

# Released papers document Supreme Court nominee Roberts's anti-democratic record

**John Andrews**  
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Senate Judiciary Committee hearings on the nomination of John Roberts to the US Supreme Court are set to begin September 6, when Congress returns from its summer recess. Prior to the summer break, the Democratic leadership agreed to the demands of the Bush administration and Senate Republicans for an expedited confirmation process, including a September 15 deadline for the Judiciary Committee to vote on the nomination.

The aim of this schedule is to ensure that Roberts, named to fill the seat vacated by retiring Associate Justice Sandra Day O'Connor, will be confirmed by the full Senate in time for him to join the high court when its new term begins October 3.

By agreeing to the administration's timetable, despite the White House's categorical rejection of requests by Democrats on the committee for documents dating from Roberts's tenure as deputy solicitor general in the administration of the senior George Bush, the Democratic leadership has made clear that it does not intend to seriously oppose Roberts's confirmation. The confirmation hearings promise to be a largely pro-forma affair in which the Democrats refrain from pressing Bush's nominee on the key constitutional and political issues on which he will rule during his lifetime tenure as a justice on the Supreme Court.

This ensures that there will be no meaningful debate over the long-term political implications of Roberts's addition to the court. Despite some smoke and mirrors in the media obscuring Roberts' views, his record as a Republican Party operative with extreme right-wing positions is well established. Even as the Democrats were agreeing to a procedure designed to virtually assure Roberts's confirmation, the documents concerning his years in the Reagan administration that were released revealed the nominee's highly partisan and deeply reactionary political and ideological views.

Roberts's confirmation will move the Supreme Court significantly further to the right, not only on the "hot button" social issues like the right to an abortion, but more importantly on the fundamental political question of giving the executive branch quasi-dictatorial powers under the guise of fighting the "war on terror."

Already, as a judge on the Court of Appeals for the District of Columbia Circuit, Roberts has approved the Bush administration's practice of rounding people up as "enemy combatants" and imprisoning them indefinitely without charges or judicial review, a position more extreme than O'Connor's. (See "US court upholds military trials for Guantánamo prisoners".)

Roberts was among the brightest in the wave of young right-wing lawyers entering the US government after Ronald Reagan's 1980 election as president. Having graduated magna cum laude from Harvard Law School, Roberts clerked for then-Supreme Court Associate Justice William Rehnquist, at the time the most coveted post for conservative law school graduates. Beginning in 1981, Roberts spent five years in the Reagan administration, where he worked with a coterie of like-minded attorneys including Kenneth W. Starr, who later, as Whitewater independent counsel, would spearhead the Clinton impeachment drive,

and Theodore B. Olson, another key figure in the right-wing conspiracy against Clinton, who went on to become Bush's lead attorney during the Republican theft of the 2000 presidential election.

As an assistant to Attorney General William French Smith and then a lawyer in Reagan's White House Counsel's office, Roberts argued in favor of rolling back federal civil rights protections and dismantling programs aimed at remedying past discrimination; these policies were integral to the Republican Party's "Southern strategy" initiated by Richard Nixon to develop a base among unreconstructed racists, segregationists and other right-wing forces in the Deep South who were alienated from the Democratic Party because of its association with civil rights reforms.

Roberts returned to government in 1989 as the chief deputy to Starr, then George H.W. Bush's solicitor general, the attorney representing the federal government in cases before the Supreme Court. Starr and Roberts used the solicitor general's office to pursue the agenda of the extreme right wing: limiting civil rights laws and restricting environmental lawsuits, dismantling school desegregation plans and opposing race-based affirmative action, instituting prayers in public schools, attacking abortion rights and giving legal immunity to anti-abortion protesters who block clinics and harass patients.

In one case, Solicitor General Starr and Roberts asserted that newly discovered evidence pointing to a death row inmate's "actual innocence" should not entitle him to habeas corpus relief. In another, presaging the Terri Schiavo controversy, they intervened on the side of then-Missouri Governor John Ashcroft in *Cruzan v. Director*, contending that state officials may force a hospital to maintain someone in a persistent vegetative state over the objections of her family.

Roberts returned to private practice during the Clinton years, as a lawyer and lobbyist for big business clients. In the process, he quickly became a multimillionaire, recently reporting assets in excess of \$6 million.

