The Senate met at 1 p.m. and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER
The Chaplain, Dr. Barry C. Black, offered the following prayer:
Let us pray.
Eternal Father, rule of all nature, as Hurricane Rita’s flood waters recede, we pause to thank You for Your goodness and mercy. We praise You for lighter-than-expected damage, for spared lives, and for generous hearts.
We thank You for the evidence of national and international unselfishness the forces of nature have shown us and for the opportunity to grow in grace by helping others.
Bless our lawmakers today as they continue their task of building a better nation and world. Guide them with Your providence and make them examples of civility and integrity. Give them the wisdom to listen to the whisper of conscience and to choose the harder right.
We pray in Your powerful Name. Amen.

PLEDGE OF ALLEGIANCE
The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:
I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME
The PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

RECOGNITION OF THE MAJORITY LEADER
The PRESIDENT pro tempore. The majority leader is recognized.

Mr. FRIST. Mr. President, today we formally begin the consideration of John Roberts to be Chief Justice of the United States. In a moment, we will proceed to executive session to begin the debate on that nomination. In order to facilitate the debate on the Roberts nomination, we have set aside controlled time so that Members can better plan when they will be speaking to the body. I know many Members will want to come to the floor to speak on this important nomination. However, I hope Senators do not feel compelled to make lengthy statements. We will stay each night this week if the Senators desire to speak, but I would like to reach an agreement as to when that final vote will occur so that Members can plan accordingly. I will be discussing a time certain for that vote with the Democratic leader as we go forward with the debate.

Last week, I announced that we would have a vote today beginning approximately 5:30. Shortly, we expect to have that vote locked in by unanimous consent. We have about 24 nominations that are pending on the Executive Calendar. We will likely set one of those pending nominations for a vote. As always, we will alert Members when that vote is set.

Also, this week we need to address the continuing resolution as we end the fiscal year. We will continue working on the appropriations process following the vote on the Roberts nomination.

The appropriations bill for the Defense Department will be reported this week, and we expect to quickly turn to that bill.

Having said that, I look forward to a good debate and good discussion on John Roberts, followed by the vote on his confirmation.

The question now becomes, and the approach every case with a fair and open mind.

The qualifications they expect us to possess, and the approach every case with a fair and open mind.
John Roberts fit to serve as Chief Justice of the United States? Does he possess each of the qualities that the American people expect and qualities that our highest Court deserves?

In answering these questions, I recommend a hard look at what we have learned about John Roberts over these last several weeks.

From his resume, we know he graduated at the top of his class from both Harvard College and Harvard Law School. He was editor of one of the most well-respected law journals in America.

He has argued 39 cases before the Supreme Court, and he has earned bipartisan respect as one of the finest appellate advocates in the Nation.

He served two Presidents in prominent positions. The American Bar Association gave John Roberts the highest rating possible—"well-qualified"—on two occasions.

We know he has earned respect from both sides of the political divide.

During the committee hearing 2 weeks ago, my distinguished Democratic colleague, Senator BIDEN, said Judge Roberts "one of the best witnesses to come before [the] committee" in his 30-some years.

Senator FEINSTEIN complimented Judge Roberts for getting through the hearing "in a remarkable way." Senator HARKIN called him "one of the best litigators in America" and praised his "amazing knowledge of the law."

Senator SCHUMER went on to say that Judge Roberts "may very well possess the most powerful intellect of any person to come before the Senate for this position."

I agree with all of my colleagues' observations. John Roberts' record speaks for itself. And I believe that in the committee testimony he has earnestly and effectively shown America the face of John Roberts.

We know he understands the importance of liberal realist aims of judicial independence. We know Judge Roberts appreciates that the role of a judge is to interpret the law and not to legislate from the bench. He understands that a judge is a humble servant of the law but never above the law.

In the words that captured his core philosophy, and captured the minds of Americans, Judge Roberts said:

[Judges are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them...]

And we know that Judge Roberts will not allow his personal political views to interfere with his judicial decisions.

In the hearings, he stressed that he has always sought, but rather than a commitment to "confront every case with an open mind," "to fully and fairly analyze the legal arguments that are presented, and to decide every case based on the record, according to the rule of law, without fear or favor, to the best of [his] ability."

John Roberts has been open and forthcoming in the committee hear-
where they cannot be amended except in very strict ways. People who want to offer amendments dealing with Katrina have to use some political gyrations to be able to get a vote, and that is a two-thirds number they have to come up with to have it passed, which is very difficult to do. I would hope we could get to some of these bills quickly.

I have said this before, and I do not want to sound like a broken record, but yesterday there were more than 2,000 Americans killed in Iraq—I got a call late last night from Colonel Herbert, who is with the Nevada National Guard, a person who has devoted his life to the military. He said: Senator, I lost two of my men yesterday in a helicopter that went down in Afghanistan. He felt very bad. One of the pilots and one of the crew chiefs, both from Nevada, were killed.

This morning I was at Bethesda Naval Medical Center. As I walked in, there was a man in a wheelchair, missing both legs, and obviously he has some trauma to his head. The naval officer who was with me indicated he was one who had been in the hospital, then left, and now is back. But yet in the Senate we have not done a bill to take care of these people.

In spite of the fact we have almost 2,000 Americans who have been killed in Iraq—we are spending upwards of $2.5 billion a week in Iraq—and that we are causing the ranks of the veterans to increase dramatically, we do not have a bill to take care of them. We have a bill, but we are not allowed to bring it to the floor. The Defense authorization bill, which sets up the funding and the other matters to take care of the active personnel who wear the uniform of the United States, plus our Guard and Reserve, plus the many obligations we as a nation have to our veterans—we are not debating that bill to do that. We spent a couple days on it.

There are 60,000 Katrina evacuees in Arkansas and elsewhere that have accepted government and elsewhere that have accepted government health care. But many States in the region and elsewhere that have accepted thousands of Katrina evacuees are facing a similar problem. There are 60,000 evacuees in Arkansas.

If we know no matter how hard these States try, they lack the resources to do what is needed, and many survivors will be left behind—and have been left behind. Only the Federal Government has the resources to address the evacuees’ health care and other needs.

Fortunately, Senator Grassley, the chairman of the Finance Committee, and the ranking member, Max Baucus, set aside partisan differences and recognized this fact, that help is needed—and both have come together and crafted a compromise to ensure that Katrina’s victims will be covered under Medicaid, wherever they are, with full Federal funding.

This package does not provide coverage regardless of status, as my bill would have, but it is a good compromise. Senators Grassley and Baucus are to be commended. It will provide relief to many who need it. We need to pass this bill. We need to get the House to agree with this bipartisan approach so we can get the bill to the President’s desk as soon as possible.

We need to do this now. Proceeding with business as usual, while the administration relies on bureaucratic waivers on a State-by-State basis, will not, and has not, gotten the job done. The White House approach will not provide care, for example, to a 55-year-old grandmother or father who has found a job but still needs health care. It will not ensure coverage from State to State. It will not expedite the process for victims and States who have already waited too long. It will not ease the financial burden that destination States are being asked to shoulder, such as Arkansas. And it will not provide relief to the States hit by Hurricane Katrina. In fact, it may make their situations even worse.

The Finance Committee bill enjoys bipartisan support in the Senate, and from our colleagues in the House, Medicaid directors, and numerous patient and provider groups.

There is no reason to wait any longer. We were ready to clear the bill Thursday. It was cleared on our side. It was ready to go. Not on that side. We said: Let’s wait a couple hours. No.

Times have changed. Our priorities must change with them. America can do better. We can start doing better today with bipartisan health care relief for survivors of Katrina. We have all heard about how the State governments of Louisiana, Mississippi, and other States are providing health care. But many States in the region and elsewhere that have accepted thousands of Katrina evacuees are facing a similar problem. There are 60,000 evacuees in Arkansas.

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We need to do this now. Proceeding with business as usual, while the administration relies on bureaucratic waivers on a State-by-State basis, will not, and has not, gotten the job done.
being hurt. They cannot bear the burden of the disaster that befell us.

The PRESIDING OFFICER (Mr. Sessions). Under the previous order, the time from 1:30 p.m. to 2:30 p.m. will be under the control of the majority leader or his designee.

The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, this afternoon, the Senate begins the debate on the confirmation of Judge John G. Roberts, Jr., to be Chief Justice of the United States. It is not an overstatement to note this is a historic debate. At the age of 50, Judge Roberts, if confirmed, has the potential to serve as Chief Justice until the year 2040 or beyond.

Today, Justice John Paul Stevens, at the age of 85, continues to serve. If you project Judge Roberts ahead 35 years, it would be to the year 2040. Obviously, by that time it will be a very different world. There will be very different issues which will confront the Court with the advances in technology, with the advances in brain scanning, key questions as to how far the privilege against self-incrimination goes to scan someone’s brain. Will it be like a blood test to detect a deadly virus or viewed as invasive and a violation of a right to privacy? Those are the kinds of issues which Judge Roberts will confront if confirmed as Chief Justice.

He has the potential to project a new image on the Supreme Court. That Court has been buffeted by a whole series of 5-to-4 decisions. Candidly, some of them are inexplicable, where you have, this year, the Supreme Court of the United States saying that Texas could display the Ten Commandments outdoors, but Kentucky could not display the Ten Commandments indoors. There are some minor differences, but it is hard to understand how the Ten Commandments can be shown in Texas but not Kentucky by a 5-to-4 margin.

Under the very important legislation of the Americans With Disabilities Act, the Supreme Court had two 5-to-4 decisions 3 years apart. One, in a case captioned Garrett v. University of Alabama, in 2001, the Supreme Court declared the title unconstitutional which dealt with discrimination against the disabled in employment.

Three years later, in Tennessee v. Lane, the Supreme Court upheld the constitutionality of another Title I of the Americans With Disabilities Act which dealt with access to public accommodations. We have seen a proliferation of opinions with multiple concurrences, making them very hard to understand. Earlier this year, the Judiciary Committee took up the issue of what was happening in Guantanamo, and a study was undertaken on three opinions handed down by the Supreme Court in June of last year. On one case, they couldn’t get a majority, a plurality to agree; on the other, a majority to disagree. In the other two cases, there were concurrences and dissents. You have a pattern which exists where Justice A will write a concurring opinion, joined by Justice B, and Justice B will write a separate concurring opinion, joined by Justice A and Justice C.

This is an issue which was considered during the course of Judge Roberts’ hearing. If he is confirmed as a new Chief Justice at the age of 50, will have an opportunity to make some very system changes in the way the Court functions. When Judge Roberts was questioned about his ability to handle the matter—first during the informal meeting in my office and later in the hearings—he said he thought he could handle it because, in his many appearances before the Supreme Court, some 39 in number, it was a dialog among equals. I was impressed by his concept of a dialog among equals, that he considered himself as a lawyer arguing before the Court to be dealing with equals. I have had occasion three times to appear before the Supreme Court, and it didn’t seem to me like a dialog among equals. But when you have been there 39 times and you know the Justices as well as he does—and the word is that the Justices very much applaud his nomination to be Chief Justice—he has the potential almost from a run-up to his confirmation and a new era to the Supreme Court. That is a very attractive feature about his projection as Chief Justice.

