NATIONAL ABORTION FEDERATION

JUDGE JOHN ROBERTS IS NO FRIEND OF FUNDAMENTAL FREEDOMS AND SHOULD NOT BE CONFIRMED AS CHIEF JUSTICE OF THE UNITED STATES

The National Abortion Federation (NAF) opposes President Bush's nomination of Judge John Roberts to be Chief Justice of the United States. NAF is deeply concerned that if confirmed, Roberts would vote to weaken or even overturn Americans' fundamental freedoms. Although he was given ample opportunity to do so, Judge Roberts did not alleviate these concerns during his confirmation hearing. Now that the Judiciary Committee hearing is over, we urge Senators to reject Judge Roberts' nomination to be Chief Justice of the United States. Since the day he took office in 2001, President Bush has advanced his agenda to restrict women's access to reproductive health care.[1] His nomination of Judge Roberts to the Supreme Court is another part of this strategy.

The Chief Justice leads the most important court in our country, the United States Supreme Court. Any Supreme Court vacancy is of monumental importance, but the position of Chief Justice carries enormous responsibility and influence. The Chief Justice presides over oral arguments, leads weekly conferences of the justices, and assigns the writing of opinions when he or she is in the majority. Many Chief Justices have left a distinct stamp on the Court, and if confirmed, Judge Roberts would be one of the youngest Chief Justices ever, with the potential to lead the Court for many decades to come.

I. Judge Roberts Has Questioned Americans' Constitutional Right to Privacy and Reproductive Freedom

Not only has Roberts criticized *Roe v. Wade* and argued for its reversal, he has argued that the right to privacy does not exist in the Constitution. In *Griswold v. Connecticut*, the Supreme Court recognized a fundamental right to liberty and privacy, rights guaranteed by the Fourteenth Amendment.[2] Several years later, in *Eisenstadt v. Baird*, the Court further defined the right to "be free from unwanted government intrusions into matters so fundamentally affecting a person."[3] Those decisions became the basis for the Court's ruling in *Roe v. Wade*, extending the fundamental right to have an abortion to women.

Roberts' "So-Called Fundamental Rights"

Judge Roberts was one in a group of conservatives who argued that the Supreme Court went too far in defining the right to privacy. In one memorandum, Judge Roberts characterized the right to privacy that the Court had held fundamental in three cases as a "so-called 'right to privacy.'"[4] He then extended his criticisms to other "so-called" fundamental rights:

---

[1] For more information, visit NAF's web site at http://www.prochoice.org/policy/national/bush_strategy.html.
[2] 381 U.S. 479 (1965).
[3] 405 U.S. 438, 453 (1972).
[4] See Memorandum from John Roberts to the Attorney General re Erwin Griswold Correspondence, December 11, 1981.

> All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution, arbitrarily elevate it over other constitutional rights and powers by attaching the label "fundamental" and then resort to it as, in the words of one of Justice Black's dissents, "a loose, flexible, uncontrolled standard for holding laws unconstitutional." [5]

If the Supreme Court were to rule in the way Judge Roberts has advocated, it would mean the end of the right to privacy and would open Americans' bedrooms to government intrusion and surveillance. Several Senators gave Judge Roberts many opportunities to disavow the positions he has previously taken on privacy, and he refused to do so. Although he recognized a right to privacy and argued that he "had no quarrel" with Supreme Court cases finding the right to privacy, he was careful how he defined it and would not reveal how far he thinks it should extend. When asked about whether there is a fundamental right to privacy, Judge Roberts declared,

> I think that the court's expressions, and I think if my reading of the precedent is correct, I think every justice on the court believes that, to some extent or another. Liberty is not limited to freedom from physical restraint. It does cover areas, as you said, such as privacy. And it's not protected only in procedural terms but it is protected substantively as well. Again, I think every member of the court subscribes to that proposition.[6]

The similarities to Justice Thomas's answers during his confirmation hearing were striking. Justice Thomas, who has recently written that he does not find a right to privacy in the Constitution,[7] was asked his views on the right to privacy during his own confirmation hearing in 1991. He stated, "my view is that there is a right to privacy in the Fourteenth Amendment."[8] These statements led Senator Biden to conclude,

> He (Roberts) answers the questions exactly how Thomas answered them to me. Every time I asked him a tough question, he'd say, quote, 'I have no quarrels with the majority opinion.' He did that to me, I don't know, seven or eight times. That was exactly what Thomas said to me when I asked about civil rights cases. ... Yet when he got there, he didn't have any quarrel but he voted the other way.[9]

Judge Roberts' answers to questions about his view of the right to privacy were simply too vague to be convincing. Moreover, Judge Roberts refused to say whether he believed that the right to privacy extended to the right to have an abortion.

