Judge Roberts's Record on Women's Rights

- Some left-wing groups, including People for the American Way, accuse Judge Roberts of opposing women's rights and being "derisive" towards women.
  - Someone should ask Judge Roberts' three sisters, his Washington, D.C. attorney wife, or his young daughter how they feel about their brother, husband, and father being depicted as against the rights of women.
  - When told of Judge Roberts' nomination as her replacement, Justice Sandra Day O'Connor described him as, "Brilliant legal mind, a straight shooter, articulate, and he should not have trouble being confirmed by October."
  - Linda Chavez, the President of the Center for Equal Opportunity and John Roberts' former colleague said: "I knew Judge Roberts as a brilliant lawyer, as a very nice man, and I can say he doesn't have a sexist bone in his body."
- Judge Roberts' legal career clearly demonstrates his support for protecting women and for advocating equality among men and women.
  - As a private attorney, Judge Roberts successfully defended the state of Alaska's Megan's Law sex-offender registration program before the Supreme Court. Roberts argued that the law protected the public by making truthful information about sex offenders available. In an interview with NPR, Roberts said, "The purpose of the law is not to punish anyone. The purpose of this law is to protect families and particularly the most vulnerable among us, children." The Supreme Court agreed and upheld the law.
  - In his capacity as judge for the D.C. Circuit Court of Appeals, Judge Roberts upheld a FCC program that gave access to interactive video and data licenses to small businesses, which were primarily owned by women and minorities. Judge Roberts concluded that the FCC's consideration of the positive impact "on minority- and women-owned businesses" was not improper, especially in light of the fact that the FCC was providing licenses to "congressionally favored small business[es]."

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AG2-00361-264, AG1-01389-92,
AG1-01399, WH2-39586

***Univ. of Richmond v. Bell* (Title IX)**

- Critics have noted that as a young Justice Department lawyer, Judge Roberts recommended that the government should not appeal a case it had lost against a Virginia university.

- The case, *University of Richmond v. Bell,* was about whether the government can force private colleges to provide government investigators with highly detailed reports and information about their athletic programs. The law said, and the trial court had found, that the government only had this power over federally-funded athletic programs. The programs, in this case, did not receive any federal funding.

- Some government lawyers wanted to use the courts to change the law, hoping for a ruling that the government could force virtually any private university to comply with these costly and burdensome requests.

- Judge Roberts objected, arguing that the law only gave government investigators the limited authority to demand information from university programs that were federally funded.

- Judge Roberts pointed out that Congress had specifically chosen to make Title IX applicable only to federally-funded programs, and that the Supreme Court, that very same year, had affirmed that principle in *North Haven Board of Education v. Bell* when it stressed that Title IX was program-specific.

- Judge Roberts was not limiting Title IX's coverage of gender discrimination. He was simply enforcing the law as written by Congress at that time, and advocating that the government not use the Courts to rewrite the law.

AG6-01797-01799

Title VII and Employment Discrimination

- Some left-wing interest groups, including the Alliance for Justice and People for the American Way, have based their opposition to Judge Roberts, in part, on a 1981 memo that addressed proposed settlement negotiations with two school districts accused of race and sex discrimination in their hiring process.

- As Special Assistant to Attorney General William French Smith, Judge Roberts was tasked with reviewing a memorandum that overviewed the discrimination suit and the proposed settlement negotiations.

- Judge Roberts voiced concern that the proposed settlement agreements did not accurately reflect Title VII case law. He noted that as the law stood in 1981, a Title VII plaintiff had to prove not only that the applicant was discriminated against based on his or her race or sex, but also that the person was not hired *because of* the race or sex discrimination. In other words, there must be a *causal connection* between the discrimination and the fact that the person was not hired.

- This view of Title VII was entirely reasonable and was correct as a matter of law at the time Judge Roberts drafted the memorandum.

    - For example, only a few months earlier, the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, held that an employer could defend itself against a charge of discrimination under Title VII if it could "articulate some legitimate, nondiscriminatory reason for the employee's rejection" and the plaintiff was unable to prove that the "legitimate reasons offered by the defendant were not its true reasons."

    - It was not until ten years later that Congress enacted the Civil Rights Act of 1991, which changed the law to make it unlawful for race or gender to be used as any "motivating factor" in employment decisions.

Judge Roberts' on Disability Rights

Judge Roberts has a public record of advocating for judicial restraint and treating all litigants fairly. Yet far-left interest groups have attacked Judge Roberts for being hostile to civil rights laws, particularly disability discrimination laws. The facts are otherwise:

