Report of the Alliance for Justice:
Opposition to the Confirmation of John G. Roberts
to the U.S. Court of Appeals for the D.C. Circuit

Introduction

John G. Roberts, nominated by President Bush to a seat on the United States Court of Appeals for the D.C. Circuit, has a record of hostility to the rights of women and minorities. He has also taken controversial positions in favor of weakening the separation of church and state and limiting the role of federal courts in protecting the environment. The Alliance for Justice opposes his nomination to the D.C. Circuit.

Although Mr. Roberts is indisputably a very capable lawyer, that alone does not qualify him for such a prestigious and critical post. As a group of over 300 law professors stated in a 2001 letter to the Senate,[1] a lifetime appointment to the federal bench is a privilege that comes with great responsibility and requires much more. Every nominee bears the burden of showing that he or she respects and pledges to protect the progress made in the areas of civil rights and liberties, the environment, and Congress' constitutional role in protecting the health and safety of all Americans. Mr. Roberts' record, particularly his record as a political appointee, argues strongly that he would not do so.

While working under Presidents Reagan and Bush, Mr. Roberts supported a hard-line, anti-civil rights policy that opposed affirmative action, would have made it nearly impossible for minorities to prove a violation of the Voting Rights Act and would have "resegregated" America's public schools. He also took strongly anti-choice positions in two Supreme Court cases, one that severely restricted the ability of poor women to gain information about abortion services, and another that took away a key means for women and clinics to combat anti-abortion zealots.

Finally, Mr. Roberts is being considered for lifetime tenure on a court that is only one step below the U.S. Supreme Court and is acknowledged to be the second most important court in the country. His nomination must be considered in light of the special significance of that court. Moreover, Judiciary Committee Chairman Hatch's insistence on scheduling three controversial Circuit Court nominees, including Mr. Roberts, for confirmation hearings on a single day ensured that senators had no meaningful opportunity to question Mr. Roberts about his views on a number of critical issues. The Alliance for Justice urges the Senate to reject his confirmation.

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[1] Alliance for Justice letter by law professors to Senate Judiciary Committee, May 8, 2001.

The D.C. Circuit

The U.S. Court of Appeals for the District of Columbia Circuit is widely viewed as second only to the U.S. Supreme Court in influence over law and policy in this country. Unlike other regional courts of appeals, the D.C. Circuit has exclusive jurisdiction over appeals not only from the D.C. District Court, but also from many federal tax and regulatory agencies. It thus establishes precedent in areas such as labor and workers' safety laws and environmental protections that affect all Americans in very significant ways.

The D.C. Circuit is also viewed as a stepping-stone for nomination to the Supreme Court. In recent years, Chief Justice Burger and Justices Scalia, Thomas and Ginsburg all served on the D.C. Circuit before elevation to the Supreme Court. Judges Robert Bork and Douglas Ginsburg were both judges on the D.C. Circuit when they were nominated to the Supreme Court.

As a result of its critical importance, the D.C. Circuit has long been the target of attempts by Republican administrations to pack the court with ultra-conservative ideologues who will carry out a pro-business, anti-regulatory, Republican political agenda. President Reagan appointed eight such judges – Robert Bork, Kenneth Starr, Stephen Williams, Douglas Ginsburg, James Buckley, David Sentelle, Laurence Silberman, and Antonin Scalia – to the court, and President George H.W. Bush followed with Karen Henderson and Raymond Randolph.

The D.C. Circuit currently has twelve authorized judgeships, with four active Democrat-appointed judges, four active Republican appointed judges, and four vacancies. The oldest of these vacancies was created on August 31, 1996, when Judge Buckley assumed senior status. If President Bush were to fill all of the existing vacancies on the D.C. Circuit, Republican appointees would dominate this currently balanced court. President Clinton nominated Elena Kagan and Allen Snyder – a well-respected partner at Hogan & Hartson, Roberts' law firm – to fill two of the vacancies on the D.C. Circuit, but neither was confirmed by the Republican-controlled Senate, thereby preserving Republicans' ability to take control of the court. Had Snyder and Kagan been confirmed, filling the remaining two vacancies with Republican nominees would have retained the court's balance. Instead, confirming both of President Bush's current nominees will tilt the court decisively to the right.