We know the famous historical story about Chief Justice Earl Warren, who was on the bench when I was a law student in 1953. The Court was then faced with Brown v. Board of Education, the desegregation case. There were many disputes in the Court at that time. They had to carry the case over. Chief Justice Warren was able to get a unanimous Court, which was important, so that contentious issue was one where nine Justices agreed and came down with an opinion which was obviously difficult to implement but had a great deal more stature because it happened in a unanimous way. There is an extra bonus for the Court, an extra bonus for America, if confirmed as Chief Justice: the potential that Judge Roberts has to promote a new day and a new era for the Court administratively.

On his qualifications, Judge Roberts was rated “well qualified” by the American Bar Association. It is understandable, since he was a magna cum laude graduate of Harvard College, magna cum laude graduate of Harvard Law School; had a very distinguished career as assistant to Attorney General William French Smith, after serving as clerk to a distinguished Second Circuit judge, Henry Friendly; then served with Attorney General William French Smith, became Associate Justice William Rehnquist; then following his work with Attorney General William French Smith, became associate White House counsel; practiced with the prestigious law firm of Hogan & Hartson—Hogan & Hartson was prestigious before Judge Roberts got there but a lot more prestigious now, and, frankly, after he left—then his status as a premier appellate lawyer; then the Supreme Court with some 30 cases.

It was my view that Judge Roberts has a broad, expansive understanding of the application of the Constitution. He said:

They—referring to the Framers—were crafting a document that they intended to apply in a meaningful way down through the ages.

While he would not quite accept my characterization of agreement with Justice John Marshall Harlan on the document being a living thing, he did say that the core principles of liberty and due process had broad meaning as applied to evolving societal conditions. He is not an originalist. He is not looking to original intent. But he sees the Constitution for the ages and adaptable to evolving societal conditions.

On the issue of how many questions he answered before the Judiciary Committee, I believe he answered more than most but, candidly, did not answer as many questions as I would like to have had him answer. I will detail them in the course of this brief presentation.

I have observed, in the 10 Supreme Court nominations where I have had the privilege to participate on the Judiciary Committee, that nominees answer as many questions as they believe they have to in order to be confirmed. But it has become an evolving process. A view of some of the history of Supreme Court nominations is relevant to see what has happened, what is in the course of happening, and what the next nominee may face.

The Senate Judiciary Committee has conducted hearings on nominees only since 1916—that is, for the Supreme Court—with the nomination of Louis Brandeis by President Woodrow Wilson. Justice Brandeis did not appear. The first time a nominee appeared before the committee was in 1925. The nominee was Harlan Fiske Stone. An issue had arisen as to whether there was a political motivation in the controversial investigation into the conduct of Judge Burton Wheeler. Justice Stone asked to appear to respond to the allegations. He did so, and he was confirmed.

In 1938, President Roosevelt nominated Felix Frankfurter, who initially refused to appear personally, but after being attacked for his foreign birth, his religious beliefs, and his associations, Frankfurter decided to appear. He read from a prepared statement, refused to discuss his personal views on issues before the Supreme Court. His hearing lasted only an hour and a half in duration and did not set a precedent for future nominees.

In 1949, Sherman Minton, who had been a U.S. Senator, became the only Supreme Court nominee to refuse to testify before the Judiciary Committee. Minton wrote to the committee:

I feel the personal participation by the nominee in the committee proceedings related to his nomination presents a serious question of propriety, particularly when I
might be required to express my views on highly controversial and litigious issues affecting the Court.

Notwithstanding Minton’s refusal, the committee conducted its hearing in Minton’s absence and confirmed him. It wasn’t with the nomination of Justice John Marshall Harlan, that nominees have appeared regularly before the Judiciary Committee. Only since 1981, following my own election in 1980, have the hearings taken on a little different approach as to what the nominees will answer. Justice O’Connor declined to answer many questions. The next nomination hearing was that for Chief Justice Rehnquist, who was a sitting Associate Justice. Initially Justice Rehnquist declined to appear, then was advised that if he wanted to be confirmed, he would have to appear. It was a contentious hearing. As the record shows, Chief Justice Rehnquist was confirmed by a vote of 65 to 33. He did answer a great many questions, although he did not answer a great many questions.

I asked him a bedrock question as to whether Congress had the authority to take away the jurisdiction of the Supreme Court of the United States on the question of whether the defendant would answer. Overnight a Senate staffer brought me an article which had been written by a young Arizona lawyer in 1958 by the name of William H. Rehnquist which appeared in the Harvard Law Record with the young Arizona lawyer, William H. Rehnquist, was very tough on the Senate Judiciary Committee for the way it conducted its hearings for Charles Whittaker. Charles Whittaker was from Kansas City. There are two Kansas Cities—one in Kansas and one in Missouri. Justice Whittaker lived in one and practiced law in the other. A big to-do was made about the fact that it would be an honor to two States if he was confirmed, where he worked and where he lived.

This young lawyer from Arizona, Bill Rehnquist, didn’t think that amounted to a whole lot. He chastised the Senate Judiciary Committee for not asking about due process and other constitutional issues. So in the face of his declination to answer my questions on taking jurisdiction away from the Supreme Court on the first amendment, I asked him if he was a young Arizona lawyer. He said, yes, that was true, he was. I said: Did you write this article? He said: Yes, I did. Then he added: So that didn’t end the issue because having the authority of this young lawyer from Arizona, pretty good reasoning, I pursued the questions. Finally, he answered the question on could the Congress take away the jurisdiction of the Court on the first amendment. He said, no, the Congress could not do that.

So naturally I then asked about the fourth amendment, search and seizure. Could the Congress take away the jurisdiction from the Supreme Court on search and seizure. He declined to answer that. I went to amendment five on privilege against self-incrimination. Again he declined. And then six, and seven, and eight, and nine, and ten, and on and on. Then I asked him a follow-up question: Why would he answer on the first amendment but not on any of the others? As you may suspect, he refused to answer that question as well. It was my judgment that Chief Justice Rehnquist passed muster. It was a battle. And then Justice Scalia came before the Senate following Chief Justice Rehnquist. Justice Scalia would not answer any questions. As I have said—and really too apocryphal—Justice Scalia wouldn’t even give his serial number. He would only give his name and rank. Prisoners of war are compelled to answer questions, but only three—name, rank, and serial number. But as I have said, and I have not made this clear, in personal banter, he wouldn’t even give us his serial number. But it was perhaps an exhausted Senate following the confirmation of Chief Justice Rehnquist or perhaps it was Justice Scalia’s professed professional record, he would not even answer the question as to whether he would uphold Marbury v. Madison, a decision of the Supreme Court of the United States in 1803 where the Court had interpreted the Constitution and to interpret the law and to be the final arbiter of the Constitution.

Then in 1987 the Judiciary Committee considered the nomination of Judge Bork from the District of Columbia Court of Appeals. Judge Bork had extensive writings in law reviews and books, many speeches, had a very extensive paper trail, a controversial paper trail. Judge Bork had written that there was no judicial legitimacy, and absent judicial legitimacy, there could not be judicial review. Understandably, the committee had many questions for Judge Bork, and in that context Judge Bork felt compelled to answer the questions. In the interrum between Justice Scalia and Judge Bork, Senator DeConcini and Senator DeConcini and I—Senator DeConcini being another member of the Judiciary Committee who is an author of the legislation to be submitted to the Judiciary Committee which would delineate an appropriate line of questions for nominees in trying to set some standards and trying to set some parameters as to what we felt were appropriate questions to be answered and the authority to demand a warrant confirmation. After the proceedings as to Judge Bork, we felt it unnecessary to move ahead with that kind of a resolution.

The nomination of Justice Kennedy followed, and Justice Souter and the other Justices, Justice Thomas, who answered a great many questions, and then the nomination of Justice Ginsburg and the nomination of Justice Breyer. These nomination proceedings found the nominees answering some, not answering others, but essentially following the rule that they answered about as many questions as they felt they had to.

Judge Roberts answered more questions than most. He answered the question about the right of privacy in a very positive manner in response to questions which I asked, which Senator Kouri asked, and which others answered. He said there was a right of privacy. He said the decision of the Supreme Court of the United States in Griswold v. Connecticut was a correct decision and he extended the contraception issue beyond marriage to those who were single, saying that right of privacy existed, and upheld the propriety of the decision of the Supreme Court in the Eisenstadt case. Other nominees had refused to answer such questions.

I felt that Judge Roberts did not answer some questions which I thought should have been answered. For example, I asked him about the appropriate standard for testing constitutionality under the commerce clause. We found that the Supreme Court of the United States had cut back on congressional authority of the Congress which had been in existence for almost 60 years. Then in the case of the United States v. Morrison, striking down portions of legislation designed to protect women against violence. They did so on the stated principle that they disagreed with the congressional “method of reasoning.” When I heard about that rationale, it seemed to me to be inappropriate. What was the Court’s method of reasoning which was superior to the congressional method of reasoning? I find the matter of unique historical importance that the columns of the Senate are lined up exactly evenly with the columns of the Supreme Court.

Interestingly, in an early draft of the Constitution, the Senate was given the authority to appoint Supreme Court Justices. I have seen or visualized conceptualized a certain parody with those columns lined up exactly the same. When I read the opinion of the Supreme Court 5 to 4 in the United States v. Morrison, striking down portions of the legislation to protect women against violence, I wondered what was there in the Supreme Court which led them to a method of reasoning superior to a congressional method of reasoning? What happens when you move across the short space of green between the Supreme Court columns and the Senate’s columns?

As the dissent pointed out, the opinion of the Court must have presumed some kind of judicial competency. If you have no unique form of “judicial competency,” you have a form of congressional incompetency which is hardly fitting in an analysis of cases and facts and a determination of
constitutionality with the separation of powers between the Congress and the Court.

In the case of United States v. Morrison, the factual record exists "showing on gender bias from the task force, and 8 separate reports issued by Congress in House committees over a long course of time. The dissent detailed all of the evidentiary basis and then concluded "there was a mountain of evidence."

When I wrote Justice Roberts by letter dated August 8 and August 23, I had alerted him to this case and this question. At this point, I ask unanimous consent the full text of those letters be printed in the RECORD.

"There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, August 8, 2005.
Hon. JOHN G. ROBERTS, Jr.
E. Barrett Prettyman Courthouse,
Washington, DC.

DEAR JUDGE ROBERTS: I write to give you advance notice of the issues I will be asking at your confirmation hearing. In addition to identifying topics, I think it is helpful to outline the background for the questions that we have addressed.

