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A PAIR OF QUESTIONS FOR ROBERTS

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I have two questions for Judge John G. Roberts Jr., both unlikely to be posed by the media or by any member of the U.S. Senate. They deal with the naturally dynamic relationships among the branches of government. The need to inquire grows out of a massive shift in that balance required to remedy an economic collapse early in the last century; the power transfer required to eradicate a cancer from which this country has suffered since before we became a country; and how and where we routinely weigh our values and make our routine, day-to-day political decisions.

As the economy imploded from below, the commodities markets throve on hysterical demand for ever-scarcer produce. The stock markets throve, buoyed by margin trading, as the profits behind the companies behind the stocks reversed into staggering losses. Even after the public collapse, the repository of legislative power, the well-spring of public policy, sat silent. Sickened by congressional inaction, President Franklin Roosevelt created uncounted new executive-branch agencies, each with a mission to put people, cash and products together, each with the power to enact extensive law labeled "regulation."

Congress happily ceded responsibility, retaining advise and consent authority over appointees to those agencies. Only the courts resisted, and then only briefly in the face of overwhelming need. In this context, while the witch-hunt of the early '50s was spearheaded by fanatics, the support of the congressional rank-and-file was more likely a symptom of sellers' remorse.

In 1954, 89 years after the War Between the States ended the institution of slavery, a substantial portion of us still lived in informal, but very real, servitude. Congress, the point of convergence of Southern segregationism (reference nearly anything Faulkner) and Northern segregationism (careful, it might rub off), refused to create any meaningful mechanism to give life to the words of the 13th Amendment. For the better part of a century, the 13th was a truck without wheels because Congress thought it would be political suicide to act.

With no enabling legislation to uphold, the courts were eventually so sickened by congressional inaction that they were forced, commencing with *Brown v. Board of Education*, to provide the practical, as opposed to the previously only theoretical, repeal of slavery. This giant leap forward was not without a cost of its own. Congress learned that it could abdicate another load of responsibility for unpopular, but necessary, government action. The courts would pick up the slack, as willing to accept responsibility as Congress was to avoid it. The only condition was that Congress would leverage its authority over the courts, making an increasingly ostentatious show of examining judicial appointees, just as ostentatious as its examination of executive-branch appointees.

Hammering out differences to come up with a law that balances legitimate concerns and harsh reality is hard, ugly, dirty work; gauging by the wreck that is the current round of energy legislation, it is impossible, but still, the competing versions will get hammered together according to what the various lobbies can tolerate. If you are confirmed, it is virtually certain that someone will petition you to determine whether our new energy policy, in whatever form it eventually takes, makes a fair allocation of resources. This is a legislative question of the first order, but one that will remain only casually addressed when the act goes to the president for signature.

Enacting criminal laws that tag well-known constitutional bases seems a mountain no mere human legislator can

scale. Heaven help the congressman who advocates less than life-imprisonment for jay-walking if the news media have promoted jay-walking to the status of evil du jour. When you occupy the highest bench of the land, a parade of earnest, well-intentioned prosecutors, who had no part in enacting a series of hurried, half-baked statutes, will earnestly beg you to help protect us by filling in the blanks.

If the only price to be paid were the micro-examination of appointees, then we could probably live with it, but Congress is making inroads. Mandatory, periodic medical examination of judges has already been floated, and it will not be long before we see proposals for cognitive testing, continuing education, mandatory retirement and routine accounting for and justification of results. The argument will run that Article III is archaic and out of touch with modern reality, as though the courts had asked for their expanded role. With the courts conscripted into service as the primary forum for our political debates, and Congress poised to micro-manage with the blessing of a growing portion of the populace, there is little that can be said in response.

Witness the previously unheard of notion of lobbying judges to change undesirable outcomes. Congress gets lobbied, and Congress sees the responsibilities the courts have taken on as legislative, so lobbying a court seems only natural. Individual congressmen are beginning to feel free to approach our courts, informally, to demand that decisions with which they do not agree be changed. Anyone who thinks Rep. F. James Sensenbrenner Jr. of Wisconsin will get more than a slap on the wrist for his recent assault on the 7th U.S. Circuit Court of Appeals does not know Congress. An inroad has been made. New incidents will be increasingly invasive and decreasingly shocking.

With this mess as a backdrop, you will sit in a hearing room and face tough questions. Where do you stand on abortion, gay rights and affirmative action? What is your position on the death penalty? Will you import law from foreign countries? What is the proper role of God in a court's deliberations? The answers are important to many of us watching from out here. The people asking the questions, from either side of the aisle, will be less concerned with your answers than with your willingness to tackle the questions.

This, then, leads to my questions, your honor: Can you please share with us your definition of the word "all," the first word of [section 1 of Article I of the U.S. Constitution](#)? And if, in this context, the word carries a more restricted than natural meaning, to what extent should the executive and judicial branches submit to oversight by the legislative branch in exchange for the curtailment?

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