

# Roberts Rules

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## ABSTRACT (ABSTRACT)

Within minutes of President Bush's nomination of John Roberts to the Supreme Court, the folks at People for the American Way sent out their all-points bulletin: "Sparse Record Raises Serious Concerns." In other words, they don't know how in the world they're going to assault this guy, but they'll try like mad to come up with something.

Even liberals are conceding Mr. Bush's description that the 50-year- old federal judge is "one of the best legal minds of his generation." He's served as Associate White House Counsel to President Reagan, principal deputy Solicitor General under Ken Starr in the administration of the first President Bush, prominent appellate litigator who's argued 39 cases before the Supreme Court, and two years on the D.C. Circuit. That's a resume.

Inevitably, abortion will come up, but this too is a red herring. Opponents will raise his anti-Roe advocacy when he was in the Solicitor General's office, but Mr. [Roberts] was doing so as a hired lawyer for the government -- one of several whose names appear on the brief -- required to express the Administration's position. As a judge, Mr. Roberts has not decided any cases involving abortion. In any event, Roe has a 6-3 majority on the current Court and isn't in jeopardy even if he would vote to overturn it. But abortion rights wouldn't vanish even if Roe were overturned. They'd merely revert to state legislatures to determine.

## FULL TEXT

Within minutes of President Bush's nomination of John Roberts to the Supreme Court, the folks at People for the American Way sent out their all-points bulletin: "Sparse Record Raises Serious Concerns." In other words, they don't know how in the world they're going to assault this guy, but they'll try like mad to come up with something.

We doubt they'll succeed. While it's always possible that opponents will simply make something up, Judge Roberts is a judicial conservative who is no easy political target. He deserves to be confirmed easily and soon, and he probably will be.

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One irony is that both liberals and some social conservatives wish Mr. Roberts had spent a few more years on the D.C. Circuit, to see more of his philosophy emerge in more opinions. But what we know suggests a jurist in the mold of Chief Justice William Rehnquist, for whom Mr. Roberts clerked.

He gives every sign of being a careful constitutionalist -- for example, as a believer in federalism and the Lopez line of cases. One signal on this point is his 2003 dissent in *Rancho Viejo*, in which he questioned a Fish & Wildlife Service order to a developer to move a fence from its own property in order to accommodate an endangered toad.

"The hapless toad," he wrote, "for reasons of its own, lives its entire life in California" and thus could not affect

interstate commerce. This implies a less expansive view of the Commerce Clause than the current Supreme Court majority, and suggests he would have joined the four dissenters in *Raich*, the Supreme Court's recent decision to let the federal government overrule state laws on regulating medical marijuana.

Also in the Rehnquist tradition is the deference to executive war powers that Judge Roberts showed in joining last week's unanimous D.C. Circuit ruling on Guantanamo that cleared the way for enemy combatants to be tried in military commissions.

It's possible that the nominee might not be as willing to overturn precedent as Justices Antonin Scalia or Clarence Thomas, but he seems to be someone with deeper roots in the original Constitution than either Justice Sandra Day O'Connor or Justice Anthony Kennedy. While we won't agree with every Roberts opinion, it's impossible to see him making the law up as he goes along. And if confirmed he is thus likely to move the High Court marginally, but importantly, back toward where it was before Justice Ruth Bader Ginsburg replaced Byron White in 1993.

Liberals also know this, which is why they are now demanding that Mr. Roberts answer "all" of their questions, so they can trip him up on this or that issue. But they are likely to be frustrated, as Judge Roberts follows the Ginsburg-Stephen Breyer rule of not commenting on cases that might come before the Supreme Court.

Expect to hear responses along the lines of "I must avoid giving an advisory opinion on any specific scenario, because ... that scenario might come before me," which was how Justice Ginsburg put it during her confirmation hearing. If Mr. Roberts isn't more expansive, Democrats have only themselves to blame because nominees know that anything they say can and will be used against them.

Expect, too, to hear demands for the White House to release the confidential case memorandums written by Judge Roberts during his time in the Solicitor General's office. This is the Democratic delaying tactic du jour, used as an excuse to filibuster Miguel Estrada's nomination for the D.C. Circuit and employed most recently against John Bolton. We hope the White House resists, lest every lawyer in the SG's office starts giving advice not on the merits but based on how it might look at some future confirmation hearing.

Inevitably, abortion will come up, but this too is a red herring. Opponents will raise his anti-Roe advocacy when he was in the Solicitor General's office, but Mr. Roberts was doing so as a hired lawyer for the government – one of several whose names appear on the brief – required to express the Administration's position. As a judge, Mr. Roberts has not decided any cases involving abortion. In any event, Roe has a 6-3 majority on the current Court and isn't in jeopardy even if he would vote to overturn it. But abortion rights wouldn't vanish even if Roe were overturned. They'd merely revert to state legislatures to determine.

All in all, Mr. Bush seems to have made a shrewd choice, one that moves the Court back toward the center while denying opponents easy attack lines. The list of the three Democrats who voted against Mr. Roberts in committee for the appeals court – Ted Kennedy, Richard Durbin and Chuck Schumer – tells us who is really in the judicial "mainstream."

We'll still get a noisy battle, because the MoveOn.org crowd can't help themselves, but unless they can dig up some mud we aren't now aware of, the left is about to discover that losing Presidential elections has judicial consequences.

(See related letter: "Letters to the Editor: In High Court Nomination, Bush Pulls 'Double Switch'" – WSJ 26, 2005)

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