AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

Supreme Court Nominee John Roberts: An Incomplete Record that Gives Cause for Concern

President George W. Bush has nominated John G. Roberts, Jr., a judge on the U.S. Court of Appeals for the D.C. Circuit, to replace retiring U.S. Supreme Court Justice Sandra Day O'Connor.

The American Association of University Women (AAUW) has reissued its strong concerns about the judicial philosophy of Judge Roberts, which date back to his confirmation for the federal judgeship he now holds. At that time, troubling information came to light regarding his opposition to reproductive choice and family planning. Also troubling, Judge Roberts' philosophy on other issues critical to maintaining decades of progress for women and girls – such as Title IX, pay equity, and other civil rights – remain in part unclear.

Recently released documents demonstrate that, as a young lawyer, John Roberts was part of the "vanguard of a conservative political revolution in civil rights," promoting new legal theories and implementing Reagan Administration plans designed to rein in the role of government and reduce the use of the courts to remedy racial and sexual discrimination.[1] It is difficult to determine, roughly two decades later, the degree to which now-Judge Roberts still holds these views and how he might apply them if he is confirmed to the U.S. Supreme Court. From all accounts, these were deeply held convictions from Roberts' earliest days at the Department of Justice; it would be unusual for such core principles to drastically alter over the years. At the same time, Roberts appears at times to be a pragmatist in his approach to the law, and his record in private practice has been somewhat mixed – although neither conservatives nor liberals seem to "attach much importance to his diverse practice… some activists on both sides remain secure in their conviction that he is an emphatic conservative who will move the high court to the right – never mind his client list."[2]

AAUW believes the cloudiness of Judge Robert's views makes it especially important that his entire record be carefully reviewed and assessed, including a careful evaluation of his record on civil rights and liberties, disability rights, environmental protections, privacy rights, religious freedom, and worker and consumer safety.

The Need for Additional Information

Since his nomination, some documents from Roberts' legal career have come to light which have begun to paint a picture of the nominee's judicial philosophy. Unfortunately, the Bush Administration refuses to release many documents that AAUW believes would provide additional valuable information about the nominee's record.

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Many of these documents harken back to Roberts' work as a political deputy to then-Solicitor General Ken Starr in the White House during the first Bush Administration. AAUW is concerned that the current Bush Administration's refusal to give senators a complete record of Roberts' actions as a political appointee in a senior legal position undermines the Senate's effort to carry out a comprehensive review of the nominee's record.

While more documents were released by the Reagan Presidential Library in mid-August, the critical memos Roberts wrote while in the Solicitor General's Office under the first Bush Administration, between 1989 and 1993, have been purposely withheld. AAUW urges the Bush Administration to change its position and provide these critical documents so that senators can thoroughly address any subsequent concerns and questions during Judge Roberts' confirmation hearings. While the White House has argued that the Solicitor General documents are protected by attorney-client privilege, there is strong 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.[3]

Further, while for much of Roberts' career he has been an advocate for others – both in public service and in private practice – his memos and briefs during these years still help to illuminate his judicial philosophy and patterns of legal reasoning. Roberts was a political appointee in both the Reagan and first Bush Administrations; it is therefore safe to assume that his positions were reasonably in line with those who appointed him. At the same time, he did exercise his own intellectual reasoning in the course of his work, which is what makes these documents potentially helpful in the confirmation process. Indeed, as reported in the *Washington Post*, the Justice Department memos released at the end of July "show Roberts speaking at times in his own voice. … In the rare instances revealed in the documents in which Roberts disagreed with his superiors on the proper legal course to take on major social issues of the day, he advocated the more conservative tack."[4]

A primary issue for AAUW is to what degree, if any, this past work reflects on the judicial philosophy Roberts would exercise as a Supreme Court Justice. There are many yet-to-be-determined pieces to be added to the puzzle in the vetting of Roberts' nomination, and these pieces cannot be summed up with the necessary thoroughness and accuracy without access to the entirety of John Roberts' record and the documents that illuminate it.

To date, there are certain aspects of Judge Roberts' record that have come to light that raise significant questions. Some of AAUW's most pressing concerns regarding his record include Title IX, privacy rights and reproductive choice, and other civil rights protections. These areas must be thoroughly examined before the Senate can determine his suitability for a lifetime appointment to the U.S. Supreme Court.