- Judge Roberts, while working as a special assistant to Attorney General William French Smith, argued for a broad view of the scope of Congress' power under section 5 of the Fourteenth Amendment. Section 5 grants Congress the power to enforce the Equal Protection Clause and the Due Process Clause, and Congress often invokes section 5 to enact antidiscrimination laws, including disability-discrimination laws.
    - Judge Roberts, in at least two separate memoranda written long before he became a judge, argued that Congress has the authority to enact legislation pursuant to section 5 so long as it "might rationally" conclude or if "the Court can conceive of a basis" for concluding that the law is necessary to safeguarding civil rights. (Busing Legislation, at 1; Note for the Attorney General, at 10 (April 6, 1982)).
    - That broad view of Congress' power to protect civil rights would enable Congress to enact a host of antidiscrimination laws, and is even more expansive than the views of Justice Ruth Bader Ginsburg. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Kennedy, J., for the Court, joined by, among others, Ginsburg, J.); *id.* at 545-46 (O'Connor, J.) (agreeing with the Court's reasoning in relevant part).
- The Bazelon Center for Mental Health law claims that Judge Roberts was hostile to the right to be free from disability discrimination created by section 504 of the Rehabilitation Act.
    - Yet while a Judge on the D.C. Circuit Court of Appeals, he joined the opinion of a Clinton appointee that *upheld* section 504 as a valid exercise of Congress' Spending Power. *See Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1168-70 (D.C. Cir. 2004). Judge Roberts thus allowed a disabled Metro worker who claimed he was fired on account of his mental health to sue his employer.

- In doing so, Judge Roberts rejected the position taken by a conservative judge on the panel, Judge David B. Sentelle, who voted to strike down this law and strongly dissented from Judge Roberts' vote. *Id.* at 1171-77 (Sentelle, J., dissenting).

- Judge Roberts also joined an opinion by another Clinton appointee allowing a suit by a disabled veteran for disability benefits to proceed. *See Thomas v. Principi*, 394 F.3d 970, 973-75 (D.C. Cir. 2005).

- The Bazelon Center also claims that Judge Roberts' decision on whether the federal government can ban economic activity that might affect a specific breed of toad endangers the rights of the disabled:

  - Judge Roberts never questioned that Congress may protect endangered species, or even that it could protect that toad.

  - Judge Roberts said that the court may have reached the correct result, but incorrectly applied Supreme Court precedent. He asked the full court to take time to review the case "to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

  - The question in that case – whether Congress can regulate a toad that never goes more than 1.2 miles from its birth place – is very different from whether Congress can regulate people, who work, travel, and contribute to the nation. In short, it says nothing about Congress' ability to enact antidiscrimination laws.

AG6-01797-99; WH2-39586

General Civil Rights
(FOLLOW-UP)

- Judge Roberts has been accused of being hostile to minorities and women simply because he advocated President Reagan's interpretation of civil rights statutes.

- As both Counsel to the Attorney General, as well as a White Counsel to President Reagan, it was Judge Roberts' duty to evaluate the law and determine what whether there would be any legal objections to the Reagan Administration's views.

- In fact, Judge Roberts was obligated to advocate the positions supported by President Reagan.

- It does not seem fair that Judge Roberts is being criticized now 20 years later for doing his job.

- I would also like to point out that none of Judge Roberts critics point out that when performing his job he consistently advocated equality for minorities and women.

    - For example, as Special Assistant to Attorney General William French Smith, Judge Roberts drafted an op-ed on behalf of the Attorney General that highlighted the efforts "to vindicate the principle of equal opportunity" and "to ensure that individuals in the workplace are treated on their ability and not their race, creed or sex." *[AG1-01433 to -01438]*

    - Judge Roberts also criticized the Administration when he thought that it was providing special treatment for Hispanic civil right complainants. He argued that this could only mean something less for Black civil rights complaints and that such preferential treatment for Hispanics could not be pursued by the Administration. *[WH2-36945]*

    - Judge Roberts also consistently advocated equality for women. For example, he pointed out in a memo that that women deserve equal pay rather than just the "good pay" that was specified in a White House speech. *[WH2-24460 to -24461]*.

Judge Roberts on Affirmative Action

As a young lawyer in the Reagan Justice Department, Judge Roberts advocated President Reagan's view that affirmative action was acceptable as long as it did not involve racial quotas or special treatment.

- Judge Roberts wrote in support of "affirmative action programs which increase the pool of applicants or compel the employer to consider a wider group with more blacks and women." (AG1-00448-49).

- Judge Roberts also wrote that "race or sex conscious preferences can of course be used in providing remedies to proven victims of discrimination." (AG1-00448-49).

- Judge Roberts further said that President Reagan should "encourage" awarding government contracts to minorities by "actively soliciting bids from qualified minority firms" and engaging in "broader advertising" to minorities. (WH2-29676).

Public opinion polls show that the American people agree with the position advocated by President Reagan and Judge Roberts.

- A recent ABC News/Washington Post poll showed that 7 out of 10 Americans, including a majority of Democrats, oppose affirmative action if it involves quotas or special treatment. (January 2003 ABC News/Washington Post poll).

As an open-minded and fair jurist, Judge Roberts will decide each affirmative action case on its own individual merits.

- As an attorney in private practice, he was retained by Democrat state attorneys general to defend a race-based policy adopted by the state of Hawaii. (*Rice* v. *Cayetano*).

- As a government lawyer in the first Bush Administration, he advocated the government's position that a racial quota program was wrong because it allowed only minority owners to buy certain TV broadcasting licenses. (*Metro Broadcasting v. FCC*).

- Judge Roberts's ability to see and argue both sides of the issue prepares him well for a seat on Supreme Court.