In addition to the commentaries of scholars and others about the Supreme Court's judicial activism and the Court's usurping Congressional authority, members of Congress are aware about the Court's denigrating and, really, disrespectful statements about Congressional competence. In U.S. v. Morrison, the Court in Congressional findings because of "our method of reasoning." As the dissent notes, the Court's judgment is "dependent upon a uniquely judicial competence." The dissent then points out: "the formalistic contrived confines of commerce power in large measure pro-voked the judicial crisis of 1937" so that one might reasonably have doubted that Members of this Court would ever again try with a return to the days before NLRB v. Jones & Laughlin Steel Corporation which brought the earlier and nearly disastrous experiment to an end.

The Souter dissent further notes the categorial formalism "... is useful in serving a conception of Federal power. A reinvigorating vigilance of Federal lose agenda of the judicial activism of the Rehnquist Court.

Even with the Souter dissent referencing the crisis of 1937, I do not suggest any move as radical as President Roosevelt's attempt to pack the Court. I do see a great deal of popular and Congressional dissatisfaction with the judicial activism; and, at a minimum, the Senate's determination to confirm new justices who will respect Congress' constitution.

My questions are:

(1) Is there any real justification for the Court's denigrating Congress' "method of reasoning" by the dissent contrasted with the majority opinion?

(2) Is there any possible basis for the Court's characterization of "uniquely judicial competence" implicitly criticizing a legitimacy of Congressional competence?

(3) Do you agree with Justice Harlan's jurisprudence concerning legislation on the "rational basis" embraced by the dissent contrasted with the majority opinion?

(4) What is your thinking on the jurisprudence of U.S. v. Lopez and U.S. v. Morrison which overturned almost 80 years of Congress' power under the Commerce Clause?

Sincerely,

Arlen Specter.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Hon. JOHN G. ROBERTS, Jr., U.S. Department of Justice,
Washington, DC.

DEAR JUDGE ROBERTS: Supplementing my letter of August 8, this letter deals with Supreme Court decisions on the Americans with Disabilities Act (ADA) which I intend to ask you about at your confirmation hearing.

Like my first letter on the Commerce Clause, I am concerned about the Supreme Court's judicial activism and its usurping Congressional authority by creating, as Justice Scalia's dissent in Tennessee v. Lane makes clear, this letter deals with Supreme Court decisions on the Americans with Disabilities Act (ADA)
states’ Eleventh Amendment immunity by enforcing fundamental rights under the Fourteenth Amendment. To do that, under the Court’s reasoning, there must be “a congruence and proportionality” between the injury and the remedy imposed. That leaves the Court substantial latitude, as a matter of interpretation, to declare acts of Congress unconstitutional by misunderstanding the conscious evidentiary support for Congress’ public policy determinations.

Justice Scalia’s dissent in *Lane* attacked the “congruence and proportionality standard” as an “ill-advised opinion” calling it a “flabby test” and an “invitation to judicial arbitrariness and policy driven decision making.” The dissent added: “When this Court in the role of Congress’ taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress’ homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional. As a general matter, we are ill-advised to adopt or adhere to constitutional roles that bring us into conflict with a coequal branch of Government. Justice Scalia then carved out a new rationale for disagreeing with the ADA’s remedy, unmentioned when he joined the majority three years earlier in *Garrett*, that the Fourteenth Amendment applies only to state racial discrimination and “do not apply to this field of social policy far removed from the principal object of the Civil War amendments.”

My questions are:

1. Aren’t the “congruence and proportionality standard” and Chief Justice Rehnquist’s “method of reasoning” dictum in *Morrison* examples of manufactured rationales used by the Supreme Court to exercise the role of super legislator and make public policy which is in effect a Congressional role under the Constitution?

2. Without invoking the “flabby test” and engaging in an “invitation to judicial arbitrariness by policy driven decision making” embodied in the “congruence and proportionality standard,” wouldn’t a preferable test of constitutionality be the standard applied by Justice Harlan to the Commerce clause in *Maryland v. Wirtz*, and again invoked in *Gonzales v. Raisch*: “But the legislators… have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”

3. Isn’t there a lack of respect for Congress demonstrated by the Supreme Court as Justice Scalia points out that it is “ill-advised” for the Court to set itself up as “taskmaster” to determine that Congress has done its “homework” and to strike down Acts of Congress as Chief Justice Rehnquist did in *Morrison* by impugning our “method of reasoning”?

4. Using the maxim that “hard cases make bad laws,” should there be any place in the judicial process to tolerance allowances for the unique and sympathetic factual situation in *Lane* where a paraplegic had to crawl up the courthouse steps?

Sincerely,

ARLEN SPECTER

P.S. Following the release of my prior letter on the Commerce Clause, there were misrepresentations that my questions asked how we decided specific prior cases. That is not true. The questions were carefully crafted to elicit your thinking on your jurisprudence and judicial philosophy as opposed to how you would have decided specific cases.

Mr. SPECTER. At this juncture, it might be appropriate to note that Re-
activity which is abhorred by both the right and the left on the political spectrum. My distinguished colleague, Senator HATCH, who preceded me as chair of the Judiciary Committee, and I have discussed the decision of the Supreme Court in working down the Religious Freedom Restoration Act of 1993, and it is one which candidly defies logic. But the Court decided to undertake that restriction of congressional authority, and it did so in that case.

The public does not understand the issue of judicial independence and the ramifications of answering a question on a case likely to come before the Court. The public in the opinion polls wanted to know what Judge Roberts thought about Roe v. Wade. Is he right and the left on the political spectrum, or overrule Roe v. Wade. It is a virtual certainty—in fact, you can strike “virtual” out—it is a certainty that the next nominee will have these laws unconstitutional. It is a rule of surprise as to what nomines do.

There is no doubt that the hearings in the Judiciary Committee have been more contentious because of the highly controversial issues, and it is more than the issue of choice of Roe v. Wade, it is the issue of congressional authority versus the action of the Supreme Court in declaring certain laws unconstitutional. It is in the issue of religious freedom as embodied in the Religious Freedom Restoration Act of 1993, which has indicated he is going to proceed in a virtual certainty.

It is a virtual certainty that the question he is asked, is to the suggestion that the President defer a replacement for Justice O’Connor until the end of the June term, at a point where we would know a great deal more about Judge Roberts. But in the context of religious freedom and the controversies, it is a rule of surprise as to what nomines do.

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day—the question of choice, the question of the right to die, the question of the Ten Commandments, the question of establishment of religion, the question of the free exercise clause, the question of the death penalty, the question of exonerating the innocent— it is the public interest, in my view, to have the Supreme Court televised.

We all know the momentous decision of the Supreme Court in Bush v. Gore. On that occasion, when I walked across the green to attend the argument, the square block was overloaded with television trucks because of the enormous interest, but the television cameras could not go inside. At that time, Senator BIDEN and I wrote to the Chief Justice and asked that the Court be open for television. We received a letter of declination. As I recollect, the Court did have a transcript which was released right after the oral argument concluded.

I think the proceedings of the Court could be televised with due regard to the security and safety of the members of the Court. Under the proposed legislation, the Court would have the authority in a particular case to stop the television if it felt it necessary. In conclusion, as we approach the confirmation of Judge Roberts to be Chief Justice, I urge my colleagues to take a close look at his record. The conventional wisdom is that the nomination will stand. I believe that is true. Nevertheless, I think there is value in rolling up the score. We frequently cite the vote of 98 to 0 for Scalia; only three votes against Justice Ginsburg; 52 to 48 for Justice Thomas. I believe a strong vote for Judge Roberts would give him added stature. It is pretty hard to add stature to the Chief Justice of the U.S. Supreme Court, but I believe it would add a modicum of stature.

As the President ponders the nominee to replace Justice Sandra Day O’Connor, it is my hope that there will be balance maintained on the Court. With the uncertainties of the vote of Judge Roberts, the uncertainties of the vote of a new nominee, and the prospects of retirements in the immediate future, the composition of the Court could change, and the rule of law is structured on expectations being fulfilled, and reliance, and it is enhanced by not interfering.

The nomination of Judge Roberts to replace Chief Justice Rehnquist may work out to be a substitution of people with about the same judicial approach. Although it is far from certain exactly how Judge Insured a will, judge, there is no doubt that Justice O’Connor was a swing vote, tipping the scale. I believe that is a factor to be considered.

While I would like to see more women, a Hispanic, and more African American on the Court, I urge the President to name the very best person he can find. We could use a Brandeis or a Holmes on the Supreme Court. I am not saying we do not have one now, but if we do, we could use more.

President Bush disarmed his critics by nominating Judge Roberts with his extraordinary record, and I urge the President to nominate the very best person he can nominate—of gender, ethnicity, or any other factor.

I draw the attention of my colleagues to the full text of my remarks of Monday, September 19, 2005.

The PRESIDING OFFICER (Ms. Murkowski). The Senator from Alabama.

Mr. SESSIONS. Madam President, I appreciate the leadership of Senator SPECTER in this confirmation process. We stayed on track and on time better than at any time I can remember. We had a lot of people with a lot of strong views and ideas they wanted to express and they were given plenty of time to do that. We had 30-minute rounds of questioning and then 20-minute rounds. Some got more who asked for it. Judge Roberts was forthright under certain circumstances and appropriately failing to be drawn into discussions of cases that may come before him.

I think things went well. A lot of people doubted whether we would be in the position to have a vote this week, but the Senator from Pennsylvania was tireless. He stayed as long as it took. He listened to all of it, chaired the hearings, and kept us going straight, and made sure on occasion the witness felt there would be follow-up. Sometimes he was given more questions and interruptions than he was given a chance to answer. The Senator did a great job and I want to thank him for that.

I also join the Senator in saying that one never knows what a judge will be confronted with 10, 12, 15, 20 years from now. We might as well get the best person we can get who can deal with those questions that are unanticipated now and who can construct a philosophy of the judiciary that will be healthy and faithful to the Constitution, to the people who have ratified that Constitution, who have elected the representatives, to be respectful of all of that, and who understands the proper role of a judge.

I think Judge Roberts meets every one of those qualities. I think he is an extraordinary individual. Everyone who has been watching the hearings has been very impressed. I think he represents the ideal of what a judge should be. The President deserves great credit for nominating the best.

I asked Professor Fried of Harvard, who is a former Solicitor General of the United States and had himself argued cases before the Supreme Court—he is now at Harvard teaching philosophy of law—how would he rank Judge Roberts as an advocate before the Supreme Court, and he said the best, as so have certain legal magazines that rate the best lawyers in the country.

