Senator FRIST, our leader, deserves praise as he returned briefly to his earlier career as Dr. FRIST. I truly admire his courageous efforts to provide medical care in the early days at the makeshift hospital at the New Orleans airport.

Friday was not a one-time visit; it was just one day, but it will be a day I will not forget. We will not simply move on to a new issue tomorrow. This wound in our Nation runs deep, and our response must be equal to the task. The hurricane destroyed communities, but it did not and could not destroy their spirit. They will rebuild, and we will help them to the very best of our ability, because in the end, we are one Naion, one people, one family. It is in this way that we can best tap the true wealth of Nation. We must get it right.

Mr. KENNEDY. Mr. President, I ask unanimous consent to be able to proceed for 4 more minutes.

The PRESIDENT pro tempore. Without objection, it is so ordered.

SANDY FELDMAN

Mr. KENNEDY. Mr. President, I am sad to inform the Senate of the passing of a true giant in the world of education, Sandy Feldman, who headed the American Federation of Teachers. Sandy was a fighter for schoolchildren every day of her very productive life. She was determined to make a difference, especially to the millions of disadvantaged children in our schools—and she did. She inspired some many young people to become teachers. She helped them understand that teaching was not just a job, but it was a calling.

Sandy, you leave a proud and rich legacy. You will be an inspiration to students and teachers for many years to come.

We love you, and you will be missed but never, ever forgotten.

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

The PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll

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

The PRESIDENT pro tempore. Without objection, it is so ordered.

NOMINATION OF JUDGE JOHN G. ROBERTS, JR.

Mr. SPECTER. Mr. President, I have sought recognition to speak about the confirmation of Judge John G. Roberts, Jr., to be Chief Justice of the United States.

Mr. President, no vote cast by a Senator in this body is more important than a vote cast on the confirmation of a Supreme Court Justice, with the exception of a declaration of war, or a resolution authorizing the use of force.

The confirmation process for Chief Justice is obviously somewhat more important than that for Associate Justice. It is even more important in the context of Judge Roberts who is 50 years old and has the potential to serve for decades in that very key position, as the second youngest Chief Justice in the history of the country and the 17th Chief Justice in our Nation's history.

Judge Roberts comes to this position with an extraordinary academic record—3-year graduate of Harvard College summa cum laude, magna cum laude in the Harvard Law School, and an illustrious career in private practice and government service. He argued some 39 cases before the Supreme Court of the United States.

We have examined some 76,000 documents. We have looked at his participation in some 327 cases in the Court of Appeals for the District of Columbia Circuit, where he was confirmed by the Senate 2 years ago by unanimous consent. We have seen his briefs in the Solicitor General's Office, and we have heard some 31 witnesses regarding his nomination. These included a witness from the American Bar Association, which rated him unanimously well qualified, the highest recommendation possible. The remaining thirty witnesses, who were chosen equally by the Democrats and the Republicans, testified at length about Judge Roberts' career. We know a great deal about Judge Roberts.

Based on all of these proceedings, including 17 hours of testimony before the committee, it is my judgment he is well qualified to be Chief Justice of the United States. I intend to vote aye when his nomination is called before the Senate.

He has taken a position that a judge should be modest and should look for stability in the law. On a number of occasions in his testimony before the committee, he emphasized the point that judges are not politicians and that judges ought not inject their own personal views into the law.

He commented about the flexibility of the law, saying that principles such as equal protection and due process were meant to last through the ages and have a flexible quality. 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 accept the specific language of Justice John Marshall Harlan II that the Constitution is a living thing, he did testify that the language of liberty and due process has broad meaning as applied to evolving societal conditions.

He talked very directly when questioned about the right of privacy. He said that Griswold v. Connecticut, which established the right of privacy, was correctly decided. That case overturned the state law prohibiting the use of contraceptives for married people. He also said the holding of Griswold would apply to single people as well as to married people under the Eisenstadt decision.

When it came to the critical question of Roe v. Wade, I did not ask him whether he would affirm or reject the Roe doctrine. I did not do so because I believe it is inappropriate to ask a nominee how he would decide a specific case.