A Narrow Interpretation of Title IX

Recent documents that have been released have illuminated Roberts' participation in shaping civil rights policies during the Reagan and first Bush Administrations. AAUW is particularly

concerned about Title IX of the Education Amendments of 1972, the law that prohibits sex discrimination in education. According to reports based on documents released to date,[5] Roberts' writings reveal troubling statements about this landmark civil rights law that has opened so many doors for women and girls, both in the classroom and on the athletics field.

Federal Funds and the Application of Civil Rights Law: The recently disclosed memos from the nominee's work in the Reagan Administration show that he pressed for a limited interpretation of Title IX. For example, AAUW is troubled by an instance in which Roberts urged then-Attorney General William French Smith to withdraw the Reagan Administration's support from a Department of Education investigation of alleged sex discrimination in athletics at the University of Richmond. The Carter Administration had earlier supported the Department, contending that Title IX granted the federal government broad authority over all programs at a federally-funded university, whether or not the particular program directly received federal funds.[6] Roberts wrote a 1982 memo to Attorney General Smith advising that the Reagan Administration reverse the previous administration's policy. According to research by the National Women's Law Center, Roberts believed "that the Department of Education should not appeal a district court's ruling which prevented the Department from investigating [the] alleged sex discrimination in athletics at the University of Richmond, because under the extremely narrow view of Title IX that Roberts espoused, Title IX's prohibition of sex discrimination did not apply to the athletics program since it did not *directly* receive money from the federal government."[7] [emphasis added]

During his subsequent years in the White House Counsel's office, Roberts wrote a memo stating that there was "intuitive appeal" to the argument that a university should not be covered by Title IX – even though its students paid tuition to the school with federal financial aid.[8] In the same memo, Roberts criticized the Civil Rights Restoration Bill, which clarified that Title IX and similar civil rights laws prohibiting discrimination on the basis of race, ethnicity, disability, and age apply to an entire institution – not just the specific program receiving federal funds. Roberts argued the Civil Rights Restoration Bill would "radically" expand the scope of existing civil rights laws.[9] The language of the bill, which was later passed with substantial AAUW support, was in direct contrast to Roberts' own much more narrow interpretation of Title IX.

AAUW finds Roberts' line of reasoning on this question particularly troubling, since it is through the receipt of federal funding in all its myriad forms that many civil rights laws – not just Title IX – are applied and enforced. Roberts' overly restrictive argument would have severely narrowed the reach of Title IX. Further, if his reasoning in this instance were to be applied more broadly, it could negatively impact the application and enforcement of other critical civil rights protections as well.

Monetary Damages: In addition to Roberts' efforts to narrow Title IX during the Reagan years, he later advocated positions that would have seriously weakened a plaintiff's ability to seek redress under this critical civil rights law. In *Franklin v. Gwinnett County School District*, Roberts co-authored an *amicus* brief as Deputy Solicitor General in the administration of President George H. W. Bush.[10] It is important to note that participating as *amicus* is a discretionary decision on the part of the Solicitor General. Thus the decision to intervene in such

a way is in and of itself instructive – and another example of the well-documented efforts of Reagan Administration to curtail the use of federal courts to remedy sex discrimination.

In the *Franklin* brief, Roberts' argued against a high school student obtaining monetary damages for sexual harassment and sexual abuse by her teacher/coach. Roberts' overly restrictive view of appropriate remedies under Title IX was rejected unanimously by the U.S. Supreme Court, which held that victims of sexual discrimination can recover monetary damages under Title IX.

AAUW is concerned that Roberts' position in the *Franklin* case raises questions about whether he would seek to narrow long-standing interpretations of Title IX in ways that would limit the ability of women to fully assert their legal rights. AAUW finds this extremely restrictive interpretation of Title IX quite troubling for a Supreme Court nominee; critical rights for women and girls have been won and protected through the courts, but they are hollow victories if we cannot hold those in authority accountable for civil rights violations. In 1991, AAUW signed on to an *amicus* brief to the U.S. Supreme Court in the *Franklin* case espousing views opposite to those put forward by Roberts.

