor General Ken Starr in the first Bush administration, Roberts signed a brief urging the Supreme Court to uphold school-sponsored prayer at graduation ceremonies, contending that the practice was not coercive. [93] The Court rejected Roberts' position, and in its opinion specifically criticized the government's arguments as wrong under the First Amendment. Significantly, the federal government was not a party in this case and had no obligation to participate. Documents concerning this case, *Lee v. Weisman*, are among those being sought by the Judiciary Committee Democrats in their document request to the Bush administration.[94]

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

[91] Memorandum from John G. Roberts to Fred F. Fielding re S.J. Res. 2 – Constitutional Amendment to Permit Silent Prayer in Schools, November 21, 1985.

[92] Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus, August 6, 1985 and attached draft Bennett speech, August 7, 1985.

[93] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lee v. Weisman*, no. 90-1014, 1990 U.S. Briefs 1014 (May 24, 1991).

[94] Office of Senator Leahy, "Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee," July 29, 2005.

Roberts' positions could lead to a reversal of constitutional protections for religious liberties, especially for Americans of minority faiths.

ACCESS TO JUSTICE

Roberts on many occasions has called for a restricted role for the courts. If he is confirmed to the Supreme Court, Americans seeking relief in the federal courts on a wide range of issues, from discrimination to environmental protection are likely to have reduced access to justice.

As previously mentioned, as special assistant to Attorney General William French Smith in the Reagan Justice Department, Roberts argued that Congress could strip the Supreme Court of the authority to rule on cases regarding school prayer, abortion, busing for desegregation and other issues, a position even more extreme than that advanced by Theodore Olson and adopted by the Reagan administration. Even Robert Bork believed that the court stripping plans were unconstitutional. David Brink, then President of the American Bar Association, described the court-stripping bills as "a legislative threat to our nation that may lead to the most serious constitutional crisis since our great Civil War." [95] The Conference of Chief Justices of the States resolved unanimously that court stripping bills are a "hazardous experiment with the vulnerable fabric of the nation's judicial system."[96] But when Olson argued that court stripping legislation was a threat to checks and balances, Roberts wrote, "Real courage would be to read the Constitution as it should be read and not kowtow" to liberal thinkers.[97]

In addition to previously mentioned cases in which Roberts was involved as principal deputy solicitor general are a number in which the government was arguing to restrict individuals' access to justice. These include briefs in two cases arguing that

[95] Stuart Taylor, Jr., "Bar Group to Debate Law School Issue Again," *New York Times*, January 24, 1982.

[96] David Margolic, "State Judges are Shaping Law that Goes Beyond Supreme Court," *New York Times*, May 19, 1982.

[97] "Roberts Documents Reveal a Conservative," CNN Political Unit, Thursday, July 28, 2005..

citizens lack the authority to sue the government over environmental harms, and a brief in which the solicitor general's office urged the Court to severely curtail *Miranda* rights by ruling that federal courts may not entertain *Miranda* claims in habeas corpus petitions filed by state prisoners.[98]

PRESIDENTIAL POWER, CONGRESSIONAL AUTHORITY, AND ROLE OF COURTS

One of the most important issues regularly before the Supreme Court is the constitutional authority of Congress to enact and enforce legislation. A critical issue facing the Court, particularly given the war on terror, is the extent of executive authority, and whether the President will exercise untrammeled unilateral power, unchecked by the Court. Also, in recent years, a narrow majority on the Court has pursued a new "federalism" revolution, undermining congressional power through narrow interpretations of the Commerce Clause and Section 5 of the Fourteenth Amendment.

John Roberts' record raises troubling concerns about his legal views concerning the powers of the executive and legislative branches of government. In particular, it appears that Roberts views the Constitution as creating a supreme executive, and also that he would support the "federalist" revolution that seeks to interpret the Constitution in a manner that would undercut the authority of Congress to enact and enforce laws protecting the important rights and interests of all Americans.