As chairman, it was my view that any member could ask the nominee any question that the member chose to, and the nominee would be free to respond as he chose. Beyond refraining from specifically asking whether he would affirm or overrule Roe v. Wade, others and I questioned him extensively about the import of stare decisis, the Latin term meaning ''let the decision stand.'' He emphasized that stare decisis was a very important principle in the law and that even where a justice might consider Roe wrongly decided, it takes more to overturn a precedent than simply to conclude it was wrongly decided initially. Because—and this is Arlen Specter speaking, not Judge Roberts—where the case has stood for some 32 years and has been reaffirmed most emphatically in Casey v. Planned Parenthood, it has become, as some have called it, a super precedent.

I then made the point that the Supreme Court had taken up the issue so that Roe could have been reversed, overruled on some 38 occasions. Should it come before the Court again, perhaps the balance of the 38 cases would make super-duper precedent to uphold Roe.

The question remains as to how he will rule. Nobody knows that for certain.

The one rule that seems to be the most prevalent one is the one of surprise. He testified extensively about his concern for civil rights. He talked about affirmative action. He agreed with Justice O'Connor that the impact of the people in the practical everyday world was of considerable importance. I questioned him about his participation in the case of Romer v. Evans, where he lent some counsel to the lawyers who were arguing the case involving gay rights and he participated in support of gay rights.

His partner at Hogan and Hartson, Walter Smith, had this to say about Judge Roberts' participation in that case. Mr. Smith said that ''every good lawyer knows that if there is something in his client's cause that so personally offends you morally, ligiously, or if it so offends you that you think it would undermine your ability to do your duty as a lawyer, then you shouldn't take it on, and John wouldn't have. So at a minimum he had no concerns that would rise to that level.''

I then asked Judge Roberts if he agreed with Mr. Smith's analysis and if he would have refrained from helping in that situation, and he said: ''I think it's right that if it had been something morally objectionable, I suppose I would have.''

His support of gay rights is not an insignificant consideration in our evaluation of his views of civil rights.

Judge Roberts made quite a point of contending that he had answered more

questions than most, and I think to some extent he did. He articulated the standard that he would answer the questions unless the case was likely to come before the Court. Some of his predecessors have refused to answer any questions at all.

As I have said, from time to time, when Justice Scalia appeared before the Judiciary Committee, he wouldn't answer much. Even prisoners of war are compelled to give their name, rank, and serial number; Judge Scalia would only give his name and rank. He wouldn't give his serial number. I say that in a metaphor. Justice Scalia would not say if he would uphold Marbury v. Madison, which is an 1803 decision establishing the supremacy of the Supreme Court, the duty of the Supreme Court, and the responsibility and authority of the Court to interpret the Constitution.

Judge Roberts did comment on Griswold and Eisenstadt and quite a number of specific cases as he went along. There were some cases where he would not answer where I candidly thought he should have answered, but my rule is that the Senator asks the questions, the nominee responds, and it is a political judgment as to whether the nominee has responded sufficiently to warrant or merit confirmation or the Senator's vote.

For some time now, I have expressed my concern, a concern which was shared by the distinguished Senator from Ohio, Senator DEWINE, who now occupies the chair of the Presiding Officer. Senator DEWINE raised a line of questions, as I did. I raised a question about the case of United States v. Morrison where the Supreme Court declared part of the legislation unconstitutional, legislation designed to protect women against violence. I pointed to the very extensive record on surveys in 21 days and 8 separate reports. The Court, in a 5-to-4 decision, determined that the legislative record was insufficient, but it seemed to me that it was probably the case that the record was more than sufficient. This is what I consider to be an encroachment on congressional authority. The majority opinion, after reviewing that record, said it was insufficient because they disagreed with the congressional ''method of reasoning.''

The question I have about that is, Who are they—the Supreme Court Justices—to say that their ''method of reasoning,'' is superior to ours? What happens when you leave the columns of the Senate, which are directly aligned with the columns of the Supreme Court, and walk across the green? Is there some superiority of competency there? The dissent pointed out that the majority opinion was saying that there was some sort of unique judicial competence on the method of reasoning. The inference there is that there is some congressional incompetence. I reject that. And I believe the Constitutional separation of powers rejects that.

Where there is an expansive record, as we had in United States v. Morrison, it ought to have been upheld. It is a derogation of congressional authority and insulting to question our method of reasoning.