Consideration of President Bush's nominees to the D.C. Circuit, including Mr. Roberts, must take into account the current close division between Republican and Democrat appointed judges on that court and the refusal by Republican senators to take up President Clinton's nominees to it. Senators refuse to confirm any ultra-conservative Bush nominee to the court who would upset the court's current balance.

Brief Biography

John Roberts is currently a partner at the D.C. law firm of Hogan & Hartson. He was born on January 27, 1955 and received a B.A. from Harvard College (*summa cum laude*) and a J.D. from Harvard Law School (*magna cum laude*), where he was managing editor of the Law Review. He clerked for Judge Friendly on the Second Circuit and for then-Associate Supreme Court Justice Rehnquist.

Mr. Roberts has a longstanding connection to the Republican Party and to right-wing legal organizations. After clerking for Justice Rehnquist, he held significant positions in the administrations of Ronald Reagan and the elder President Bush, where he became Deputy Solicitor General. In 1992, Bush nominated Roberts for the U.S. Court of Appeals for the D.C. Circuit, but his nomination lapsed before it could be considered.

Mr. Roberts is now a partner at the D.C. law firm of Hogan & Hartson and is in charge of that firm's appellate practice, frequently arguing cases before the U.S. Supreme Court. He is a member of both the Republican National Lawyers' Association and the National Legal Center For The Public Interest. He serves on the Legal Advisory Council of the latter group,[2] which states as its mission the promotion of "free enterprise, private ownership of property, balanced use of private and public resources, limited government, and a fair and efficient judiciary," euphemisms for hostility toward environmental and worker protections and a commitment to an ultra-conservative, anti-government legal agenda, including the confirmation of President Bush's pro-corporate judges. In addition, Mr. Roberts states in his Senate Judiciary Committee questionnaire that he "regularly participate[s] in press briefings sponsored by the… Washington Legal Foundation," a rigidly right-wing legal organization that litigates on behalf of corporate interests and wealthy property owners challenging environmental and other regulations.

Government Service

The Reagan Administration

While working in the Reagan administration, Roberts served as Special Assistant to United States Attorney General William French Smith. In 1982, Roberts was appointed by President Reagan to the White House Staff as Associate Counsel to the President, where he worked under then White House Counsel Fred Fielding[3] and advised the President on his constitutional powers and responsibilities and those of the Executive

[2] Other Board Members and Legal Advisors of the Center include prominent conservatives and Republicans such as: Douglas Kmiec, C. Boyden Gray, Kenneth Starr, Eugene Meyer, Dick Thornburgh, and Fred Fielding.

[3] At the time Roberts was nominated, Fielding served as the D.C. Circuit representative on the ABA's Standing Committee on the Judiciary, would have been in charge of giving Roberts his "Well Qualified" rating. Such a role for Roberts' former White House boss would appear to present a clear conflict of interest.

Branch generally. Because Reagan chose to shift the choosing of federal judges from the Justice Department to the White House, it is possible that Roberts had some role in the selection of the President's extremist judicial nominees.

As Special Assistant to Attorney General Smith in the Justice Department, and as counsel in the Reagan White House, Roberts compiled a staunch record of hostility to civil rights. Documents compiled from a FOIA request suggest that Roberts played a significant role in supporting the Reagan Administration's "race-neutral" approach to combating discrimination. With regard to remedies for segregated public schools and employment discrimination, Roberts advised the Attorney General about the Justice Department's disagreement with a U.S. Commission on Civil Rights report, which had asserted that mandatory busing and "the fullest use of…affirmative action" were necessary. Roberts explained the Department's position that, "the objective of a proper desegregation remedy" was simply "the end to official discrimination on the basis of race,"[4] a position that effectively eliminated much of the government's traditional role in working to eradicate the effects of prior discrimination.

