



## Would John Roberts Deny Your Access to Our Courts?

Congress has included “citizen suit” provisions in numerous environmental, civil rights, and other laws in order to ensure that essential legal safeguards are upheld and enforced. For example, in upholding the ability of individuals and organizations to sue polluters, the Supreme Court recognized that: “Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations.”<sup>1</sup>

Throughout his legal career, Supreme Court nominee John G. Roberts, Jr. has supported policies, arguments and decisions that would restrict access to courts by average Americans. Roberts has argued for a narrow view of the doctrine of “standing,” the fundamental basis for access to courts; and endorsed an argument that challenges Congress’ constitutional authority to pass laws empowering citizens to protect their rights and enforce the law. There are serious questions about John Roberts’ views on citizens’ access to courts that need to be asked and answered in light of what little we know about his record.

### **As a Reagan Administration lawyer, Roberts argued for limiting access to justice and the role of courts as a protector of rights and legal safeguards:**

As a Justice Department attorney, Roberts wrote to Attorney General Smith on Nov. 25, 1981, urging Smith to tell reporters that although “certain parts of the Justice Department previously followed a policy of not raising standing challenges in the most vigorous fashion . . . particularly . . . in the environmental area. . . [i]t will be our policy to raise standing and other justiciability challenges to the fullest extent possible.”

Roberts’ new policy statement was sweeping—it was not limited to cases where the Justice Department believed there was no standing—or even to cases where there was a serious standing question. In addition to delaying court decisions to stop illegal pollution or destruction of wild habitats, “vigorous” standing challenges deny court access to individuals and non-profit groups who have standing, but who do not have the resources to fight unnecessarily lengthy and expensive court battles with the Justice Department on this issue.

As an Associate Counsel in the Reagan White House, Roberts focused on restricting access to courts rather than ensuring or expanding it. In an April 28, 1983 memorandum, he declared that ‘abuse’ of the federal civil rights statute, 42 USC § 1983, “really has become the most serious federal court problem.” Only political considerations prevented him from recommending immediate curtailment of this important federal civil-rights protection: he wrote that “the general sense is that it would be impolitic to touch the provision, which authorizes most actions for civil rights violations, until after 1984” [a presidential election year].

### **As a judge, John Roberts issued a ruling that will restrict access to courts by ordinary people:**

As a DC Circuit Court Judge, Roberts’ majority opinion in *Taucher v. Brown-Hruska*,<sup>2</sup> reversed a district court award of attorney’s fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm that had successfully represented a publisher *pro bono* against the Commodities Futures Trading Commission (CFTC). EAJA provides for the award of attorneys’ fees to a party in a lawsuit who prevails against the U.S. government, unless the government’s legal position in the case was “substantially justified.”<sup>3</sup> Although he openly rejected CFTC’s arguments, Judge Roberts’ found that the government agency’s position was substantially justified on other grounds. In a sharp dissent, fellow DC Circuit Judge Harry Edwards argued that the court had exceeded its proper scope of review and had not given proper deference to the lower court, under an abuse-of-discretion standard.

<sup>1</sup> Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

<sup>2</sup> 396 F.3d 1168 (D.C. Cir. 2005).

<sup>3</sup> See 28 U.S.C. § 2412 (d)(1)(A).

**In light of his record as an advocate and judge, Roberts' 1993 article on *Lujan v. Defenders of Wildlife*, a major Supreme Court 'standing' case, raises even more serious concerns.**

When he was in private practice, Roberts expressed his own views in a law review article that broadly praised a Supreme Court decision that dissenting Justices (including Justice O'Connor) denounced as "a slash and-burn expedition through the law of environmental standing."<sup>4</sup> In *Lujan v. Defenders*, the Court ruled that a citizens' group lacked standing to challenge a national rule that consultation with federal wildlife agencies under the Endangered Species Act would no longer be required for U.S. agency actions in foreign nations that may threaten endangered species.

Roberts specifically agreed with Justice Scalia's position that courts should rigorously enforce the Constitution's Article III case or controversy limitations to avoid infringing on the executive branch's constitutional authority under Article II.<sup>5</sup> This view calls into question the constitutionality of 'private attorneys general' laws that empower citizens to ask courts to enforce environmental and other safeguards.

Roberts' analysis is very disturbing in other respects as well. He suggested that decisions denying access to court are even-handed because "dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant."<sup>6</sup> This ignores the fact that dismissals favor corporate and government defendants, who thereby avoid the risk of losing on the merits.

Roberts also suggested that dismissal for lack of standing is "a doctrine of judicial self-restraint," writing that "[i]f a court errs in its standing dismissal and should have reached the merits, that court is wrong—not activist."<sup>7</sup> His unqualified characterization of decisions denying citizens access to court on the basis of standing as exercises of "judicial self-restraint," and his apparent belief that it is impossible for an "activist" court to summarily throw deserving litigants out of court, are wrong. A judge with an agenda to unreasonably restrict access to the courts across the board beyond what the law permits can be just as "activist" and unrestrained as one who unreasonably expands such access.

## **Conclusion**

Senators should question Judge Roberts closely on whether his actions, arguments, and analysis reflect an understanding and acceptance of, and appreciation for, the importance of access to courts and a proper deference to congressional statutes and findings that grant such access.

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<sup>4</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 606 (1992) (Blackmun, J. joined by O'Connor, J. dissenting).

<sup>5</sup> John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. Dean Nichol loses sight of this reality in criticizing Justice Scalia's invocation of the "take Care" clause of Article II. \* \* \* The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed.").

<sup>6</sup> *Id.* at 1221.

<sup>7</sup> *Id.* at 1221 & n.14.