I think the people like him. I think his idea that judges should show modesty and be faithful to the Constitution, his expression that the greatest threat to the Court could be judicial activism, where the people feel the judges are not faithful to the Constitution and are imposing their political views on the people that are not required by the Constitution, that this is a threat. That is the choice at some point in the future the Court may have to call on the American people to do things they do not want to do, they may not be popular, to be faithful to the Constitution. To erode and give away what good respect the American people have for the courts and the law would be a mistake.

I want to express how strongly I feel that our nominee is an extraordinary individual. I saw on C-SPAN today John Roberts’ former coach and teacher, and he said he was the finest student we had in our school and the finest student the school has ever produced. He did not hesitate to say that. He coached him in wrestling. He played football. He was top academically in the class and cared about those kinds of things. He worked hard and he was honest. He said, I remember when he came up at graduation and they gave him the award for the finest student in English. It was John G. Roberts. He gave the one for French, and it was John Roberts; in Latin, it was John Roberts; mathematics, it was John Roberts. He said nobody, none of the students, had the slightest doubt that he deserved those honors and he earned them because of both his work and his intelligence.

John Roberts went to Harvard to do his undergraduate degree, finished Harvard in 3 years, not 4, and was magna cum laude on his graduation from Harvard in 3 years. Then he went to law school at Harvard, likewise did exceedingly well, and was selected for Law Review, which is a great honor for a student in law school to be selected for the Law Review. I suppose some of us may not grumble, but most people would probably admit that the Harvard Law Review is the finest, most prestigious Law Review in the country. His fellow members of the Law Review elected him to be managing editor of the Law Review, which is an affirmation of their respect for him and his abilities.

After law school, he clerked for Judge Friendly, one of the great circuit judges in America. This is the court of appeals that is just below the Supreme Court. I note that outstanding law graduates apply for these courts of appeal clerkships. There are not that many of them. They are very coveted and only the best students are selected. Judge Friendly, one of the great circuit judges in the last 50 years in the United States, would have been very competitive. Many students would have liked to have clerked for him. He chose John Roberts.

I would assure Judge Friendly recommended him—or however it occurred, he was recommended to Chief Justice Rehnquist. I believe Justice
Rehnquist was not chief at that time but a justice on the Supreme Court. He clerked for the Supreme Court, the very Court on which he will now sit. Trust me, it is an honor for a lawyer to be chosen to clerk for the U.S. Supreme Court, because they want the very best lawyers who are going to help them decide the most complex cases. So I think that is something we should remember.

Then he is in private practice. He goes to the Department of Justice. He is called over at a moment’s notice by the President. He is the Solicitor General. He is the legal architect of the Reagan administration. He is called over as part of Fred Fielding’s efforts to bring the brightest to the White House. He found him and snatched him away to the White House. He was White House counsel under President Reagan. He was chosen to clerk for the U.S. Supreme Court because he knows how the Court will decide. It was a decision that my conscience led me toward.

I thank Senators REID, KENNEDY, BINGHAM, BOXER, PHYOR, OBAMA, NELSON of Nebraska, and others for their thoughtful remarks these past few days. I commend to the Senate each of the statements on both sides made in the Judiciary Committee meeting on Thursday.

I must say, as the Democratic leader of that committee, I believe the Democratic Senators did themselves by the thoughtful manner in which they proceeded. The hearing record upon which the Senate can draw in making this decision as is full as it is largely through their diligence. Now everyone can weigh this question and decide it for himself or herself.

Regardless of how Senators decide to vote on this nomination, the Democratic members of the Judiciary Committee, Senators, and I believe our colleagues in the Senate, have fulfilled our constitutional responsibility to fully, fairly, and openly review this nomination on its merits. For that I thank them all.

I note that it is true that Democratic Senators are not all voting in lockstep. Each Senator individually gave this nomination serious consideration. They each honored their constitutional duty and their obligation to the American people in reviewing this nomination.

Democratic Senators kept open minds throughout this process, unlike some partisan cheerleaders who rallied to endorse the White House decision long before the first day of hearings opened. I urged my colleagues on this side of the aisle to wait until we had the hearings before they made a decision either for or against the nominee. I thought that was the most responsible thing for any Senator to do.

I have served in the Senate for more than 30 years, much of that time on the Judiciary Committee. This is the 11th Supreme Court Justice nomination on which I cast my vote. I am one vote out of 100, but I recognize that those 100 of us privileged to serve in the Senate are entrusted with protecting the rights of 280 million of our fellow citizens. Just think for a moment, the Chief Justice is there to protect the rights of all 280 million Americans. Our job is to know the American way of life and who is going to be Chief Justice: The President, of course, with the nomination, and then the 100 Members of
U.S. Senate who have to stand in the shoes of 280 million Americans.

There is no entitlement to confirmation for lifetime appointments on any court or any nomination by any President, Democratic or Republican. Americans must judge the President's nominee in the context of the Constitution. They must consider whether the nominee has had a complicit relationship with the Court, and whether he can no longer simply defer to the Supreme Court, he can no longer simply defer to the Supreme Court. When he joins the Supreme Court, he must serve as a check on Presidential authority, are among the finest judges, and have done in this decision. As Chief Justice, John Roberts will be responsible for the way in which the judicial branch administers justice for all Americans. I was encouraged that he said he would provide a fifth vote in staying an execution when four other Justices voted to review a capital case. Effective judicial review is all the more important in an era in which so many innocent citizens have been sent to death row.

I respect those who come to different conclusions about this nomination. Actually, when I listened to those who have come to different conclusions, I heard courage, I heard willingness to serve as a check on Presidential power. I hope and trust he will.

This nomination process we complete this week provides some important lessons. President Bush expressed his efforts to select a successor to Justice O'Connor. Last week Chairman SPECTER—Chairman SPECTER—might have added, parenthetically, a chairman who ran a superb hearing in the best tradition of the Senate, making sure that both Republicans and Democrats were heard and that questions were asked—and I, along with the Republican and Democratic leaders of the Senate, met with President Bush. I urged him to follow through with meaningful consultation this time, to share with me and others what he and his team have in mind, and to seek our advice before he chooses; to use both parts of the advice and consent clause of the Constitution.

I remain concerned by the administration's lack of cooperation with the Senate on Judge Roberts's nomination. We did start off well with some early meaningful consultation. I praised the President for that. But then those early efforts didn't result in meaningful discussions.

The President's naming of Judge Roberts, first to replace Justice O'Connor and then swapping that for the vacancy left by Justice Rehnquist, came as a surprise both to Republicans and Democrats, not as a result of meaningful consultation. I believe there could and should have been consultation with the Senate on the nomination of someone to serve as the 17th Chief Justice of the United States, and I am sorry there were no efforts to include many Republican Senators, have offered similar advice.

Chairman SPECTER has appropriately counseled that the next nominee should be someone who promotes stability on the Court, much like Justice O'Connor. Senator GRAHAM urged the President to listen to Democrats and what we have to say as he considers his next nominee. What we are saying could easily be summed up by quoting the President's campaign promise. We are asking him, in this case especially, to be a uniter, not a divider, for the sake of the country—not for the sake of the 100 Senators but for the sake of the country.

I am disappointed that the White House did not help the Roberts nomination by withholding information that has tradition-
Senator REID, said about the senior
accomplished under his leadership.
us and don’t let us make a choice that unites
President to make a choice that unites
ator from Maryland.
her such time as she may need.
Maryland in the Chamber. I yield to
Ranking Member LEAHY for the way
makes
fellow Americans being displaced by
fears or irretrievable. One is the decision
to go to war. Once we vote to go to
war, to put our troops in harm’s way,
we cannot say a day later, Oops, we
changed our minds or, 6 months later,
cut off the money. Once they go, they
go, and we have to stick with them.
The other is the confirmation
of members of the Supreme Court. Those
are lifetime appointments, and they
cannot be impeached for an impeach-
able offense, to be tried here in the
Senate.
So this decision is among the top two
that we are called upon to make.
We make budget decisions, and we
can change it later. We make a legisla-
tive decision—most of our legislation
is for 3 years’ authorization we can always
change it. But not this decision.
The people of Maryland have en-
trusted me with the right to make this
decision. I was troubled. I really
pondered this and what I thought
about this nomination. Two of my
main questions were: No. 1, what will it
mean for the fundamental constitu-
tional liberties that has meant so
much to so many? And two, what will
a Chief Justice Roberts mean to our
future?
After a thorough and careful review
of his record and his testimony, I must
state now that I will oppose the con-
firmation of Judge Roberts to be the
Chief Justice.
I do so because I have too many
doubts about the direction a Roberts
Court will take us—persistent, nagging
doubts about his positions on non-
discrimination, and the right of pri-
vacy in personal decisions, and in pub-
clic policy.
On nondiscrimination, I just couldn’t
get to what his views were. Is it thor-
ough? Is it broad? Is it narrow? On the
issue of privacy, his views sounded ex-
actly like those of Clarence Thomas’s
that were given to reassure us, only to
find that they are not what we heard.
On the issue of discrimination, I am
looking at very specific issues such as
the Voting Rights Act, Americans with
Disability Act, title IX, which has
meant so much to combat gender dis-
crimination in education.
And, of course, on the right of pri-
vacy. What will this mean for personal
decisions like those concerning repro-
ductive choice, or public policy in
terms of where we are going to safe-
guard our records and safeguard our-

selfs.
When I decided how I would vote on
the nominee, I looked at three thresh-
old criteria: One, is the nominee com-
petent? Second, is the nominee a man of
integrity?
I believe every Senator knows, hav-
ing both met Judge Roberts and from
also reviewing his background, he is
competent. He is endorsed by the
American Bar Association. I also truly
believe he is a man of personal integ-

This vote is crucial. A Senator is
only called upon to make two decisions
in our career that are either irrever-
able or irretrievable. One is the deci-
sion to go to war. Once we vote to go
to war, to put our troops in harm’s way,
we cannot say a day later, Oops, we
changed our minds or, 6 months later,
cut off the money. Once they go, they
go, and we have to stick with them.

But what about the nominee
protecting core constitutional values and
guarantees that are central to our sys-
tem of government? I really do not
know the answer to this question.

Based on his writings and his testi-
mony, as I said, I am left with these
persistent doubts: whether he will
safeguard civil rights, the right to
privacy, and equal protection under the
law.

I have approached this nomination
very seriously. I have approached it
with an open mind and an open door.

I have personally met with Judge
Roberts. I found him to be very intel-
ligent, to be very affable. Although he
is personally appealing, personal
demeanor is not synonymous with per-
sonal philosophy. Personal demeanor is
not synonymous with judicial philos-
ophy. It is not his demeanor that we
are voting on. We are voting on what
will his judicial philosophy mean to
the Court, and particularly with his
sitting Chief Justice.

When I looked at the hearings, they
occurred as I was moving my Com-
merce-State-Justice bill. I put in a
couple of shifts, which I know the Pre-
siding Officer does as well—one shift
last week before the Senate with my
colleague, Senator SHELBY, getting an ap-
propriations bill through, and then I
would go home and do a second shift
and watch the Roberts hearings on C-
SPAN so that I could hear his words
personally every day that week.

