The Record of John G. Roberts, Jr.: A Preliminary Report

This preliminary report provides a summary of the record of John Roberts, who has been a judge for less than two years, having been nominated by President George W. Bush to the United States Court of Appeals for the District of Columbia Circuit and confirmed in May 2003. In compiling this report, we have examined Roberts's pre-judicial record as well as his limited record on the bench, focusing primarily on cases raising concerns with respect to civil rights and individual liberties.

Overview

Roberts's record is a disturbing one. Among other things, Roberts is hostile to women's reproductive freedom, and he has taken positions in religious liberty and free speech cases that were detrimental to those fundamental rights. Roberts has limited judicial experience, but even his short tenure as a judge raises serious concerns about his ideology and judicial philosophy. For example, dissenting opinions by Roberts have questioned the constitutionality of the Endangered Species Act and argued that Americans tortured by Iraq when it was a terrorist state can receive no compensation. This preliminary review of Roberts's record indicates that it falls far short of demonstrating the commitment to fundamental civil and constitutional rights that should be shown by a Supreme Court nominee.

Background

Judge Roberts was born in Buffalo, New York, in 1955. He received his law degree from Harvard Law School, and then clerked for Judge Henry Friendly on the United States Court of Appeals for the Second Circuit, and for then-Associate Justice William Rehnquist. Following his clerkships, Roberts worked in the Reagan Administration, first as a Special Assistant to Attorney General William French Smith (August 1981-November 1982), and then as Associate Counsel to the President (November 1982-May 1986). Roberts then entered private practice as an associate at Hogan & Hartson, where he became a partner in 1987. He left the firm in October 1989 to serve in the Administration of President George H.W. Bush as the Principal Deputy Solicitor General, also

called the "political" Deputy. This position had been created during the Reagan Administration so that, if the Solicitor General "had to remove himself from a case . . . he could defer to a manager whom the Administration trusted."[1] In this position Roberts was able personally to influence the legal decisions and positions taken by the Administration. Roberts left the Solicitor General's office in January 1993 and returned to Hogan & Hartson, where he was a partner until his confirmation to the D.C. Circuit.

Reproductive Freedom

- Rust v. Sullivan, 500 U.S. 173 (1991) and Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)

Roberts has a record of hostility to women's reproductive freedom and has sought to have the Supreme Court overturn Roe v. Wade. In 1990, for example, Roberts, then Deputy Solicitor General, co-authored a brief for the government in Rust v. Sullivan, 500 U.S. 173 (1991). Rust concerned the so-called "gag rule" that prohibited federally funded family planning clinics from discussing the option of abortion with patients, and did not directly concern the validity of Roe itself. Nonetheless, Roberts argued that "[w]e continue to believe that Roe was wrongly decided and should be overruled . . . [T]he Court's conclusion[] in Roe that there is a fundamental right to an abortion . . . find[s] no support in the text, structure, or history of the Constitution."[2]

Also as Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief in the Supreme Court on behalf of the government in support of the radical anti-choice group Operation Rescue and six individuals who had obstructed access to reproductive health care clinics. The government was not a party in the case and need not have filed a brief. The case, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), was brought by clinics that perform abortions and organizations supporting reproductive choice for women, asserting that Operation Rescue and the individual defendants had violated a federal civil rights statute by conspiring to deprive women of their right to interstate travel. This claim required a showing of a "class-based, invidiously discriminatory animus" on the part of the conspirators." 506 U.S. at 268. Roberts's brief in Bray contended that the protesters' conduct did not constitute

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[1] Lincoln Caplan, The Tenth Justice, at 62 (1987).

[2] Brief for the Respondent, Rust v. Sullivan, 1989 U.S. Briefs 1391 (1990), at 7 (LEXIS pagination). Although the majority upheld the rules at issue in Rust, it did not even mention Roberts's arguments that it should overturn Roe and thus uphold the rules.

discrimination against women, "even though only women can have abortions."[3] The Court majority held that the requisite showing of discriminatory animus had not been made in the case. Soon after Bray was decided, Congress enacted the Freedom of Access to Clinic Entrances Act to protect women and health care providers from harassment and violence.