I asked him about the two cases where the Supreme Court interpreted the Americans With Disabilities Act 3 years apart, 2001 and 2004. In Garrett v. Alabama, by a 5-to-4 decision, the Court ruled unconstitutional the part of the Americans with Disabilities Act which protected against discrimination in employment; and then, 3 years later, in Tennessee v. Lane, again by a 5-to-4 vote, the Supreme Court upheld the application of the section of the Americans With Disabilities Act concerning access to public accommodations for a paraplegic who had to crawl up the steps to get to a courtroom. The records were identical as to both of the sections in the same act. You had the same voluminous record presented.

In dissent, in the Lane case, Justice Scalia called it a ''flabby test.'' He said that where the Court has used a standard of what they called ''congruence and proportionality,'' that it was ill-advised. Justice Scalia said the Court was really making itself the taskmaster of the Congress and, in effect, treating us like schoolchildren.

Now, where did this test, ''congruence and proportionality,'' come from? It came out of thin air. In 1997, in the Boerne case where the Court declared the Religious Restoration Act unconstitutional, they came up with this test which has not a scintilla of objective meaning. How can the Congress figure out what it is that the Supreme Court has in mind? They go 5 to 4 on one title of the Americans with Disabilities Act and 5 to 4 the other way on another title of the Americans with Disabilities Act. Frankly, I thought the committee and the Senate were entitled to answers on those questions, but Judge Roberts declined to answer.

That is a work in process. We are not putting that one down. There are some things which the Congress can do about that to assert congressional power, and it will be pursued.

On the issue of Judge Roberts being Chief Justice, it is an intriguing prospect for a man of 50 to take over the Court where Judge Stevens is 35 years his senior; Justice Scalia is 18 years his senior; even Justice Thomas, the youngest of those on the Court at the moment, is 7 years his senior. I asked Judge Roberts about that, both in the informal session in my office and in the Senate hearing. He described his work as being an advocate before the Court as a ''dialogue among equals.'' I thought that was a fascinating evaluation.

In the Supreme Court—and I have had occasion to be there three times—a lawyer stands on one level, and the Court is on a higher level. I do not exactly perceive it personally as a dialogue among equals, but I consider it fascinating that he did. Perhaps when you have been there 39 times, the level of inequality levels out. But he has an opportunity, from his vantage point, knowing the Justices, as he does, having been there so long, and having been a clerk for Justice Rehnquist when he was an Associate Justice back in 1980, to do something about these 5-to-4 decisions.

There was a discussion about what Chief Justice Earl Warren did in bringing the Court together. When he was appointed Chief Justice in 1953, he molded a unanimous opinion in Brown V. Board of Education—if not the most important case in the Court's history certainly one of the most important cases, and one of the most contentious cases.

However today we see a plethora of 5-to-4 decisions—a recent case involving the Americans with Disabilities Act being one illustration, but there are many others; you had the Ten Commandments cases this year where the Court said it was OK for the State of Texas to have the Ten Commandments on a tower but unconstitutional for Kentucky to display the Ten Commandments indoors, in two decisions whose results absolutely defy logic or are inexplicable.

I have also been troubled by the modern tendency to have so many concurrences and dissents. Before the Judiciary Committee held hearings regarding the detainees at Guantanamo Bay, I read three Supreme Court opinions from June of 2004. They were a maze of confusion as you tried to work your way through them. One was a plurality opinion. Only four Justices could agree. They did not have the opinion of the Court, and the other cases were replete with multiple opinions as well.

Currently you have a situation where Justice A will write a concurring opinion, joined by Justice B; and then Justice B will write a concurring opinion, joined by Justice A and Justice C. You wonder, why so many opinions? Judge Roberts commented and testified he thought that was a matter the entire Court should work on, and certainly one he would pledge to work on himself.

The subtle ''minuet'' of the confirmation hearings for Judge Roberts turned bombastic and contentious at times, but he always kept his cool and responded within reasonable parameters. The Judiciary Committee and the full Senate cannot be guarantors that Judge Roberts will fulfill our's or anyone's expectations. The Court's history is full of Justices who have surprised or disappointed their appointers or inquisitors. But the process has been full, fair, and dignified.