Then, after listening to the hearings,
I reviewed the testimony. I reviewed
his writings and I also reviewed the
testimony of others.

I was disappointed that we didn’t
have access to documents from 16 cases
that he prepared while he worked for
Solictor General’s office in the pre-
vious Bush administration, which
would have given us insight, even
though similar documents were given
to Judge Rehnquist when he was
Chief Justice.

I tried to get insight into his legal
reasoning and judicial philosophy.

Is he smart? Yes. Is he experienced?
Yes. As a young man, was he flip and a
bit cheeky? The answer is yes. But put
me in that column, too. I understand
that. We all mature. But as we mature,
we sometimes distance ourselves from
those remarks. Yet Judge Roberts did
not distance himself from those re-
marks.

I was puzzled by it. I did not quite
understand it. I read and pursued it
further.

In the hearings, he had the oppor-
tunity to let us know whether he would
ensure personal rights, but he didn’t
clear up the uncertainty. He didn’t
back away from his record and his
writings. He wouldn’t tell us if he
shared the views of his clients. Again,
he left too many doubts about whether
he will safeguard the rights that Mary-
landers and all Americans rely on each
day.

He did say that he would follow the
rule of law. I believe that. But you
know, coming to a decision in the Supreme Court, unlike the lower court, is not necessarily only following the law. It is not a mechanical decision. It is not like punching in a legal question, you go to the 15 precedents and out comes the printout. This is interpretation of the law at the highest level. And the Supreme Court has the authority to create precedent, not only follow precedent.

So I couldn’t get to where Judge Roberts was going. Take an example such as civil rights. I think one of the most important civil rights is the right to vote—cherished, fought for both through social movements and our wars. Yet Judge Roberts left me with serious doubts.

One of the most compelling testimonies during the hearing was that of Congressman John Lewis. He was a hero of the civil rights movement. He marched side by side and hands on with Dr. Martin Luther King Jr. When John Lewis testified, he raised questions about whether Judge Roberts would support the basic guarantee of the Voting Rights Act, the law that ensures every citizen may vote and that there should be no barriers, no publicly sanctioned barriers, to participation in the voting process. Yet as a young lawyer in the Reagan administration, Roberts held a very restrictive view.

John Lewis spoke about section 2 of the Voting Rights Act, which is an important part of the law. It is a remedy not only intentional discrimination and barriers to participation but also the effects of discrimination on underrepresented groups.

Judge Roberts held a very restrictive view, as I said. He argued that only intentional discrimination violated the law.

If that argument prevailed, it would have made it impossible to change discriminatory voting practices that stood in the way of African Americans voting and holding elective office.

Let us take the poll tax, for example, a repugnant and disgraceful practice that has now been outlawed. The poll tax was a barrier that prevented African Americans from voting. But what could we do? Look at one person at a time? No. Section 2 bars it, because it was a discriminatory practice that affected a whole group of people.

During the hearings, Judge Roberts could have clarified or changed his views.

Yet he said nothing to distance himself from that very narrow legalistic viewpoint that would have maintained barriers to participation, and we have no idea what principles he might apply to a case that would come before the Court like, for example, on the so-called voter verified paper trail. We do not know today where he stands on such important voting rights issues.

Now, disability rights. He left doubts about whether he would provide disabled Americans with guarantees under the law for equal opportunity, particularly to education. Again, going back to being that lawyer in the Reagan administration, he wrote a memo attacking a Federal court decision that would have provided a deaf child with learning tools. He thought this was too burdensome on the local school system, local government and, presumably, he believed that the States should not be required to provide these same equal opportunities to handicapped children and that the burden it placed on the states had to be evaluated. He called the lower court’s decision discriminatory.

What would this mean for disabled children? What would this mean for his interpretation of the Americans with Disabilities Act? This raises doubts for me as to if he would apply a cost-benefit analysis to other areas of discrimination. Certainly when we look at disability and the equal opportunity or an opportunity for education, we have to look at the benefit, not at the cost.

And now title IX. That has changed the face of American scholarships and of American sports. Title IX, for those who might not be familiar with it, prevents gender discrimination in education. It says that schools that receive Federal funds can’t treat men and women differently. This means that there has to be parity—not sameness but parity—in the number of sports programs, access to classes, and opportunities for scholarships. That meant there had to be girl’s soccer teams at professional levels; girls’ football teams; that there had to be girl’s lacrosse just like there was boy’s lacrosse.

Let’s take a look at what that has meant. It was phenomenal. All of a sudden, girls were getting scholarships for basketball, for playing lacrosse, and for playing soccer. Aren’t we proud of what we have done? We can only look at the Olympics and see our so-called “all star” basketball team lost to Puerto Rico. But then team USA brought home the gold. People such as soccer player Mia Hamm passed the torch to the next generation, which will go on and win the gold and give us such honor. That is what title IX meant. It meant if you wanted to go to school and sports was your thing, you would not be restricted because you were a girl.

In his writings, Judge Roberts argued that the only part of the school receiving discrimination was the whole school would not have abided by title IX protection. That would have meant schools could discriminate in their athletics or scholarships even when another part of the school got federal funds. In his testimony, he did nothing to back away from this view.

What would the Roberts Court mean to millions of girls who now have access to scholarships? What would this mean to thousands of girls who right now this afternoon are heading for the college they are attending? Will they be able to go on to the Olympics, or if they do not make the Olympic team, on to make the college team. We are not sure that is the kind of heart and soul and hard work because of gender. Where would the Roberts Court be on that? Would he close that door? I am not so sure. That is why I come back to these nagging doubts.

Finally, in the area of the constitutional, protected right to privacy, I appreciate Judge Roberts speaking on the right to privacy. He certainly said more on it than some other nominees have. Yet what he said does not tell us what he thinks about how far the right of privacy extends. He said he supported Griswold. Griswold upheld the right of married couples to buy contraception. Connecticut banned the sale of contraception to married couples. So, under the right of privacy, the Supreme Court said that if you are married, you have the freedom to buy family-planning mechanisms.

In many of his answers, he sounded as if he was assuring members that the right of privacy is settled law, stating that “I believe in precedent,” et cetera. But many of these answers sounded like Clarence Thomas, eerily like Clarence Thomas. Thomas said there is a fundamental right to privacy. He did not say how he would apply it to the most personal choices or what it would mean to public policy. Since Clarence Thomas has gone to the Supreme Court, we know he does not quite follow what we thought he was assuring us he would. In fact, I don’t know if Judge Thomas really supports the right of privacy in the Constitution.

Roberts followed the same script. He refused to clarify his previous decisions. I would like him to elaborate on what the right to privacy includes. Would that mean to the future of reproductive rights? What would that mean to privacy rights in general?

This is important because I am voting not only about today. I am voting about tomorrow. If Mr. Roberts is confirmed at age 50, he will be on the Court for the next 20 or more years. And we wish him good health. But just think of what would change with the internet and information technology. Where were we 20 years ago? Where was the Internet 20 years ago? We did not have laptops; laptops were big boxes. What about 30 years ago? What was the computer? They were big machines in big warehouses.

Twenty years ago, we would not have thought about privacy rights in this context. But now, because of the Internet and computerization, we think about the clash needed to our right of privacy. Think how they can plunge in with your financial records, your medical records, the so-called data-
mining where they know everything about you and find out all your moves. Who do you want to have access to that? Who do you want to protect your basic rights?

What will technology mean 20 years from now? What will that technology mean in terms of right of privacy? How do we need to protect our privacy?

Today have a national debate on privacy, the right for security of our country versus our personal privacy. The right of search. The right, literally, of intrusion in our records. The PATRIOT Act would give us some sets of rules; the ACLU would frown on others. It is likely many of these decisions will go to the Supreme Court. Where will those decisions be made? They have to be made to serve the national interest but also to serve the principles of the Constitution. I am not dictating what the decision should be, but I can dictate who I want on the Supreme Court. I go to that decision based on one ability to be left alone from the intrusions of government.

How would Judge Roberts apply the right of privacy in a world where all our most personal health and financial records can be easily stored and shared?

So here we are now at this decision point. As I have looked at this, I have too many doubts about what Judge Roberts will mean for the Supreme Court—caused by what he said and what he didn’t say. I believe the American people are entitled to know what Judge Roberts will be a protector of their most basic and fundamental rights. I would have been more comfortable if in any way he talked about the rights of that young, cheeky lawyer trying to write up attention-getting briefs. Something that would have moved him to say: Oh, that was my client, not me. I never wanted him to say how he would rule on anything in the future or any pending before the Court. But I would have liked to have known who is this man for whom I am voting. What he believes is what he is and it will shape the Supreme Court for the next 20 years.

Several times, I came right up to the threshold. As I said, there are many magnetic aspects about the Roberts nomination, but at the end of the day and after careful review, I have too many doubts about his commitment to nondiscrimination, the right of privacy, and equal protection under the law. So when my name is called for this nomination, I will vote no.

I suggest the absence of a quorum.

Mr. DORGAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DORGAN. Mr. President, I ask unanimous consent to speak as in morning business for a few minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. DORGAN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

Ms. SNOWE. Mr. President, I rise today to speak to the nomination of Judge John G. Roberts, Jr. to be the next Chief Justice of the United States. America. After a careful and considered review before the Senate Judiciary Committee, his overall record, and a personal meeting with Judge Roberts in July, I have concluded that Judge John Roberts should be confirmed as the 17th Chief Justice of the United States.

I first want to express my deepest gratitude to my good friend and colleague, Senator SPECTER, who—as Chair of the Senate Judiciary Committee—was extraordinary in leading the nomination process to fill the first Supreme Court vacancy in 11 years, the longest such interval since the administration of President James Monroe 181 years ago. Together with Ranking Member LEAHY, Senator SPECTER ensured a thorough, rigorous, and civil examination of the individual who now comes before the full Senate for a confirmation vote.

I have not arrived at my decision lightly. It has been said that, of all the entities in government, the Supreme Court is the most closely identified with the Constitution and that no other branch or agency has as great an opportunity to speak directly to the rational and moral side of American character, to bring the power and moral authority of government to bear directly upon the citizenry.

The Supreme Court passes final, legal judgment on many of the most profound social issues of our time. The Court is uniquely designed to accept only those cases that present a substantive and compelling question of Federal law, cases for which the Court’s ultimate resolution will not be applied merely to a single, isolated dispute but, rather, will guide legislatures, executives, and all other courts in their determinations and interpretation of law and policy.

In the end, ours is a government of both liberty and order, State and Federal authority, and checks and balances. The remarkable challenge of calibrating these fundamental balance points is entrusted, ultimately, to the nine justices of the Supreme Court of the United States. To meet this extraordinary challenge of this role, any nominee for the Court must have a powerful intellect, a principled understanding of the Court’s role, and a sound commitment to judicial method.

