LEGAL momentum
Advancing Women's Rights

IN CONGRESS
Congress Must Examine Roberts' Record on Women's Rights

Minutes after President Bush announced his nomination of Judge John G. Roberts, Jr. to the Supreme Court, members of the media were already predicting Roberts would be "warmly welcomed."

But isn't that skipping a few steps?

Legal Momentum, the nation's oldest women's legal rights organization, calls on Congress to thoroughly examine Roberts' record, especially on the issues crucial to women. If they look deeper, Senators will find Roberts is anything but a blank slate. His record on issues such as reproductive rights, violence against women, federalism and affirmative action is deeply concerning. Though he has no significant record as a sitting judge, throughout his career he has taken numerous positions opposing women's rights.

As Deputy Solicitor General, Roberts argued in favor of the "gag rule," which prohibited federally funded family planning clinics from discussing the option of abortion with patients. Even though the validity of Roe v. Wade was not the issue, Roberts wrote, "[w]e continue to believe that Roe was wrongly decided and should be overruled..." In another case, Legal Momentum argued before the Supreme Court that anti-abortion protestors violated women's civil rights when they blocked the entrances to reproductive health clinics. Roberts filed a brief in support of the violent anti-choice group Operation Rescue, writing "Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions."

Legal Momentum is also concerned that, as a Supreme Court justice, Roberts may continue the trend of the Court to limit the reach of federal laws passed by Congress to protect women's and civil rights, such as the Violence Against Women Act.

The Senate must not only examine these and other positions taken by Roberts throughout his career, but further explore his record by requesting documents such as Department of Justice memos. Roberts' record on issues of deep importance to women must not go unnoticed.

# # #

Take Action! Click here to urge your Senators to examine Roberts' record!

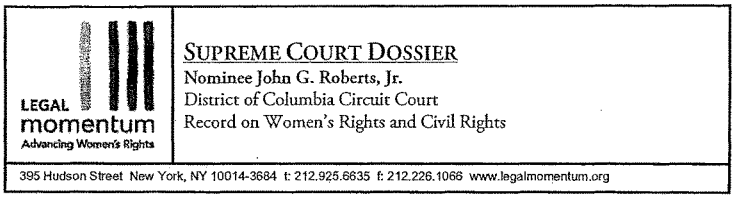
Learn more! Click here to read Legal Momentum's in-depth report on Roberts.

In This Section

- Judicial Nominations
- Social Security and Women
- Welfare Reauthorization
- Security and Financial Empowerment Act
- Violence Against Women Act
- Federal Marriage Amendment

LEGAL momentum
is the new name of NOW Legal Defense and Education Fund

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO



SUPREME COURT DOSSIER
Nominee John G. Roberts, Jr.
District of Columbia Circuit Court
Record on Women's Rights and Civil Rights

395 Hudson Street New York, NY 10014-3684 t: 212.925.6635 f: 212.226.1066 www.legalmomentum.org

John G. Roberts was born in 1955 in Buffalo, NY. He received both his A.B. and J.D. from Harvard University. His early legal career was spent clerking, first for Second Circuit Judge Henry Friendly and then for Justice William Rehnquist. He subsequently served as Special Assistant to the Attorney General William French Smith, as Associate Counsel to President Reagan from 1982 -1986, and as Principal Deputy Solicitor General under Ken Starr from 1989 - 1993. From 1986 – 1989 and then 1993 – 2003, he was a partner in the Washington law firm of Hogan & Hartson. In 2003, he was nominated by George W. Bush to the District of Columbia Circuit and he received his commission on June 2, 2003.

Judge Roberts has no significant record as a sitting judge with regard to issues impacting the rights of women; however he filed over two hundred briefs before the Supreme Court while he was in private practice and in the Solicitor General's office. In those briefs, he took numerous positions directly antagonistic to women's rights, and, in particular, to the right of women to have information about and access to abortions. Indeed, in every case in which both Roberts and Legal Momentum participated before the Supreme Court, we have been on opposite sides of the issues. Moreover, in the two cases in which Roberts participated directly involving abortion rights, his legal theories were countered by Justice O'Connor in her opinions, suggesting that Roberts would not be a moderate conservative Justice following in Justice O'Connor's footsteps, but a more extreme Justice in the mold of Justice Scalia.

Abortion Gag Rule

In *Rust v Sullivan,* Roberts, as Deputy Solicitor General, represented the respondent Louis Sullivan, Secretary of Health and Human Services, successfully arguing for the validity of the "gag rule" imposed by the administration of the first President Bush forbidding the mention of abortions by recipients of family planning (Title X) funds. That rule provided:

> A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

The brief in which Roberts participated in said:

"[w]e continue to believe that *Roe* was wrongly decided and should be overruled…the Court's conclusion in *Roe* that there is a fundamental right to an abortion…finds no support in the text, structure, or history of the Constitution."[i]

Legal Momentum, as NOW Legal Defense and Education Fund, filed a brief opposing Roberts' position and arguing that the gag rule was invalid.

The Supreme Court upheld the gag rule. Among the dissenters was Justice O'Connor, who would have held that the agency rule contravened the governing Congressional legislation.[ii]

President Clinton rescinded the gag rule on his first day in office. It has not been reinstated domestically since then.

