John Conyers, Jr. Statement on Nomination of Judge John Roberts to the Supreme Court

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The Senate should reject the nomination of John Roberts to be Chief Justice of the United States Supreme Court. As equal partners in the confirmation process, Senators have a right to all relevant information on Judge Roberts' conduct and views. That constitutional process was thwarted by Judge Roberts' evasive answers and by President Bush's denial of documents. While Roberts pledged adherence to the "rule of law," he danced around the question of just what law he thought should rule. Even so, the record that is available amply justifies his rejection. Confirming Judge John Roberts would put the wrong person, in the wrong place, at the wrong time. His confirmation would be especially unwise at the present time.

Judge Roberts Is Disqualified For The Supreme Court

I have carefully reviewed Judge Robert's record and the recent Judiciary Committee's hearings on his nomination. They demonstrate that Roberts is unqualified to be a member of our highest court, let alone its Chief justice. His elevation would pose an unacceptable threat to individual rights and to the preservation of our constitutional system. Robert's writings as a White House Counsel and as a Justice Department official reflect an extreme view of the exercise of Executive Branch power. They also show his extreme view of the power of Congress to curtail the independence of the courts.

His supporters laud the "modesty" and "self-restraint" of Roberts' judicial philosophy on the role of courts. At the same time, Roberts' view of judicial restraint, and what he calls a "modest"view of the Supreme Court's role reveals a reluctance to vigorously exercise the Court's power to enforce the Constitution. Judge Roberts' brand of judicial restraint threatens our precious system of checks and balances. His reluctance to have the courts aggressively protect civil rights and civil liberties from discrimination or abuse of power is a flaw, not a virtue.

Roberts' emphasis on judicial restraint is most dangerous precisely because of his White House and Justice Department experience asserting maximum presidential power. Would he defer to a president's abuse of executive power or to a congressional encroachment on constitutional rights?

His supporters also cite his cautionary memos on a few occasions when he did recommend that the Reagan Administration not take too extreme a position. This, too, is offered to suggest Roberts would not be an activist Justice. On closer examination, however, these occasions show that Roberts did not object to those positions because he is a legal moderate. Instead, they show that his objection was that adopting those positions or phrases might be politically dangerous. That constraint will not apply once he's on the Supreme Court.

Roberts legal brilliance qualifies him to be a competent law professor or a fine corporate attorney. But as a Justice of the Supreme Court, Roberts is not what America needs today. He is not qualified to be a Supreme Court Justice unless he demonstrably is deeply committed to protecting the people's constitutional rights. His responses at the hearing showed no such commitment.

The Role of the Supreme Court Today

Our Founding Fathers designed a brilliant document to protect our liberties and to prevent abuse of power. America's Constitution is admired and envied around the globe. Its genius lies in the separation of Executive, Legislative and Judicial powers and in the role of each branch to check and balance the other two. The Supreme Court plays a particularly crucial role in this system as the final interpreter of the Constitution. The Court is the balance wheel that preserves our constitution and guards the rights of all Americans.

Those safeguards are needed now more than ever. Americans are deeply concerned by the Executive's repeated abuses of power. President Bush's world is a universe where the courts cannot play their assigned role of protecting constitutional rights, where the people's right to know is cloaked in a veil of secrecy, and where the Congress cannot fully exercise its balance of power. In the Legislative Branch, extremist ideologues are able to ram laws through the Congress that deny citizens their civil liberties under a false banner of security. In the face of such threats, the Supreme Court's role is especially critical. The Senate should act very carefully on a lifetime appointment to a Court that is closely divided and whose decisions affect the lives of millions

The Record of Judge Roberts

Despite the nationally televised hearings, media saturation, and clever promotional campaign, what do we really know about Judge Roberts? While the Senate confirmed Judge Roberts for the U.S. Court of Appeals, the Senate's obligation is even greater now to exercise its independent judgment. The Supreme Court can overrule a mistaken decision by a Court of Appeals, but Supreme Court decisions are final. Their judgements immediately become the law of the land and remain binding precedent unless changed later by the Court, itself. For example, his supporters have emphasized that, during his confirmation for the Court of Appeals, Roberts promised his personal feelings would not prevent him from respecting Supreme Court precedents like Roe; but that offers little comfort. As an appellate court judge, he was bound by Supreme Court precedents. As a Supreme Court Justice, he would be free to vote to overturn Roe.

Stonewalling by the White House

Prior to the hearings, Roberts was not a public figure. His paper trail largely consists of documents he wrote as a White House counsel and as an attorney working for the Attorney General, both in the Administration of Ronald Reagan. We are told that those writings from early in his career should be discounted because they do not necessarily reflect his mature views. Unfortunately, the current White House has stonewalled the Senate on what would presumably be more revealing, namely, his subsequent memoranda and correspondence that he wrote as Deputy Solicitor General. While they claim these documents are privileged, comparable documents have been provided to the Senate Committee when it considered the nomination of other senior Justice Department officials. In fact, those clearly contrary precedents were a principal basis for a prior judicial nominee of this Administration, Miguel Estrada, being blocked by the Senate.