After a 1980 Supreme Court decision, *Mobile v. Bolden*, dramatically weakaned certain sections of the Voting Rights Act, Roberts was involved in the administration's effort to prevent Congress from overturning the Supreme Court's action. The Supreme Court had decided, despite a lack of textual basis for this interpretation of the statute, that plaintiffs claiming certain violations of the Voting Rights Act, such as minority vote dilution, had to prove that the discrimination was *intentional* rather than just having a discriminatory *effect*.[5] Roberts joined the Administration in opposing the "Section 2" extension of the Act, strongly supported by both the House and the Republican-controlled Senate, which would have reinstated the *effects* standard. Instead, he participated in the effort to amend the extension of the Act so that voting rights plaintiffs would continue to have to prove discriminatory *intent*, a much harder task.[6] As the Washington Post stated:

> Opponents of [the effects standard] say this would require courts to strike down any voting system that didn't result in proportional representation. Not true. It would simply reinstate the standard used by the courts before the Supreme Court decision in Mobile v. Bolden, a 1980 case requiring proof that the drafters of the law in question intended to discriminate – a standard that is virtually impossible to meet since the legislators in question have all been dead for years.[7]

The Bush Administration

[4] Memorandum, John Roberts to Attorney General re Summary of [U.C. Commission on Civil Rights Chairman] Flemming Correspondence, October 5, 1981.
[5] *Mobile* v. *Bolden*, 446 U.S. 55 (1980).
[6] Critical portions of the FOIA documents that would show Roberts' positions on this issue were redacted, making it impossible to document the actual level and substance of his influence and involvement.
[7] "Voting Rights: Be Strong," *Washington Post*, January 26, 1982.

During the administration of President George H.W. Bush, Roberts served as Deputy Solicitor General. He was the "political deputy" in the Solicitor General's office and thus, unlike career Deputy Solicitor Generals, cannot dismiss positions he took as simply arguments he was forced to make as part of his obligation to zealously represent the interests of his client, the federal government. While in the Solicitor General's office during the Bush administration, Roberts co-authored briefs in a number of controversial cases.

Environment

First, as Acting Solicitor General, Roberts was the government's lead counsel before the Supreme Court in *Lujan v. National Wildlife Federation*,[8] a case brought by citizens seeking to enforce environmental protections in response to the government's decision to open 4,500 acres of public land to mining activity. Plaintiffs asserted that they would be injured by the government's decision to open the land to mining, citing recreational activities in which they had engaged and planned to engage in the future in that area.

Despite express statutory authorization for such suits, however, Roberts argued that plaintiffs, members of the National Wildlife Federation, had no right to file the claims, because they had not presented sufficient proof of the impact of the government's actions on them to give them standing. He asserted that the D.C. Circuit, which *had* granted standing, had "presum[ed] facts that the parties did not -- and perhaps cannot -- allege on their own."[9] The Supreme Court agreed with Roberts, tightening standing requirements for federal cases in one of a line of cases making it harder for plaintiffs to challenge governmental actions detrimental to the environment.

Choice

In two cases, Roberts took positions hostile to women's reproductive rights. He was a co-author of the government's brief in *Rust v. Sullivan*,[10] the case in which the Supreme Court upheld newly revised Title X regulations that prohibited U.S. family planning programs receiving federal aid from giving any abortion-related counseling or other services. The provision barred such clinics not only from providing abortions, but also from "counseling clients about abortion" or even "referring them to facilities that provide abortions."[11] Roberts' brief argued that the regulation gagging the government-financed programs was necessary to fulfill Congress' intent not to fund abortions through these programs, despite the fact that several members of Congress, including sponsors of the amendment dealing with abortion, disavowed this position and that the Department of Health and Human Services' had not previously interpreted the provision in such a rigid

[8] 497 U.S. 871 (1990).
[9] *Lujan v. National Wildlife Federation*, 1989 U.S. Briefs 640 at p.1, Reply Brief for Petitioners, April 6, 1990.
[10] 500 U.S. 173 (1991).
[11] Title X, 42 U.S.C. 300, Section 1008.

and restrictive manner.[12] Moreover, Roberts argued, even though the case did not implicate *Roe v. Wade*, that "[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."[13]

In a second abortion-related case, Roberts co-authored the government's *amicus* brief in a private suit brought against Operation Rescue by an abortion clinic it had targeted.[14] The brief argued that Operation Rescue was not engaged in a conspiracy to deprive women of equal protection. Roberts took this position in spite of Operation Rescue's admission that its goal was to prevent women from obtaining abortions and to shut down the clinic during its protests. Although the government's brief acknowledged that only women could become pregnant, it argued that conspiring to prevent people from seeking constitutionally-protected abortions did not constitute gender discrimination. It asserted that, at worst, Operation Rescue was discriminating against pregnant people, not women.