---

[5] See Memorandum from John Roberts to Kenneth Starr re Judicial Restraint Drafts, November 24, 1981 at 4.
[6] See Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States: Hearings before the S. Comm. On the Judiciary, 109th Congress, 1st Session (2005).September 13, 2005.
[7] See *Lawrence v. Texas*, 539 U.S 558, 605 (2003) (Justice Thomas dissenting). Justice Thomas wrote, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions. *Id.*
[8] See Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court of the United States: Hearings before the S. Comm. On the Judiciary, 102nd Congress, 1st Session (1991).
[9] Statement of Senator Joseph Biden, September 16. 2005.

Judge Roberts and *Roe v. Wade*

In addition to questioning fundamental rights and freedoms generally, Judge Roberts challenged the right to safe and legal abortion during his legal career, yet he refused to comment on it during his confirmation hearing. For example, Judge Roberts has argued for the reversal of *Roe v. Wade* and has stated that there was "no support in the text, structure, or history of the Constitution" for the reasoning behind *Roe.* As Deputy Solicitor General, Roberts co-authored a brief in *Rust v. Sullivan* arguing that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled…" in a case where the validity of *Roe* was not even at issue.[10]

Although Roberts reassured the Senate Judiciary Committee in 2003 that he would be bound by *Roe v. Wade* as settled law during his Court of Appeals confirmation hearings, those assurances are no longer valid. The nominee who is confirmed as Chief Justice will have the power to shape the Supreme Court for decades to come and to overrule longstanding precedent, including *Roe v. Wade.* It is estimated that if *Roe v. Wade* is overturned and the issue returns to the states, as many as twenty states would ban abortion immediately and as many as ten more could follow.[11] Only about twenty states would keep abortion safe and legal. But the bans would not end abortion in those states. Instead, they would mean that women once again would have to risk their lives, health and fertility in order to terminate an unwanted pregnancy.

Currently, abortion is one of the safest medical procedures provided in the United States and an essential part of the continuum of women's reproductive health care. But that has not always been the case. Between the 1880s and 1973, abortion was illegal or severely restricted in all or most states, and countless women died or experienced serious medical complications as a result of those laws. Women often made desperate and dangerous attempts to induce their own abortions or resorted to untrained practitioners who performed back-alley abortions with primitive instruments in unsanitary conditions. Women streamed into emergency rooms with serious complications -- perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene that resulted in sterility or even death in many cases.

In 1973, the Supreme Court struck down state laws that criminalized abortion in the landmark decision *Roe v. Wade*. Doctors working in hospital emergency rooms and obstetrical/gynecological units before that time knew about the medical harm that women suffered as a result of self-induced and back-alley abortions. Today, many of these doctors are retiring, and generations of Americans are too young to remember the devastating consequences of limiting access to safe and legal abortion.

Since 1973, despite the Supreme Court's protection of safe and legal abortion, access to abortion has been severely eroded. The most recent survey found that 87% of all U.S. counties have no identifiable abortion provider. In non-metropolitan areas, the figure rises to 97%. As a result, many women must travel long distances to obtain abortion care. Distance is not the only barrier women face. Many other factors have contributed to the current crisis in abortion access, including a shortage of trained

---

[10] Brief for the Respondent United States, *Rust v. Sullivan* (Nos. 89-1391, 89-1392).
[11] Center for Reproductive Rights, *What if Roe Fell?* (2004).

abortion providers; state laws that make getting an abortion needlessly onerous; restrictions on public funding for low-income women; and fewer hospitals providing abortion services.

The next Supreme Court justice will enter the debate at a critical time for reproductive rights. Not only has there been an attack on reproductive freedoms from state legislatures and Congress, but battles are being fought all over the country in the courts. One such case will be before the Supreme Court in the next term. In *Ayotte v. Planned Parenthood*, the Court will look at a New Hampshire statute prohibiting a minor from obtaining an abortion until at least 48 hours after her parents have been notified. The statute lacks an exception for cases where the delay would threaten the health of a young woman, and the Court will decide whether these crucial health exceptions are necessary for future statutes. The Court's decision could mean a virtual gutting of reproductive rights as we know them. The stakes are simply too high to confirm a Chief Justice who has disparaged the fundamental right to privacy and *Roe v. Wade*.