Religious Liberty

- Lee v. Weisman, 505 U.S. 577 (1992)

In 1991, as Deputy Solicitor General, Roberts co-authored an *amicus curiae* brief filed by the United States in the case of Lee v. Weisman, 505 U.S. 577 (1992), in which he urged the Court to rule that it was constitutional for a public school to sponsor prayer at its graduation ceremonies. While Roberts's brief acknowledged that coerced participation in a religious ceremony was improper, the brief claimed that no such coercion was present here, since students were free not to attend their graduations: "A voluntary decision not to witness a civic acknowledgment of religion . . . cannot be considered a response to coercion."[4]

In a 5-4 decision authored by Justice Kennedy, the Court rejected Roberts's argument, holding that public schools may not sponsor prayer at graduation ceremonies. The Court specifically noted the coercive nature of the event. While recognizing that students may not formally be required to attend their own graduation ceremonies, the Court likewise recognized that the importance of this event means that attendance is not "voluntary" in "any real sense of the term." 505 U.S. at 595. The Court stated that the government's argument to the contrary "lacks all persuasion," noting that the "[l]aw reaches past formalism." Id. And the Court specifically criticized the government's argument for its erroneous First Amendment analysis:

> The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its

[3] Brief for the United States as *Amicus Curiae* Supporting Petitioners, Bray v. Alexandria Women's Health Clinic, 1990 U.S. Briefs 985 (1991), at 3 (LEXIS pagination).

[4] Brief for the United States as *Amicus Curiae* Supporting Petitioners, Lee v. Weisman, 1990 U.S. Briefs 1014 (1991), at 11 (LEXIS pagination).

> head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to a state-sponsored religious practice.

505 U.S. at 596 (emphasis added).

The government was not a party to this case and need not have filed a brief. Had the position advocated by Roberts been accepted, students in public schools could have been subjected to religious coercion as the price of attending their own graduation ceremonies.

In addition, Roberts's brief urged the Court to jettison the "Lemon test" that the Court has employed to determine the constitutionality of challenged laws and practices under the Establishment Clause in favor of "the more general principle implicit in the traditions relied upon in Marsh and explicit in the history of the Establishment Clause."[5] In Marsh v. Chambers, 463 U.S. 783 (1983), the Supreme Court upheld the practice of a state legislature of beginning its sessions with non-sectarian prayer, noting that the practice existed when the Constitution was ratified. Marsh is a unique case that has never been applied by the Court outside its factual setting and certainly not in the public school context. Roberts's argument that the Court should adopt Marsh as a general Establishment Clause rule was not only radical, but it also went far beyond the case at hand.

Free Speech

- United States v. Eichman, 496 U.S. 310 (1990)

Roberts, then Deputy Solicitor General, co-authored the government's brief in United States v. Eichman, 496 U.S. 310 (1990), contending that the Flag Protection Act of 1989, which criminalized flag burning, was constitutional. Although Roberts's brief conceded that the conduct at issued constituted "expressive conduct," the brief claimed that "[t]he First Amendment does not prohibit Congress . . . from removing the American flag as a prop available to those who seek to express their own views by destroying it."[6] In a 5-4 ruling, the Supreme Court majority, including Justice Scalia, disagreed, holding that the law violated the First Amendment. As the Court explained in striking down the law, "[p]unishing desecration of the flag

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[5] Brief for the United States as *Amicus Curiae* Supporting Petitioners, Lee v. Weisman, 1990 U.S. Briefs 1014 (1991), at 4 (LEXIS pagination).

[6] Brief for the United States, United States v. Eichman, 1989 U.S. Briefs 1433 (1990), at 9 (LEXIS pagination).

dilutes the very freedom that makes this emblem so revered, and worth revering." 496 U.S. at 319.

Significantly, although the Act was specifically written and passed to seek to distinguish an earlier Court ruling striking down a Texas flag desecration law, Texas v. Johnson, 491 U.S. 397 (1989), Roberts's brief urged the Court to reconsider the Johnson ruling, which it had handed down only the Term before, rejecting the claim that flag burning does not enjoy the full protection of the First Amendment. This calls into question Roberts's views of *stare decisis*. The Court expressly declined the government's invitation. 496 U.S. at 315.

Federalism and "states' rights" and the environment

- Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2061 (2004):

Judge Roberts issued a troubling dissent from the decision by the full D.C. Circuit not to reconsider the important ruling by the three-judge panel in this case upholding the constitutionality of the Endangered Species Act as applied in this matter. The case involved a real estate development company's contention that the application of the Endangered Species Act to its construction project in California was an unconstitutional exercise of federal authority under the Commerce Clause. After the United States Fish and Wildlife Service determined that the company's project "was likely to jeopardize the continued existence of the arroyo southwestern toad," placed on the Endangered Species List by the Secretary of the Interior in 1994, the company filed suit "[r]ather than accept an alternative plan proposed by the Service." Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003). The district court dismissed the company's complaint, and a panel of the D.C. Circuit unanimously upheld the dismissal (323 F.3d 1062), following prior D.C. Circuit precedent upholding congressional authority under the Endangered Species Act. By a vote of 7-2, the D.C. Circuit denied a petition for rehearing en banc (by the entire court) of the panel's ruling.

