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Roberts and Alito Misled Us

By Edward M. Kennedy
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I have had the honor of serving on the Senate Judiciary Committee for 43 years, during which I've participated in confirmation hearings for all the justices who now sit on the Supreme Court. Over that time, my colleagues and I have asked probing questions and listened attentively to substantive responses. Because we were able to learn a great deal about the nominees from those hearings, the Senate has rarely voted along party lines. I voted, for example, for three of President Ronald Reagan's five Supreme Court nominees.

Of course, an examination of a nominee's views may cause the Senate to withhold its consent. That is what happened in 1795 to John Rutledge, who was given a temporary commission as chief justice by President George Washington (while Congress was in recess) and was then rejected by the Senate several months later. In 1970, President Richard M. Nixon's nomination of G. Harrold Carswell was derailed when the Senate learned of his segregationist past. At that time, I explained that "the Constitution makes clear that we are not supposed to be a rubber stamp for White House selections." That was also the Senate's view in 1987, when its rejection of Robert H. Bork's extreme views led to the unanimous confirmation of the more moderate Anthony M. Kennedy. The Senate's constitutional role has helped keep the court in the mainstream of legal thought.

But the careful, bipartisan process of years past -- like so many checks and balances rooted in our Constitution -- has been badly broken by the current Bush administration. The result has been the confirmation of two justices, John G. Roberts Jr. and Samuel A. Alito Jr., whose voting record on the court reflects not the neutral, modest judicial philosophy they promised the Judiciary Committee, but an activist's embrace of the administration's political and ideological agenda.

Now that the votes are in from their first term, we can see plainly the agenda that Roberts and Alito sought to conceal from the committee. Our new justices consistently voted to erode civil liberties, decrease the rights of minorities and limit environmental protections. At the same time, they voted to expand the power of the president, reduce restrictions on abusive police tactics and approve federal intrusion into issues traditionally governed by state law.

The confirmation process became broken because the Bush administration learned the wrong lesson from the failed Bork nomination and decided it could still nominate extremists as long as their views were hidden. To that end, it insisted that the Senate confine its inquiry largely to its nominees' personal qualities.

The administration's tactics succeeded in turning the confirmation hearings for Roberts and Alito into a sham. Many Republican senators used their time to praise, rather than probe, the nominees. Coached by the administration, the nominees declined to answer critical questions. When pressed on issues such as civil rights and executive power, Roberts and Alito responded with earnest assurances that they would not bring an ideological agenda to the bench.

After confirmation, we saw an entirely different Roberts and Alito -- both partisans ready and willing to tilt the court away from the mainstream. They voted together in 91 percent of all cases and 88 percent of

non-unanimous cases -- more than any other two justices.

A few examples help illustrate how the confirmation process failed the American people. During Roberts's hearing, I asked him about his statement that a key part of the Voting Rights Act constitutes one of "the most intrusive interferences imaginable by federal courts into state and local processes." In response, he suggested that his words were nothing more than an "effort to articulate the views of the administration . . . for which I worked 23 years ago."

Today -- too late -- it is clear that Roberts's personal view is the same as it was 23 years ago. In *League of United Latin American Citizens v. Perry* , the Supreme Court held that Texas's 2003 redistricting plan violated the Voting Rights Act by protecting a Republican legislator against a growing Latino population. Roberts reached a different view, concluding that the courts should not have been involved and that it "is a sordid business, this divvying us up by race."

The same Roberts who wished the federal government would leave Texas alone was unconcerned by federal intrusion into Oregon's approach to the issue of assisted suicide. In *Gonzales v. Oregon* , a majority of the Supreme Court held that the Justice Department lacked the power to undermine Oregon's Death With Dignity Act. However, Roberts joined a startling dissent by Justice Antonin Scalia, stating that the administration's actions were "unquestionably permissible" because the federal government can use the Constitution's commerce clause powers "for the purpose of protecting public morality."

It is difficult to believe that a neutral judicial philosophy explains Roberts's very different views in these two cases. He memorably claimed during the confirmation process that he wanted only to be a diligent umpire, calling balls and strikes without regard to what team was at bat. But it turns out that our new umpires have a keen interest in who wins and who loses.

One clear loser is the environment. In *Rapanos v. United States* , the court was asked to interpret the definition of wetlands under the Clean Water Act. Four justices deferred to the Army Corps of Engineers' expertise in implementing the statute. But Roberts and Alito joined an opinion that describes wetlands as "transitory puddles" and criticizes their colleagues for "giving that agency more deference than reason permits." For Roberts and Alito, protecting the environment -- unlike "protecting public morality" -- is clearly not a top priority.

Perhaps the biggest winner is the president himself. During Alito's hearing, I asked him about a 1985 job application in which he stated that he believed "very strongly in the supremacy of the elected branches of government." He backpedaled, claiming: "I certainly didn't mean that literally at the time, and I wouldn't say that today."

But he *is* willing to say it now. In the very recent case of *Hamdan v. Rumsfeld* , Alito signed on to a dissent by Justice Clarence Thomas that asserts a judicial "duty to accept the Executive's judgment in matters of military operations and foreign affairs" as grounds for allowing the administration to use military commissions of its own design to try detainees at Guantanamo Bay, Cuba.

This is part of a pattern. When he was in the Reagan Justice Department, Alito wrote in support of signing statements, through which the president has claimed to limit the scope of measures passed by Congress -- including the ban on torture. When questioned about the legal status of such statements, he said it was an open issue that still needed to be "explored and resolved" by the court. But Alito joined a Scalia dissent in the Hamdan case that endorsed the use of signing statements without providing any analysis or legal support.

Similarly, Alito had a pattern of ruling against individuals in Fourth Amendment cases -- including a case involving the strip-search of a 10-year-old girl. When questioned, he insisted that one of the judiciary's most important roles "is to stand up and defend the rights of people when they are violated." But Alito cast the deciding vote in *Hudson v. Michigan* , in which the court decided -- contrary to almost a century of precedent -- that evidence gathered during an unconstitutional search of a suspect's home

could be used to convict him.

In the term that begins in October, the court will decide major cases on abortion, affirmative action and the Clean Air Act. Roberts and Alito may well cast the deciding votes. If their first term is any indication, their agenda will be exactly what many of us feared -- and nothing like the judicial modesty they promised during their hearings.

At a time when great legal issues are being decided by the slimmest of margins, we cannot afford to learn nominees' views only after they have obtained lifetime tenure on our highest court. Instead, the Judiciary Committee, the Senate and the American Bar Association need to work together to return to an honest confirmation process. I support reform despite my belief that the next justice will be nominated by a Democratic president and be sent to a Democratic Senate for confirmation.

The discussion should start with a few truths. First, any qualified nominee to the Supreme Court will have spent many years thinking about legal issues. We should require that nominees share that thinking with the Judiciary Committee, and not pretend that such candor is tantamount to prejudging specific cases. In particular, the Senate should have the same access to the nominee's writings as the administration. Second, the Judiciary Committee will need to reorganize the way it asks questions. An in-depth inquiry will require something more than short rounds of questions that pass from senator to senator. Third, we need to remember what this process is all about. It is good to hear that a nominee has a loving family, faithful friends and a sense of humor. It is important to know that nominees possess the intellect, life experience and discipline that make a good judge. But it is essential that we learn enough of their legal views to be certain that they will make good on the simple promise etched in marble outside the Supreme Court: "Equal Justice Under Law."

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