ACLJ Responds to People For the American Way's Attack Against Supreme Court Nominee John Roberts

Introduction

On August 24, 2005, People for the American Way ("PFAW") published a Report opposing the confirmation of John Roberts to the Supreme Court of the United States. The Report is full of hyperbole and distortions. This ACLJ Rebuttal responds to the most egregious assertions made in the PFAW report and rebuts PFAW's outrageous claim that John Roberts would undermine the constitutional rights of all Americans.

PFAW did get one thing right. It stated that John Roberts's nomination "will test this country's commitment to core American values."[1] America's values are reflected in the fact that a clear majority of Americans voted last fall to elect a President who promised to appoint judges who would respect the American principle that democratically elected legislatures, and not judges, are responsible for making laws. Americans elected President Bush, in part, because he promised to rein in a federal judiciary increasingly intoxicated by the self-appointed power to impose policy choices in the name of newly-discovered "constitutional rights." John Roberts's nomination is a fulfillment of the President's promise and is fully consistent with "core American values."

PFAW's notion of "core American values" is wholly at odds with the values most Americans hold. For example, PFAW opposes: 1) pornography filters on public library computers; 2) regulating hardcore internet pornography; 3) restricting simulated child pornography; 4) school choice; and 5) voluntary prayer in public places. PFAW supports: 1) deleting "under God" from the Pledge of Allegiance; 2) redefining traditional marriage; 3) voting rights for felons; 4) forcing the Boy Scouts to permit openly gay scoutmasters; 5) partial-birth abortion; 6) judicially-imposed tax hikes; 7) removing the Ten Commandments from public settings; 8) racial quotas in college admissions; and 9) extending civil liberties to foreign terrorists.[2] PFAW's vision of America is alien to the majority of Americans, not to mention those who framed and ratified the Nation's Constitution.

Rebuttal

The thrust of PFAW's Report is that confirming John Roberts would "jeopardize"[3] American civil liberties. PFAW claims that while serving in the Reagan Administration, John Roberts showed "a pattern of working . . . to undermine Americans' rights and

---

[1] People for the American Way, *Special Report: People for the American Way Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts*, 11 (Aug. 24, 2005) [hereinafter *PFAW Special Report*], http://media.pfaw.org/stc/RobertsOppositionReport.pdf.

[2] http://bench.nationalreview.com/archives/074115.asp.

[3] *PFAW Special Report* at 6.

liberties rather than uphold them."[4] PFAW supports this insulting accusation by cobbling together news articles from left-wing media and by mischaracterizing Roberts's writings as an attorney in the Reagan Administration. Examining just a few of PFAW's claims suffices to illustrate the weaknesses throughout its Report.

1. PFAW's claim: Roberts would reduce access to justice, because he favors proposals to strip the federal courts of jurisdiction.[5]

The truth: As a young attorney, Roberts wrote a memorandum at the request of his superiors in the Reagan Administration discussing the constitutionality of a law narrowing the Supreme Court's authority. Roberts's conclusions were based on explicit language in the Constitution, and he opined that the law at issue was "bad policy."

The Constitution gives authority to Congress to make "exceptions" to the Supreme Court's appellate jurisdiction.[6] At the request of Kenneth Starr, then counselor to the Attorney General, Roberts wrote a memorandum discussing the constitutionality of proposed congressional legislation to remove certain issues from Supreme Court jurisdiction.[7] Such "court-stripping" proposals had long been introduced in Congress by those objecting to various federal court decisions.[8] At the time of Roberts' memorandum, twenty such bills were pending.[9] Roberts wrote this memorandum to help the Reagan administration decide whether to support any of the pending bills. While Roberts concluded that such legislation was constitutional, he also said that it would be "bad policy."[10]

2. PFAW's claim: As Deputy Solicitor General, Roberts argued in *Bray v. Alexandria Women's Health Clinic* that the scope of a federal civil rights law should be "narrowed."[11]

The truth: Roberts argued that the Civil Rights Act of 1871 should be interpreted just as the Supreme Court had always interpreted it.

