

Democrats cave on reactionary chief justice: Senate panel rubberstamps Roberts nomination

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By a vote of 13-5, the Senate Judiciary Committee ratified the nomination of right-wing jurist John Roberts to be the next chief justice of the US Supreme Court. Three of the eight Democrats on the panel—Patrick Leahy of Vermont, and Russ Feingold and Herbert Kohl, both of Wisconsin—joined with a unanimous Republican majority to endorse Roberts, whose confirmation by the full Senate is now effectively assured.

Leahy, the Vermont liberal who is the senior Democrat on the committee, signaled the capitulation of the “opposition” party in a tortuous speech on the Senate floor Wednesday. Leahy spelled out a series of reasons for voting against the nominee, including his record of opposition to civil rights protections, his unwillingness to answer questions on such key issues as abortion, and the White House refusal to release documents from Roberts’s service in the first Bush administration. Leahy then announced, at the end of this discourse, that he would vote for Roberts anyway, based on the judge’s personal assurances that he was “no ideologue.”

Senate Minority Leader Harry Reid set the stage for this spectacle of dithering and self-contradiction, announcing a day earlier that while he would personally vote against Roberts, he would not attempt to rally the Democratic caucus on the issue. There would be no pressure on individual senators, and no effort to mount a filibuster, as the Senate Democrats did against selected ultra-right nominees for lower-ranking judicial positions.

The incoherent and inconsistent posture of the Democrats is revealed in the rationale the two senators offered for their decisions. Leahy, who supports abortion rights, said that he would vote for Roberts because his testimony before the Judiciary Committee suggested that he would not “overrule or undercut the right of a woman to choose.” Reid, who opposes abortion, made no reference to the issue in his declaration of opposition, focusing instead on “unanswered questions” about Roberts’s views on civil rights. “I must resolve my doubts in favor of the American people whose rights would be in jeopardy if John Roberts turns out to be the wrong person for the job.”

After Reid and Leahy went their separate ways, the rest of the Democratic caucus divided roughly along geographic lines, with most senators from the Southern and Midwestern states carried by Bush in the 2004 presidential election announcing they would vote for Roberts, while those from the east and west coasts, in states that Bush lost, announced their opposition.

The defeated Democratic presidential candidate, John Kerry, and his fellow Massachusetts liberal, Edward Kennedy, made speeches attacking Roberts and the Bush administration’s refusal to release documents from his tenure as deputy solicitor general from 1989 to 1992, when Bush’s father was president. Diane Feinstein and Barbara Boxer of California declared their opposition primarily on the grounds that Roberts might vote to overturn the *Roe v. Wade* decision legalizing abortion.

Those Democrats announcing their support for Roberts included Max Baucus of Montana, Tim Johnson of South Dakota, Jeff Bingaman of New Mexico and Mary Landrieu of Louisiana, as well as Feingold, who is widely reported to be considering a campaign for the Democratic presidential nomination in 2008.

Kerry’s speech was typically conflicted. Speaking of Roberts, he said it “may turn out that he will be an outstanding chief justice, but I cannot say with confidence that I know how he will approach constitutional questions of fundamental importance.” He criticized the confirmation process as “increasingly sterile” and “little more than an empty shell.”

That description is, if anything, an understatement. The week of hearings before the Judiciary Committee amounted to a carefully scripted game of dodge, in which Roberts repeatedly declined to answer questions about his views on a wide range of legal and political issues, offering only the most banal platitudes about respect for the institution of the Supreme Court and preserving the Constitution.

The attitude of the Republican majority on the Senate panel was brazenly antidemocratic. They rejected any notion that the Bush administration should be accountable to the Senate for its choice of a chief justice, or that the nominee himself should be responsive to the elected officials who are to vote on his nomination to a lifetime appointment to the highest judicial office.

Republican senators openly urged Roberts to say as little as possible. “Don’t take the bait,” Senator John Cornyn of Texas advised: i.e., don’t fall into the “trap” of actually saying anything substantive on any issue, and risk giving ammunition to critics. Other Republicans argued that Bush was entitled to have his choice of a conservative on the court. Senator Lindsey Graham of South Carolina said, “Elections matter. The president won. He told us what he was going to do”—i.e., nominate someone like Antonin Scalia or Clarence Thomas to the Supreme Court—“and he did it.”

Roberts did not attempt to repeat the farcical performance of Thomas, who told his confirmation hearing in 1991 that he had never formulated or expressed a personal view about *Roe v. Wade*—and then immediately became the most strident opponent of the abortion rights decision once seated on the court. But Roberts did tell Senator Feinstein, with a straight face, that no one in the Bush administration had ever asked him what he thought of *Roe v. Wade*.