The brief in *Bra*y also took the additional step of pointing out that the Supreme Court had not previously decided whether women were protected from private conspiracies to violate their equal protection rights, under the relevant civil rights statute,and urged the Court not to reach a decision on this question, rather than arguing that the Court should definitively state that women should be afforded protection by the statute, as was within the Court's power in this case.

The Supreme Court accepted Roberts' argument in a 5-1-3 decision, with Justices O'Connor, Stevens, and Blackmun dissenting. However, Justice Souter, who concurred in part with the Court's holding, disdainfully rejected Roberts' arguments, writing that:

> It is also obvious that petitioners' conduct was motivated "at least in part" by the invidious belief that individual women are not capable of deciding whether to terminate a pregnancy, or that they should not be allowed to act on such a decision. Petitioners' blanket refusal to allow any women access to an abortion clinic overrides the individual class member's choice, no matter whether she is the victim of rape or incest, whether the abortion may be necessary to save her life, or even whether she is merely seeking advice or information about her options. Petitioners' conduct is designed to deny *every* woman the opportunity to exercise a constitutional right that *only* women possess. Petitioners' conspiracy, which combines massive defiance of the law with violent obstruction of the constitutional rights of

[12] A 1978 memorandum from the Department of Health and Human Services stated that, "This office has traditionally taken the view that… the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by [the regulation at issue]." Memorandum from Carol C. Conrad, Office of General Counsel, Dep't of Health, Education & Welfare, to Elsie Sullivan, Ass't for Information and Education, Office of Family Planning, BCHS (April 14, 1978).
[13] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 1392).
[14] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

> their fellow citizens, represents a paradigm of the kind of conduct that the statute was intended to cover. [15]

Civil Rights

Roberts co-authored two briefs on the government's behalf arguing for court supervision to be lifted in school desegregation cases. In a 1990 case, the *amicus* brief co-authored by Roberts in his capacity as Deputy Solicitor General sought to weaken the standard and limit the timeline for court-enforced desegregation decrees in the nation's schools. Roberts argued that Oklahoma City schools, which had been declared "unitary" in 1977, could not again be subjected to a desegregation decree in 1985, despite the school board's decision to eliminate busing in elementary schools, thus returning a number of schools that had previously been desegregated to one-race status.[16] In a 5-3 split, with Justice Souter not yet participating, the Supreme Court held that the board did not have to remain under court-ordered supervision, and that it could implement the proposed change, so long as the result did not cause a new violation of the Equal Protection Clause. In a strong dissent joined by Justices Blackmun and Stevens, Justice Marshall wrote:

> The majority today suggests that 13 years of desegregation was enough…. Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed. I therefore dissent.[17]

The next year, the government filed another *amicus* brief on a case with substantially similar facts. It argued that a school system whose racial makeup had changed due to demographic shifts in residential patterns allegedly unrelated to prior discrimination could not be required to eliminate racial imbalances within its schools and that the court could lift a desegregation decree even if not all six factors for "unitary status" had been fulfilled.[18] In doing so, it won the Supreme Court's approval to lower the bar for the proof that school systems that had previously engaged in *de jure* discrimination had to show in order to obtain the court's revocation of a desegregation decree.

After acknowledging that the DeKalb County, Georgia school system was still segregated and had failed to fulfill several "unitariness" factors – "teacher and principal assignments, resource allocation, and quality of education"—the district court nonetheless removed the system from supervision, instructing it to remedy the remaining factors.[19] Plaintiffs, a group of parents of public school students, sought to ensure the court's continued jurisdiction over the schools, which had employed *de jure* segregation through 1969, until they achieved "unitary" status. The Eleventh Circuit granted plaintiffs' request, reversing

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[15] *Id*. at 324 (footnotes omitted).
[16] *Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991).
[17] *Id*. at 251-2.
[18] *Freeman v. Pitts*, 503 U.S. 467 (1992).
[19] Id. at 474 (citing district court decision).

the district court and holding that a school system that allocated fewer resources to Black children and remained segregated had to prove that it had shown total fulfillment of all factors of "unitary status" for several years:

> School boards violated the Constitution by operating dual systems. To remedy this violation, they must eliminate *all* of the dual system's vestiges…. The factors operate, in part, as an indicator of more intangible vestiges…. A school achieves unitary status or it does not. We will not permit resegregation in a school system that has not eliminated all vestiges of a dual system.[20]

The Supreme Court reversed, agreeing with the U.S. government's argument that the school district may regain control of those factors for which it had achieved unitary status and reversing the Eleventh Circuit's order that the court retain control until several years of complete unitary status had been completed. Justice Souter, however, warned in his concurrence that the remaining "vestiges" – including funding disparities and trailers at only the majority-Black schools – could, and often do, contribute to the "independent" migration of White families, and thus students, from those school districts, and that the district court must continue to monitor the situation to prevent such resegregation.