Despite his previous statements, Judge Roberts refused to answer questions about his view of *Roe* during his confirmation hearing. Several Senators, including the Chairman of the Committee, Senator Arlen Specter (R-PA), asked him to state whether he supported Roe and a woman's right to choose. On every occasion, Judge Roberts ducked the question and refused to answer. Instead Judge Roberts stated that he could not answer questions on issues coming before the Court and noted that other sitting Justices have responded the same way during their confirmation hearings. However, when asked the same question, Justice Ruth Bader Ginsburg answered in a direct and specific manner. She stated, "Abortion prohibition by a state controls women and denies them full autonomy and full equality with men. It would be unconstitutional."[12]

II. Judge Roberts has Argued Against the Use of a Federal Civil Rights Law to Protect Reproductive Health Clinics

In addition to questioning the fundamental right to privacy, and arguing for the reversal of *Roe*, Roberts also co-authored a brief for the Supreme Court taking the side of Operation Rescue in *Bray v. Alexandria Women's Health Clinic.*[13] NAF urges Senators to question why he chose to advocate the positions of extremists in this case and if he has considered the ramifications of his argument and the Supreme Court's decision. Most importantly, Senators need to ask Roberts if he has an appreciation for the seriousness of the issue of violence against reproductive health care providers and the validity and necessity of protective measures put in place since that decision, such as the Freedom of Access to Clinic Entrances Act (FACE).

Harassment of Reproductive Health Care Professionals

Since the 1973 *Roe v. Wade* Supreme Court decision that made abortion legal, there has been an organized campaign against abortion by anti-abortion extremists which has resulted in harassment and violence against women's health care providers.

---

[12] See Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States: Hearings before the S. Comm. On the Judiciary, 103rd Congress, 2d Session (1993).
[13] 506 U.S. 263 (1993).

What began as peaceful protests with picketing moved to harassing clinic staff and patients as they entered clinics and eventually escalated to blockading clinic entrances. This foundation of harassment led to violence with the first reported clinic arson in 1976 and a series of bombings in 1978.[14] Arsons and bombings have continued to this day, with a serious arson occurring most recently on July 4 in south Florida.[15] Anti-abortion extremists have also used chemicals to block women's access to abortion employing butyric acid to vandalize clinics and sending anthrax threat letters to intimidate clinic staff.

In the early 1990s, anti-abortion extremists concluded that murdering providers was the only way to stop abortion. The first provider, Dr. David Gunn, was murdered in Florida on March 10, 1993, less than two months after the decision in *Bray*. Since then, there have been six subsequent murders and seventeen attempted murders of clinic staff and physicians, several of which occurred in their own homes.

Bray v. Alexandria Women's Health Clinic

Bray v. Alexandria Women's Health Clinic arose from a ruling by a federal court in Virginia enjoining clinic blockades by Operation Rescue and several extremist individuals with histories of harassing abortion providers and patients.[16] Some of the individuals had even approved of the use of violence against abortion providers. The parties included:

Operation Rescue (OR) – Started in early 1987 by Randall Terry. In the early years, OR was known for large-scale sieges of clinics. These blockades spurred hundreds, probably thousands, of arrests. Jayne Bray played an integral role in its inner circle.

Michael Bray – Spent four years in prison in connection with the bombings of ten abortion clinics and pro-choice advocates' offices, including the offices of NAF and the ACLU, in 1984. Bray is an outspoken advocate of the murder of abortion providers, is a leader in the Army of God,[17] and has even authored a book justifying homicide entitled *A Time to Kill*. The Army of God has published a manual that advocates the murder of abortion providers.[18]

---

[14] For more information, including statistics, visit NAF's web site at http://www.prochoice.org/about_abortion/violence/index.html.

[15] Emily Minor, "Clinic Owner Steadfast Amid Arson's Ashes," *Palm Beach Post*, July 7, 2005 at A1.

[16] *NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989).

[17] The Army of God is an underground network of domestic terrorists who believe that the use of violence is appropriate and acceptable as a means to end abortion. The first public mention of the Army of God (AOG) is believed to have been when an Illinois abortion provider and his wife were kidnapped in 1982. In 1984, Supreme Court Justice Harry Blackmun received a death threat through the mail from the Army of God. In letters sent to the media, the Army of God claimed responsibility for Eric Rudolph's bombings of an abortion clinic and a gay bar in Atlanta, GA. Army of God member James Kopp, alias Atomic Dog, was convicted of the fatal shooting of Dr. Barnett Slepian in 1998. Clayton Waagner, the man who was convicted of sending over 550 anthrax threat letters to clinics in 2001, signed many of his threat letters with the Army of God. He also posted threats to kill 42 individuals working at abortion clinics on the Army of God website.

