

The Rehnquist-Roberts Court

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ABSTRACT (ABSTRACT)

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The judicial left understands these stakes, which is why they are now ratcheting up their rhetoric against Judge Roberts. People for the American Way yesterday called him "unfit" to be Chief, which is the ultimate compliment. They're afraid he's every bit as smart as he seems. Mr. Roberts will be confirmed in any case, but the real game here is to intimidate Mr. Bush into naming a less conservative nominee for the second opening.

All the more so now that Mr. Bush is on the defensive in the aftermath of Hurricane Katrina. With a war in Iraq and down in the polls, Mr. Bush will hear from some of his own advisers that he should play it "safe" with his second choice. They'll suggest he avoid another "divisive" battle by selecting someone who will win the acquiescence of Democrats Ted Kennedy or Chuck Schumer.

FULL TEXT

With his nomination yesterday of John Roberts to be Chief Justice of the United States, President Bush moved to fulfill the Supreme Court legacy of the late William Rehnquist, and also took what we hope is the first step toward guaranteeing his own.

Elevating Judge Roberts to Chief was a logical decision, both politically and on the merits. The Senate and media have been investigating the nominee since July, and have found superlatives with nary a negative. The Judge is in a position to be rapidly confirmed and ready to preside by the time the High Court begins its new term on October 3.

More importantly, what we have learned about Judge Roberts suggests that he shares Chief Justice Rehnquist's judicial philosophy. If Mr. Bush now follows with the nomination of an equally distinguished conservative for the Court's second opening, the Roberts Court will be able to continue the legal restoration that the late Chief Rehnquist began but was never able to finish.

That historic mission is to restore the Court to its proper Constitutional role as a judicial arbiter rather than as an engine of liberal policy-making. Judicial activism was in its heyday in 1972, the year Justice Rehnquist arrived at the Court. In his early years, he earned the nickname the "Lone Ranger" because he was often the only dissenter on the nine-member Court. But after he became Chief in 1986, and with the help of other Reagan appointees, he began to move the Court back toward the center.

He made some progress, notably on limiting federal power over state governments (Lopez in 1995); church-state relations, especially with the 5-4 Zelman decision in 2002 that found private-school vouchers constitutional; racial preferences (Richmond v. Croson, 1989); and property rights (Nollan in 1987). It's a tribute to Mr. Rehnquist's

principles that he also upheld liberal precedents if they had become embedded in common practice, such as the Miranda warnings (Dickerson v. U.S., 2000) that he had once opposed as policy. Modern liberals never display such deference to precedent when their policy preferences are at risk.

But the Chief was denied a genuine intellectual majority by the protean quality of some of his colleagues. Justices Anthony Kennedy and Sandra Day O'Connor tapered their views to the Beltway winds, while David Souter repudiated his confirmation testimony and joined the Court's liberal wing. When Bill Clinton replaced Byron White (Justice Rehnquist's partner in dissent on Roe v. Wade in 1973) with Ruth Bader Ginsburg in 1993, most conservative momentum stalled.

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We hope he rejects such counsel. With two vacancies, Mr. Bush now has a genuine chance to remake the Court. He told voters during two election campaigns that he'd nominate Justices in the mold of Antonin Scalia and Clarence Thomas. Especially with his other troubles, Mr. Bush can't afford to alienate his most loyal supporters in the hope of buying a confirmation truce.

A battle with Senate liberals over a distinguished conservative nominee would probably even help Mr. Bush politically. While the activist left is howling about Judge Roberts, Red State Democrats have kept a studious silence. They know that the "values" issues that so motivate the political left – abortion, gay marriage, racial preferences – are far less popular in Nebraska, North Dakota or Florida.

Democrats from these states will need an excuse beyond ideology to oppose a qualified nominee. And Mr. Bush has many such candidates to choose from: J. Harvie Wilkinson, Edith Jones, Ted Olson, Michael Luttig, Sam Alito, Larry Thompson, Michael McConnell or Janice Rogers Brown. The political trap for Mr. Bush would be to choose someone who is less distinguished but is somehow thought to be easier to confirm. The President should be thinking about his Supreme Court legacy for the next 30 years, not the next 30 days.

DETAILS

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