Executive Power

While working in the Reagan and Bush administrations, Roberts was a strong advocate of presidential power, including even at the expense of independent regulatory agencies. For example, in a July 15, 1983 memorandum to White House counsel Fred Fielding, Roberts commented favorably on proposed Justice Department testimony suggesting that it was time to "reconsider the existence" of independent regulatory

[98] Request for John Roberts' Department of Justice Documents, background information accompanying document request from Judiciary Committee Democrats to Attorney General Alberto Gonzales, July 29, 2005.

agencies and to "take action to bring them back within the executive branch." Roberts recognized that the suggestion was "provocative" but specifically agreed that such agencies are a "Constitutional anomaly."[99] This view of independent agencies like the FCC and the FTC is extremely troubling. It would significantly expand presidential power and undermine the independence of agencies charged with regulating corporate behavior.

In recent years, the administration of President George W. Bush has engaged in some of the most extensive uses and abuses of executive power in American history. Several legal challenges to the administration's exercise of power have come before Roberts in his short career as a federal judge. He has shown significant deference to presidential authority and the executive branch in its use of power and its interpretation of law.

For example, in *Hamdan v. Rumsfeld*, No. 04-5393, 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005), Judge Roberts joined in a 3-0 ruling that upheld the military commissions created by the Bush administration to try foreign nationals held at Guantanamo Bay for war crimes. The ruling was such a sweeping acceptance of the administration's position that one journalist wrote that "Roberts signed on to a blank-check grant of power to the Bush administration to try suspected terrorists without basic due-process protections."[100] (Several legal ethicists have raised questions about the propriety of Roberts hearing and ruling on a case so important to the Bush administration at the very time he was actively interviewing with White House officials for a possible Supreme Court nomination.)[101]

Since the use of the U.S. naval base at Guantanamo Bay as a detention facility for suspected al Qaeda and Taliban members, serious questions have been raised regarding

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[99] Memorandum from John G. Roberts to Fred F. Fielding, July 15, 1983.

[100] Emily Bazelon, "Thank You, Mr. President: Last week, John Roberts wrote Bush a blank check," *Slate*, July 26, 2005, http://slate.com/id/2123055

[101] Stephen Gillers, David J. Luban, and Steven Lubet, "Improper Advances: Talking Dream Jobs with the Judge Out of Court," *Slate*, August 17, 2005, http://www.slate.com/id/2124603/

the treatment of detainees there. Reportedly, hundreds of detainees have been held at the facility for three years or more, and, of that number, only four have been formally charged. Several civil and human rights groups filed briefs in Hamdan's case, arguing that the facility's conditions, in addition to the interrogation techniques employed there, could result in coerced confessions and false statements that could be used in the military commissions. On November 8, 2004, the district court granted Hamdan's habeas petition, holding, among other things, that the military commissions were unlawful. 344 F. Supp. 2d 152 (D.D.C. 2004). The court also concluded that the 1949 Geneva Convention is a self-executing treaty that is effective as domestic law and that Hamdan must be given its protection unless and until a "competent tribunal" concludes otherwise.

On appeal, a three-judge panel of the D.C. Circuit, including Judge Roberts, reversed, accepting the position of the Bush administration that the military commissions were lawful and authorized by Congress based primarily on the general congressional authorization to use force against terrorists. In addition, the Court of Appeals disagreed with the district court that the Geneva Convention was self-executing, agreeing with the Bush administration that its provisions were not enforceable in court.

Two of the judges, including Roberts, held that the treaties do not apply to suspected members of al Qaeda, accepting the administration's argument that the President's decision that the Geneva Convention applies to Taliban detainees, but not to al Qaeda detainees, is non-reviewable. On that point, the majority said that "the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him. To the extent there is ambiguity about the meaning of [Geneva Convention] Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail." 2005 U.S. App. LEXIS 14315 at *24 (internal citation omitted).[102]

[102] Judge Williams, who otherwise concurred "in all aspects of the court's opinion," would have held that the Geneva Convention does apply "to the United States' conduct toward al Qaeda personnel captured in the conflict in Afghanistan." 2005 U.S. App. LEXIS 14315, at *30. However, Judge Williams agreed with the majority that the Geneva Convention "is not

Georgetown University law professor Neal Katyal and Navy Lt. Commander Charles D. Swift, who are counsel in the case, explained that the ruling of the Court of Appeals "is contrary to 200 years of constitutional law. [The] ruling places absolute trust in the president, unchecked by the Constitution, statutes of Congress and long-standing treaties ratified by the Senate of the United States."[103]

In another case, *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1928 (2005), Judge Roberts alone among his colleagues on a three-judge panel sided with the Bush administration, this time in its efforts to retroactively deprive the federal courts of jurisdiction to hear claims brought against Iraq by American soldiers held and tortured as POWs there during the first Gulf War. In *Acree*, seventeen American soldiers who had been held as prisoners of war and tortured by Iraq during the Gulf War sued the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Under the FSIA, foreign states are immune to suits for money damages. The terrorism exception applies to damages claims for personal injury or death caused by torture or other acts of terrorism.

The district court entered a default judgment against the defendants after they failed to appear and awarded compensatory and punitive damages to the plaintiffs totaling more than $959 million. The Bush administration moved to intervene to contest the district court's subject matter jurisdiction, arguing that the Emergency Wartime Supplemental Appropriations Act (EWSAA) "made the terrorism exception of the FSIA inapplicable to Iraq and thereby stripped the District Court of its jurisdiction" over the suit. 370 F.3d at 43. The district court denied the motion as untimely and the administration appealed.

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enforceable in courts of the United States . . . ." Id.

[103] Robert Burns, "Court: U.S. Can Resume Detainee Tribunals," *Washington Post*, July 16, 2005.

All three members of the D.C. Circuit panel, which included Judge Roberts, agreed that the district court had erred in denying the motion to intervene. All three judges also agreed that the plaintiffs could not pursue their claims. However, Judge Roberts alone would have gone further and adopted the position of the Bush administration that the federal courts did not even have jurisdiction to hear the plaintiffs' claims for damages resulting from torture and other acts that occurred when Iraq was designated as a terrorist state.[104]

In another area relating to civil liberties, recently released documents from Roberts' tenure in the Reagan administration reveal that Roberts personally disagreed with the position of the White House counsel's office in opposition to a national identification card. Many members of Congress and others have had concerns about the civil liberties implications of a national identification card, even in the aftermath of the 2001 terrorist attacks. Roberts, in an October 1983 memo, dismissed such concerns as "largely symbolic."[105] Roberts went on to say, "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."[106]

Congressional Power and the New Federalism

In recent years, a narrow majority on the Supreme Court, as well as a number of lower court judges, urged on by a right-wing legal and political movement, have launched a "states' rights/federalism" revolution, cutting back on the authority of Congress to enact and enforce critical laws important to Americans' rights and interests, including laws prohibiting discrimination and protecting the environment. The Court's "federalism" rulings have struck down all or important parts of a number of federal laws by narrowly construing congressional power under the Commerce Clause and Section 5

[104] 370 F.3d at 60-65

[105] Memorandum from John G. Roberts to Fred F. Fielding re National I.D. Comments, October 21, 1983.

[106] Id.

of the Fourteenth Amendment, and by giving an expansive reading to state sovereign immunity under the Eleventh Amendment.[107]

As discussed above, while serving in the Reagan administration, long before the "federalism" movement gained significant ground in the courts, Roberts espoused that view in opposing federal voting rights. As a judge, Roberts has already given a strong indication that he subscribes to the ideology of this new "federalism" revolution. In *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), cert. denied, 541 U.S. 1006 (2004), Roberts issued a troubling dissent from the decision by the full D.C. Circuit not to reconsider the ruling by a three-judge panel upholding the constitutionality of the Endangered Species Act as applied in this case.

The lawsuit involved a real estate development company's contention that the application of the Endangered Species Act to its construction project in California was an unconstitutional exercise of federal authority under the Commerce Clause. After the United States Fish and Wildlife Service determined that the company's project "was likely to jeopardize the continued existence of the arroyo southwestern toad," placed on the Endangered Species List by the Secretary of the Interior in 1994, the company filed suit "[r]ather than accept an alternative plan proposed by the Service." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003).

The district court dismissed the company's complaint, and a panel of the D.C. Circuit (not including Judge Roberts) unanimously upheld the dismissal (323 F.3d 1062), following prior D.C. Circuit precedent upholding congressional authority under the Endangered Species Act. The panel's ruling not only followed D.C. Circuit precedent, but was also consistent with a recent ruling of the Fourth Circuit in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001). The opinion in that case,

[107] See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (Gun Free School Zones Act); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act).

upholding the authority of Congress to protect endangered species on private lands, was written by Judge J. Harvie Wilkinson, an archconservative Republican appointee.