The only dissenters were Judges Roberts and Sentelle. All of the other Republican-appointed judges on the court — Judges Ginsburg, Henderson, and Randolph — joined the court's Democratic appointees in voting to deny rehearing en banc. The panel's opinion upholding the authority of Congress under the Commerce Clause in this case not only followed D.C. Circuit precedent, but was also consistent with a recent ruling of the Fourth Circuit in Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001). The opinion in that case upholding the authority of Congress to protect endangered species on private

lands was written by Judge J. Harvie Wilkinson, a conservative Republican-appointee.

Roberts's dissent in Rancho Viejo strongly suggested that he thought it would be unconstitutional to apply the Endangered Species Act in this case. By his vote to rehear the case and thus potentially reverse the district court, Roberts indicated that he may well be ready to join the ranks of such right-wing officials as Judge Michael Luttig (who dissented in Gibbs) and Alabama Attorney General William Pryor — nominated by President Bush to the Eleventh Circuit and unilaterally placed on that court by the President through a recess appointment — in their efforts to severely limit the authority of Congress to protect environmental quality as well as the rights and interests of ordinary Americans.

Individual rights

- Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148 (D.C. Cir. 2004):

This case grew out of an infamous incident in the District of Columbia several years ago -- the arrest of a 12-year-old girl for eating a single french fry on the Metro during a "zero tolerance" crackdown by transit police on Metro riders violating the subway's rules against eating and drinking. The child was searched, handcuffed, her shoelaces were removed, she was taken away in a windowless police vehicle, fingerprinted, and held for three hours until she was released into her mother's custody. The mother brought a civil rights action on behalf of her daughter under 42 U.S.C. §1983, claiming that her daughter's Fourth and Fifth Amendment rights had been violated. In particular, the mother claimed that the child's equal protection rights had been violated because, under then-D.C. law, adults in the same situation would only have been given a citation, while juveniles had to be arrested. (In response to the negative publicity surrounding this incident, the no-citation policy for juveniles was changed.)

Judge Roberts's opinion (joined by Judges Karen LeCraft Henderson and Stephen Williams) affirmed the district court's ruling against the mother. In rejecting the equal protection claim, Roberts held that the law requiring harsher treatment of juveniles was rationally related to "the legitimate goal of promoting parental awareness and involvement with children who commit delinquent acts." 386 F.3d at 1156. According to Roberts, juveniles given citations might give the police "an entirely fanciful [name] or, better yet, the name of the miscreant who pushed them on the playground that morning," and their parents would then never know about their transgression. Id.

Although Roberts began his opinion by noting that "[n]o one is very happy about the events that led to this litigation," and that the district court had termed the policy "foolish," Roberts appeared dismissive of the serious concerns raised by the use of police power in this case, stating that "the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry." Id. at 1150. The police, however, did far more than make the child cry; they arrested her, handcuffed her, took her away in a police vehicle, and gave her an arrest record that she must now live with.

- Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004)

Seventeen American soldiers who had been held as prisoners of war and tortured by Iraq during the Gulf War brought suit under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA) against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein. This statutory exception to the immunity of foreign states from suit for money damages applies to claims for such damages for personal injury or death caused by torture or other acts of terrorism.

The district court entered a default judgment against the defendants after they failed to appear and awarded compensatory and punitive damages to the plaintiffs totaling more than $959 million. The United States moved to intervene to contest the district court's subject matter jurisdiction, arguing that the Emergency Wartime Supplemental Appropriations Act (EWSAA) "made the terrorism exception of the FSIA inapplicable to Iraq and thereby stripped the District Court of its jurisdiction" over the suit. 370 F.3d at 43. The district court denied the motion as untimely and the United States appealed.

All three members of the D.C. Circuit panel agreed that the district court had erred in denying the motion to intervene. On the merits of the jurisdictional question, however, Judges Harry Edwards and David Tatel rejected the government's argument and held that the district court did have jurisdiction over the case.[7] In an opinion concurring in the judgment, Judge Roberts disagreed, and would have adopted the position of the government that the EWSAA "deprived the courts of jurisdiction over suits against Iraq" for damages resulting from torture and other

[7] The court held, nonetheless, that the plaintiffs' claims should be dismissed for failure to state a cause of action. According to the majority, the terrorism exception to the FSIA is only a jurisdictional provision and does not provide a cause of action.

terrorist acts. Id. at 65. The result would have been to deprive Americans tortured in Iraq of any possible relief in federal court.

Although the majority considered the jurisdictional issue "an exceedingly close question," id. at 51, it concluded that there is nothing in the language of the EWSAA or in its legislative history "to suggest that Congress intended by this statute to alter the jurisdiction of the federal courts under the FSIA." Id. at 57. In addition, the majority noted that the position of the government and Judge Roberts would lead to the "perplexing result" of restoring Iraq's immunity "even for acts that occurred while Iraq was still considered a sponsor of terrorism." Id. at 56. The majority explained that "[t]his perplexing result appears even more bizarre when the sunset provisions" of the relevant portion of the EWSAA are taken into account. Id. According to the majority, if the government were correct in its interpretation of the ESWAA, the federal courts would be deprived of jurisdiction only during the period from May 7, 2003 (the date of a Presidential Determination carrying out the authority of the EWSAA) until September 30, 2004 "over a suit against Iraq based on events that occurred while Iraq was designated as a state sponsor of terrorism." Id. at 57. The majority found "little sense" in such an interpretation of the EWSAA. Id. at 57.