The White House did make available a list of the cases on which Roberts submitted briefs or argued. Those briefs have been obtained and analyzed. The positions Roberts advanced in the briefs he signed are troublesome enough. We can only imagine what might be revealed by the more unvarnished portrait of Roberts' views in his underlying memoranda.

Roberts' Private Practice and Judicial Record

The other two phases of Judge Robert's career are not very illuminating. He has been on the bench a short time and written few significant opinions, none that are particularly reassuring. He spent most of his career in the private sector as a corporate lawyer defending big business interests. That is hardly disqualifying, but it does make his views about congressional power under the Commerce Clause important. In recent years, conservative activist justices have interpreted that
central clause very narrowly, in order to strike down laws passed by Congress. Would Roberts vote to unduly limit Congress's authority to regulate business for the public welfare?

The Confirmation Hearing

That leaves us with his confirmation hearing, itself, as the main source of information to supplement the memoranda and other documents that the White House did release.

The Founding Fathers recognized the Supreme Court's importance by dividing the selection of its members between the President and the Senate, giving the President the power to nominate but with the "advise and consent" of the Senate. The Framers of the Constitution did not assume the President would nominate felons or incompetents. So what is the Senate's proper role? Senators are charged with thoroughly evaluating all aspects of the nominee. That is not only their right, but also their solemn duty.

The Senate's task at the hearing was to ensure that Roberts is not a 'stealth candidate' and closet conservative ideologue. After all, President Bush had plainly said that he wanted to appoint another Justice Scalia or Justice Thomas.

Roberts' supporters claimed the Senators could not ask a Supreme Court nominee about his views and how he would approach deciding important categories of issues. That is absolutely wrong. This is the essence of the Senate's constitutional responsibility to "Advise and Consent." It has done so throughout our history. To the extent a Supreme Court nominee's views on critical issues and judicial philosophy are not well known, and his full "paper trail" is withheld, the Senate must explore them vigorously in the confirmation hearing.

That legitimate inquiry is different from inappropriately pressing a nominee on how he would decide a specific case. Supreme Court nominees have refrained from that, but have properly answered inquiries about legal principles and how they would apply them to particular issues. When a nominee has previously indicated an opinion on a leading precedent, his obligation to be forthcoming is even greater. One of the most troublesome examples of this is his prior position on Roe v. Wade, a beacon of the right to privacy. Robert's view was not subtle or ambiguous. He has argued that the Roe was unconstitutional and should be overruled. Asked whether that was

still his view, Robert's answers were nimble and displayed his legal talents. They did little to allay concern. The key is his view about when that Court should reverse a long-standing precedent that has been relied upon by millions of Americans.

Civil Rights

A review of his record on other sensitive issues that were discussed at the hearing also demonstrates his disqualification. During his first service at the Department of Justice, civil rights appears to have been one of Judge Roberts' primary concerns. The nation's leading civil rights organizations have documented that Roberts was no mere foot soldier in the Reagan Justice Department's assault on our Nation's hard-won civil rights laws. He was a key player in the abandonment or undermining of civil rights policies fashioned or followed by the Johnson, Nixon, Ford and Carter Administrations. What Roberts habitually deemed distortions of an entrenched status quo were often widely hailed breakthroughs forged by the Supreme Court, or by the Executive Branch in prior administrations, on the long march to equality.

Roberts emphasized that he was simply an advocate for his client, the Reagan Administration. Yet the caustic phrasing in his steady stream of memos, talking points, and draft letters or op-eds reveals an unmistakable hostility to vigorous civil rights enforcement. It belies any deep commitment to the progress painfully made in recent decades. Nothing in his subsequent career or his ambiguous answers in the hearing record outweighs that disturbing pattern.

Roberts' Determination to Weaken the Voting Rights Act

Roberts was an important lieutenant in the Reagan Administration's failed effort to weaken the Voting Rights Act, the crown jewel of our civil rights laws. In 1981 and 1982, Roberts fought to require proof of intent in order to establish violation of Section 2, the general prohibition on discriminatory election laws. In order to clarify the issues, the House of Representatives' Judiciary Committee had added explicit language to Section 2 indicating that only proof a discriminatory result was required.

I joined my colleagues on the House Committee when we reported it by a vote of 23 to 1. That did not satisfy Roberts. Nor did the overwhelming vote of 389 to 23 by which the whole House of Representatives passed the bill. In the Senate, the Republican-controlled Judiciary Committee rejected Robert's arguments and endorsed the results test by a 14 to 4 vote, and the full Senate passed it almost unanimously by an 81-8 vote.