Far-Reaching Civil Rights Consequences: Roberts's arguments for limiting Title IX are troubling not only because they would limit protections against sex discrimination for students, and their ability to seek legal recourse in the face of such behavior, but also because his arguments could apply to other analogous civil rights laws that have been so important to women and girls. These include Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in programs that receive federal funds; Section 504 of the Rehabilitation Act of 1973, which protects the recipients of federal funds from discriminating against people with disabilities; and the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age in federal programs or activities.

AAUW continues to be a strong proponent of these civil rights measures, and Roberts' record on Title IX reveals a pressing need for the Senate to ask compelling questions of the nominee regarding his judicial philosophy on these critical civil rights matters, as well as his respect for precedent and his ability to independently and impartially apply settled law. AAUW urges in particular that the Senate Judiciary Committee question Judge Roberts on his respect for precedent in the *Franklin* case, which continues to be an important benchmark for addressing sex discrimination in education.

Privacy Rights and Reproductive Choice

President Bush, who selected Judge Roberts after careful vetting, has made clear that his model Supreme Court Justices are Antonin Scalia and Clarence Thomas. Both of these men have stated they wish to overturn *Roe v. Wade* and have voted consistently to restrict women's reproductive rights.

During his confirmation hearings for the D.C. Circuit, AAUW was disappointed to note that John Roberts repeatedly refused to state whether he believed in a constitutional right to privacy, or whether that right includes a woman's right to have an abortion. These are some warning

signs that Judge Roberts, if confirmed, might provide an additional vote to undermine the right to choose.

The Precedent of Roe v. Wade: Roberts, as a political appointee in the first Bush Administration, co-authored an *amicus* brief that argued that "*Roe* was wrongly decided and should be overruled" and that the U.S. Supreme Court's conclusions that there is a fundamental right to privacy "find no support in the text, structure, or history of the Constitution."[11] The case for which the brief was written, *Rust v. Sullivan*, did not present a legal question regarding *Roe's* validity – yet Roberts as co-author still brought up the issue of *Roe* in his brief.[12]

In his 2003 confirmation hearing for the D.C. Circuit, Roberts said his personal views should not be inferred from his participation in the *Rust* brief. But Roberts stopped short of saying the brief did not reflect his views and he repeatedly declined to answer questions asking for his views on *Roe* or even more broadly the right to privacy.[13]

AAUW believes Judge Roberts, like Supreme Court Justice Ruth Bader Ginsburg before him, should answer questions about the fundamental right to privacy – upon which the right to legal abortion rests – during his confirmation hearing. Then-Judge Ginsburg did answer senators' questions on a number of controversial issues, including abortion. Notably, at the time of her hearings, Justice Ginsburg also had a very extensive record of articles and opinions on a range of legal matters, giving senators a comprehensive record on which to determine her views on important legal questions – which is clearly not the case with Judge Roberts.[14] As a result, AAUW urges Judge Roberts to be forthcoming and forthright in his answers to all questions at his confirmation hearings. We also urge the Bush Administration to release the requested documents detailing Roberts' legal work during the Reagan and first Bush Administrations.

Clinic Violence: Roberts' work on the case *Bray v. Alexandria Women's Health Clinic* raises additional questions about his judicial philosophy regarding sex discrimination. As Deputy Solicitor General, Roberts co-authored an *amicus* brief in *Bray* that argued that Operation Rescue's tactics of blocking entrances to abortion clinics did not constitute discrimination against women, and thus could not be stopped under then-existing federal anti-discrimination laws.[15] Roberts advanced this argument even though only women can exercise the right to seek an abortion.[16]

It is important to note that participating as *amicus* is a discretionary decision on the part of the Solicitor General. In *Bray*, "the government chose to involve itself in a case in support of those who sought to deprive women of the right to choose through massive, often violent, blockades. Roberts argued that the protesters' blockades merely amounted to an expression of their opposition to abortion and that a civil rights remedy was therefore inappropriate."[17] As Roberts did in the Title IX cases discussed previously, AAUW is concerned that *Bray* represents another example where Roberts again advocated an exceptionally narrow interpretation of civil rights law. In 1991, AAUW signed on to an *amicus* brief to the U.S. Supreme Court in the *Bray* case espousing a position opposite to that taken by Roberts.