[18] It is believed that the Army of God manual was first drafted when numerous anti-abortion extremists were arrested and jailed together for several weeks for protests during the Democratic National Convention in Atlanta, GA, in October 1988. It was during this time that the Army of God was formed and its members given aliases. James Kopp was given the name Atomic Dog. The Army of God Manual was discovered in Shelly Shannon's backyard in 1993 by law enforcement officials while searching Shannon's home and property after she shot Dr. Tiller in Wichita, KS. The manual is essentially a "how to" for abortion clinic violence. It details methods for blockading entrances, butyric acid attacks, arson, bomb-making, and

Jane Bray – Stated at the bombing trial of her husband Michael Bray that she was "tickled pink" with the result of his actions. She also advocates the use of violence against abortion providers.

Randall Terry – Arrested over 40 times in relation to various clinic blockades. In 1988, he was arrested and jailed in connection with protests at the 1988 Democratic National Convention. James Kopp, convicted of murdering abortion provider Dr. Barnett Slepian, was among those jailed with Terry.

Patrick Mahoney – Arrested numerous times for blocking access to clinics. He is affiliated with Youth Defense, a militant group in Ireland that advocates violence against doctors, as well as Precious Life, a similar group in Scotland.

Clifford "Kip" Gannett – Member of Michael Bray's church. He organized dozens of clinic blockades in the D.C. area. Friend to James Mitchell, who pleaded guilty to setting a Falls Church, VA clinic on fire.

Following widespread blockades, women's health clinics sued under a federal civil rights statute to prevent future blockades and protect women seeking abortion care. A permanent injunction was entered enjoining the defendants from trespassing, blockading, impeding, or obstructing access to certain abortion clinics in the metropolitan Washington, DC area. In reaching its conclusion, the court noted that the blocking of clinic entrances threatened the health of women seeking abortion care and counseling.[19]

In 1991, the United States Supreme Court agreed to hear the case and Judge Roberts co-authored the Bush administration's *amicus* brief. The brief advocated against the use of anti-discrimination law to prevent blockades of abortion clinics.[20] The case was heard twice at the Supreme Court, and both times Roberts argued the case for the government. The Bush administration sought to deny jurisdiction to the federal courts to remedy the illegal actions of anti-abortion extremists who were traveling from state to state, waging campaigns of harassment and intimidation. The federal government was not required to take the side of anti-abortion extremists; rather, they chose to enter the case and advocate against the use of a federal civil rights law to protect women seeking abortion care. They argued that blockading entrances to abortion clinics did not constitute discrimination against women, even though only women had abortions.

Administration officials knew their arguments, if adopted, would greatly limit the options available to abortion providers to protect themselves and their patients. Notably, the brief refrained from condemning the tactics of Operation Rescue and the other defendants, and did not take other steps to distance the government from their activities. As deputy solicitor general, John Roberts was intimately involved in those decisions and the framing of the brief.

The Reagan administration also intervened in a second case involving Operation Rescue in Wichita, Kansas, submitting Roberts' brief from the Supreme Court in *Bray* and asking that the federal court lift an injunction issued under the same federal law at issue in *Bray*. That injunction was key in preventing

---

other illegal activities. The manual contains not only strong anti-abortion sentiments but also anti-government and anti-gay/lesbian language.

[19] *Id* at 25.

[20] 1990 U.S. Briefs 985.

chaos during an enormous clinic blockade. The federal judge who issued the injunction stated "If these marshals are removed…there will be bloodshed, and it's just ludicrous to believe that somehow our government…agrees to that."[21] Roberts even appeared on television to defend the move, saying that the idea that mayhem would ensue was "absurd."

In a close vote, the Supreme Court ruled against the use of a civil rights statute to prevent anti-abortion extremists from blockading clinics in their attempt to prevent women from accessing abortion care. Justice Sandra Day O'Connor dissented. This case, decided in January 1993, struck down numerous injunctions, putting reproductive health care providers and their patients at risk. A high-ranking political appointee with substantial policy-making responsibilities, Roberts played a key role in the Bush administration's involvement in this case. Yet he was unwilling to separate himself from the Administration's position in the case. Senator Dianne Feinstein (D-CA) asked Judge Roberts about the case directly and he stuck by the position he furthered in his brief, noting that the Supreme Court accepted it 6-3, but not noting that Congress then had to take steps to remedy the effects of the decision by passing the Freedom of Access to Clinic Entrances Act (FACE).