Today the nominee for Chief Justice must also, among other leadership skills, engender collegiality and respect among all of the justices in order to facilitate the consensus of majority, command the respect of lower Federal courts, and foster cooperation with the States’ highest courts. And the nominee must have a keen understanding of, and a disciplined respect for, the great and tremendous body of law that precedes them to warrant our consent.

These are the few key qualifications against which any person chosen by the President of the United States to serve as just the 17th Chief Justice of the United States must be measured. And all the more so when our Nation would undoubtedly bear the mark of the nominee for decades to come.

Indeed, given the age of this particular nominee, it is not unreasonable to conclude that John Roberts may indeed serve longer than Chief Justice Marshall, who—with his 47 year tenure—stands as our longest-serving Chief Justice. If confirmed, Judge Roberts could well directly impact the Nation for a half century and for decades beyond. He would conceivably be entrusted with the “care of the constitution” for the next 40 years.

It is against the backdrop of this reality that we also evaluate the record of Judge Roberts. And from a professional standpoint, it is clear that Judge John Roberts is one of the most highly-qualified individuals ever to be nominated for the Supreme Court, given his experience clerking for both the Second Circuit Court of Appeals and the Supreme Court, and serving as counsel to a President, Attorney General, and Solicitor General and given he is one of the most respected lawyers in the Nation who has argued 39 cases before the Supreme Court and currently serves on the second highest court in the land with unanimous consent of the Chamber just last year. So I applaud the President for selecting an individual who indisputably possesses the professional credentials to serve as Chief Justice.

Concurrently, however, I believe there are four additional threshold qualifications that are critical to assess and evaluate the nominee. They are judicial temperament, integrity, methodology, and philosophy, and by their nature, are more challenging to measure. That is why I have arrived at my decision through an analysis of the complete and accumulated record accompanying Judge Roberts’s nomination.
With regard to the matter of judicial temperament, the members of the Judiciary Committee rightly and vigorously questioned the nominee on the tone and content of memoranda he authored as counsel to the Reagan administration.

Because these memos presented opinions on such critical issues as civil rights, the right to privacy, and gender equity—including a 1984 memorandum regarding a letter I initiated as a member of Congress—dozens of Representatives requesting the Administration not to intervene in a Federal court decision on the matter of women receiving lower pay because they often work in different jobs than men—I would have welcomed a more direct and forceful refutation of these documents.

At the same time, Judge Roberts did testify that, “Of course gender discrimination is a serious problem. It’s a particular concern of mine . . . and always has been. I grew up with three sisters, work outside the home. I married a lawyer who works outside the home. I have a young daughter who I hope will have all of the opportunities available to her without regard to any gender discrimination.”

Further, when probed about memoranda on vital civil rights issues, Judge Roberts stated to the committee that he believes Congress has the power to guarantee civil rights for all Americans.

As an example, when he was asked, “Do you believe that the Court had the power to address segregation of public schools on the basis of the Equal Protection Clause of the Constitution?”, Roberts responded, “Yes”. And when questioned by Senator Kennedy, John Roberts agreed with the approach taken by Justice O’Connor in upholding an affirmative action program within a university’s admissions policy.

With regard to the right to privacy, in responding to concerns that he characterized this fundamental right as a “so-called right to privacy” in one Reagan administration memorandum, Judge Roberts testified that he does believe the Constitution guarantees such a right, that he was representing the administration’s views in his memorandum, and he elaborated that this right emanates from at least five memoranda, and he elaborated that... such a right, that he was representing the administration in the 1980s.

Judge Roberts responded, “With regard to the right to privacy, as the Supreme Court decision on the matter of women receiving lower pay because they often work in different jobs than men—I would have welcomed a more direct and forceful refutation of these documents.”

And that conclusion is buttressed by an examination of another of the threshold qualifications—judicial methodology—which directly reflects a judge’s commitment to the essential tenets of fairness and judicial integrity.

In making this assessment, it is most instructive to consider the emphasis Judge Roberts has placed on judicial process in adjudicating cases. Rather than a “top-down” approach wherein a decision is made and then the opinion is written to support that position, Judge Roberts has espoused a “bottom up” approach to decision-making—meaning that he will work through the specific facts and law of each case, and then arrive at a conclusion based on that analysis.

As regards judicial integrity, I believe we can all agree it is absolutely essential that a judge be fair and open-minded. Our citizens simply must have confidence that a judge who hears their legal claims does not do so with a closed mind.

A judge must be truly committed to providing a full and fair day in court, and to arriving at decisions based on the facts and law of each case, and not on any personal agenda or ulterior motive. For it is when the latter occurs that the public justifiably loses faith in the independence and fairness of our courts.

I conclude that no such faith should be lost here with Judge Roberts. He is, by all accounts, a man of sound character whose integrity is widely respected by Democratic and Republican lawyers alike.

To illustrate the essence of his judicial integrity, I recall during the course of our meeting in July that he indicated it was not uncommon for him to author an entire legal opinion before reaching the conclusion that the reasoning was wrong leading him to a different decision.

He also spoke at length about his years as a law clerk to the late Judge Henry Friendly of the Second Circuit, one of the most respected legal minds of our time, and a mentor and legal role model for Judge Roberts.

He recounted how Judge Friendly was assigned the duty of writing an opinion for the three judge panel that heard a certain case. But once Judge Friendly began trying to write what was supposed to be the majority opinion, he realized that the reasoning behind the ruling simply was not sound.

So after a number of failed attempts, Judge Friendly finally circulated a folder to each of the judges containing two opinions, with this note attached—“The first opinion fulfills my obligation for writing the majority opinion. The second is my dissent.”

With regard to the fourth and final threshold qualification I referenced—the matter of judicial philosophy—should be a factor for Presidents, but it should not be one the Senate considers in its confirmation process. I respectfully disagree.

In my view, the Senate must also consider the nominee’s commitment to the limits and horizons of the great promises of our Constitution, and of the nominee’s specific view of the proper role of the Supreme Court in deciding whether to take such cases and, if so, the method used to rule upon them.

The inquiry into Judge Roberts’ judicial philosophy assumed particular significance for all of us who value the Court’s landmark rulings. Decisions protecting the rights of privacy, of free speech, of equal access to the courts, and to the protections of the laws against the arbitrary intrusion of governmental agents into the most private aspects of our lives.

Entire generations of Americans have come to live their lives in reliance upon the Court’s rulings in these key areas, and overruling these precedents would simply roll back decades of societal advancement and impose substantial disruption and harm.

Therefore, central to the question of a judicial philosophy is his views on one of the cornerstone of jurisprudence, and that is, judicial precedent. Because it was once said—by a
Professor Walter Murphy— the Court is bound by the “wisdom of the past, not the free choice of the present.”

On this vital matter, John Roberts has firmly stated to me his belief that precedent plays a crucial role in the judicial process, and the fact, a precedent has been challenged is not enough that you or the Court may think the prior decision was wrongly decided.

Furthermore, Judge Roberts is on record stating that nothing in his personal beliefs, including his religion, would prevent him from faithfully applying the laws of our land. As well, he indicated that nothing in his personal views would prevent him from applying Supreme Court precedent as governed by the doctrine of stare decisis.

Thus, he acknowledged the crucial interior to the doctrine of stare decisis, to promote stability and predictability, and therefore respect for the law. This commitment to stare decisis takes on, of course, a special significance for this issue of privacy that I and so many Americans accept and embrace. He then went on to explain that his philosophy clearly and, yes, in plain English, Judge Roberts has the potential to become one of the preeminent judges in modern times.

Of course, no Member of this body can forecast with 100 percent accuracy the shape of the Supreme Court under Judge Roberts, but in evaluating the universe of the threshold qualifications I have outlined, the entirety of the legal and judicial record of Judge Roberts points to a fair-minded judge with deep respect for the rule of law, the independence of the courts, and the judicial method . . . a judge committed to stability in the law, and to the established judicial principles for reviewing and upholding precedent.

There is little doubt that Judge John Roberts will have the opportunity to author a legacy for America that will reverberate for the ages. After intensive examination, it is my conclusion that the totality of the record before us, has earned him the privilege of writing that legacy as the next Chief Justice of the United States. Thank you, Mr. President. I yield the floor.

THE PRESIDING OFFICER. The Senator from Ohio.

Mr. DEWITT. Mr. President, the Constitution gives us a solemn duty when it comes to the confirmation of an individual to sit on the U.S. Supreme Court. While the President is to nominate that individual, it is our duty in the Senate to decide whether to provide our consent.

When it comes to whether Judge John Roberts should be the 17th Chief Justice of the United States, I have little trouble providing mine. Judge Roberts is one of the most accomplished legal minds of his generation. He has argued 39 separate cases before the U.S. Supreme Court, and he served with great distinction for 2 years on the Court of Appeals for the District of Columbia. He is certainly an eloquent spokesman for the rule of law, and he has received a “unanimously well qualified” rating from the American Bar Association, a rating that specifically addresses his openmindedness and fairness from his commitment to equal justice under the law.

I will vote to confirm Judge Roberts. I encourage my colleagues to do the same.

I think it might be helpful for us to consider this afternoon what we have learned about Judge Roberts over the past several months.

First, we have learned something about his judicial philosophy. Judges should not make policy. They don’t pass laws or implement regulations. Instead, in the words of Justice Byron White, judges simply decide cases, nothing more. Judge Roberts embodies this philosophy.

During our hearing in the Judiciary Committee, he told us:

The role of the judge is limited. A judge is to decide the cases before them. They are not to legislate. They are not to execute the laws.

Time and again he repeated his belief that judges should play a limited and modest role. During the confirmation hearings, he said this to Senator HATCH, Senator GRASSLEY, Senator GRAHAM, Senator CORNYN, and Senator KOHL. He told Senator KYL:

Judges and Justices do not have a side in these disputes. Rather, they need to be on the side of the Constitution.

Judge Roberts explained his philosophy clearly and, yes, in plain English, without using fancy words or resorting to long dissertations. By the end of last week, there was little doubt where Judge Roberts stood.

He believes that judges play a limited and modest role, and, to use his own words, “judges and Justices are servants of the law, not the other way around.”

Second, we have learned that the American people share our view that Judge Roberts will be fair, openminded, and modest as Chief Justice. We need not pass any further than the editorial pages of America’s newspapers to know that Judge Roberts has broad support.

The Los Angeles Times put it bluntly:

It will be a daunting indictment of petty partisanship in Washington, if an overwhelming majority of the Senate does not vote to confirm John G. Roberts, Jr., to be the next Chief Justice of the United States. After last week’s confirmation hearings made clear, Roberts is an exceptionally well-qualified nominee, well within the mainstream of American legal thought, who deserves broad bipartisan support. If a majority of Democrats in the Senate vote against Roberts, they will reveal themselves as nothing more than self-defeating obstructionists.