By a vote of 7-2, with only Judges Roberts and Sentelle dissenting, the D.C. Circuit in *Rancho Viejo* denied a petition for rehearing en banc of the panel's ruling. In his dissent from the denial of rehearing, although Judge Roberts indicated that there might be grounds to uphold the application of the Endangered Species Act in this case, he also stated that "[t]he panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" 334 F.3d at 1158.

Roberts' dissent strongly suggested that he thought Congress lacked the power under the Commerce Clause to protect the endangered species in this case and therefore that it would be unconstitutional to apply the Act here. Moreover, Roberts indicated that he may well subscribe to an extremely constricted interpretation of the Commerce Clause recently rejected by a narrow majority of the Supreme Court in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). In *Raich*, the Court majority held that Congress' authority under the Commerce Clause includes the power to prohibit purely local cultivation and use of marijuana for medical purposes even in compliance with state law.

CONCLUSION

John Roberts has spent much of the past two and one-half decades in high-level political and legal positions of great influence. While crucial aspects of his record remain hidden by White House intransigence, the public record that has been revealed over recent weeks demonstrates that Roberts has consistently used his influence to advocate positions that would undermine Americans' fundamental rights and liberties under the Constitution and roll back progress the nation has made toward the achievement of equality and opportunity for all Americans.

The confirmation of John Roberts to replace Justice Sandra Day O'Connor would move the Supreme Court far to the right, to the great and lasting detriment of Americans and the constitutional principles and legal safeguards that protect their families and communities.

We urge senators to vote against Roberts' confirmation.

APPENDIX A

Key 5-4 rulings in which Sandra Day O'Connor was decisive

Sandra Day O'Connor has been the deciding fifth vote in many important Supreme Court decisions affecting civil rights, environmental protection, personal privacy, reproductive freedom and reproductive health, religious liberty, consumer protection and much more. If she is replaced by someone far to her right – more in the mold of Clarence Thomas and Antonin Scalia – the consequences could be devastating. These are among the key 5-4 decisions in danger of being overturned:

Civil rights: affirmative action and discrimination based on sex, race, and disability

Jackson v. Birmingham Bd. Of Educ. (2005) ruled that federal law protects against retaliation against someone for complaining about illegal sex discrimination in federally assisted education programs.

Tennessee v. Lane (2004) upheld the constitutionality of Title II of the Americans with Disabilities Act and required that courtrooms be physically accessible to the disabled.

Grutter v. Bollinger (2003) affirmed the right of state colleges and universities to use affirmative action in their admissions policies to increase educational opportunities for minorities and promote racial diversity on campus.

Davis v. Monroe County Bd. of Educ. (1999) ruled that it is a violation of federal law for school districts to be deliberately indifferent towards severe and pervasive student-on-student sexual harassment.

Brentwood Academy v. Tennessee Secondary School Athletic Association (2001) affirmed that civil rights laws apply to associations regulating interscholastic sports.

Morse v. Republican Party of Virginia (1996) said key anti-discrimination provisions of the Voting Rights Act apply to political conventions that choose party candidates.

Hunt v. Cromartie (2001) affirmed the right of state legislators to take race into account to secure minority voting rights in redistricting.

Environmental protection

Alaska Department of Environmental Conservation v. EPA (2004) said the Environmental Protection Agency could step in and take action to reduce air pollution under the Clean Air Act when a state conservation agency fails to act.

Reproductive rights and privacy

Stenberg v. Carhart (2000) overturned a state law that would have had the effect of banning abortion as early as the 12th week of pregnancy and that lacked any exception to protect a woman's health.

Consumer protection and corporate power

Rush Prudential HMO, Inc. v. Moran (2002) upheld state laws giving people the right to a second doctor's opinion if their HMOs tried to deny them treatment.

Access to justice

Zadvydas v. Davis (2001) told the government it could not indefinitely detain an immigrant who was under final order of removal even if no other country would accept that person and that access to federal courts is available to combat improper, indefinite detention.

Brown v. Legal Foundation of Washington (2003) maintained a key source of funding for legal assistance for the poor.

Hibbs v. Winn (2004) subjected discriminatory and unconstitutional state tax laws to review by the federal judiciary.