Blockading of Abortion Clinics

In the 1980s, Legal Momentum, under its former name of NOW Legal Defense and Education Fund, represented the National Organization for Women in attempting to establish the legal principle that the blockading of abortion clinics by ant-abortions protestors violated 42 U.S.C. §1985(3), also known as the Ku Klux Klan Act, because it constituted a conspiracy to interfere with respondents' rights to travel interstate and to obtain abortions. Under the name *NOW v Operation Rescue,* both the District Court of the Eastern District of Virginia and the Fourth Circuit Court of Appeals ruled in favor of NOW, enjoining the protests of Operation Rescue. Roberts entered the fray in the Supreme Court, filing an *amicus curiae* brief and arguing before the Court on behalf of the United States. His brief argued, among other things, that "Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions."[iii] Roberts relied on the Supreme Court's infamous decision, in *Geduldig v. Aiello,* 417 U.S. 484 (1974), that discrimination against pregnant women is not sex discrimination, but only a permissible distinction between "pregnant women and non-pregnant persons," *id.* at 497.

The Supreme Court agreed with Roberts' position and ruled in favor of Operation Rescue. Justice O'Connor, then the lone woman on the Supreme Court, and the Justice whom Roberts would replace if he is confirmed, dissented from the Court's opinion and would have held that the blockading of the abortion clinics fell squarely within the ambit of the Ku Klux Klan Act. Among other things, she wrote:

> If women are a protected class under § 1985(3), and I think they are, then the statute must reach conspiracies whose motivation is directly related to characteristics unique to that class. The victims of petitioners' tortious actions are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of women. ...
>
> . . . It is undeniably petitioners' purpose to target a protected class, on account of their class characteristics, and to prevent them from the equal enjoyment of these personal and property rights under law. The element of class-based discrimination that *Griffin* read into § 1985(3) should require no further showing.
>
> I cannot agree with the Court that the use of unlawful means to achieve one's goal "is not relevant to [the] discussion of animus." To the contrary, the deliberate decision to isolate members of a vulnerable group and physically prevent them from conducting legitimate activities cannot be irrelevant in assessing motivation. ... The clinics at issue are lawful operations; the women who seek their services do so lawfully. In my opinion, petitioners' unlawful conspiracy to prevent the clinics from serving those women, who are targeted by petitioners by virtue of their class characteristics, is a group-based, private deprivation of the "equal protection of the laws" within the reach of § 1985(3).[iv]

Congress subsequently passed the Freedom of Access to Clinic Entrances Act (FACE), prohibiting the blockading of abortion clinics.

Applicability of Title IX to the NCAA

In private practice, Roberts represented the NCAA as lead counsel, successfully arguing that Title IX, which prohibits sex discrimination in federally-funded educational institutions, does not apply to the NCAA, which is not a direct recipient of federal funds but only an indirect beneficiary in that it is financed virtually exclusively by institutions which receive federal funds. [v] Legal Momentum joined a brief arguing for NCAA's obligation to comply with Title IX.[vi] A unanimous Supreme Court ruled in favor of the NCAA.

Participation of Disadvantaged Individuals in the Construction Industry

Roberts and Legal Momentum were once again at odds before the Supreme Court in *Adarand Constructors v. Mineta.* Legal Momentum argued as *amicus curiae* for the validity of the "Disadvantaged Business Enterprise ("DBE") program of the U.S. Department of Transportation ("DOT"), which implements the congressional mandate--first established in the Small Business Act ("SBA"), and reaffirmed in subsequent legislation--of ensuring that "small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [vii]

Roberts, on the other hand, represented the Associated General Contractors of America as *amicus curiae*, arguing that the program was invalid because minority hiring goals must be supported by detailed evidence of past discrimination.[viii]

The Supreme Court concluded that it had improvidently granted certiorari because the issue of standing had not been adequately addressed below, and it left in effect the Court of Appeals ruling that the DBE program is consistent with the constitutional guarantee of equal protection.

In sum, whenever Legal Momentum and John G. Roberts have participated in the same Supreme Court case, we have been on opposite sides. Given that we believe our positions further the rights of women, we think Judge Roberts' positions are antithetical to those rights.

Published on July 19, 2005

Special thanks to Legal Momentum Board of Legal Advisors co-chair Amy L. Katz for her legal research assistance.

---

[i] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392). 1989 U.S. Briefs 1391

[ii] *Rust v. Sullivan*, 500 U.S. 173, 204 (1991) (Blackmun, Marshall, Stevens and O'Connor, dissenting)

[iii] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Bray v. Alexandria Women's' Health Clinic*, 1990 U.S. Briefs 985, April 11, 1991

[iv] *Bray v. Alexandria Women's' Health Clinic*, 506 U.S. 263, 350-351 (1993) (O'Connor, J., dissenting)

[v] Brief of Petitioner, *NCAA v. Smith*, 1998 U.S. Briefs 84

[vi] Brief of National Women's Law Center, *et al.*, as *Amici Curiae* in support of Respondents, *NCAA v. Smith*, 1998 U.S. Briefs 84

[vii] Brief of *Amici Curiae* NOW Legal Defense and Education Fund, Lawyers Committee for Human Rights, and Allard K. Lowenstein International Human Rights Clinic in Support of Respondents, 2000 U.S. Briefs 730, *Adarand Constructors v. Mineta*

[viii] Brief of *Amicus Curiae* for the Associated General Contractors of America, Inc., in Support of Petitioner, 2000 U.S. Briefs 730, *Adarand Constructors v. Mineta*