The Washington Post has offered a similar assessment:

John G. Roberts, Jr., should be confirmed as Chief Justice of the United States. He is overwhelmingly well qualified, possesses an
unusually keen legal mind and practices collegiality of the type an effective Chief Justice must have. He shows every sign of commitment to restraint and impartiality. Nomination of comparable quality have, after rigorous hearings, been confirmed nearly unanimously. We hope Judge Roberts will similarly be approved by a large bipartisan vote.

Papers from my home State of Ohio have also given Judge Roberts their approval. The Akron Beacon Journal, a paper that endorsed Al Gore in 2000, and then John Kerry in 2004, called Roberts “supremely qualified.” They went on to write:

Judge Roberts is eminently qualified. He has a sharp mind, a sound temperament, and a keen understanding of the collegiality required to run an effective Supreme Court.

According to the Cleveland Plain Dealer:

In selecting a leader for the U.S. courts, intellect and probity are far more important than predictable political philosophy. In the instance of John Roberts, it is difficult to find, even among his most committed opponents, anyone who will deny his intellectual superiority. His ethics are unimpeached. He is, by all measures, a fair mind. There is no reason to believe that he will make an outstanding Chief Justice.

The Dayton Daily News described Judge Roberts in straightforward terms:

Ya gotta like the guy. Judge John Roberts’ 3-day appearance before the Senate was impressive. Among his most committed opponents, anyone who would deny his intellectual superiority. His ethics are unimpeached. He is, by all measures, a fair mind. There is no reason to believe that he will make an outstanding Chief Justice.

The ABA Standing Committee on the Federal Judiciary, explained, Judge Roberts has “the admiration and respect of his colleagues on and off the bench. And, he is, as we have found, the very definition of openmindedness, freedom from bias, and commitment to equal justice under law.”

The ABA, by the way, includes in its criterion of judicial temperament such important qualities as compassion, openmindedness, freedom from bias, and commitment to equal justice under laws.

To be sure, over the past several months we have learned a great deal about who John Roberts is. We know about his extraordinary professional accomplishments. We have seen the overwhelming bipartisan support that he has earned from his colleagues in the legal profession. We have heard from John Roberts himself in a very eloquent defense of the rule of law. For all of these reasons, I will vote to confirm Judge John Roberts as the 17th Chief Justice of the U.S. Supreme Court, and I certainly urge my colleagues to do the same.

I yield the floor.

The PRESIDING OFFICER (Mr. AXN): The Senator from Utah.

Mr. HATCH. Mr. President, last week the Judiciary Committee gave its solid, bipartisan recommendation that the Senate confirm John G. Roberts, Jr., to be Chief Justice of the U.S. Supreme Court. The Senate should follow that recommendation with a substantial bipartisan vote supporting this exceptional nominee. As the Los Angeles Times put it when endorsing Judge Roberts, anything short of an overwhelming vote would be an indictment of petty partisanship.

I think Judge Roberts is the most analyzed and evaluated Supreme Court nominee in history. The American Bar Association, whose rating my Democratic colleagues once hailed as the gold standard for evaluating judicial nominees, completed two exhaustive reviews. Each time the ABA unanimously gave Judge Roberts its highest qualified rating.

The ABA, by the way, includes in its criterion of judicial temperament such important qualities as compassion, open-mindedness, freedom from bias, and commitment to equal justice under laws.

Judge Roberts spent almost 20 hours before the Judiciary Committee while Senators asked him 673 questions. Senators then asked him 243 more questions in writing, providing nearly 3,000 pages to the Judiciary Committee, including his published articles, congressional testimony, transcripts from interviews, speeches, and panel discussions and material related to the dozens of cases that he argued before the U.S. Supreme Court.

The Judiciary Committee obtained more than 14,000 pages of material in the public domain, including the opinions Judge Roberts authored and joined while on the U.S. Court of Appeals and legal briefs from his years at the law firm of Hogan & Hartson and as Deputy Solicitor General in the first Bush administration.

As if all of that were not enough, the Judiciary Committee obtained a staggering 82,943 pages of additional material from the National Archives and both the Reagan and Bush Libraries regarding Judge Roberts’ service in those administrations. Total that up, and we have more than 100,000 pages of material on a 50-year-old nominee. That amounts to about 2,000 pages for every year of his life.
By orders of magnitude, this is more information than any Senators have had about any previous Supreme Court nominee.

The real debate over this nomination is about the standard we should apply to the mountain of information. The standard the nominee applies reflects a particular job description, what a Senator believes judges should do in our system of government. For some Senators, it is a political job description. They see judges as playing a political role, delivering results favoring certain political interests, setting or changing policy, creating new rights, defending social progress, and blazing a trail toward justice and equality.

Not surprisingly, Senators who believe in this kind of political job description ask political questions and apply political standards during the hearing process.

During the hearing, for example, the distinguished assistant minority leader, and chairman of the Judiciary Committee, told Judge Roberts he needed to know the nominee’s personal values. Personal values are a condition for judicial service only if judges make their decisions based on their personal values, not the Constitution. Simply said, this is a political standard.

The Senator from Massachusetts, Mr. Kennedy, a former Judiciary Committee chairman, has repeatedly said that the central question is, in his words, Whose side will Judge Roberts be on when different kinds of cases come before him?

Demanding that judges take sides before cases even begin is, again, a political standard.

Last week on the Senate floor, the Senator from Massachusetts, Mr. Kerry, said he could not support Judge Roberts because, as he put it: I can’t say with confidence that I know on a sufficient number of critical constitutional issues how he would decide.

Based on support for a judicial nominee on a checklist of results, without regard for the facts or the law in each case, is a political standard.

The Senator from California, Mrs. Boxer, last week announced her opposition to Judge Roberts and described her standard by asking: Who will be the winners if we confirm Judge Roberts?

This question, of course, completely contradicts the age-old teaching of parents in California, my home State of Utah, and everywhere else that it does not matter if one wins or loses but how they play the game.

Focusing on the political correctness of a judge’s results rather than the judicial correctness of his reasoning is a political standard.

Other Senators, and I place myself squarely in this camp, use a judicial standard. We see judges as playing a judicial rather than a political role.

During his hearing, Judge Roberts properly compared judges to umpires who apply rules they did not make and cannot change to a contest before them.

Can anyone imagine conditioning an umpire’s employment on knowing before he officiates his first game which teams on the roster will win or lose? Similarly, judges must not take sides before a case begins.

Senator, who believe in a judicial job description ask judicial questions and apply judicial standards during the hearing process, and during the hearing process as well, I might add.

I want to know, for example, whether Judge Roberts believes he can make law at the particular law he would make. I want to know whether parties will win before him because the law favors their side, not because he does.

Like America’s Founders, I believe it makes all the difference for our liberty whether judges occupy a judicial or a political role in our system of government.

In the Federalist No. 78, Alexander Hamilton wrote, quoting the political will. The separation of powers is literally the lynchpin of liberty. That principle hangs on the question when there is no liberty at all if judicial power is not separated from legislative and executive power.

The separation of powers is the Constitution. If my friends really believe that there is no difference between what the Justices do across the street in the Supreme Court and what we do in this Chamber? If so, I wish them luck trying to make that case to the American people. If not, if they agree with America’s Founders and with Judge Roberts that judges are not politicians, they should vote to confirm this nomination.

Judge Roberts says judges are the servants of the law. If my friends on the other side oppose this nomination, do they believe judges are instead the masters of the law? Do they believe the Constitution governs the judicial as well as the legislative branch, if they agree with Judge Roberts that judges are instead the servants of the law? If so, if my friends really believe that there is no difference between what the Justices do across the street in the Supreme Court and what we do in this Chamber? If so, I wish them luck trying to make that case to the American people.

If my friends on the other side oppose this nomination, do they believe in impartiality and keep an open mind, then they should vote to confirm this nomination.

Judge Roberts pledged that, as he has agreed with Judge Roberts that judges should be impartial, then they should confirm his nomination.

Judge Roberts said that judges must be open to the views of their judicial colleagues. This is a mark of modesty that humility and that the parties said should characterize judges. If my friends on the other side of this nomination oppose this nomination, are they arguing that judges should not consider anyone else’s views but narrowly insist that they are always right? If so, then they should make their case to the American people. If not, if they agree with Judge Roberts that modest judges remain open to consider what others have to say, then they should vote for his nomination.

Judge Roberts told us that judges are not politicians. If my friends on the other side oppose this nomination, do they really believe that judges, and not elected legislators, should make the judgment on issues that come before them? Do they believe the Justices do across the street in the Supreme Court than in this Chamber? If so, then I urge them to try to convince the American people. If not, if they agree with America’s Founders that the Constitution governs the judicial as well as the legislative branch, if they agree with Judge Roberts that judges are not politicians, they should vote to confirm this nomination.

Judge Roberts pledged that, as he has done on the appeals court bench, he will approach every case with an open mind and consider each case on its own merits.

If my friends on the other side oppose this nomination, do they believe instead judges should have a closed mind on issues that come before them, that judges should prejudge issues in cases even before they know the facts? If so, then I urge my friends to try and convince the American people.

If not, if they agree with Judge Roberts that judges should safeguard their impartiality and keep an open mind, then they should vote to confirm this nomination.

Judge Roberts said: The role of the judge is limited, that judges are to decide the cases before them, they’re not to legislate.

If my friends on the other side oppose this nomination, do they believe instead judges have an unlimited role,
that judges should decide cases not properly before them, and that judges should do the legislating?

If so, I urge them to try to make that case before the American people.

If not, if they share Judge Roberts’ views that the proper limited judicial role, then they should vote to confirm this nomination.

Judge Roberts said judges must decide cases—and I am quoting him again—judges must decide cases: according to the rule of law, not their own personal preferences or policy views rather than the rule of law?

If so, again, they should make this case to the American people.

If not, if they agree with Judge Roberts that the rule of law trumps a judge’s personal views, then they should vote to confirm this nomination.

Judge Roberts said when Congress enacts a statute, we do not expect judges to substitute their judgment for ours but to implement our view of what we are accomplishing. If my friends on the other side oppose this nomination, are they instead saying judges should substitute their judgment for ours?

If so, again, they should make that case to the American people.

If not, if they agree with Judge Roberts that Congress’s intent should prevail regarding Congress’s own statutes, then they should vote to confirm this nomination.

Judge Roberts said:

I don’t think the Court should be the taskmaster of Congress. I think the Constitution is the Court’s task master and it’s Congress’s task master as well.

That was said on September 14 of this year.

If my friends on the other side oppose this nomination, do they believe judges should decide cases based on their personal preferences or policy views rather than the rule of law?