Religious liberty and church-state separation

McCreary County v. ACLU of Kentucky (2005) upheld the principle of government neutrality towards religion and ruled unconstitutional Ten Commandments displays in several courthouses

Lee v. Weisman (1992) continued the tradition of government neutrality toward religion, holding that government-sponsored prayer is unconstitutional at public school graduations.

Money, politics and government accountability

McConnell v. Federal Election Commission (2003) upheld most of the landmark McCain-Feingold campaign finance law, including its ban on political parties' use of unlimited soft money contributions.

Federal Election Commission v. Colorado Republican Federal Campaign Committee (2001) upheld laws that limit political party expenditures that are coordinated with a candidate and seek to evade campaign contribution limits.

APPENDIX B

Senators Denied Access to Full Roberts Record

Almost 3000 documents have been withheld from public disclosure by the Ronald Reagan Presidential Library and National Archives, mostly on alleged personal privacy grounds, with virtually no effort to release segregable portions or to justify the withholding.

In addition, the Bush White House has said that it will block senators from seeing key documents from Supreme Court nominee John Roberts' time as the political deputy to Solicitor General Ken Starr in the White House during the Bush "41" administration.

The White House continues to argue that the Solicitor General documents are protected by attorney-client privilege, despite the fact that, as documented below, former Senator Fred Thompson – the man selected by the Bush White House to shepherd the Roberts nomination – himself rejected a similar argument when he was in the Senate. In addition, as set forth below, there is ample precedent for the release of such documents to the Senate in connection with past nominations to the Supreme Court, the Attorney General's office, and the federal appellate courts.

As Senate Judiciary Committee Democrats noted in their documents request to Attorney General Alberto Gonzales:

> During John Roberts' term as Deputy Solicitor General, the Solicitor General's Office was involved in hundreds of landmark cases affecting the rights of all Americans. Democratic members of the Senate Judiciary Committee have requested information on Judge Roberts' involvement in just 16 of the hundreds of cases the Solicitor General's office litigated while Judge Roberts served in a policy-making role in the office. Each of these cases raises important issues about civil rights, and fundamental Constitutional principles. Americans deserve to know more about his views on these issues before the Senate decides whether to confirm him to the nation's most powerful court.

The senators' carefully targeted request focuses on only 16 cases, less than one-fifth of the 81 cases in which he signed briefs.

<u>This is how the senators described the cases for which they are seeking documents:</u>

Board of Education of Oklahoma City v. Dowell, 498 U.S. 237 (1991), was an important school desegregation case in which John Roberts filed an *amicus* brief opposing efforts of African American families to pursue claims that their local schools would become re-segregated.

In ***Bray v. Alexandria Women's Health Clinic***, 506 U.S. 263 (1993), John Roberts filed an amicus brief and participated in oral argument requesting that the Court hold that the obstruction of family planning clinics by anti-abortion activists did not harm women because of their gender in violation of federal law.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), was a landmark case rejecting John Roberts' arguments to limit relief under Title IX for students who suffer even the most severe gender harassment. If accepted, his arguments would also have undermined other important civil rights prohibiting discrimination with federally funded programs, including Title VI of the 1964 Civil Rights Act (prohibiting race and ethnic discrimination), Section 504 of the Rehabilitation Act (prohibiting disability discrimination), and the Age Discrimination Act of 1975) all which contain language nearly identical to that in Title IX.

In ***Freeman v. Pitts***, 503 U.S. 467 (1992), John Roberts filed a brief urging the Supreme Court to reverse a Court of Appeals ruling that required a Georgia school district to make further efforts to fully de-segregate its public schools.

In ***Herrera v. Collins***, 506 U.S. 390 (1993), the Solicitor General's office filed a brief arguing that a Texas man could not seek relief in federal court based on his claim that new evidence showed he was actually innocent of the crime for which he had been sentenced to death.

Lee v. Weisman, 505 U.S. 577 (1992) involved the question of whether a prayer by clergy selected by the public school at a graduation ceremony violates the principle that the government should not favor a particular religion.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Solicitor General's Office filed a brief arguing that the state had taken petitioner's property within the meaning of the Fifth Amendment when it passed building regulations which had the result of forbidding petitioner from building a permanent structure on his property, and that the state therefore must compensate him. John Roberts was not on the briefs.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), is an important environmental case in which the Solicitor General argued to deny a citizen standing to challenge environmental harm. John Roberts was not on the briefs.