I think Judge Roberts went about as far as he could go in answering the questions and declining to answer questions on cases likely to come before the Supreme Court. When you consider all of the factors—his academic record, his professional record, his record on the court of appeals, the witnesses who testified who have known him intimately—it is my judgment he is well

qualified and should be confirmed as the next Chief Justice of the United States, the 17th Chief Justice of the United States. When the roll is called, I intend to vote yea.

I ask unanimous consent that the full text of my statement be included in the RECORD.

The PRESIDENT pro tempore. Without objection, it is so ordered.

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

FLOOR STATEMENT OF SENATOR ARLEN SPECTER ON THE NOMINATION OF JUDGE JOHN ROBERTS TO BE CHIEF JUSTICE OF THE UNITED STATES

After listening to Judge John Roberts testify for nearly 17 hours and then hearing from 31 witnesses, some for and some against his nomination, I have decided to vote to confirm him to be Chief Justice of the United States.

Except for a declaration of war or its virtual equivalent, a resolution for the use of force, no Senate vote is more important than the confirmation of a Supreme Court justice; and this vote has special significance because it is for Chief Justice and the nominee is only 50 years old with the obvious potential to serve for decades.

Judge Roberts comes to the committee with impeccable credentials. He was graduated summa cum laude from Harvard College in only 3 years, and magna cum laude from the Harvard Law School. Following his graduation from law school, Roberts obtained prestigious clerkships with Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit and then Associate Justice William H. Rehnquist.

Judge Roberts subsequently embarked on a distinguished career in public service, serving as an Associate White House Counsel in the Reagan administration and Principal Deputy Solicitor General in the George H.W. Bush administration. While in the Solicitor General's Office and then in private practice with the firm of Hogan & Hartson, Judge Roberts argued 39 cases before the U.S. Supreme Court, earning a reputation as one of the finest appellate advocates in the Nation.

When Judge Roberts was appointed to his current position on the U.S. Court of Appeals for the D.C. Circuit, he earned the highest rating from the American Bar Association and enjoyed broad bipartisan support in being confirmed by unanimous consent.

A threshold question, beyond his academic and professional qualifications is how a man at 50 from outside the Court can effectively function as Chief Justice. His previous clerkship on the Court and the 39 cases he has argued there give him an intimacy with the Court that few outsiders enjoy. He knows the Court and the other Justices know him. Concerned about his relative youth, I questioned Judge Roberts about how he would feel becoming Chief Justice of a Court where one member was 35 years his senior, and the next youngest, still some 7 years older. Judge Roberts' answer impressed me. He said that, while in private practice, he approached his arguments before the Court as a ''dialogue of equals.'' When he viewed oral arguments in that light, considering himself to be their equal, he projected the kind of confidence that he would be comfortable and consider himself up to the job of Chief, who is the ''first among equals.''

I also questioned him about the role the Chief Justice should play in bringing about consensus on the Court. I have been troubled by the numerous 5 to 4 decisions and the proliferation of concurrences and plurality opinions that often leave lower courts, lawyers, and litigants wondering about what the Court actually held. I therefore asked:

''Judge Roberts, let me [ask about] the ability which you would have, if confirmed as Chief Justice, to try to bring a consensus to the Court. You commented yesterday about what Chief Justice Warren did on *Brown v. Board of Education*, taking a very disparate Court and pulling the Court together. As you and I discussed in my office, there are an overwhelming number of cases where there are multiple concurrences. A writes a concurring opinion in which B joins; then B writes a concurring opinion in which A joins and C joins. In reading the trilogy of cases on detainees from June of 2004 to figure out what we ought to do about Guantanamo, it was a patchwork of confusion. I was intrigued by the comment which you made in our meeting about a dialogue among equals, and you characterized that as a dialogue among equals when you appear before the Court, and they are on a little different level over there. Tell us what you think you can do on this dialogue among equals to try to bring some consensus to the Court to try to avoid this proliferation of opinions and avoid all these 5–4 decisions. . . .''