Yet Roberts would not give up and sought to weaken the effectiveness of the Act. He counseled the Department to take the narrowest possible reading of Section 2 in subsequent cases applying the clarified statute. He still suggested that the focus should be on official intent. If Roberts had prevailed, Blacks, Latinos and Asian-Americans would have been denied a phenomenally successful tool to tear down the walls of electoral discrimination.

Roberts explicitly opposed the clarified provisions of Section2 because he feared they would make it too easy to challenge allegedly discriminatory election laws. He expressed concern to his colleagues that:

"such widely-accepted practices as at-large voting would be subject
to attack, since it is fairly easy to demonstrate that such practices have the effect of diluting black voting strength."

I doubt that these and other devices frequently challenged under Section 2 were "widely accepted" by minority voters whose rights they infringed.

That was precisely the point. If a current law discriminates against Black, Latino or Asian-American voters, then what difference should it make what lawmakers intended decades ago? Why should such a discriminatory law be allowed to remain on the books? This legal scholar just did not get it then and, based on his responses at the hearing, he still does not understand.

There is another aspect of his effort to weaken Section 2 of to the Voting Rights Act and other laws that I find deeply troubling. Roberts insisted that proving intent would not be difficult, even though extensive congressional hearings and detailed testimony by expert practitioners convinced the Congress that it was often extraordinarily difficult and costly. I am concerned that his disdain for detailed congressional findings would align Roberts with those sitting justices who are quick to disregard an extensive congressional record because they find Congress's reasoning less satisfactory than their own. Will he properly acknowledge the Congress's superior fact-finding ability?

Affirmative Action

Roberts' opposition to affirmative action is also manifest, although that fundamental civil rights policy was supported by two previous Republican Administrations and has been upheld as constitutional by the Supreme Court. He was even out of step with the rest of the Reagan Administration, when he filed a brief in opposition to the Department of Labor's affirmative action program, pioneered by former Secretary George Schultz for president Nixon. At his confirmation hearing, Roberts boasted that he allowed the Labor Solicitor to file a different brief, in opposition to Justice Department's filing for the United States, though he was not required to do so. His "generous" gesture is not impressive. Later, in 1990, as Acting Solicitor General, Roberts also opposed the Federal Communications Commission affirmative action plan.

Asked about these positions, Roberts refused to tell the Senate whether he agreed with the most recent Supreme Court decision last year upholding affirmative action as constitutional, or would try to overturn it.

Roberts' Support for Court-stripping

In a series of school desegregation cases, Roberts signed briefs urging a retreat from the practical principles of school desegregation laid down by the Burger Court. He even counseled that Congress could constitutionally prohibit courts from using procedures that they had found necessary to remedy unconstitutional school segregation. On this point he sought to overrule the view of the conservative Assistant Attorney General Ted Olsen, who claimed such court - tripping would be unconstitutional..

His view that school desegregation cases could best be handled by state and local courts is a disturbing indication that he does not appreciate the crucial role that the federal judiciary has played in the long march to equal protection.

More generally, Roberts wrote that the Congress could constitutionally strip courts of jurisdiction to protect constitutional rights in whole areas, such as abortion and separation of church and state. His claim at the hearing that he was merely a zealous advocate for his client is belied by a personal cover note in which he challenged the Administration to show "real courage" by adopting that view of the courts' responsibilities.

Executive Abuse of Power

On the currently pressing issue of Executive abuse of power, Roberts was far too equivocal. He first conceded the President was not above the law and was bound to follow statutes or treaties such as those prohibiting torture, but then said there might be circumstances where the President's Executive power would support exceptions. Similarly, he was unwilling to acknowledge that, since the Congress has the exclusive power to declare war, logic implies Congress also has the power to end a war which it has declared. The Senate hearings, far from being an unseemly "bartering process,"as Roberts characterized it, embodied the Senate's solemn obligation to ensure that anyone confirmed for the Supreme Court, and especially as the Chief Justice, would guard against an Executive abuse of power that endangers the Constitution.

Conclusion

These are just some of the more glaring examples of why Judge Roberts is not qualified to be Chief Justice of the United States. There are many more. Giving Judge Roberts a "pass," in order to focus attention on whomever is nominated to replace Justice O'Connor, would be a disservice to our Constitution, to the Senate's responsibility and, most important, to the American people. Some opponents of the nomination warn that there are too many unanswered important questions to "roll the dice" with America's future by making Judge Roberts Chief Justice of the United States for decades to come. In fact, the Senate's choice is even starker. The American people have already learned enough to realize that those dice are loaded against them. This nomination should be rejected.