---

[4] *Id.* at 5.

[5] *Id.* at 34.

[6] U.S. Const. Article III, Section 2.

[7] Warren Richey, *Roberts's Papers: Congress Tops High Court*, Christian Science Monitor (Aug. 23, 2005), *available at* http://search.csmonitor.com/search_content/0823/p02s01-uspo.html.

[8] *Id*.

[9] *Id.*

[10] *Id*.

[11] *PFAW Special Report* at 30.

In *Bray*, abortion facility owners claimed that pro-life protesters had violated the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. The Act's purpose was to end Reconstruction era brutality against African-Americans and civil rights activists. The drafters designed the Act to prohibit individuals, conspiring together, from employing violence to thwart participation of African-Americans and their supporters in elections.[12] Before abortion ever became a constitutional right, the Supreme Court had held that a plaintiff claiming a violation of the Civil Rights Act of 1871 had to show "some racial, or perhaps otherwise class-based, *invidiously discriminatory animus* [lay] behind the conspirators' action."[13] The abortion facility owners in *Bray* claimed that opposition to abortion was the same as discriminatory animus against women. Roberts opposed this far-fetched argument and the Supreme Court agreed.[14] Thus, the Court ruled that the Civil Rights Act of 1871 could not be applied to pro-life protesters.[15]

3. PFAW's claim: Confirming Roberts would threaten the "Right" to abortion.[16]

The truth: A Roberts vote to overrule *Roe v. Wade,* would not make abortion illegal.

As do all pro-abortion groups, PFAW practices demagoguery over the abortion issue. The truths that PFAW will not tell are:

a. If Roberts thinks *Roe v. Wade* is bad constitutional law, he is in very good company. *Roe* is a constitutional embarrassment to many prominent legal scholars who otherwise support abortion. The decision has generated scathing commentary,[17] and even Justice Ruth Bader Ginsburg, a staunch abortion supporter, has said that *Roe* was "heavy handed judicial intervention" that "was difficult to justify."[18]

---

[12] *See United Bhd. of Carpenters & Joiners of Am. Local 610 v. Scott*, 463 U.S. 825, 836-37 (1983).

[13] *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (emaphasis added).

[14] Justice Souter even agreed with Court's (Roberts's) conclusion. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 288 (1993) (Souter, J., concurring in the judgment in part and dissenting in part).

[15] *Id.* at 268 (majority opinion).

[16] *PFAW Special Report* at 2 (Executive Summary).

[17] *See, e.g.*, Alexander M. Bickel, The Morality of Consent 27-28 (1975); Archibald Cox, The Role of the Supreme Court in American Government 113-14 (1976); John H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973); Richard A. Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159. The editors of the Michigan Law Review surveyed the literature on Roe and concluded: "The consensus among legal academics seems to be that, whatever one thinks of the holding, the opinion is unsatisfying." Editors Preface, 77 Mich. L. Rev. 1568, 1568 (1979).

[18] Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385-86 (1985).

b. Overruling *Roe* would not make abortion illegal; the only change would be that the issue would be returned to the states, where it should have been all along.

c. By an overwhelming majority of 73 percent, Americans do not accept PFAW's view that Roberts's views on abortion should be a deciding factor in his confirmation. Americans also reject by a margin of 69 percent PFAW's conviction that a nominee should be rejected because of his politics.[19]

4. PFAW's claim: "Roberts has a record of hostility to separation of church and state."[20]

The truth: Roberts criticized the Supreme Court's decision holding that a moment of silence at the beginning of the school day constitutes an "establishment of religion."