Despite constant references to not “prejudging,” however, Roberts was dealing with questions about long-established legal precedents on which any competent lawyer must have an opinion. While affirming his support for *Brown v. Board of Education* and other court rulings handed down before he was born, Roberts evaded any discussion of decisions later than the mid-1960s. The obvious conclusion is that all these decisions, including *Roe v. Wade*, are now up for grabs.

The *Washington Post* summed up a series of Roberts responses to questions about a wide range of issues, from abortion to war powers to voting rights: “I don’t think I should express a determinative view.... I should not respond.... I can’t answer that.... I do not feel it appropriate for me to comment.... I think I should stay away from discussions of particular issues that are likely to come before the court again.... I don’t want to answer a particular hypothetical.” According to a running total kept by the Democrats, Roberts declined to answer at least 60 such questions the first day alone.

There is no legal basis for the claim that a judicial nominee should refrain from expressing his views on any substantive issue in order not to be guilty of “prejudging” cases. This doctrine has been brought to the fore in the last two decades in order to further insulate the federal courts from any genuine democratic scrutiny.

The first nominee to assert this principle in so absolute a form was Scalia, who refused during his 1986 confirmation hearing even to express an opinion on *Marbury v. Madison*, the seminal 1803 Supreme Court decision in which the high court established the precedent that it has the power to strike down legislation if it conflicts with the Constitution. A Democratic-controlled Senate nonetheless confirmed the ultra-right nominee by a 96-0 vote.

The two Supreme Court justices nominated by Bill Clinton, Stephen Breyer and Ruth Bader Ginsburg, also declined to discuss many specific issues, but their views were well known because they had long records as federal appeals court judges. Roberts has only been on the appeals bench for two years.

The closest that Roberts came to expressing a view on *Roe v. Wade* was when he gave an undoubtedly rehearsed response to a question from Judiciary Committee Chairman Arlen Specter, reiterating his support for the legal doctrine of *stare decisis*, which holds that long-established legal precedents should be given deference and only overturned for the most egregious reasons, not merely because the views of the court majority have shifted with political winds.

He endorsed a constitutional right to privacy, as set down in the 1965 case of *Griswold v. Connecticut*, which overturned a state law banning contraception. But Roberts declined to express a view on the subsequent decision to extend that right of privacy to include abortion and gay rights. Spokesmen for anti-abortion

groups pronounced themselves “extremely pleased” with his answers.

At one point, pressed on whether the courts should act as the protectors of the weak against the powerful, Roberts actually gave a substantive response. “Somebody asked me, you know, ‘Are you going to be on the side of the little guy?’” he said. “And you obviously want to give an immediate answer, but, as you reflect on it, if the Constitution says that the little guy should win, the little guy’s going to win in court before me. But if the Constitution says that the big guy should win, well, then the big guy’s going to win, because my obligation is to the Constitution. That’s the oath.” In disavowing any bias towards the “little guy,” Roberts was reassuring corporate America and the wealthy that he can be relied on to uphold their interests.

Just as significant as the collapse of Democratic opposition is the general adulation in the media for Roberts’s qualifications and his performance at the televised hearings. The *Washington Post* published several editorials calling for a near-unanimous confirmation vote, and condemning any opposition to Roberts that is based on his right-wing political views.

The newspaper’s senior political commentator, liberal David Broder, wrote a tribute to Roberts in which he declared the nominee to be “so obviously—ridiculously—well-equipped to lead government’s third branch that it is hard to imagine how any Democrats can justify a vote against his confirmation.” He praised the judge’s intellect, temperament, his choice of role models—including the man he will replace, the late Chief Justice William Rehnquist, a vicious reactionary and opponent of democratic rights—even his “sense of humility.”

“Roberts’s only problem is that he has set a standard so high, it will be difficult for the next nominee to measure up,” Broder gushed. “If the Democrats are smart, they will not bow to their interest groups but instead will embrace this extraordinary nominee and challenge President Bush, who has at least one more vacancy to fill, to ‘send us another Roberts.’”

The Senate Democratic leadership appears to be following this prescription, with its internal discussions dominated by how their votes on Roberts will affect the next nomination to the Supreme Court, expected within a week. Senator Richard Durbin of Illinois, the minority whip, dismissed the significance of the Democratic split on Bush’s first court nomination, saying, “It’s more important to be united on the next.”

The collapse in the face of the Roberts nomination, however, demonstrates that the Democratic Party is incapable of mounting serious opposition to the Bush administration, even in the one area of the federal government—the confirmation of judicial nominees—where it still has significant influence.



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