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Privacy Views: Roberts Argued Hard for Others

By **ADAM LIPTAK**

Judge John G. Roberts Jr., President Bush's nominee for the Supreme Court, has written quite a bit in opposition to a constitutional right to privacy that has served as the basis for Supreme Court decisions protecting abortion and gay rights. But his writings, though distinctive and consistent, were always on behalf of superiors and clients and might not reflect his own views, then or now.

The positions Judge Roberts sketched out do echo those of Robert H. Bork, whose nomination for the court was defeated in 1987.

"Robert Bork was blocked in large part because he said in his writings that there was no constitutional right to privacy," said Erwin Chemerinsky, a law professor at Duke.

Judge Roberts could face serious trouble, liberal and conservative law professors agreed, if he were to embrace similar views at his confirmation hearings in the Senate next month.

In his two years on the federal appeals court in Washington, Judge Roberts has addressed significant privacy issues only in his Fourth Amendment decisions, sustaining police searches and other actions in the nine cases in which the issue arose. But there is little overlap between Fourth Amendment doctrine and the sort of constitutional privacy rights involved in cases concerning broader social issues.

Judge Roberts addressed that second sort of constitutional right to privacy, as set forth in a 1965 court ruling, as a lawyer in the Justice Department in 1981, just after finishing his clerkship with Justice William H. Rehnquist, now the chief justice.

In a draft article for Attorney General William French Smith that year, Judge Roberts wrote that the Supreme Court should not interpret the Constitution to give rise to new rights.

"All of us, for example," he wrote, "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.' "

The quotation was a telling one. Justice Hugo L. Black's dissent was in *Griswold v. Connecticut*, a 1965 case in which the Supreme Court struck down a Connecticut law that made the use of contraceptives a crime. It was, Justice Potter Stewart wrote in his own dissent, "an uncommonly silly law." But, the dissenters said, the Constitution did not give courts the power to strike down even silly laws unless they were in direct conflict with a constitutional command.

Justice William O. Douglas, writing for five of the seven justices in the majority, said the law was at odds with a fundamental constitutional right to privacy. The right, he said, was implicit in or suggested by guarantees in the First, Third, Fourth, Fifth and Ninth Amendments. The "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees," Justice Douglas wrote in explaining the roots of the right to privacy.

Roe v. Wade, the 1973 decision finding a constitutional right to abortion, and *Lawrence v. Texas*, the 2003 case striking down laws making homosexual sex a crime, both relied in part on the *Griswold* decision.

The draft article, apparently never published, might not reflect Judge Roberts's views. But it does seem to reflect the worldview of Chief Justice Rehnquist.

"It sounds like something Rehnquist would have written," said Jack Balkin, a law professor at Yale. "William Rehnquist didn't believe there is a right to privacy either."

In another document, a 1981 memorandum to Mr. Smith summarizing a law review article with seeming approval, Judge Roberts said its author wrote about "the so-called 'right to privacy,' arguing as we have that such an amorphous right is not to be found in the Constitution."

The reasoning in *Griswold* and *Roe* had been widely criticized in the years before Judge Roberts joined the Justice Department, even by people who agreed with their outcomes.

John Hart Ely, a leading constitutional scholar who said he supported the availability of abortion as a matter of policy, wrote in *The Yale Law Journal* in 1973: "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."

"It is not constitutional law," Professor Ely said of the decision, "and gives almost no sense of an obligation to try to be."

Laurence H. Tribe, a law professor at Harvard, said the views expressed in Judge Roberts's draft article were at the time "still at least marginally defensible although, by my lights, misguided even then."

This was no longer the case, Professor Tribe said, after Judge Bork's nomination was defeated, an action that he and many other liberal law professors supported. "It was not until the mid-1980's," Professor Tribe said, "that intervening developments could be said to have exposed such views as resting on so cramped and narrow a concept of liberty that any nominee committed to a project of restoring them to the law posed a danger to the American Constitution."

Douglas W. Kmiec, a law professor at Pepperdine University, said the views expressed in the draft article were less extreme than those of Judge Bork.

"Judge Roberts here has articulated the court's own caution to itself, not always observed, that it should be wary of implying rights into the Constitution," Professor Kmiec said. "Should the court ever engage in the practice? Yes, because the founders affirmed in the Ninth Amendment that there were rights not specifically listed which deserved protection. This is a point that Robert Bork mistakenly denied in his own hearings."

Three years after Judge Bork's nomination failed, Judge Roberts was one of nine government lawyers listed on a brief urging the Supreme Court to overturn *Roe v. Wade*.

"We continue to believe that *Roe* was wrongly decided and should be overruled," the brief said. "The court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure or history of the Constitution."

Judge Roberts's supporters have emphasized that what lawyers say on behalf of their superiors and clients may not reflect their own beliefs. And at his confirmation hearings in connection with his current position, as a judge on the United States Court of Appeals for the District of Columbia Circuit, Judge Roberts said he viewed *Roe* as "settled law."