Harassment and violence against reproductive health care providers continued in the wake of the *Bray* decision, culminating in the first murder of an abortion provider, Dr. Gunn, less than two months after the Supreme Court's ruling. Violence began to subside once FACE, enacted into law in May 1994, began to be enforced.

The Importance of FACE

In the aftermath of the defeat in *Bray* and an escalation of violence with the first murder of an abortion provider, Congress overwhelmingly passed the Freedom of Access to Clinic Entrances (FACE) Act. FACE forbids the use of "force, threat of force or physical obstruction" to prevent someone from providing or receiving reproductive health services. The bill was signed into law by President Clinton in May 1994.

The FACE law has had a clear impact on the decline in certain types of violence against clinics and providers. Since its enactment, clinic blockades have dwindled to their lowest levels since they were first used to prevent women from accessing reproductive health care. This is directly attributable both to the deterrent effect of the penalties the FACE law imposes, and the involvement of federal law enforcement in investigations and prosecutions of anti-abortion violence which was facilitated by the passage of FACE. Each of the federal appellate courts that have heard a FACE case have held that FACE is constitutional.[22] The Supreme Court has never heard a FACE case.

The arguments against the validity of FACE turn on interpretations of the Commerce Clause of the federal Constitution. One of President Bush's appellate court nominees, Judge Michael McConnell of the Tenth Circuit, has written that FACE is unconstitutional. It is essential that FACE continue to be preserved and upheld in the future. As a democratic society, we cannot allow extremists to take the law into their own hands in their attempts to stop safe and legal abortion.

---

[21] *The MacNeil/Lehrer NewsHour:* "Abortion Protest; Divided Nation; Makeover with a Mission" (Aug. 7, 1991).

[22] *United States v. Bird* 401 F.3d 633 (5th Cir. 2005); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002); *United States. v. Hart*, 212 F.3d 1067 (8th Cir. 2000); *United States. v. Gregg*, 226 F.3d 253 (3rd Cir. 2000); *United States. v. Wilson*, 154 F.3d 658 (7th Cir.1998); *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1996); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996).

NAF urges the Senate to probe Judge Roberts' views of FACE and other criminal and civil laws enacted pursuant to Congress' commerce clause powers.

Abortion Providers and Their Patients Are Still Victims of Violence, Harassment, and Intimidation

Since 1993, there have been 7 murders, 17 attempted murders, 14 bombings, and 72 arsons committed against abortion providers.[23] Different tactics such as butyric acid attacks and anthrax threats continue to emerge. It is imperative that judges in the United States, including Supreme Court justices, recognize the threats that abortion providers face, and believe not only in the validity of *Roe*, but also the legitimacy of laws like FACE that help ensure the safety of health care professionals and their patients.

NAF urges the Senate to closely examine the record of Judge Roberts, demand thorough and honest answers, and vote against his confirmation if he refuses to respect the well-established precedent of *Roe* and the constitutional right to privacy. Judge Roberts must also explain the decision he made to represent the position of extremists who advocated and committed violence against abortion providers. Senators must understand how his judicial philosophies could impact his views of laws such as FACE.

III. Conclusion

Americans will not tolerate retreating to the days of back alley abortions when women had to sacrifice their lives and health to end an unwanted pregnancy. American women deserve better. With the nomination of Judge Roberts as Chief Justice, President Bush is continuing steps toward his goal of limiting access to safe and legal abortion. In the next Supreme Court term, the right of a woman to have a safe and legal abortion, embedded in the privacy protections of the Constitution, could be in peril if Judge Roberts is confirmed. The stakes could not be higher.

The confirmation hearings gave Senators a chance to examine Judge Roberts' positions and philosophies on a variety of rights and freedoms Americans hold dear, yet he refused to answer questions regarding his judicial philosophy on Roe and women's basic reproductive freedom. Americans overwhelmingly support *Roe* and the right to make personal, private health care decisions. If Judge Roberts is confirmed as Chief Justice of the United States, it could have grave consequences for women's lives and health for decades to come. Roberts' record and narrow, conservative legal philosophies are unacceptable for a Chief Justice, a lifetime position of enormous power and influence. We urge the Senate to reject his nomination.

[23] For more information, visit NAF's web site at http://www.prochoice.org/about_abortion/violence/violence_statistics.html.