AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **October 2005**
From: **A. Eric Johnston**
Re: **Honorable John Glover Roberts, Jr., 17th Chief Justice of the United States Supreme Court**

United States Supreme Court Chief Justice William Rehnquist died on September 3, 2005 after serving on the United States Supreme Court for 33 years. During that time he was not only a friend to religious freedom, but to unborn children and the rights of states for self-governance. We pay homage to his legacy and give thanks for his dedication to important rights and principles. We look forward to a new Chief Justice, a former clerk to Rehnquist and his friend. John Roberts was approved on September 29, 2005 on a voice vote of 78-22 by the United States Senate. Will he prove to be as valiant and valuable a warrior as former Chief Justice William Rehnquist? SLI is vitally concerned with the work of the Supreme Court. It has a direct effect on our work protecting the sanctity of life, religious freedom and the family. The leadership of its Chief Justice will directly impact what we do.

Prior to Confirmation

President George W. Bush nominated D.C. Circuit Court of Appeals Judge John Roberts to be the new Chief Justice. Almost immediately, his work and writings became known, but not much was known about the man. Not much more was known about his personal views, even after the confirmation hearings. Roberts had largely served conservative employers in his government work, but the question was, did he share their views? In private practice he took many cases and later said he did not let his personal feelings interfere with the cases he took. Commentator Terence Jeffrey said that Roberts had "managed to spend a quarter of a century working on constitutional issues in Washington, D.C. without ever publicly tipping his hand about where he personally stands on constitutional issues."

Confirmation Hearings

The principal inquiry of Roberts' confirmation hearings, as well as all in recent history, was the nominee's position on the *Roe v. Wade* decision legalizing abortion. Republican nominees, like Roberts, must be "stealth" nominees on pro-life and conservative issues. Justice David Souter was a Republican stealth candidate who indicated he opposed abortion, but has turned out to be a supporter. Democrats require outright affirmation of the "pro-choice" position, *e.g.*, as Bill Clinton said of his nominee Ruth Bader Ginsburg, "she is clearly pro-choice." All but three senators voted for her confirmation. But, when Judge Roberts took the chair at the table in the confirmation hearings, he was accosted by virtually every Democrat Senator on whether he would uphold *Roe.* He said he agrees with the case of *Griswold v. Connecticut*, which recognizes the privacy right for married couples to use contraceptives and which underpins *Roe*, but he appeared to fudge on explicitly extending his acceptance of any privacy right to include abortion. Following the hearings, Senator Jeff Sessions said about abortion ". . . I don't know what he'll do."

Roberts' general testimony was perhaps a model of how a nominee should conduct himself. Relying time and again on *stare decisis* (being bound by and following the precedents of earlier cases) and refusing to answer questions "in the abstract," he made it clear that it was not the role of a judge to make public policy. Senators like Kennedy and Biden pressed him on the need to help the poor and downtrodden. Roberts consistently responded that was the job of the legislative branch, but that the job of the courts was to carry out what Congress intends, not do what a judge may think is right. If Congress does not make itself clear or falls short of doing the right thing, it is Congress' responsibility and not the courts' to correct it. Liberal senators dwelt on social inequities as if it is the role of courts to remedy. Because Roberts did not agree with their positions, he was labeled insensitive, racist and unfit.

In addition to privacy questions, Roberts also answered some of present concern: the right of government to take property by eminent domain may be restricted by local legislation; foreign law should not be used by judges in making their decisions; he minimized his private legal work on a major homosexual rights case, but was evasive on his position. Overall, Roberts' answers were clear and often compelling. His demeanor was modest, as he suggests a judge should be. While he may not have answered questions to everyone's satisfaction, he comported himself in the very proper judicial manner of fairness and openness, as he said he would as Chief Justice.

Conclusion

The really bad thing about the confirmation process is that it has become polarized and those who should guarantee protection of the selection process do not stand up to those who would subvert the system. Democrats filibuster in confirmation hearings for the liberal agenda, while Republicans must portray their nominees as unbiased and, seemingly, without values. We are asked "what kind of Chief Justice will John Roberts be?" Keeping Mr. Jeffrey's observation in mind, we hope John Roberts has saved himself for just this moment, that he has a well developed respect for *stare decisis*, but that he recognizes the judicial activism of the last half century and the need to correct the gross distortions of constitutional law like *Roe v. Wade* and its progeny. As he said, "Whether the doctrinal bases of a decision have been eroded by subsequent developments may be a basis for reconsidering the prior precedent." There is hope.