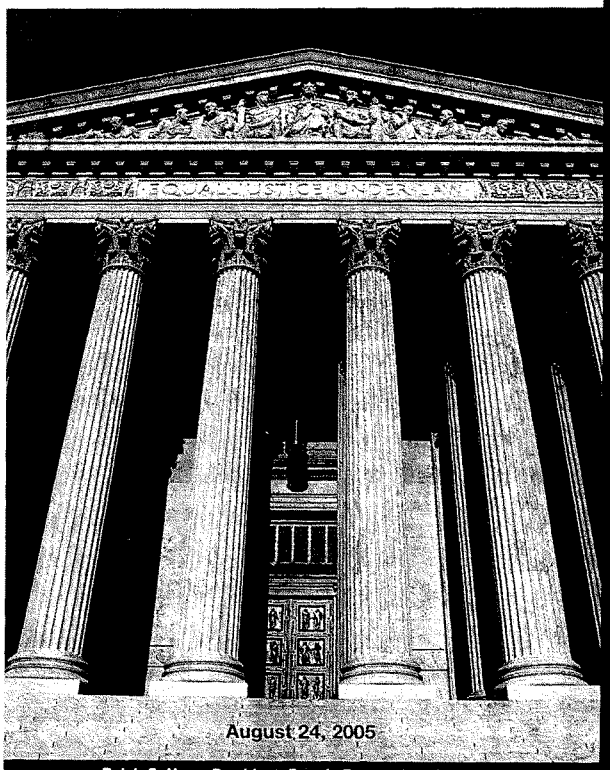
SPECIALREPORT

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



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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."

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.

John Roberts: The Wrong Choice for Associate Justice, An Even Worse Choice for Chief Justice

The death of Chief Justice William Rehnquist and President Bush's nomination of John Roberts to succeed Rehnquist have raised the stakes for the Court and the American people exponentially. If confirmed, Roberts would not be one among eight Associate Justices, as when he was initially nominated to replace Justice Sandra Day O'Connor. Instead, he would become the nation's highest ranking judicial officer, with unique powers, influence and responsibilities beyond those of the Associate Justices.

Last month, after an exhaustive examination of John Roberts' public record, we concluded that Roberts' confirmation as an Associate Justice should be opposed. As set forth in two lengthy, detailed reports, we based that conclusion in large measure on Roberts' record of disregard for the laws and remedies that protect Americans from discrimination and his longtime efforts to restrict the role of the courts in upholding Americans' rights and legal protections.[1] To an even greater degree, Roberts' record and the nature of the power and responsibilities of the Chief Justice make Roberts the wrong choice for this powerful lifetime position as the 17th Chief Justice in our nation's history.

The Importance of the Chief Justice

The Chief Justice of the United States is one of our nation's most important and influential public officials. Indeed, as Chief Justice Rehnquist frequently noted, his correct title was "Chief Justice of the United States," not merely "Chief Justice of the Supreme Court."[2] Although the Supreme Court is made up of nine Justices, the Chief Justice has formal and informal powers, duties and responsibilities that exceed those of the eight Associate Justices, giving the Chief Justice a significant opportunity to shape the federal judiciary and the course of American law. Thus, the importance of who is confirmed to succeed Chief Justice Rehnquist cannot be overstated.

"The Chief Justice, as presiding officer of the Court, is responsible by statute for its administration, in addition to hearing cases and writing opinions."[3] One of the most important powers wielded by the Chief Justice is the power to assign the writing of the Court's opinion in each case in which the Chief Justice is in the majority. Who writes the Court's opinion in a particular case is critically important, since how the opinion is written — its breadth and scope, its nuances, its reasoning — affects not only the outcome of that case but sets judicial precedent for other cases as well, perhaps for decades to come. John Roberts' disturbing record, as detailed in our reports, now

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[1] See PFAW, Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court (Sept. 2005) (hereafter "Final Pre-Hearing Report") and Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts (Aug. 24, 2005), available at <http://media.pfaw.org/stc/PH-report.pdf> and <http://media.pfaw.org/stc/RobertsOppositionReport.pdf>.

[2] 28 U.S.C. § 1.

[3] The Supreme Court Historical Society, "How the Court Works: The Chief Justice's Role," <http://www.supremecourthistory.org/03_how/subs_how/03_a15.html> (visited Sept. 8, 2005).

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takes on even greater importance given that Roberts, if confirmed as Chief Justice, would have the authority to determine who writes the Court's opinion in particular cases.