Three other Justices – Blackmun, Stevens, and O'Connor – agreed that the Eleventh Circuit's decision required a remand but disagreed sharply with the majority's contention that the school system had substantially complied, noting the school system's ability to influence the residential choices made by White families and the resulting exiting disparities and segregation in the system and ordering the lower court, on remand, to investigate that issue in making its final decision.

Rights of Criminal Defendants

While in the Solicitor General's office, Roberts co-authored two *amicus* briefs arguing that the Supreme Court should limit the rights of prisoners or criminal defendants. In one, he argued that the Ninth Circuit had erred in denying summary judgment for the state on a prisoner's claim that the prison violated his Eighth Amendment rights.[21] The brief asserted that the Ninth Circuit test – which allowed a court to dismiss an *in forma pauperis* complaint only if it could take judicial notice that the alleged facts did not occur – was improper. Criticizing what it felt was that court's excessive leniency toward *in forma pauperis* prisoner litigants, the brief quoted an earlier dissent by Justice Rehnquist, in which he asserted that, "[t]he potential for abuse of [the *in forma pauperis* statute] is especially acute in the context of suits by prison inmates. Such individuals not only have no financial disincentive to mount such claims, but may look upon bringing suit as a means to 'obtain[] a short sabbatical in the nearest federal courthouse."[22] Roberts' brief argued that "frivolous" claims could be dismissed if the judge believed that an attorney

[20] *Pitts v. Freeman*, 887 F.2d 1438, 1446 (11th Cir. 1989).
[21] *Denton v. Hernandez*, 504 U.S. 25 (1992).
[22] Brief for amicus curiae United States, *Denton v. Hernandez*, No. 90-1846, October Term, 1991, citing *Cruz v. Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting).

would have refused to file the complaint for fear of being sanctioned and stated that this claim was clearly frivolous. The Supreme Court agreed that the standard set by the Ninth Circuit was too high and remanded the case for further review with instructions, however, that the lower court weigh all facts in plaintiff's favor.

As Acting Solicitor General, Roberts also authored the government's Supreme Court brief in *Burns v. United States*.[23] Petitioner William Burns was convicted of government theft, attempted tax evasion, and false claims based upon a plea bargain with the government under which he would receive a prison sentence of 30-37 months, which was within agreed-upon guidelines. At Burns' sentencing hearing, however, the district court judge *sua sponte* announced a 60-month sentence. Burns appealed, but the Court of Appeals affirmed, finding no language in the Federal Rules mandating advance notice of such a decision by the judge. The U.S. Supreme Court granted certiorari to resolve a circuit split and reversed.

Under the Federal Rules of Criminal Procedure, a presentence report must include the projected range of sentence and any possible basis for deviating from it.[24] The government argued that the absence of a similar express requirement for a judge to notify a defendant of his intent to make an upward departure in sentencing or his reasons for doing so demonstrated a legislative intent to exclude this right for criminal defendants. The Court disagreed, 5-4, with Justices Blackmun, Stevens, Scalia, and Kennedy joining Justice Marshall in stating that:

> [I]n our view, it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a sua sponte departure but not the right *to be notified* that the court is contemplating such a ruling… Such a reading…renders meaningless the parties' express right. The Government's construction of congressional "silence" would thus render what Congress has *expressly* said absurd.[25]

First Amendment

Roberts co-authored two briefs arguing for an expanded role for religion in public schools. In one case, he co-authored a government *amicus curiae* brief before the Supreme Court, in which he argued that public high schools should be allowed to conduct religious ceremonies as part of a graduation program, a position rejected by the Supreme Court.[26] In the other, the government argued that barring a religious group from meeting

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[23] 501 U.S. 129 (1991).