Judge Roberts responded:

''I . . . think . . . it's a responsibility of all of the Justices, not just the Chief Justice, to try to work toward an opinion of the Court. The Supreme Court speaks only as a Court. Individually, the Justices have no authority. And I do think it should be a priority to have an opinion of the Court. You don't obviously compromise strongly-held views, but you do have to be open to the considered views of your colleagues, particularly when it gets to a concurring opinion. I do think you do need to ask yourself, what benefit is this serving? Why is it necessary for me to state this separate reason? Can I go take another look at what the four of them think or the three of them think to see if I can subscribe to that or get them to modify it in a way that would allow me to subscribe to that, because an important function of the Supreme Court is to provide guidance. . . . I do think the Chief Justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed.''

SPECTER QUESTIONING, SEPT. 14, 2005

Given the unusual combination of his qualifications and experience, including extensive personal contact with the other justices, he has the unique potential to bring consensus to the Court and to reduce the numerous repetitious and confusing opinions.

The Judiciary Committee conducted a thorough and fair confirmation hearing for Judge Roberts. He answered questions before the committee for nearly 17 hours. Committee members, both Democrats and Republicans, stated the hearings were conducted in a fair manner with ample time for questions. Although historically the majority party reserves more witnesses for itself than it grants to the minority party, I made the decision to break with precedent and divide the number of witnesses evenly between the parties—1 neutral witness from the ABA, 15 witnesses chosen by the majority, and 15 witnesses chosen by the minority. This testimony, combined with Judge Roberts's extensive record—76,000 pages of documents from his service in the Reagan and Bush administrations, 327 cases decided by Judge Roberts while on the D.C. Circuit, thousands of pages of legal briefs from Judge Roberts's service in the Solicitor General's Office and in private practice, and dozens of articles and interviews by Judge Roberts—provided the committee and now the full Senate ample basis to evaluate Judge Roberts's qualifications to serve as Chief Justice of the United States.

During his hearing, Judge Roberts addressed a wide variety of subjects. On the key issue of whether the Constitution is a static document or one which has the flexibility to adapt to changing times, he said ''they (the framers) were crafting a document that they intended to apply in a meaningful way down the ages.'' While he would not accept Justice Harlan's language of a ''living thing,'' he testified that the language of ''liberty'' and ''due process'' have broad meaning as applied to evolving societal conditions.

At the same time, however, he did not answer all the questions I would have liked him to respond to. I questioned Judge Roberts closely about his views with respect to congressional authority to remedy discrimination under the 14th amendment. I asked him how the Supreme Court could possibly have struck down the private remedy the Congress created in the Violence Against Women Act in view of the extensive congressional record, which—

''showed that there were reporters on gender bias from the task force in 21 States and eight separate reports issued by Congress and its committees over a long course of time . . . there was a mountain of evidence.''

SPECTER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

In light of that record, I asked:

''What more does the Congress have to do to establish a record that will be respected by the Court? . . . Isn't that record palpably sufficient to sustain the constitutionality of the Act?''

SPECTER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

Judge Roberts, however, declined to comment, explaining that ''. . . I don't want to comment on the correctness or incorrectness of a particular decision.''

SPECTER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

Although I pushed him to answer my question, observing that the case was long over, and the specific facts unlikely to come before the Court again, Judge Roberts declined to answer because of his view that:

''the particular question you ask about the adequacy of findings . . . is likely to come before the Court again. And expressing an opinion on whether the Morrison case was correct or incorrect would be prejudging those cases that are likely to come before the Court again.''

SPECTER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

In fact, the most Judge Roberts would say is that:

''the appropriate role of a judge is a limited role and that you do not make the law, and that it seems to me that one of the warning flags that should suggest to you as a judge that you may be beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings, because that doesn't look like a judicial function. It's not an application of analysis under the Constitution. It's just another look at findings.''

SPECTER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

On the very important question of conflict between the Congress and the Supreme Court, I was dissatisfied with his responses on the Court's derogation of Congress' ''method of reasoning'' and the Court's recent improvisation of the meaningless ''congruence and proportionality'' standard. In discussing the Americans with Disabilities

Act, I pointed out to him the problem of the Court issuing 5 to 4 decisions in two cases with identical records going entirely opposite ways within 3 years. With respect to the *Garrett* case, where Ms. Garrett, who had breast cancer, sought relief under the ADA for employment discrimination, I explained:

''The Court in 2001 said that the title of the Disabilities Act was unconstitutional, 5–4, on employment discrimination. Then 3 years later, you have the case coming up of Lane, the paraplegic crawling up the steps, accommodations, 5–4, and the Act is upheld.''