In ***Lujan v. National Wildlife Federation***, 497 U.S. 871 (1990), John Roberts argued as acting Solicitor General urging the Court to narrow citizens' ability to challenge unlawful land use decisions as harmful to the environment. John Roberts was on the brief and participated in oral argument.

In ***Metro Broadcasting, Inc. v. Federal Communications Commission***, 497 U.S. 547 (1990), as acting Solicitor General, John Roberts filed a brief contrary to the position taken by the FCC, in which he unsuccessfully attacked the FCC's affirmative action program with regard to applications for new broadcast licenses.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), is a landmark case holding that the constitutional right to privacy regarding reproductive decisions prevents the state from requiring women to notify their husbands before deciding to have an abortion. The Solicitor General's office filed a brief in the case that urged the Court to overturn *Roe v. Wade*. John Roberts was not on the brief.

Rust v. Sullivan, 500 U.S. 173 (1991), upheld the validity of an abortion "gag rule" regulation under the First Amendment, and did not directly involve *Roe v. Wade*. The Solicitor General's brief in the case, which Roberts co-authored, not only argued to uphold the regulations, but also went further to urge the Court to reverse *Roe*.

Saudi Arabia v. Nelson, 507 U.S. 349 (1993). Solicitor General's Office filed an amicus brief arguing that the Saudi Arabian government should be immune from a lawsuit by an American who claimed he was recruited to work for the kingdom and then imprisoned and tortured. Roberts was on the brief.

Suter v. Artist M, 503 U.S. 347 (1992). In an important case concerning when a citizen's right to sue can be implied from a statute, the Solicitor General's office filed an amicus brief urging the Court to interpret an Adoption Assistance statute narrowly so as to preclude abused children from suing the states for failing to take reasonable actions to ensure that foster children are reunified with their natural families where possible. John Roberts was on the brief and participated in oral argument.

Voinovich v. Quilter, 507 U.S. 146 (1993), a key Voting Rights Act case in which the Solicitor General filed a brief opposing claims by minority voters in Ohio. John Roberts co-authored the Solicitor General's brief.

Withrow v. Williams, 507 U.S. 680 (1993), was a key case in which the Solicitor General's office urged the Court to severely curtail *Miranda* rights by ruling that federal courts may not entertain *Miranda* claims in habeas corpus petitions filed by state prisoners. John Roberts was on the brief and participated in oral argument.

Precedents for Release of Solicitor General Documents

There are numerous examples of the release to the Senate of internal Solicitor General and similar documents during the consideration of judicial and executive branch nominations. As Senator Patrick Leahy stated on March 18, 2003 during Senate consideration of Miguel Estrada's nomination to the U.S. Court of Appeals for the District of Columbia, "Past administrations have provided such legal memoranda in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott and Ben Civiletti, and even this Administration did so with a nominee to the environmental Protection Agency."

Examples of documents released to the Senate while considering confirmation of particular nominees include:

Robert H. Bork nomination to be Associate Justice of the Supreme Court

- Memo from Solicitor General to the Attorney General on pocket vetoes (Bork nomination hearing record: S. Hrg. 100-1011, Pr. 1, at page 177).
- Memo to the Solicitor General from the Assistant Attorney General, Civil Rights Division regarding appeal of Omaha school desegregation case. See *Confirmation Hearings on Federal Appointments,* Hearings before the Senate Committee on the Judiciary, Part 5, 107th Cong. 2nd Sess. (August 1, September 18, September 26, and October 7, 2002).
- Memo to the Solicitor General from the Assistant Attorney General, Civil Rights Division recommending filing of amicus brief in Philadelphia school desegregation case. (See *Confirmation Hearings on Federal Appointments,* Hearings before the Senate Committee on the Judiciary, Part 5, 107th Cong. 2nd Sess. (August 1, September 18, September 26, and October 7, 2002).
- Memo to the Solicitor General from the Assistant Attorney General, Civil Rights Division regarding appeal of Demopolis City (Alabama) school desegregation case. See *Confirmation Hearings on Federal Appointments,* Hearings before the Senate Committee on the Judiciary, Part 5, 107th Cong. 2nd Sess. (August 1, September 18, September 26, and October 7, 2002).

