

John Roberts: Closet Liberal, or Supreme Court Savior?

Janet Ybarra

March 6, 2019

What began as a few whispers over a perplexing decision or two have now become almost the panicked cries of conservatives in Washington, wondering just what John Roberts is up to.

Roberts, chief justice of the Supreme Court, had been a solid, reliable court conservative since President George W Bush appointed him nearly 15 years ago.

Certainly, Roberts role wasn't even questioned once eager, salivating right-wingers grabbed what should have been easy conservative control of the high court with Donald Trump's two-fer pair of nominations: Neil M. Gorsuch and, then, Brett Kavanaugh.

Except—once conservatives thought they had all their set-pieces in place to begin what they hoped will be a generation of far-right jurisprudence—a funny thing started to happen.

Roberts, that stalwart conservative, started voting with the court's liberal wing.

When it began last fall, the change in Roberts' voting pattern coincided with a very public spat between the chief justice and President Trump.

In one of his many intemperate tweets, Trump complained about a federal judge striking down Trump's migrant asylum ban, and in doing so, he blamed an "Obama judge."

This attack raised Roberts' ire. Known as an institutionalist, Roberts apparently takes public faith in the integrity and guarantee that they will be impartial as more than lip-service.

Roberts released an extraordinary statement of his own.

"We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them," Roberts said.

So some assumed that initially, Roberts' votes with the left was simply to punctuate his message to Trump.

Now, it seems to be something more.

Operated by unelected, lifetime-term personnel, the Supreme Court only can maintain public legitimacy through public acceptance and respect.

"All of us need to be aware of that—every single one of us—and to realise how precious the court's legitimacy is," liberal-wing Justice Elena Kagan told long time high-court journalist Dahlia Lithwick.

Roberts doesn't even like the court issuing split 5-4 vote rulings for the split message that they send the public.

And, unlike many of his colleagues, Roberts does pay considerable attention to media coverage and public perception of the high court.

Indeed, this recent run of votes with the liberals is not Roberts' first dalliance with the court's left wing.

Although he originally planned to side with conservatives who planned to strike down Barack Obama's Affordable Care Act, Roberts ultimately changed his mind and voted with the liberal wing to uphold Obamacare, particularly its individual mandate which said all Americans must carry health insurance or face a fine.

Roberts reportedly did so because he was concerned it "would prove he had been deceitful during his confirmation hearings, when he explained a philosophy of judicial restraint."

Supreme Court justices appointed by Republicans suddenly taking left turns after a time on the bench were the nightmares of conservatives for decades. Harry Blackmun, John Paul Stevens and David Souter all are examples of Republican-nominated justices who would become among the best-known of the court's liberals.

In fact, conservatives have taken pains over recent decades to tighten the Supreme Court nomination process specifically to avoid any more of those surprises.

Few think Roberts really is the next Blackmun or Stevens.

"I don't think this means he's changing his mind on the substance of big important issues on which he's written opinions — voting rights, campaign finance, abortion, gay marriage, etc.," said Ilya Shapiro, a lawyer at the libertarian Cato Institute. "But at the margin he's trying to make fewer partisan splits."

But Roberts may well have a larger motivation. And that motivation is the highly political taint on court nominations since the death of Justice Antonin Scalia, up to—and including—the confirmation of Roberts' newest colleague on the court, Brett Kavanaugh.

Roberts is surely aware of the heightened level of partisanship represented when Senate Republicans refused to even consider President Barack Obama's choice of Merrick Garland to succeed Scalia on the court.

The Supreme Court is highly collegial, and once a justice is confirmed, they are fully accepted as one of the team.

That doesn't mean Roberts has to like how a colleague gets there, however. That's especially true for the naked, venomous partisanship Kavanaugh spewed before the Senate Judiciary Committee trying to salvage his nomination after becoming the target of credible sexual assault allegations.

Roberts problem isn't so much even with the sexual assault allegations, but the naked conservative partisanship of his response, railing about "apparent pent-up anger about President Trump and the 2016 election," "revenge on behalf of the Clintons," and "millions of dollars and money from outside left-wing opposition groups."

Those are not words spoken by a sober, impartial jurist.

“I can’t imagine John Roberts was happy about that opening statement,” says Jill Dash, vice president for strategic engagement at the American Constitution Society, a liberal legal advocacy group. “He has done quite a bit to try to lift up the institution as a fair and neutral place to bring claims.”

Roberts is 63 years old, and theoretically could continue to lead the Supreme Court for decades to come.

While no one expects Roberts to become the court’s fifth liberal, the irony could be that these years that conservatives expected would be full-tilt conservative jurisprudence could instead be used by Roberts as a go-slow period to rebuild public confidence in the court.

“It’s clear that 5-4 decisions will be perceived by many, many lawyers, many politicians and large numbers of the public at large as ideological decisions,” said Lawrence Solum, constitutional law professor at Georgetown Law. “So given Roberts’ desire to preserve the legitimacy of the court, he could be highly motivated to avoid decisions like that in the next immediate period in the history of the court. Whether that’s one year, or two years or five years, who knows?”