Yet, ''the record in the case was very extensive—13 congressional hearings, a task force that held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination.''

Despite these extensive factual findings, however, the Court employed the ''congruence and proportionality'' test, a test Justice Scalia criticized as ''flabby,'' to strike down a portion of the act.

I asked Judge Roberts:

''Isn't this congruence and proportionality test, which comes out of thin air, a classic example of judicial activism . . .?''

Judge Roberts acknowledged the applicable precedents, but when asked whether he agreed with Justice Scalia's sentiments, stated:

''I don't think it's appropriate in an area—and there are cases coming up, as you know, Mr. Chairman. There's a case on the docket right now that considers the congruence and proportionality test.''

He declined to answer the question. He did, however, state that:

''If I am confirmed and I do have to sit on that case, I would approach that with an open mind and consider the arguments. I can't give you a commitment here today about how I will approach an issue that is going to be on the docket within a matter of months.''

SPECTER QUESTIONING, WEDNESDAY, SEPT. 14, 2005

Although I was disappointed that Judge Roberts did not answer some of my questions, still, I believe that he went somewhat beyond the usual practice of answering just as many questions as he had to in order to be confirmed. Many nominees decline to answer if the issue could theoretically or conceivably come before the Court.

Judge Roberts, however, went further, testifying:

''And the great danger of courts that I believe every one of the Justices has been vigilant to safeguard against is turning this into a bargaining process. It is not a process under which Senators get to say I want you to rule this way, this way, and this way. And if you tell me you'll rule this way, this way, and this way, I'll vote for you. That is not a bargaining process. Judges are not politicians. They cannot promise to do certain things in exchange for votes. . . . Other nominees have not been willing to tell you whether they thought *Marbury* v. *Madison* was correctly decided. They took a very strict approach. I have taken what I think is a more pragmatic approach and said if I don't think that's likely to come before the Court, I will comment on it . . . it is difficult to draw the line sometimes. But I wanted to be able to share as much as I can with the Committee in response to the concerns you and others have expressed, and so I have adopted that approach.''

SCHUMER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

Judge Roberts explained:

''If I think an issue is not likely to come before the Court, I have told the Committee what my views on that case were, what my views on that case are.''

KYL QUESTIONING, SEPTEMBER 14, 2005

Of course, as with all nominees, there are circumstances in which it would be inappropriate for Judge Roberts to take a position. Since I believe it is inappropriate, for example, to ask about an issue realistically likely to come before the Court, I did not ask whether he would sustain or overrule *Roe* v. *Wade*. Instead, I asked about his views on stare decisis, or precedents, and what factors—how long ago decided, stability, reliance, legitimacy of the Court—he might rely on to decide whether he would vote to depart from a precedent.

In addressing his respect for stare decisis, Judge Roberts explained:

''I would point out that the principle goes back even farther than Cardozo and Frankfurter. Hamilton, in *Federalist No. 78*, said that, 'To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents.' So even that far back, the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, the appearance of integrity in the judicial process.

SPECTER QUESTIONING, SEPT. 13, 2005

When I inquired about his application of these principles to *Roe*, he noted that, ''it's settled precedent of the court, entitled to respect under principles of stare decisis.'' When I pressed Roberts to explain what he meant by that in the context of *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, where the Court said: ''that to overrule *Roe* would be a 'surrender to political pressure,' and 'would subvert the Court's legitimacy,'' he explained that ''as of 1992, you had a reaffirmation of the central holding in *Roe*. That decision, that application of the principles of stare decisis, of course, itself a precedent that would be entitled to respect under those principles.''

I called Judge Roberts' attention to the fact that *Casey* had been labeled a superprecedent because different judges had reaffirmed *Roe* after almost two decades. I then suggested that, since the Supreme Court did not overrule *Roe* when it had the opportunity to do so in 38 subsequent cases, it was entitled to classification as a ''super-duper precedent.'' Again, he was noncommittal.

Judge Roberts consistently reiterated his commitment to modesty in the law and the importance of stare decisis by explaining:

''I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions—it is not enough that you may think the prior decision was wrongly decided.''