His most prominent victory as a private attorney was the 2002 Supreme Court ruling in *Toyota v. Williams*, which held that the Americans with Disability Act (ADA) did not require an employer to accommodate a worker unable to continue at her old job because of carpal tunnel syndrome caused by years of repetitive motion. Roberts argued that although the employee could no longer work on the assembly line, she was not entitled to relief because her condition did not impair a "major life activity," as "she can brush her teeth, wash her face, bathe." (See "US Supreme Court ruling limits disabled workers' rights".)

Roberts played a prominent role behind the scenes in the theft of the 2000 presidential election, preparing legal memoranda and briefing Republican Party attorneys on legal theories to suppress the counting of Florida ballots, thus giving Bush the state's electoral votes and the presidency. He also advised Governor Jeb Bush on having the Republican majority in the state legislature disregard the official tally of the popular vote, should it go against Bush, and appoint electors for his brother, a thoroughly undemocratic plan that became unnecessary when the

Supreme Court intervened 5-4 to stop the ballot count and install George Bush as president.

Bush appointed Roberts to his present position on the Court of Appeals for the District of Columbia Circuit 20 months ago. After some token opposition by Democrats on the Senate Judiciary Committee, he was confirmed unanimously on voice vote by the full Senate.

Roberts has the support of all but the most extreme right-wing elements, including the enthusiastic support of big business. Underscoring the importance of Roberts's confirmation to the overall political situation, for the first time in its 110-year history the National Association of Manufacturers, the US's largest industrial trade association, has intervened publicly in the choice of a Supreme Court justice, declaring its support for Roberts's confirmation.

The cynicism and dishonesty pervading this entire process was revealed when Roberts got caught early on lying about his affiliation with the Federalist Society, a legal association founded in 1982 as a network for right-wing lawyers to increase their influence in law schools and government. After White House spokeswoman Dana Perino denied early media reports of Roberts's membership in the Federalist Society—leading to a series of media retractions—the *Washington Post* obtained a copy of the Federalist Society Lawyers' Division Leadership Directory for 1997-1998 listing Roberts as a member of the steering committee of the Washington chapter. Federalist Society Executive Vice President Leonard A. Leo confirmed Roberts's membership.

Senate Democrats appear willing to confirm Roberts even though the Bush administration is suppressing government memoranda documenting his legal and political views. The release of some of Roberts's memoranda during his tenure in the Reagan administration led to several embarrassing disclosures, such as his advice to Attorney General Smith that he lie to Coretta Scott King, widow of slain civil rights leader Martin Luther King, about the reasons for terminating federal funding for the Atlanta-based King Center for Non-violent Social Change. As a result, the White House dispatched two aides to the Reagan Library in Simi Valley, California, to screen the memoranda before any further releases.

The Bush administration is refusing to release any of the papers generated during Roberts's time as Kenneth Starr's deputy solicitor general under President George H.W. Bush, claiming they are protected by the attorney-client privilege. As Starr's deputy, Roberts signed 81 Supreme Court briefs between 1989 and 1993. Senate Democrats have requested the internal memoranda in 16 of those cases, documents that would amplify Roberts's personal views on the right to an abortion, the rights of criminal defendants, environmental protection, personal privacy and civil rights legislation.

The hypocrisy of the Bush administration's lawyers on this point is underscored by the fact that while they are seeking to suppress Roberts's memoranda to Solicitor General Starr, Starr himself, five years after leaving the solicitor general post and having become the Whitewater independent counsel, subpoenaed Bruce Lindsey, one of Bill Clinton's White House lawyers, to testify before a grand jury he convened to investigate the Monica Lewinsky affair. At Starr's urging, the Court of Appeals rejected identical White House arguments that the communications were protected by attorney-client privilege, ruling that Lindsey was a government lawyer and not Clinton's personal attorney.

The memoranda released so far, however, clearly document Roberts's role as an ideologically driven Republican Party operative intent on facilitating the right-wing restructuring of the federal government.

Shortly after joining the Reagan administration, Roberts wrote a series of memoranda supporting limitations on the Voting Rights Act. He criticized the Supreme Court decision striking down state residency requirements for welfare benefits. He urged the attorney general not to back an investigation of alleged sex discrimination in athletics at the University of Richmond (Virginia) on the flimsy basis that the athletic

program received no federal funds.