[24] "The presentence report must: (A) identify all applicable guidelines and policy statements of the Sentencing Commission; (B) calculate the defendant's offense level and criminal history category; (C) state the resulting sentencing range and kinds of sentences available… (E) identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P. 32 (d)(1). (At that time, (c)(1)).

[25] *Id*. at 135-6 (emphasis in the original). Note that, at the time this case was heard and decided, Fed. Rule Crim. Proc. 32(a)(1) mandated that parties be given "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."

[26] *See Lee v. Weisman*, 505 U.S. 577 (1992).

on school grounds violates the Equal Access Act, while granting access does not violate the Establishment Clause.[27] The Supreme Court agreed with the government's position.

In the area of freedom of speech, Roberts co-authored a brief arguing that the 1989 Flag Act did not violate the First Amendment.[28] Two Americans had been prosecuted for burning the U.S. flag in violation of the Act, but both charges were dismissed on the grounds that the law violated the First Amendment right to freedom of speech. The government's brief argued for the Court to treat flag burning like "obscene words" and "defamatory statements" and allow the government to ban it for the common good,[29] but the Supreme Court disagreed 5-4, holding the statute unconstitutional.

Private Practice

In private practice, Roberts has often represented corporations in suits against private individuals or the government. He represented Toyota Motor Manufacturing, Kentucky, Inc., in its successful petition to the Supreme Court arguing that a worker with carpal tunnel syndrome is not disabled such that she is entitled to accommodation at work under the Americans with Disabilities Act.[30] Mr. Roberts took the position that Ella Williams, an automobile assembly line worker, was not covered by the ADA, even though she was fired because carpal tunnel syndrome – which she acquired as a result of activities she was required to perform as part of her job – prevented her from doing all of the tasks required by her job.

Roberts also served as the attorney for Fox Television, the network owned by conservative media mogul Rupert Murdoch, in its challenge of governmental regulations. In *Fox Television Stations, Inc. v. Federal Communications Commission*, Fox won its challenge to the federal government's ownership and cross-ownership rules.[31] The D.C. Circuit held that there was insufficient evidence to uphold the use of the rule in this case, given the lack of proof of a potential for monopoly on Fox's part and the federal government's imprecise definition of the term "diversity" to justify its need for the rule.

As counsel for The Associated General Contractors of America, Roberts wrote an *amicus* brief in *Adarand Constructors, Inc. v. Mineta*,[32] arguing in a challenge to an affirmative action program for Department of Transportation contractors that Congress had failed to make sufficiently specific findings to justify the program. The Supreme Court dismissed the case as an improvident grant of certiorari, effectively preserving the federal program.

In another case, however, Roberts was successful in challenging a minority preference program. He again wrote an *amicus* brief for Associated General Contractors of America, who took the side of a contractor challenging the Department of Defense's

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[27] *Mergens v. Westside Community School District*, 496 U.S. 226 (1990).
[28] *United States v. Eichman, United States v. Haggerty*, 496 U.S. 310 (1990).
[29] *United States v. Eichman, United States v. Haggerty*, Brief for the United States at p.23-4.
[30] *See Toyota Motor Mfg., Kentucky v. Williams*, 534 U.S. 184 (2002).
[31] 280 F.3d 1027 (D.C. Cir. 2002).
[32] 534 U.S. 103 (2001).

program granting bid preferences to small, minority-owned businesses.[33] Plaintiffs argued, much as they had in *Adarand*, that the Defense Department's program, which promoted bids from socially and economically disadvantaged individuals (SDBs), was unconstitutional because it lacked the evidentiary findings necessary to support the implementation of a program with race-based classifications, or, alternatively, that the program was not sufficiently tailored to pass constitutional muster.[34] The Federal Circuit reversed the district court's decision to uphold the statute, remanding the case to the lower court with orders that the court conduct further findings and apply a lesser standard of deference to Congressional intent.

Roberts' record with regard to his private practice work in environmental cases is decidedly mixed. He submitted an *amicus* brief on behalf of the National Mining Association in the 2001 case *Bragg v. West Virginia Coal Association*. [35] Citizens of West Virginia who were adversely affected by the practice of "mountaintop removal" had sued the state, claiming that West Virginia's issuance to mining companies of permits to extract coal by blasting the tops off of mountains and depositing the debris in nearby valleys and streams harmed both the environment and their homes.