The Chief Justice also has the power to influence the Court's workload and thus how many and which cases the Court hears. Indeed, according to one report published during Chief Justice Rehnquist's tenure, "[o]ne of Rehnquist's proudest achievements as chief justice has been to pare the court's docket. The Burger court heard oral arguments in 160 or more cases every term. Rehnquist and his colleagues hear half as many cases. . . . Rehnquist has pushed to minimize federal jurisprudence at every level."[4] Clearly, the number of cases the Court hears, and which cases it chooses to hear, are matters of vital importance to the interpretation of federal constitutional and statutory law and thus to the preservation of Americans' rights and freedoms.

Significantly, John Roberts has troubling views about the courts and the ability of Americans to turn to them for redress. He has claimed that the courts frequently engage in "judicial policymaking"[5] and "have been drawn by litigants before them into areas properly and constitutionally belonging to the other branches or to the states."[6] "[T]oo frequently," he has written, courts have "attempted to resolve disputes not properly within their province."[7] In fact, Roberts responded to a suggestion intended to allow the Supreme Court to hear more cases by saying:

> [I]t strikes me as misguided to take action to permit them to do more. There are practical limits on the capacity of the Justices, and those limits are a significant check preventing the Court from usurping even more of the prerogatives of the other branches. The generally-accepted notion that the Court can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the Court in July, when we know that the Constitution is safe for the summer.[8]

Roberts even stated that "there is much to be said for changing life tenure to a term of years" for federal judges, in part because of his view that the federal judiciary "usurps the roles of the political branches."[9] And during his tenure in the Reagan Administration, Roberts took a position to the right of ultraconservative Ted Olson and supported the constitutionality of

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[4] David Plotz, "Chief Justice William Rehnquist: Mr. Efficiency," *Slate* (Jan. 11, 1998), available at <http://slate.msn.com/id/1846> (visited Sept. 8, 2005).

[5] Draft Article on Judicial Restraint for ABA Journal at 2 ("judicial policymaking is also inevitably inadequate or imperfect policymaking"); see also Memorandum from John Roberts to Dean St. Dennis re Judicial Restraint Initiatives (Dec. 7, 1981).

[6] Draft Article on Judicial Restraint at 1.

[7] Suggested Remarks for the Attorney General [before] The American College of Trial Lawyers (2nd draft of March 30, 1982), at 8, delivered by John Roberts to Fred Fielding and Dave Gergen on March 30, 1982.

[8] Memorandum from John Roberts to Fred Fielding, Department of Justice Recommendations on Creation of an Intercircuit Tribunal (Apr. 19, 1983).

[9] Memorandum from John Roberts to Fred Fielding re Department of Justice Proposed Report on S.J. Res. 39 (Oct. 3, 1983). In opposing a Justice Department report that supported life tenure for federal judges, Roberts stated that "the Framers adopted life tenure at a time when people simply did not live as long as they do now." Id. However, in Roberts' view, "the case for insulating the judges from political accountability weakens" when judges "lose all touch with reality through decades of ivory tower existence" and fail to limit their task to "discerning and applying the intent of the Framers or legislators." Id.

proposals to strip the Supreme Court of jurisdiction over cases concerning school desegregation, abortion, and school prayer, as well as proposals to strip lower federal courts of jurisdiction to order busing as a remedy in school segregation cases.[10]

In addition, as we have documented, Roberts has attempted to reduce the ability of Americans to seek justice though the courts. For example, he has worked to make it harder for individuals to enforce rights granted them under federal law, and has advanced arguments that would make it harder for Congress to grant statutory standing to individuals whose rights have been violated. He has argued for strict limits on the nature of injuries the courts can address, making it difficult for plaintiffs to gain standing to bring suit in the public interest. Roberts has been hostile to prisoners' habeas corpus petitions, and has even suggested eliminating the federal rule that prevents illegally obtained evidence from being used against a defendant in court. Throughout his career, Roberts has advocated legal theories that would deprive Americans of access to justice in the federal courts on civil rights, reproductive freedom, environmental protections, religious liberty, and other crucial subjects.[11]

Someone with such a record concerning Americans' ability to seek justice through the courts, and with such an uncharitable view of the courts generally and the Supreme Court specifically, is the wrong choice to be the most important judge in our country. This conclusion is reinforced by the fact that the duties of the Chief Justice "extend far beyond the Court. He is responsible for the administrative leadership of the entire federal judicial system."[12]

Law professors Judith Resnik and Theodore Ruger have recently explained just how much power is wielded by the Chief Justice as a result of these responsibilities, observing that,

> [i]n essence, the chief justice is the chief executive officer of a bureaucracy of some 1,200 life-tenured judges, 850 more magistrate and bankruptcy judges, and a staff of 30,000. He is the chair of the policy-setting body -- the Judicial Conference of the United States -- that establishes the priorities for the federal judiciary, including overseeing its budget, now about $5.43 billion annually. The chief justice appoints the director of the Administrative Office of the United States Courts, and, together, they select the judges who sit on judicial committees focused on topics from technology to international judicial relations.[13]