If so, they should vote to confirm this nomination.

Judge Roberts told us the Bill of Rights does not change during times of war or crisis. If my friends on the other side oppose this nomination, are they arguing for setting aside the Bill of Rights in times of war or crisis?

If so, then they should make their case to the American people.

If not, if they agree with Judge Roberts that the Bill of Rights nor a judge’s obligation to uphold the rule of law is suspended in a time of war or crisis, then they should vote to uphold this nomination.

I want to quote Judge Roberts again because his particular words are very important. He said:

If the Constitution says that the little guy should win, well, then, the big guy is going to win, because my obligation is to the Constitution.

He said that on September 15 of this year.

If my friends on the other side oppose this nomination, are they arguing that whoever the little guy might be must win, regardless of what the facts and regardless of what the law requires? Are they saying judges should disregard their oaths to do justice without respect to persons?

If so, I will be watching with great expectation as they try to make that case to the American people.

If not, if they agree with Judge Roberts that the law, not the judge, determines who wins, if they agree with Judge Roberts that the judge’s obligation is to the Constitution and not to a particular side, then they should confirm this nomination.

These examples show the type of judge John Roberts is on the appeals court, the kind of Justice John Roberts will be on the Supreme Court. Judge Roberts knows the difference between political and as a justice he must settle legal disputes by interpreting and applying law and leave the politics to the politicians.

We have all the information we need about this exceptional nominee. If we apply a judicial standard rather than a political standard, the Senate will confirm him as the Nation’s 17th Justice overwhelmingly and without delay.

Judge Roberts is one of the finest nominees ever to come before the Congress of the United States, and in particular the Senate confirming body. Not only was he an excellent student, graduating from Harvard in only 3 years as an undergraduate, but he became the top graduate in law school and the editor in chief of the Harvard Law Review, a position everybody in this Chamber has to respect and admire.

He also served as a clerk for Judge Friendly, one of the greatest circuit court judges this country has ever seen. He served as a clerk for Chief Justice Rehnquist.

I was impressed at the Rehnquist funeral to see some 95 former clerks paying respect to their Justice Rehnquist, some of whom were my fellow Utahns. He then worked in the White House counsel’s office as a young man and served with distinction there. He then went on to become Deputy Solicitor General of the United States and did a terrific job while there. He rose to become one of the top partners in one of the best law firms in the country and argued 39 cases before the U.S. Supreme Court. Hardly anybody can make that claim today.

I have asked various Justices on the Supreme Court who they consider to be the best appellate lawyer to appear before them, and invariably the name John Roberts comes up from the Justices themselves.

They say that Justice Stevens is overjoyed that John Roberts is going to join them on the Court because he has such respect for John Roberts.

I have to say in 20 hours of testimony, how could anybody vote against him? I have to say also it concerns me that there will be some who will. I suggest if they would vote against Judge Roberts for the Supreme Court, then I doubt sincerely there is any nominee this President could put forth they would vote for, and that is a sorry case and I think a sad indictment.

I urge everybody in this body to vote for this outstanding nominee for Chief Justice of the United States.

In doing so, I don’t disagree with what justices is going to be sorry afterward. Yes, I believe him to be conservative. Yes, I believe he is not going to be an activist on the bench. Yes, I believe he will honor and sustain the law—and I know one thing: he is going to teach the law as intelligently as any person who has ever been nominated to the Supreme Court. I think people who watched those hearings have to come to the same conclusion. If they do, then hope our colleagues who have announced they are going to vote against him will change their mind, do what is right, and vote for him.

Remember, when now Justices Ginsburg and Breyer came before this body, I was the leader on the Judiciary Committee. I have to say, we Republicans all knew both of those now Justices were social liberals, that they disagreed with many of the things we believed and we disagreed with many of the things they believed. But they were both qualified and they were put forth by the then President of the United States. President William Jefferson Clinton. And Presidents deserve respect on these nominations.

Justice Ginsburg was confirmed on a vote of 96 to 3, and I believe Justice Breyer was confirmed on a vote of 87 to 9, which means virtually every Republican voted for both of them. We did take the political way. I have to say I don’t think others should take it here in this case with this person who everybody acknowledges is exceptionally well qualified, including the American Bar Association.

I recommend everybody vote for Judge Roberts, and in the end you are going to be able to go to sleep at night knowing you did the right thing.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. JOHNSON. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.
Mr. JOHNSON. Mr. President, I come to the Chamber today to discuss the nomination of Judge John G. Roberts to be Chief Justice of the United States.

Last week, the Senate Judiciary Committee approved the nomination of Judge Roberts to be the next Chief Justice of the United States by a 13-to-5 margin. This came after weeks of exhaustive research by the Judiciary Committee and a thorough set of hearings.

While I wish the White House would have been more cooperative during the process by releasing a more comprehensive set of documents relating to Judge Roberts’ work in the executive branch, I do believe the committee hearings were conducted in a fair and dignified manner, and I do have some understanding of where Judge Roberts’ judicial views fall within the political spectrum.

After careful review of Judge Roberts’ testimony and the information prepared by the Judiciary Committee, I have come to the conclusion that Judge Roberts should be confirmed by the Senate to be Chief Justice of the U.S. Supreme Court. It is my intention to vote in favor of his confirmation when his nomination comes for a full vote before the Senate later this week. There are few decisions of greater consequence that I will ever be asked to make than whether to approve an individual for a lifetime appointment as Chief Justice of our Nation’s highest Court. While Judge Roberts is no abortionist, his confirm- taintly Judge Roberts will conduct himself as Chief Justice when he is confirmed, it is my belief that he appears to be a thoughtful and respected jurist who possesses integrity and great legal skills. I see no reason to believe that the nominee is an ideologue or otherwise outside the broad mainstream of contemporary conservative legal thinking. In addition, it is important to note that with the confirmation of Judge Roberts to replace Chief Justice Rehnquist, the balance of the Court will be maintained.

It is the prerogative of the President to nominate whomever he sees fit to lifetime appointments to the Federal judiciary, so it should come as no surprise that President Bush has nominated a conservative jurist such as Judge Roberts for the Supreme Court. While I have voted against President Bush’s nominees to the lower federal courts on most number of instances, I have voted roughly 200 times to confirm judicial nominees who I believed were conservative Republicans of great legal skill and who deserved bipartisan respect. With the nomination of Judge Roberts, I am once again prepared to support a qualified, conserva-judicial nominee. However, with this vote I also send a message to President Bush that I hope his nominee to fill the vacancy of retiring Associate Justice O’Connor will as well be a person of great legal skill and who has the ability to garner strong bipartisan support.

In my home State of South Dakota, we have seen difficult and polarizing political battles over the past few years. I believe South Dakotans as well as all Americans desire a bipartisan centrist approach to government. Our Nation is governed best when it is governed from the broad bipartisan mainstream but not by the extremes of the political far left or far right. I encourage President Bush to nominate someone for Justice O’Connor’s seat who will further unite the citizens of our great Nation rather than drive a political wedge between them. The proper legal foundation for America is found in the broad mainstream of contemporary jurisprudence. It is my hope that Judge Roberts will unite Americans and serve the Supreme Court in a fair and prudent and centrist manner.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BENNETT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

UNANIMOUS CONSENT AGREEMENT—EXECUTIVE CALENDAR NO. 1

Mr. BENNETT. Mr. President, on behalf of the leader, I ask unanimous consent that at 5:30 today the Senate proceed to executive session to consider the following treaty on Today’s Executive Calendar: No. 1. I further ask unanimous consent that the treaty be considered as having passed through its various parliamentary stages up to and including the presentation of the resolution of ratification, that any committee conditions, declarations, or reservations be agreed to as applicable, that any statements be printed in the RECORD, and that at 5:30 today the Senate vote on the resolution of ratification; further that when the resolution of ratification is voted upon, the President be notified of the Senate’s action.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BENNETT. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will please call the roll.

The legislative clerk proceeded to call the roll.

Mr. BURNS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROTOCOL OF AMENDMENT TO THE INTERNATIONAL CONVENTION ON SIMPLIFICATION AND HARMONIZATION OF CUSTOMS PROCEDURES—TREATY DOCUMENT 108-6

The PRESIDING OFFICER. Under the previous order, the clerk will report the treaty.

The legislative clerk reads as follows:

Resolution of advice and consent to ratification to accompany Treaty Document 108-6, Protocol of Amendment to the International Convention on Simplification and Harmonization of Customs Procedures.

Mr. BURNS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is, Will the Senate advise and consent to the ratification of the treaty?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. The following Senators were necessarily absent: the Senator from Louisiana (Mr. VITTER), the Senator from Florida (Mr. MARTINEZ), the Senator from Texas (Mr. CORNYN), the Senator from Kansas (Mr. BROWNBACK), the Senator from North Carolina (Mr. Burr), the Senator from Nebraska (Mr. HAGEL), and the Senator from Texas (Mrs. HUTCHISON).

Further, if present, and voting, the Senator from Louisiana (Mr. VITTER), the Senator from Florida (Mr. MARTINEZ), and the Senator from Texas (Mr. CORNYN) would have voted "yea."

Mr. DURBIN. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from New Jersey (Mr. CORZINE), the Senator from Iowa (Mr. HARKIN), the Senator from Louisiana (Ms. LANDRIEU), the Senator from Florida (Mr. NELSON), and the Senator from Massachusetts (Mr. STABENOW) are necessarily absent.

The PRESIDING OFFICER (Mr. THUNE). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 87, nays 0, as follows:

[Rollcall Vote No. 242 Ex.]

YEAS—87

Akaka

Alexander

Allard

Allen

Baucus

Bayh

Bennett

Bingaman

Bond

Boxer

Bunning

Burns

Byrd

Cantwell

Carper

Chafee

Chambliss

Clinton

Coburn

Conrad

Craig

Crapo

Curley

Daschle

DeMint

DeWine

Dodd

Dole

Domenici

Dorgan

Durbin

Enzi

Feingold

Feinstein

Frist

Graham

Grassley

Gregg

Hatch

Inhofe

Inouye

Isakson

Johanned

Johnson

Kennedy

Kerry

Kyl

Levin

Lieberman

Lincoln

Lott

Lucar

McCain

McConnell

Mikulski

Markowski

Murray

Nelson (FL)

Obama

Pryor

Reed

Roberts

Rockefeller

Salazar

Santorum

Sarbanes

Schumer

Sensenbrenner

Shelby

Smith

Specter

Stevens

Sununu

Talent

Thomas

Thomas

Voinovich

Warner

Wyden

NOT VOTING—19

Biden

Brownback

Burr

Cochran

Collins

Conrad

Couric

Corry

CORNYN

CORNELIA

Dodd

Hagel

Harkin

Hutchison

Inouye

Martinez

The PRESIDING OFFICER (Mr. THUNE). On this vote, the yeas are 87,