Frequently, Roberts's anti-civil rights positions were more extreme than those of other right-wingers in the Reagan administration. He urged Attorney General Smith to disregard the recommendation of William Bradford Reynolds, the head of the civil rights division, that the administration intervene on behalf of female inmates in a sex discrimination case involving job training for prisoners, claiming "the end result in this time of state prison budgets may be no programs for anyone." He criticized Solicitor General Rex Lee for not joining in support of Texas in a Supreme Court case, *Plyler v. Doe*, that resulted in a ruling striking down Texas statutes and asserting that school districts could not refuse to enroll children who entered the United States without immigration documents.

When right-wing Republicans in Congress introduced bills to strip the Supreme Court of jurisdiction over cases involving abortion, busing or school prayer, then-Assistant Attorney General Theodore B. Olson prepared a memorandum that the bills were an unconstitutional violation of the separation of powers, and Reagan's opposition to the bills would "be perceived as a courageous and highly principled position, especially in the press." Roberts scrawled "NO!" in the margin, and where Olson wrote that the bills were unnecessary because the high court had more Republican-appointed members than in the 1960s, Roberts underlined the name of Justice Harry A. Blackmun, the author of *Roe v. Wade*, and drew an arrow pointing to the word "abortion."

One of Roberts's early Reagan-era memoranda criticized the seminal Supreme Court decision recognizing the constitutional right to privacy, 1965's *Griswold v. Connecticut*, which struck down a state law prohibiting contraceptive drugs or devices to married persons. A second memorandum belittled "the so-called 'right to privacy,' which Roberts claimed to be "an amorphous right...not to be found in the Constitution."

While the deputy solicitor general, Roberts filed a brief urging the Supreme Court to uphold legal restrictions on advice that family planning clinics could give to women considering abortions, stating explicitly that *Roe v. Wade* was "wrongly decided."

When asked about this passage during his 2003 confirmation hearings for his current position on the federal appeals court for Washington, DC, Roberts called *Roe* "settled law," binding on lower courts. As Attorney General Alberto R. Gonzales has pointed out, however, "If you're asking a circuit court judge, like Judge Roberts was asked, yes, it is settled law because you're bound by the precedent." On the other hand, "if you're a Supreme Court justice, that's a different question because a Supreme Court justice is not obliged to follow precedent if you believe it's wrong."

For Roberts, civil rights apparently belong primarily to anti-abortion demonstrators. As the deputy solicitor general, Roberts appeared twice before the Supreme Court to defend Operation Rescue, arguing that federal civil rights statutes do not protect women from having to navigate a gauntlet of threats and violence outside medical clinics in order to exercise the right to an abortion. "We were greatly bothered that the federal government was in this case on the side of Operation Rescue," said Deborah Ellis, one of the lawyers suing Operation Rescue. "There is a right to abortion, and whether you agree with it or not, it is objectionable that women could be deprived of this right by force."

The Supreme Court is scheduled to hear a similar case this fall against Operation Rescue, which is appealing from a lower court ruling that the coordinated use of violence and threats against doctors and patients to interfere with abortions violates federal anti-racketeering laws.

The most fundamental political question the Supreme Court will be facing in the immediate future is the reach of executive power. Using the September 11 terrorist attacks as a pretext, the Bush administration has waged a four-year multipronged offensive to establish legal precedents concentrating government authority in the White House under the rubric of the president's duties as "commander-in-chief" for the duration of the

so-called “war on terror.” Roberts’s 20 months on the Court of Appeals indicates that he will be a dependable vote in favor of unbridled presidential power.

Besides his role in *Hamdan v. Rumsfeld*, upholding the Bush administration’s policy of giving detainees at Guantánamo Bay, Cuba, only a brief hearing before a military judge, Roberts voted to uphold the Bush administration’s decree invalidating the nearly \$1 billion legal verdict won by 17 former American prisoners of war who were tortured and abused by Iraq after their capture during the 1991 Persian Gulf War. Finally, he dissented from his court’s refusal to rescind its ruling that Vice President Dick Cheney release records of his energy task force. That ruling was later reversed by the Supreme Court, and the records appear to be sealed permanently.



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