The Senate Should Not Rush to Judgment

AAUW encourages the Senate to vigorously exercise their advise and consent responsibilities by conducting a thorough and deliberate examination of the nominee's record. This includes obtaining and carefully reviewing all relevant information about the nominee, and conducting comprehensive confirmation hearings. AAUW believes lifetime appointments should never be rushed.

AAUW continues to urge the Senate to withhold judgment on this lifetime appointment until this review is complete and the confirmation process has ensured that John Roberts is a jurist within the mainstream of legal thought. It is more important than ever to ensure the moderate balance of the court by confirming a justice who reflects mainstream America. The Senate has few constitutional duties more significant than that of advising on and consenting to U.S. Supreme Court nominations, and should confirm only those nominees that exhibit the impartiality and independence that are so critical on the nation's highest court.

No nominee is presumptively entitled to confirmation. Whether Judge John Roberts deserves that honor is still an open question, and AAUW looks forward to his honest and forthright answers regarding the civil rights concerns we have outlined here during his confirmation hearings.

For more information, call 800/608-5286 or e-mail votered@aauw.org.

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[1] R. Jeffrey Smith, Amy Goldstein, and Jo Becker, "A Charter Member of the Reagan Vanguard," *The Washington Post*, August 1, 2005, at A1.
[2] Jo Becker and Michael Grunwald, "In Private Practice, Roberts's Record Is Mixed," *The Washington Post*, August 5, 2005, at A2.
[3] Sen. Patrick Leahy 3/18/03 statement 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."
[4] R. Jeffrey Smith, Jo Becker, and Amy Goldstein, "Documents Show Roberts Influence in Reagan Era," *The Washington Post*, July 27, 2005 at A1.
[5] Jo Becker and Amy Argetsinger, "The Nominee As a Young Pragmatist," *The Washington Post*, July 22, 2005, at A1; Charlie Savage, "Civil Rights Groups Cite Concerns Over Roberts," *The Boston Globe*, July 22, 2005; R. Jeffrey Smith, Jo Becker and Amy Goldstein, "Documents Show Roberts Influence In Reagan Era," *The Washington Post*, July 27, 2005 at A1.
[6] Ibid.
[7] National Women's Law Center, "Judge Roberts's Record: Incomplete But Very Troubling," August 3, 2005.
[8] Ibid.
[9] Ibid.
[10] *Franklin v. Gwinnett County School District*, 503 U.S. 60 (1992).
[11] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391 and 89-1392).

[12] In *Rust v. Sullivan,* the Supreme Court considered whether Department of Health and Human Services regulations limiting the ability of Title X recipients to engage in abortion-related activities violated various constitutional provisions. Judge Roberts, appearing on behalf of HHS as Principal Deputy Solicitor General, argued that this domestic gag rule, whereby doctors working in family planning programs receiving federal funds were barred from even discussing abortion options with patients, did not violate constitutional protections. In 1990, AAUW signed on to an amicus brief to the U.S. Supreme Court in the *Rust* case espousing a position opposite that of Judge Roberts.
[13] *U.S. Committee on the Judiciary: Nomination of John G. Roberts, Jr., of Maryland, to be Circuit Judge for the District of Columbia* (Apr. 30, 2003) (question of Senator Durbin). *See also* Responses of John G. Roberts, Jr. to Written Questions of Senators Biden, Feingold, Feinstein, and Kennedy (Feb. 5, 2003).
[14] National Women's Law Center, "The Ginsburg Standard: What Really Happened," July 2005, at pg. 1
[15] Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993) (No. 90-985).
[16] The Freedom of Access to Clinic Entrances Act (FACE), which passed in 1994 in response to the *Bray* case, provides federal protection against the unlawful and often violent tactics used by abortion opponents. Courts repeatedly have upheld the law as constitutional, and experts credit FACE as a contributing factor in reducing clinic violence.
[17] NARAL ProChoice America, "John G. Roberts, Jr."
http://www.prochoiceamerica.org/retirement/roberts_choice_highlights.pdf at pg 2.