

## **JOHN ROBERTS – W’S SOUTER**

**By Don Feder**

**Posted – August 10, 2005**

When the president announced John Roberts’ nomination to the United States Supreme Court – the most powerful deliberative body in the world, membership in which comes with lifetime tenure – I had doubts.

As I said in a previous column, I wanted a nominee whose professional life was a 4-lane highway paved with paper. I wanted a picture window on his soul – I mean an iron-clad guarantee that we weren’t getting another Souter in Scalia-clothing.

Everything we know about John Roberts says here is a man who’s been polishing his resume since age six -- a go-to guy who wanted to be liked by his colleagues, a savvy lawyer who put his conscience in a blind trust to advance his career.

When the nomination was announced, the White House breathlessly informed us that when Roberts was tapped for the DC Circuit Court, 152 members of the DC Bar – prominent Democrats as well as Republicans – sang his praises to the Senate Judiciary Committee. Never trust a man who’s universally loved. Real conservatives are despised by the left.

Before last week’s revelations, it was still possible to give Roberts the benefit of the doubt. Not any more.

In an August 4<sup>th</sup> article, the Los Angeles Times disclosed that as a partner with the high-octane DC law firm of Hogan & Hartson, in the mid-1990s, Roberts helped a homosexual group

engineer one of the most disastrous Supreme Court decisions of the past two decades.

In *Romer v. Evans* (1996), the Court overturned an amendment to the Colorado Constitution – passed by 53% of the state’s voters – prohibiting municipalities from enacting so-called gay rights laws (conferring special status based on bedroom behavior). It was the first time the Court recognized homosexuals as a protected class for civil rights purposes.

*Romer* led directly to *Lawrence v. Texas* (2003), which declared laws against homosexual sodomy unconstitutional. If the Supreme Court ever finds a right to same-sex marriage banging around in the 14<sup>th</sup>. Amendment’s Equal Protection Clause, *Romer* will be the precedent.

In his blistering dissent, Justice Antonin Scalia (supposedly the president’s model for Supreme Court nominees) said the majority opinion in *Romer*: “has no foundation in American constitutional law and barely pretends to. The people of Colorado have adopted an entirely reasonable provision.... Amendment 2 (*the initiative the Court threw out*) is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will.”

And Bush’s first Supreme Court nominee helped facilitate this national disaster.

According Walter A. Smith Jr. (then the head of the firm’s pro-bono department), when he approached Roberts to assist the Lambda Legal Defense Fund in helping it to demolish the nation’s

moral foundation, the Great Right Hope didn't hesitate, "Let's do it!" Roberts reportedly said.

And do it he did. He read briefs, participated in a moot court session (to prepare the Lambda lawyer for the kind of tough questions she might get in oral arguments) and coached her on strategy. Jean Dubofsky, the plaintiff's lead attorney, recalls that Roberts instructed her, "You have to know how to count and to get five votes. You're going to have to pick up the middle." Advising gay litigators on how to push their cause is like giving Rommel a French road map.

Says Smith, who now runs a liberal interest group: "I would have expected on these cases that he (*Roberts*) would turn them down. But none of them raised so *serious a concern* to him personally."

Their conversation might have gone something like this:

Smith: "John, I'd like you to help us get civil-rights status for homosexuals. We want to negate the will of Colorado voters, further eroding representative government in this country. We hope to establish the precedent that a state's voters are to have no say over whether localities can create special rights based solely on performing certain sex acts."

Roberts: "Delighted to help. I have no serious concern about marshalling the troops for this particular assault on Judeo-Christian values."

Roberts' apologists on the right (who are legion) are trying to rationalize his participation in this case, arguing:

- 1) His involvement was minimal. Supposedly, Roberts only spent 5 hours on the case.

- 2) As a lawyer with Hogan and Hartson, Roberts was expected to take pro-bono cases, regardless of his personal opinions.
- 3) There's no way that this can be taken as a sign that the nominee supports gay rights. (In other words, Roberts has never actually been seen leaving a motel with Barney Frank.)

In reality, Roberts' contribution to the case was crucial. He worked in the Reagan Justice Department, clerked for Chief Justice William Rehnquist and argued 39 cases before the Supreme Court. Thus, he was perfectly positioned to provide insights into the thinking of conservative justices – how to counter the objections they'd likely raise to the anti-Amendment 2 position.

If Smith had gone to one of the many liberal lawyers at Hogan & Hartson and asked them to help Operation Rescue with a challenge to Roe v. Wade, or to assist the NRA in trying to overturn the assault weapons ban – what do you think the response would have been?

But for Roberts – a solid conservative and a strict constructionist, the administration's conservative cheerleaders assure us – assisting the homosexual lobby to establish a lethal precedent raised “no serious concern.”

Romer isn't Roberts' only pandering to political correctness. He spent over 200 hours representing DC welfare queens who saw their free-lunch counter shut down during a budget crisis.

He also helped a Florida mass murderer (who gunned down eight people in two drug-related shootings) in his attempts to have his death sentence vacated on the grounds of temporary insanity (which certain conservative leaders may be pleading after Roberts has been on the Court for a few years).

Smith discloses: “Unlike a lot of conservative lawyers at the firm, I don’t think that John had a *doctrinaire* view about certain issues that would cause him to say, ‘I shouldn’t work on that.’” This suggests that other conservatives in Hogan and Hartson declined to be involved in such cases, based on principle. Not John Roberts.

It makes you wonder what other issues – besides gay rights – Roberts does not hold “doctrinaire views” (i.e., is morally flexible) on: abortion, religious expression in the public square or applying European standards to American justice?

I don’t know if John Roberts supports gay rights or welfare rights or the rights of mass murderers. But neither do his conservative defenders. And neither does George Bush.

After solemnly and repeatedly promising the right Supreme Court nominees who are intellectual clones of Thomas and Scalia, the president gave us a man without a paper trail, a 50-year-old lawyer who isn’t on record expressing a conviction about anything more controversial than a preference for tuna-fish sandwiches over BLTs– a moral tabula rasa.

Ann Coulter points out that, before he was confirmed, there was more in the background of David Souter to suggest he would be a conservative vote on the Court than there is in Roberts’s history.

Apparently, the president’s priority is less putting another conservative on the Supreme Court, than getting one of his nominees confirmed without much of a fight.

In 4 ½ years in office, Bush has shown no great passion for social conservative causes (though, on the whole, his picks for the

federal appellate courts have been excellent). It took a good six months to get the president to endorse the Federal Marriage Amendment. Initially, he equivocated. (Let's wait to see what the courts do with the 1996 Defense of Marriage Act, he urged – which is rather like saying let's wait and see what Hamas does to the peace process.)

It wasn't until Karl Rove began to worry about the president's prospects of winning reelection, that Bush embraced the issue -- wisely, it transpires. The president probably owes his 2004 win to a state marriage protection amendment that turned out tens of thousands of evangelical voters in Ohio.

My read on Roberts: Ambitious, obsessively cautious, sociable and morally flexible – not the temperament that produces a Thomas or a Scalia.

Souter me once, shame on you. Souter me twice, shame on me.

*(This article originally was published on Grasstops.USA.org)*