S. HRG. 109–158

[ERRATA]
CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR. TO BE CHIEF JUSTICE OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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Insert the following page after page number 121 and make it 121a, this material was inadvertently left out of the Questionnaire.

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It is difficult to comment on either "judicial activism" or "judicial restraint" in the abstract, without reference to the particular facts and applicable law of a specific case. On the one hand, courts should not intrude into areas of policy making reserved by the Constitution to the political branches. As Justice Frankfurter has noted, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." In our democratic system, responsibility for policy making properly rests with those branches that are responsible and responsive to the people. It was precisely because the Framers intended the judiciary to be insulated from popular political pressures that the Constitution accords judges tenure during good behavior and protection against diminution of salary. To the extent the term "judicial activism" is used to describe unjustified intrusions by the judiciary into the realm of policy making, the criticism is well-founded.

At the same time, the Framers insulated the federal judiciary from popular pressure in order that the courts would be able to discharge their responsibility of interpreting the law and enforcing the limits the Constitution places on the political branches. Thoughtful critics of "judicial activism"— such as Justices Holmes, Frankfurter, Jackson, and Harlan — always recognized that judicial vigilance in upholding constitutional rights was in no sense improper "activism." It is not "judicial activism" when the courts carry out their constitutionally-assigned function and overturn a decision of the Executive or Legislature in the course of adjudicating a case or controversy properly before the courts. Chief Justice Marshall made the point clearly in his opinion for the Court in *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821):

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.

It is not part of the judicial function to make the law — a responsibility vested in the Legislature — or to execute the law — a responsibility vested in the Executive. As Marshall wrote in his most famous opinion, however, "[it] is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). When doing so results in checking the Legislature or Executive, the judiciary is not engaged in "activism;" it is rather carrying out its duty under the law.

The proper exercise of the judicial role in our constitutional system requires a degree of institutional and personal modesty and humility. This essential modesty manifests itself in several ways:

First, judges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law. When the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities.