

The Stakes for States

IN A REMARKABLE letter last week, Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) laid down a marker to Supreme Court nominee John G. Roberts Jr. on the subject of federalism -- that is, the balance of power between the national government and the states. Mr. Specter wrote to give Judge Roberts "advance notice of some of the issues I will be asking at your confirmation hearing" and proceeded to attack the high court's recent jurisprudence on states' rights and congressional power. He concluded with a series of questions that attempt to ascertain Judge Roberts's own views on the subject.

Mr. Specter's interest in the issue is certainly justified. As a justice, Judge Roberts could have a major influence on issues of federalism, which are the tectonic plates of constitutional law. Federalism questions may not be the hot-button issues that rile public passions, but they have been at the center of the court's deliberations over the past decade and the results have been uneven. Some rulings have offered a healthy check on congressional power over the states. Others have been frankly inconsiderate of Congress's ability to make law in matters squarely within its competence.

As on many issues, Judge Roberts's views on federalism are mostly unknown. His comments at his confirmation hearing for his current job on the U.S. Court of Appeals for the D.C. Circuit suggest a healthy respect for the ability of the federal government to regulate. Yet his first opinion as a judge seemed -- at least tentatively -- to embrace a narrow conception of the constitutional power on which Congress relies for so much policymaking: authority over interstate commerce. The commerce power, the subject of Mr. Specter's missive, is the legal foundation for a huge swath of modern law. Civil rights, environmental and worker protections statutes all depend upon it. We have been sympathetic to the court's interest in emphasizing its limits in recent years. But this has always carried the risk that the justices would go too far and gut Congress's legitimate authority.

Judge Roberts's opinion, which questions whether the commerce power is broad enough to permit the federal government to protect an endangered species

within a single state, is a bit elliptical and underdeveloped. It isn't clear if he is actually announcing his view on the subject or merely suggesting that the court should adopt a different intellectual strategy for upholding the environmental enforcement under attack in the case. But the opinion raises the concern that he would take a view of federal power more constrained than is healthy in a country with a modern economy, a mobile population and environmental problems that know no state borders.

If Judge Roberts proves an energetic states-righter, the short-term impact will be limited, since Justice Sandra Day O'Connor -- a swing vote on many issues -- was pretty protective of the states. Still, few believe Justice O'Connor was interested in emasculating federal power, as is Justice Clarence Thomas. Judge Roberts does not appear to be a radical either, but he is more of a wild card. He could end up crystallizing a vital center on the court if he takes a balanced view of Congress's commerce power, as Justices Antonin Scalia and Anthony M. Kennedy did at the close of this term.

In a related area Justice O'Connor has voted often to insulate states from lawsuits for monetary damages under federal laws. This doctrine, found nowhere in the text of the Constitution, is one of the least appealing features of the court's new federalism. In an interview in 1999 and in his Senate hearing for the D.C. Circuit, Judge Roberts seemed untroubled by the decisions, but his comments were hardly decisive. And Justice O'Connor has, in two more recent cases, given Congress more leeway. So once again, as a justice, Judge Roberts could easily make matters better or worse.

In his Senate hearings Judge Roberts is likely to follow the lead of past nominees and refuse to discuss his views of individual cases or to appear to commit his vote in future ones, and senators will have to be careful to keep the discussion on a plane on which the nominee can ethically engage them. But there is no reason senators cannot explore his views, in general terms, of the reach of national power, the rights reserved to the states and the method by which he would approach such questions.