Defendants argued that, because of the way in which the Surface Mining Control and Reclamation Act (SMCRA)[36] was structured, upon the federal government's approval of its plan for implementing the Act, the state gained complete authority over decisions in this area, and it was therefore immune from suits by private citizens.[37] To the dismay of environmentalists, three Republican appointees to the Fourth Circuit – Judges Niemeyer, Luttig, and Williams – agreed, holding that the citizens could not sue in federal court to challenge West Virginia's issuance to mining companies of permits.

In another recent case, however, following his nomination to the D.C. Circuit, Roberts represented the Tahoe Regional Planning Agency, which was defending its development moratorium on a pristine portion of Lake Tahoe.[38] Roberts argued successfully to the Supreme Court that, in light of landowners' investment-backed expectations, the actual impact of the regulation on them, and the public benefit gained from the regulations, the moratorium did not constitute a taking that required government compensation of the landowners, a decision applauded by many environmental groups.

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[33] *Rothe Development Corporation v. United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001).

[34] Because we do not have Roberts' brief in this case, we cannot lay out with any certainty the arguments he presented. Given the premise of the case, however, it seems clear that the brief must have argued against the use of race in such affirmative action programs. In that case, Roberts' position here is similar to that espoused by the Reagan Administration during his time there.

[35] 248 F.3d 275 (4th Cir. 2001).

[36] 30 U.S.C. §1201.

[37] Since we have not yet obtained Roberts' brief in this case, it is unclear what exactly he argued. What is clear is that he sought to protect the right of mining companies to engage in mountaintop removal and that he sought to prevent private citizens from suing to bar that practice.

[38] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

One of the American Bar Association's requirements for lawyers is the performance of work on behalf of the disadvantaged, and the Alliance considers this a prerequisite for any individual seeking a lifetime appointment to the federal bench. Mr. Roberts has fulfilled this requirement in his private practice.

Published Writing and Public Statements

As a law student, Roberts authored two law review articles arguing for the courts to interpret clauses of the Constitution in ways that would weaken key worker, consumer, and environmental protections.[39] Interestingly, he advanced interpretations of both the Takings and Contracts Clauses that went against long-standing precedent and explicitly rejected "plain language," or literal interpretation of the Constitution's language.

In the first article, Roberts offered his view of the Takings Clause, which requires that the government give "just compensation" for takings of "private property." Roberts claimed that courts trying to ascertain its meaning, "have not been significantly aided by the words of the clause, which are incapable of being given simple, clear-cut meaning… Indeed, the very phrase 'just compensation' suggests that the language of the clause must be informed by changing norms of justice."[40] After rejecting on various grounds several interpretations of the clause traditionally used by courts – *i.e.* physical intrusion onto an owner's property as anachronistic in a largely non-agrarian society, "noxious use" as too value-laden, and Justice Holmes' 1922 "diminution of value" test as too vague, Roberts argued for a "constrained" model based on a utility-based test proposed by Professor Frank Michelman. Under that model, parties made unwhole or "insecure" by regulation should be compensated accordingly.

In his second article, Roberts took on the Contract Clause, which provides that, "No state shall… pass any… law impairing the obligation of contracts." Roberts argued that this clause should be interpreted to protect corporations from legislation that might increase their obligations to their workers, such as pension protection, and not, as Justice Brennan had asserted, to protect individuals from decisions by states that nullified rights by reneging on contracts.[41] Roberts criticized Justice Brennan's plain language interpretation of the Contract Clause, arguing instead that, "Constitutional protections, however, should not depend merely on a strict construction that may allow 'technicalities of form to dictate consequences of substance.'"[42] Here, as in his Takings Clause article, Roberts seems unafraid to reject a "strict construction" approach to constitutional interpretation to reach results that favor corporations and wealthy property owners. In both articles, Roberts' non-literal interpretation of the clause seems to fly in the face of President Bush's pledge to nominate judges who would strictly interpret the law, not make it.

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[39] Mr. Roberts has written numerous other, less controversial articles, which are not summarized here.
[40] "The Takings Clause," Developments in the Law – Zoning, 91 *Harvard Law Review* 1462, 1464 (1978).
[41] Comment, "Contract Clause – Legislative Alteration of Private Pension Agreements," 92 *Harvard Law Review* 86 (1978).
[42] *Id* at 91 & n.37 (1978) (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 181 (1958) (Harlan J., dissenting)).