SPECTER QUESTIONING, WEDNESDAY, SEPTEMBER 14, 2005

Notwithstanding his answers and my efforts to glean some hint or realistic expectation from his words and body language, candidly it is not possible to predict or have a solid expectation of what Judge Roberts would do. If there is a rule on expectations, it is probably one of surprise. Professor Charles Fried, a professor of constitutional law at Harvard Law School who thought *Roe* was wrongly decided, testified that he did not think Judge Roberts would or should vote to overrule *Roe*.

The Washington Post editorial of September 15 had some comfort from Judge Roberts' testimony:

''While he declined to address the merits of *Roe* v. *Wade*, he did indicate that it is a decision to which *stare decicis* consideration properly apply. Importantly, he said several times that the subsequent decisions in *Planned Parenthood* v. *Casey* which reaffirmed *Roe's* core principle—was independently entitled to be treated as a precedent. That implies that there would be a heavy burden for the court in upsetting abortion rights now.''

Nevertheless, Judge Roberts did engage the committee on several important related issues. With respect to the right of privacy, for example, I asked him directly:

''Do you believe that the right to privacy—do you believe today that the right to privacy does exist in the Constitution?''

Roberts was forthright in his response, declaring:

''Senator, I do. The right to privacy is protected under the Constitution in various ways . . . the Court has, with a series of decisions going back 80 years that personal privacy is a component of the liberty protected by the Due Process Clause.''

RESPONSE TO SPECTER QUESTIONING, SEPTEMBER 13, 2005

Similarly, in response to Senator Biden, who asked the pointed question: ''Do you agree that there is a right of privacy to be found in the Liberty Clause of the 14th Amendment?'' Roberts responded:

''I do, Senator. . . . Liberty is not limited to freedom from physical restraint. It does cover areas . . . such as privacy, and it's not protected only in procedural terms but it is protected substantively as well.''

BIDEN QUESTIONING, SEPTEMBER 13, 2005.

In fact, Judge Roberts was unequivocal in his support for a right of privacy, asserting that:

''I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, that it includes certain other protections, including the right to privacy.''

BIDEN QUESTIONING, SEPTEMBER 14, 2005.

But Judge Roberts did not limit himself to finding simply a general right to privacy. He also testified as to his commitment to *Griswold* v. *Connecticut*. Senator KOHL, in particular, asked:

''Judge, the *Griswold* v. *Connecticut* case guarantees that there is a fundamental right to privacy in the Constitution as it applies to contraception. Do you agree with that decision and that there is a fundamental right to privacy as it relates to contraception? In your opinion, is that settled law?''

Judge Roberts explicitly stated:

''I agree with the *Griswold* Court's conclusion that marital privacy extends to contraception and [the] availability of that.''

KOHL QUESTIONING, SEPTEMBER 13, 2005.

He did not limit his understanding of the privacy right merely to *Griswold*, however. Senator FEINSTEIN asked:

''Do you think that right of privacy that you are talking about [in *Griswold*] extends to single people as well as married people?''

In response, Judge Roberts stated his agreement with the *Eisenstadt* case, which provided protection to unmarried couples as well as those who are married.

FEINSTEIN QUESTIONING, SEPTEMBER 14, 2005

Roberts explained further his support for the Voting Rights Act, observing that the right to vote is a ''fundamental constitutional right,'' in his words:

''preservative . . . of all the other rights. Without access to the ballot box, people are not in the position to protect any other rights that are important to them. And so I think it's one of, as you said, the most precious rights we have as Americans.''

KENNEDY QUESTIONING, SEPTEMBER 13, 2005

He acknowledged that the Voting Rights Act had advanced the rights of minorities. He explained that:

''I think the gains under the Voting Rights Act have been very beneficial in promoting

the right to vote, which is preservative of all other rights.''

FEINGOLD QUESTIONING, SEPT. 13, 2005.

He also underscored his belief in the constitutionality of the Voting Rights Act, explaining in response to Senator KENNEDY that ''the existing Voting Rights Act, the constitutionality has been upheld . . . and I don't have any issue with that.''

