

Looking for a leader for the high court

As confirmation hearings start, senators hope John Roberts can bring consensus to an often ideologically splintered Supreme Court

By Tom Curry, National affairs writer - MSNBC
Updated: 8:46 a.m. ET Sept. 12, 2005

WASHINGTON — In what direction is John Roberts most likely to lead the Supreme Court, if the Senate confirms him as chief justice?

Does he have the talent to lead justices who have been polarized on issues such as property rights and the death penalty?

The Senate Judiciary Committee opens hearings at noon Monday that may supply some answers to these questions.

Roberts will be formally presented to the committee by a group of senators including Sen. Evan Bayh, D-Indiana, a contender for the 2008 Democratic presidential nomination. Roberts grew up in Indiana.

"It has been my experience that the hearings are a subtle minuet with nominees answering as many questions as they think they have to in order to be confirmed," said Judiciary Committee chairman Sen. Arlen Specter, R-Pa., in the text released Sunday of his prepared statement that will open the hearings.

How skillfully Roberts handles the interrogation by the members of the committee will determine whether he gets to succeed his old mentor, Chief Justice William Rehnquist, who died Sept. 3. Roberts served as one of Rehnquist's law clerks in 1980 and 1981.

If confirmed, Roberts, who is 50, would likely serve on the high court for 30 years.

The hearings begin exactly three weeks before the Supreme Court begins its 2005-2006 term, in which it will decide historic cases on abortion, assisted suicide, military recruiting on college campuses, and the rights of prisoners under the Americans with Disabilities Act.

Replacing the conservative Rehnquist with the conservative Roberts will not in itself alter the direction of the court. That will hinge on who the Senate confirms for the vacancy created by the retirement of Justice Sandra Day O'Connor.

President Bush has yet to announce a nomination for that opening. But if Roberts proves to be an adept leader, he could guide the court in a conservative direction for decades to come.

“In some ways this is what the election was about, because the president gets to choose who sits on the federal courts,” said Sen. John Cornyn, R-Texas, one of the Judiciary Committee members who’ll be posing questions to Roberts. “The choice: is the court going to perform its traditional function of interpreting the law — or is the court going to be the primary policy maker in American society?”

Mysterious beliefs

What are Roberts’s most deeply held beliefs on combustible issues such as abortion, same-sex marriage, and property rights?

Few people outside his inner circle know. Roberts has never given a speech, written a law review article, or handed down a judicial decision on those issues.

Two years ago, when the Senate was scrutinizing Roberts for the appeals court post he now holds, he said his judicial philosophy “begins with an appreciation of the limited role of a judge in our system of divided powers. Judges are not to legislate and not to execute the law.”

Expressing his views as an appeals court judge for the District of Columbia Circuit for the past two years, Roberts has written about 50 decisions, concurrences, and dissents.

Since the D.C. circuit handles a docket heavy in cases interpreting arcane federal regulations, most of what Roberts has written has been on specialized topics such as how the Federal Communications Commission operates its auctions of the spectrum between 218 and 219 megahertz.

Girl arrested for eating French fry

Probably the most famous ruling Roberts has written was last year’s “French fries” decision, arising from the arrest and handcuffing of a 12-year old girl at a Washington, D.C. Metro subway station. She was eating a French fry in violation of the Metro system’s rules.

Roberts’s decision illustrated his practice of deferring to government agencies when their actions have some rational basis.

His personal view was that the decision to arrest the girl was not good police policy. But he declined to overrule the decision because it did not raise constitutional questions, as the girl’s lawyer claimed it did.

Under the subway system’s rules — later changed after a public outcry — adults were given a citation or ticket for eating food on the subway, but juveniles were arrested.

The Metro’s policy of arresting minors was not “worth the youthful trauma and tears,” Roberts wrote, but, he added, “It is not our place to second-guess such legislative judgments.”

He explained that the question facing him and his two appeal court colleagues “is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not.”

One might expect that if confirmed, Roberts might likewise refrain from overturning federal and state laws which he personally thinks are “a bad idea,” but which don’t run afoul of the Constitution.

The chief as consensus builder

Although the chief justice has only one vote, just as his eight colleagues do, a skillful chief can sometimes bring discordant justices together. Yet even the adroit Rehnquist found this difficult with the current court.

“The Rehnquist court has been a very divided court,” said Sen. Ken Salazar, D-Colo., after conferring with Roberts on Friday for nearly an hour. “You don’t have a Chief Justice Warren on the court that would bring nine justices together.... What we end up having today is a lot of cases decided on a 5-to-4 split and each one of the justices writing their own concurring opinion.”

Specter also voiced hope Roberts could unite the court.

“Judge Roberts may have a real chance to bring the court together, based on the personality which I have seen, if he is confirmed,” Specter said last week.

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