In addition, the Chief Justice chooses the members of important specialized courts, including the Foreign Intelligence Surveillance Court, which meets in secrecy and which, "since its creation in 1978 has approved over 10,000 government requests for surveillance warrants."[14] The Chief Justice "also picks the 255 people who sit on the 24 committees of the judiciary, including those that make the rules for litigants. Whether a civil litigant, a prosecutor, a criminal defendant or a bankruptcy petitioner, litigants must comply with requirements described in federal rules, all crafted by committees whose members are selected by the chief."[15]

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[10] See Final Pre-Hearing Report, at 10-14.

[11] See Final Pre-Hearing Report, at 8-29.

[12] The Supreme Court Historical Society, "How the Court Works: The Chief Justice's Role," <http://www.supremecourthistory.org/03_how/subs_how/03_a15.html> (visited Sept. 8, 2005).

[13] Judith Resnik and Theodore Ruger, "One Robe, Two Hats," *New York Times* (July 17, 2005).

[14] Id.

[15] Id.

Chief Justice Rehnquist demonstrated how much the judge who holds all these powers can use them off the Court to advance particular ideological beliefs, and to do so in tandem with his decision making on the bench. For example, in his 1994 year-end annual report to Congress on the federal judiciary, Chief Justice Rehnquist claimed that "[t]here is considerable sentiment in the federal judiciary at the present time against further expansion of federal jurisdiction into areas which have been previously the province of state courts enforcing state laws."[16] Then in 1995, Rehnquist wrote the Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995), a 5-4 ruling dramatically reinterpreting the Commerce Clause to hold that Congress had no authority under the Constitution to make gun possession near schools a federal crime and striking down the Gun-Free School Zones Act.

Roberts is simply the wrong person to exercise the enormous powers and unique influence of the Chief Justice, both on and off the bench.

America cannot afford a "Roberts Court"

Following President Bush's September 5 announcement that he intended to nominate John Roberts to succeed Chief Justice Rehnquist rather than Justice O'Connor, some have suggested that Roberts is ideologically similar to Rehnquist (for whom Roberts clerked), so that Roberts' confirmation would not significantly affect the Court. There are several fallacies with these views.

First, every nominee to the Court, no matter who he or she is replacing, must be independently fit and qualified to serve on the Court and must satisfy the important criteria for confirmation. As more than 200 law professors explained in a letter to the Senate Judiciary Committee in July 2001, 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 duty to make an independent evaluation of the president's nominees.

According to the law professors' letter, these criteria include not only "an exemplary record in the law," but also 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."[17] These criteria are even more important in the case of someone nominated to our nation's highest court, and still more important when that person has been nominated to be the Chief Justice.

As we have already demonstrated in our reports examining Roberts' record, he does not satisfy these important criteria for confirmation. In particular, he has not demonstrated a

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[16] William H. Rehnquist, 1994 Year-End Report on the Federal Judiciary, 18 Am. J. Trial Advoc. 499, 502-03.

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

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.

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. It is clear that 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. All of this, which was of great concern when Roberts was nominated to fill Justice O'Connor's seat, is of even greater concern now that he has been nominated to be Chief Justice.

Moreover, there is evidence in Roberts' record indicating that he would be even more conservative than was Chief Justice Rehnquist in a number of significant areas of the law. For example, although the records of both Roberts and Rehnquist have been negative toward women's rights and the laws that protect women from discrimination, Roberts' record is even more troubling.[18] In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), Roberts, then the Principal Deputy Solicitor General, urged the Supreme Court to hold that victims of unlawful sex discrimination under Title IX could not obtain monetary damages, a position that would have left some victims of discrimination, including the plaintiff in that sexual harassment case, without any remedy at all. Roberts' efforts to limit Title IX in this manner were rejected by a unanimous Court that included Chief Justice Rehnquist.[19]

There are other important areas of the law in which Roberts' record indicates that he may well be to the right of Chief Justice Rehnquist. For example, in the religious liberty case of *Locke v. Davey*, 540 U.S. 712 (2004), Chief Justice Rehnquist wrote the Court's opinion holding that the state of Washington was not required to fund the education of a college student studying for the ministry, even though the state subsidized secular education. Roberts, however, has a long record of favoring government endorsement and support of religion that might well have caused him to rule differently than Rehnquist did in *Davey* (as did Justices Scalia and Thomas), and to require a state to fund religious education when it funds secular education, despite a state constitutional prohibition on such funding.[20]

And in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), Chief Justice Rehnquist wrote the Court's opinion holding that state employees have the right to seek monetary damages from their employer for violating the federal Family and Medical Leave Act, rejecting the "states' rights" claim that Congress has no authority to protect the rights of individual Americans in this manner. Roberts' record, however, indicates that he takes a narrow view of congressional power that might well have caused him to rule differently than Rehnquist did in *Hibbs*, and seek to undermine the FMLA.[21]

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[18] See Final Pre-Hearing Report, at 30-52.