William Bradford Reynolds nomination to become Associate Attorney General

- Memo by William Bradford Reynolds, Assistant Attorney General, Civil Rights Division to the Solicitor General in a discrimination case (Reynolds nomination hearing record: S. Hrg. 99-374, at page 983).

Stephen Trott nomination for the Ninth Circuit Court of Appeals

- On June 3, 2002 it was reported that the Department of Justice turned over three memoranda concerning a department decision not to recommend an independent counsel probe (Legal times, June 3, 2002).

Justice William H. Rehnquist nomination for Chief Justice

- The Congressional Research Service (CRS), in its May 31, 2005 report titled "Congressional Oversight of Judges and Justices," indicates that several documents that William Rehnquist authored on controversial subjects when he headed the Office of Legal Counsel were released to the Judiciary Committee.

Further, during consideration of the Estrada nomination on February 27, 2003, Senator Harry Reid entered into the Congressional Record a list of specific, internal Department of Justice attorney memoranda provided during the Bork, Reynolds, and Rehnquist nominations:

- All documents related to school desegregation between 1969 and 1977 relating to Bork in any way (disclosure included, among others, the SG Office memos about *Vorcheimer* v. *Philadelphia,* known as ''the Easterbrook memo''; *United States* v. *Omaha; United States* v. *Demopolis City* (school desegregation in Alabama)
- Documents related to *Halperin* v. K*issinger* (civil suit for 4th Amendment violations for wiretapping)

- Memos about whether to file an amicus brief in *Hishon* v. *King & Spaulding* (gender discrimination at a law firm)
- Memos regarding *Wallace* v. *Jaffree* (school prayer in Alabama)
- Memos about Congressional reapportionment in Louisiana and one-person, one-vote standard
- Memos regarding possible constitutional amendment in 1970 to overturn *Green* v. *New Kent County*, and preserve racial discrimination in Southern schools
- Memo of November 16, 1970 from John Dean
- Memos of William Ruckelshaus of December 19, 1969 and February 6, 1970
- Memos of Robert Mardian of January 18 1971
- Memos of law clerk to Justice Jackson
- Department memos about whether or not to seek Supreme Court review in *Kennedy* v. *Sampson* (pocket veto)
- Memos about *Hills* v. *Gautreaux* (racial discrimination in housing in Chicago)
- Memos about *DeFunis* v. *Odegaard* (affirmative action program at the University of Washington law school)
- Memos about *Morgan* v. *McDonough* (public school desegregation in Boston)
- Memos about *Pasadena* v. *Spengler* (public school desegregation)
- Memos about *Barnes* v. *Kline* (military assistance in El Salvador)
- Memos about *Kennedy* v. *Jones* (pocket veto and the mass transit bill and bill to assist the disabled)
- Documents related to Supreme Court selection process of Nixon and Reagan

Attorney-Client Privilege

The White House has claimed that the documents from Roberts' time as deputy Solicitor General are protected from release by attorney/client privilege. This claim simply does not hold, since attorney-client documents have been released to Senators in the past, as Senators of President Bush's own party asserted during Senate debate over Special Counsel Kenneth Starr's Whitewater investigation during the Clinton administration

In a Senate floor speech delivered on December 20, 1995 (Congressional Record at S18972) Senator Fred Thompson said:

> [A]n invocation of the attorney-client privilege is not binding on Congress. It is well established that in exercising its constitutional investigatory powers, Congress possesses discretionary control over witnesses' claims of privilege. It is also undisputed that Congress can exercise its discretion completely without regard to the approach that courts might take with respect to that same claim. …The Senate … has rejected invocations of attorney-client privilege on numerous occasions.

Senator Thompson continued:

> Under Article I, section 5 of the Constitution, each House determines its own rules. And the rule of this body in connection with attorney-client privilege

> claims is longstanding and consistent: We balance the legislative need for the information against any possible injury.

That same day, Senator Orrin Hatch, during a Senate floor speech (Congressional Record at S18962), said:

> No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules.

Senator Hatch further stated:

> This body cannot simply take the President's claim of privilege against Congress at face value. To do so would be to surrender an important constitutional obligation.

History and precedent are on the side of the Senate, in fulfilling its constitutional duty on behalf of the American people, to thoroughly review the complete Roberts record, including review of the Department of Justice documents from his service as Deputy Solicitor General.