



July 27, 2005

**STATEMENT OF NATIONAL SENIOR CITIZENS LAW CENTER
ON SUPREME COURT NOMINATION OF JOHN G. ROBERTS**

- ★ Justice
- ★ Independence
- ★ Dignity
- ★ Security

President Bush stated when he announced the nomination of John J. Roberts, “The decisions of the Supreme Court affect the life of every American.” Older Americans are no exception, and they have a huge stake in the Senate’s thoroughly examining Judge Roberts before he receives promotion to a life-tenured seat on that powerful court.

For senior citizens, the overriding question is whether Roberts will advance the activist agenda, frequently packaged as “federalism,” “property rights,” or the “constitution-in-exile,” that would curtail Congressional authority to enact--and the courts’ authority to enforce--safety net, civil rights, consumer protection, and other landmark protections passed during the last century.

The public needs answers to that question before the Senate acts on this nomination. The Senate Judiciary Committee needs to assemble a complete documentary record, conduct thorough hearings, and require Judge Roberts to provide meaningful responses to legitimate questions, to assess the philosophical vision that Roberts will bring to the Court if confirmed. For his constitutional vision will drive the Court, and hence the nation – given the strategic position he will inherit from the Justice he will replace, Sandra Day O’Connor.

Justice O’Connor cast key votes on fundamental issues affecting older Americans’ interests, such as:

- whether beneficiaries of entitlement programs such as Medicaid can enforce their federal rights to treatment in court – in many instances the only effective tool for ensuring that states spend federal funds in accordance with federal guarantees to patients;
- whether conservative activist judges should be empowered to immobilize government social programs – such as nursing home safety standards -- in the guise of imposing constitutionally mandated compensation for regulatory compliance costs;
- whether federal antidiscrimination protections extend to whistle-blowers who complain about illegal discrimination;

- whether Congress has authority to empower victims of discrimination to hold state governments liable in court for violations of their rights under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act (Justice O'Connor's "swing vote" swung in both directions in cases on these issues);
- whether employers are immune from liability under the Age Discrimination in Employment Act unless plaintiffs can prove actual intent to discriminate on the basis of age – an interpretation that would render most age discrimination claims nearly impossible to prove. (Justice O'Connor voted for the narrow interpretation in this case.)
- whether states are barred from guaranteeing independent medical review of HMO denials of coverage under health insurance plans.

In the last case, a 5-4 decision in which O'Connor's vote was necessary to preserve patients' opportunity for independent review of HMO coverage denials, Roberts as a private lawyer argued the contrary view on behalf of an HMO client of his law firm. That fact does not demonstrate what his position would be as a judge. But it does underscore how great a difference could be made by his replacement of Justice O'Connor.

To gauge the scope of that difference, the Committee needs to spotlight the extent to which Roberts could help create a 21st century Supreme Court bent on rolling back the great social reforms of the last two-thirds of the 20th century – like the anti-government Court of the first third of that century. Roberts criticized that "era of judicial activism" during the hearings preceding his confirmation to the District of Columbia Circuit Court of Appeals. His performance record on these issues to date is scant and mixed:

- A somewhat troubling omen is a 2003 dissenting opinion, filed during his current two-year tenure on the D.C. Circuit Court. In that case, Judge Roberts contended that Congress lacks power to bar real estate developers – who concededly operate within interstate commerce – from damaging the habitat of endangered species which themselves are not part of interstate commerce. Potentially, Judge Roberts' reasoning might imperil the great civil rights laws that prohibit discrimination against older Americans or other citizens.
- A more promising, similarly inconclusive, sign was Judge Roberts' concurrence in a 2004 decision affirming Congress' power to bar grantees of federal transit funds from discriminating against disabled citizens. His position contrasted with dissenter Judge David Sentelle, who in this and other instances has echoed Supreme Court Justice Clarence Thomas in championing a radical rollback of Congressional authority to enact social reform legislation.
- Another positive, though limited, sign is Roberts' 2002 victory as a private attorney in an important Supreme Court case that blunted the two-decade campaign of activist conservatives to broadly require constitutionally mandated compensation for the costs of complying with government regulation.

Judge Roberts will be in a position to determine whether Congress retains the broad authority it has exercised throughout most of the 20th century to meet the needs of all Americans. The Senate needs to determine how he will use that position.