In a 1993 Duke Law Journal article, Mr. Roberts wrote in support of Justice Scalia's majority opinion in the critical 1992 Supreme Court case *Lujan v. Defenders of Wildlife*,[43] which significantly limited citizens' ability to bring challenges to government actions harming the environment.[44] In this case, plaintiffs, members of Defenders of Wildlife, had sued to compel the federal government to consider the potential harms to endangered species overseas before enacting programs that might affect those species. Roberts agreed with Scalia's holding that, in spite of specific details about plaintiffs' past activities involving those species and their future plans to engage in similar activities, they had not presented sufficient evidence to show the injury-in-fact necessary to obtain standing.

Recent statements by Roberts prior to his nomination also serve to belie assertions by the Bush Administration and other supporters that he is not an extremist and would not act as an ideologue if confirmed to the federal bench. When asked in 2000 for his opinion of the Rehnquist Supreme Court, which has been characterized by many legal scholars as the most right-wing and activist in decades,[45] Roberts stated, "I don't know how you can call [the Rehnquist] court conservative . . . ."[46] And when asked specifically about the 1999-2000 Supreme Court term, a term in which the Court rendered numerous highly controversial decisions,[47] Roberts said that "[t]aking this term as a whole, the most important thing it did was make a compelling case that we do not have a very conservative Supreme Court . . . ."[48]

Had Roberts been asserting that the Court was not "conservative" in the traditional sense of the word – *i.e.* granting due deference to Congress and prior caselaw and maintaining the *status quo* to the extent possible – then his assertion would seem quite credible, given the striking number of laws the Court has overturned and precedents it has reversed. However, it seems clear that Roberts meant that, in his view, the Supreme Court was not particularly right-wing, an astonishing assertion in light of the Court's recent activism. Roberts' assertion that the current Rehnquist Court is not very conservative raises serious concerns about the extreme positions he might take if confirmed to the bench.

Conclusion

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[43] 112 S.Ct. 2130 (1992).
[44] "Comment: Article III Limits on Statutory Standing," John G. Roberts, Jr. 42 *Duke L.J*. 1219, April, 1993.
[45] This is the Court that the *New York Times* recently termed "William Rehnquist's archconservative Supreme Court," Cohen, Adam, "Hell Hath No Fury Like a Conservative Who Is Victorious," November 24, 2002, and about which the *National Journal* noted that, no matter whom Bush appointed to fill Rehnquist's seat, should he retired, he would be unlikely to be able to shift the court further to the right than it already is. "Bush and the Supreme Court: Place Your Bets," Taylor, Stuart, November 16, 2002.
[46] Lyle Denniston, "High court's recent rulings, future are campaign issues" *Baltimore Sun*, July 2, 2000.
[47] For example, striking down a critical portion of the Violence Against Women Act in *U.S. v. Morrison*, 529 U.S. 598 (2000) and making it substantially more difficult for victims of age discrimination to make a successful claim in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).
[48] David Jackson, "Conservative Drive to Remake Supreme Court Hits Some Speed Bumps This Term" *Dallas Morning News*, July 1, 2000.

John Roberts' legal career and professional writings reveal that he is out of the mainstream in his legal views in a number of areas, most prominently civil rights and the right to choose. His record as a member of the Bush and Reagan administrations reflects opposition to the rights of women and minorities, as well as a restrictive view of the proper role of federal courts in protecting the environment and the rights of criminal defendants. His comments about the Rehnquist Court reveal Roberts' extremist ideology, a view confirmed by his membership in and connections to ultra-conservative legal groups.

Mr. Roberts has been nominated to a federal court with tremendous influence. The Washington Times said of the nomination of Roberts (along with that of Miguel Estrada) to the D.C. Circuit that it, "offer[s] business the best opportunity in years to free itself from government regulations…. A victory for conservatives on the appellate court could cut deeply into the aspirations of environmentalists, labor groups, and other social activists. They depend on federal regulations to carry out their advocacy efforts."[49] The Senate was denied the opportunity to question Roberts fully about his record and his views at his recent hearing. The Alliance for Justice opposes his nomination.

[49] Tom Ramstack, "Bush Appointees Good for Business; Could Tip Balance on D.C. Circuit," *Washington Times*, June 7, 2001.