Access to justice

- Taucher v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005)

Roberts wrote the majority opinion in the court's 2-1 ruling overturning an award of attorneys' fees to the plaintiffs under the Equal Access to Justice Act ("EAJA"). The EAJA provides for the award of attorneys' fees to a party in a lawsuit who prevails against the U.S. government, unless the government's legal position in the case was "substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. § 2412 (d)(1)(A). The statute is important in opening access to the courts to persons who might otherwise not be able to challenge unlawful or unconstitutional government action.

This particular case was brought against the Commodity Futures Trading Commission ("CFTC") by publishers of books, newsletters and other publications providing information and advice on commodity futures trading. The plaintiffs challenged as an unconstitutional prior restraint on speech the application to them of a provision of the Commodity Exchange Act imposing certain burdensome registration requirements. The lower court agreed that the relevant portion of the Act was unconstitutional as applied to the publishers. The CFTC appealed, but then "adopted regulations exempting persons like the publishers in

this case from the registration requirement," thus mooting the case. 396 F.3d at 1180. "The parties then agreed to voluntarily dismiss the appeal." Id.

Having prevailed, the plaintiffs, who were represented *pro bono* (without charge) by a public interest law firm, sought and were awarded attorneys' fees under the EAJA by the district court. The magistrate judge who considered the fee petition "held that the Commission was not substantially justified in its position" on the merits of the case. Id. at 1181. The CFTC appealed the award of fees. In an opinion by Judge Roberts, a divided panel of the D.C. Circuit overturned the fee award, holding that the CFTC's position was sufficiently justified to bar the award and that "it was an abuse of discretion to conclude otherwise." Id. at 1178.

Judge Harry Edwards issued a sharp dissent, accusing the majority of exceeding the very limited scope of appellate review of EAJA awards set out by the Supreme Court in Pierce v. Underwood, 487 U.S. 552 (1988), requiring, in Judge Edwards's words, "significant deference under an abuse-of-discretion standard." 396 F.3d. at 1179. As Judge Edwards explained, in Underwood, the Court held that "a district court's judgment [to award fees under the EAJA] may be reversed only when the record 'commands the conclusion that the Government's position was substantially justified.'" 396 F.3d at 1179 (emphasis by Judge Edwards). According to Judge Edwards,

> adherence to Underwood means that our review of the District Court's decision is narrow, limited, and deferential. Under this standard of review, there is no conceivable way that the record in this case can be seen to 'command' the conclusion that the Government's position was substantially justified.

396 F.3d at 1179-80 (emphasis added).

Protecting the federal Treasury

- United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004)

Edward Totten, a former Amtrak employee, brought this action under the False Claims Act, charging that two private companies had delivered defective rail cars to Amtrak and had submitted invoices to Amtrak for payment for them from an account that included federal funds. The district court dismissed the case, holding that, under the False Claims Act, the false claims must have been presented to an officer or employee of the United States government, and that, since Amtrak is not the government, the Act did not apply.

Totten appealed, and in a 2-1 ruling in which Judge Roberts wrote the majority opinion, the D.C. Circuit affirmed. Judge Roberts stated that the plain language of the statute required the claims to "be presented to an officer or employee of the Government before liability can attach," and that it was not sufficient for the claim to be paid by a federal grantee using money provided by the government to pay the claim where the grantee was not a department or agency of the government. 380 F.3d at 490, 491.

Judge Merrick Garland dissented, stating that "[u]nder the court's interpretation, the government cannot recover against a contractor that obtains money by presenting a false claim to a federal grantee," and that the "court's ruling immunizes [from False Claim Act liability] those who defraud" a government-funded corporation that receives billions of dollars in federal funds, merely because the grantee does not re-present the claims to the government. Id. at 503. Judge Garland criticized the majority's interpretation of the Act as "inconsistent with its plain text" as well as "not just inconsistent, but irreconcilable with the legislative history of the 1986 amendments to the False Claims Act." Id.

Judge Garland further noted that the government, arguing as an *amicus curiae* on behalf of Totten, had warned that the interpretation of the Act adopted by the majority "leaves 'vast sums of federal monies' without False Claims Act protection.'" Id. at 502 (citation omitted). According to the government, this interpretation will "'significantly restrict[] the reach of the False Claims Act in a manner that Congress did not intend, withdrawing False Claims Act protection with respect to a broad swath of false claims inflicting injury on the federal fisc.'" Id. at 516.