In *Wallace v. Jaffree*,[21] the Supreme Court struck down a state statute requiring Alabama public schools to begin the school day with a moment of silence. Students were not forced to pray; they were given the opportunity to daydream, think, or plan.[22] The Court nonetheless applied a test to determine that this harmless law affected an establishment of religion. Roberts criticized that extreme result, and he also criticized the test the Court used to arrive at its conclusion. Roberts's criticism proved prescient. The test, called the

[19] Maggie Gallagher, *The NARAL Debate*, Yahoo News!, Aug. 16, 2005 (citing Fox News/Opinion Dynamics Poll, www.foxnews.com/projects/pdf/poll_071405.pdf). *See also*, Richard Morin & Charles Babington, *Nominee Supported by a Majority in Poll; But 64 Percent Want Judge to State His Views on Key Issues Such as Abortion*, Wash. Times, July 23, 2005, at A06 (". . . [A majority of t]he public said senators should vote to confirm Roberts if they believe he has the right background and qualifications to serve on the high court but disagree with his judicial philosophy and legal opinions.").

[20] *PFAW Special Report* at 32.

[21] 472 U.S. 38 (1985).

[22] 472 U.S. at 89 (Burger, C.J., dissenting).

"*Lemon* test," has since been criticized by six of the current Supreme Court Justices,[23] as well as some of the Nation's most prominent legal scholars.[24]

5. PFAW's claim: As a judge on the D.C. Court of Appeals, Roberts demonstrated deference to President Bush's "extensive . . . abuses of executive power."[25]

The truth: Roberts joined a unanimous opinion in *Hamdan v. Rumsfeld*, holding that Congress authorized President Bush to try a foreign terrorist captured during the Afghanistan war in a military tribunal.

In *Hamdan*,[26] the court followed well-established Supreme Court precedent holding that when Congress authorizes the President during war-time to establish military tribunals, war criminals captured during battle can be tried in those tribunals.[27] Shortly after September 11, 2001, Congress passed a resolution authorizing President Bush to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . ."[28] In the 2004 case of *Hamdi v. Rumsfeld*, Justice O'Connor's majority opinion, concluded "that the AUMF is explicit congressional authorization for the detention of individuals" and

---

[23] *See Santa* Fe *Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("Lemon has had a checkered career in the decisional law of this Court."); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again."); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (lamenting the "sisyphean task of trying to patch together the "blurred, indistinct and variable barrier' described in Lemon"); *Allegheny County v. ACLU*, 492 U.S. 573, 595 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (stating that he did "not wish to be seen as advocating, let alone adopting, [the Lemon] test as our primary guide in [holiday display cases]"); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346, 348 (1987) (O'Connor, J., concurring in judgment) (suggesting a reformulation of the inquiry framed by the Lemon test); *Books v. City of Elkhart*, 532 U.S. 1058, 1060-61 (2001) (Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari).

[24] *See*, e.g., Choper, *The Establishment Clause and Aid to Parochial Schools* -- An Update, 75 Calif. L. Rev. 5 (1987); Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495 (1986); McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1; Kurland, *The Religion Clauses and the Burger Court*, 34 Cath. U.L. Rev. 1 (1984); R. Cord, *Separation of Church and State* (1982); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980).

[25] *PFAW Special Report* at 36.

[26] 415 F.3d 33 (D.C. Cir. 2005).

[27] *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *In re Vidal*, 179 U.S. 126 (1900); *Ex parte Vallandigham*, 68 U.S. 243 (1864).

[28] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004) (quoting Authorization for Use of Military Force ("the AUMF"), 115 Stat. 224 (2001)).

the subsequent "trial[s] of unlawful combatants, by 'universal agreement and practice,' [are] 'important incident[s] of war.'"[29] Thus, contrary to PFAW's false statement, the D.C. Circuit Court, in *Hamdan*, did not give deference to the Executive branch of government, but rather followed the law as interpreted by the Supreme Court of the United States.

Conclusion

The five claims rebutted above are merely a sampling of the distortions contained in PFAW's Report. The 50-plus page report is nothing but a desperate attempt to smear one of the best qualified nominees in the history of Supreme Court nominations. It deserves no credence at all from either the American people or the United States Senate.

[29] *Id.* at 2639-40; citing *Ex Parte Quirin*, 317 U.S. 1, 28 (1942).