[19] See Final Pre-Hearing Report, at 41-45.

[20] See Final Pre-Hearing Report, at 82-93.

[21] See Final Pre-Hearing Report, at 106-110.

But even if Roberts proves to be not appreciably more conservative than was Chief Justice Rehnquist, from the perspective of Americans' rights and interests the prospect of twenty, thirty or more years of a Chief Justice who shares Rehnquist's judicial ideology is not a situation to be desired. To the contrary, several more decades of a "Rehnquist Court" would be significantly harmful to America.

Among other things, Chief Justice Rehnquist was the leader of an activist Court that from 1995 to 2000 alone struck down in whole or in part more than 22 laws passed by Congress, in contrast to the 128 struck down during the first 200 years of the Constitution.[22] Between 1987, shortly after Rehnquist became Chief Justice, and 2002, the Court struck down in whole or in part some 33 federal laws.[23] This assertion of judicial power has been called "one of the most important constitutional shifts in decades."[24] One Supreme Court expert has stated that "[n]ot since before the 1937 constitutional crisis over the court's invalidation of progressive New Deal legislation has a bare majority been so bent on reining in Congress."[25]

In particular, Rehnquist was an architect of the new "federalism" revolution, leading a narrow 5-4 majority of the Court that overturned laws protecting Americans against discrimination and that protected our public well being. These included 5-4 rulings that struck down key parts of the Violence Against Women Act, that held the Gun-Free School Zones Act to be unconstitutional, and that held that state employees cannot sue their employers for money damages for violating the Americans with Disabilities Act or the Age Discrimination in Employment Act. Even if, as some have assumed, Roberts were expected to do no more than continue in Rehnquist's ideological footsteps, that would be sufficiently harmful to this country in and of itself to warrant strong opposition to his confirmation.

Professor Laurence Tribe has written that "[i]n the twentieth century the changing of the Chiefs has translated into an important difference in the Court's direction."[26] Indeed, the power of the Chief Justice to shape the direction of the law and thus of the rights and freedoms of all Americans is illustrated by the appointment of Earl Warren to replace Chief Justice Vinson. As Professor Tribe describes it,

> most observers believe that Chief Justice Fred Vinson was ambivalent about the constitutionality of school segregation, and uncertain about what position he would take after hearing arguments in a series of cases in 1953. Instead of deciding the cases, the Court

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22 See S. Waxman, "Defending Congress in the Courts," Keynote Address at the 7th Circuit Judicial Conference (May 1, 2000) at 1-2.

23 J. Raskin, *Overruling Democracy* (2003) at 5.

24 E. Palmer, "Supreme Court Favors States in Age Bias, Gender Cases," *Congressional Quarterly* (Jan. 15, 2000) at 80 (*quoting* University of Virginia law professor A. E. Dick Howard).

25 D. O'Brien (University of Virginia government professor), "Justice: Supreme Court Can No Longer Duck the Big Issues," *Los Angeles Times* (Oct. 3, 1999).

26 Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes our History*, at 37 (1985).

> ordered their reargument the following year. In the interim, Vinson died and a new Chief Justice, Earl Warren, took his place. The new Chief not only wrote the Court's precedent-shattering decision in *Brown v. Board of Education*, signaling the end of segregated public schools in this country, but also worked with his Associate Justices to develop an opinion that could be announced unanimously. That the Court spoke with a single, authoritative voice in *Brown* added immeasurably to the ruling's credibility in the face of widespread and bitter resistance.[27]

According to Professor Tribe, "one Chief may make all the difference in the constitutional world."[28]

Chief Justice Rehnquist served on the Court since 1972, and as Chief Justice since 1986. If John Roberts, who is only 50, were to be confirmed as Chief Justice, it is likely that he could serve for thirty years or more. The confirmation of a successor to Chief Justice Rehnquist is of critical importance to this country and to the future of the rights, freedoms and interests of every American for years and most likely decades to come. Based on John Roberts' record, it is clear that he is the wrong choice to serve as this country's most important and powerful judge.

--Sept. 9, 2005

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[27] Id. at 37-38.
[28] Id. at 37.