KENNEDY QUESTIONING, SEPTEMBER 13, 2005

Moreover, when Senator Leahy asked Judge Roberts whether he believed that individuals should be allowed to sue State governments to remedy illegal conduct, Judge Roberts confirmed that he would not take a narrow or crabbed view of individuals' rights.

Judge Roberts explained that the best place to look for his views was not the briefs he filed on behalf of clients, but his decisions as a judge:

''I did have occasion as a judge to address a Spending Clause case. It was a case called *Barber* v. *Washington Metropolitan Area*. . . . . I ruled that the individual did have the right to sue.''

LEAHY QUESTIONING, SEPTEMBER 15, 2005

Those individuals, it should be noted, sued Washington, DC for discriminating against them based on their disabilities, and Judge Roberts affirmed their right to sue in the face of a dissent by a conservative panel member.

Moreover, demonstrating a sensitivity to the ''real world'' problems of race, Judge Roberts expressed his agreement with the approach taken by Justice O'Connor's opinion for the Court in upholding an affirmative action program employed by a university in its admissions policy, explaining that he agreed that it is vital ''to look at the real-world impact in this area [the area of affirmative action in university admissions], and I think in other areas, as well.''

KENNEDY QUESTIONING, SEPTEMBER 14, 2005

Judge Roberts further reaffirmed his support for minority outreach programs that are designed to guarantee equal opportunity for all:

''A measured effort that can withstand strict scrutiny is, I think, affirmative action of that sort, I think, is a very positi[ve] approach. . . . efforts to ensure the full participation in all aspects of our society by people without regard to their race, ethnicity, gender, religious beliefs—all of those are efforts that I think are appropriate. . . . beneficial affirmative action to bring minorities, women into all aspects of society. That's important, and as the Court has explained, we all benefit from that.''

FEINSTEIN QUESTIONING, SEPTEMBER 14, 2005

Judge Roberts also cast aside any question about his commitment to civil rights for all Americans. In commenting on Congress's authority under the 14th amendment to remedy discrimination, Judge Roberts expressly stated that he believes Congress has the power to guarantee civil rights for all. In response to Senator Kennedy's question: So do you agree with the Court's conclusion that the segregation of children in public school solely on the basis of race is unconstitutional?'' Roberts responded: ''I do.''

KENNEDY QUESTIONING, SEPTEMBER 13, 2005

And, when asked by Kennedy: ''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 again responded, ''Yes. . . .''

KENNEDY QUESTIONING, SEPTEMBER 13, 2005

Judge Roberts, in his pro bono work, further demonstrated his evenhandedness. I questioned him about his participation in *Romer* v. *Evans*, which involved alleged discrimination on the basis of sexual orientation:

''Where you gave some advice on the arguments to those who were upholding gay rights, and a quotation by Walter Smith, who was the lawyer at Hogan & Hartson in charge of pro bono work. He had this to say about your participation in that case supporting or trying to help the gay community in a case in the Supreme Court. Mr. Smith said, 'Every good lawyer knows that if there is something in his client's cause that so personally offends you, morally, religiously, or if it so offends you that you think it would undermine your ability to do your duty as a lawyer, then you shouldn't take it on, and John'—referring to you—'wouldn't have. So at a minimum he had no concerns that would rise to that level.' Does that accurately express your own sentiments in taking on the aid to the gay community in that case?''

Judge Roberts responded that:

''I was asked frequently by other partners to help out particularly in my area of expertise, often involved moot courting, and I never turned down a request. I think it's right that if it had been something morally objectionable, I suppose I would have, but it was my view that lawyers don't stand in the shoes of their clients, and that good lawyers can give advice and argue any side of a case. And as I said, I was asked frequently to participate in that type of assistance for other partners at the firm, and I never turned anyone down.''

SPECTER QUESTIONING, TUESDAY, SEPTEMBER 13

In addition, Judge Roberts provided a thorough discussion of a much debated issue of the day—judges' use of foreign law in interpreting the U.S. Constitution. Judge Roberts stated, ''a couple of things . . . cause concern on my part about the use of foreign law . . . as precedent on the meaning of American law.'' Judge Roberts explained:

''The first has to do with democratic theory. . . . If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed. The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. . . . In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.''

KYL QUESTIONING, SEPT. 13, 2005

Most importantly, Judge Roberts's answers demonstrated that he would take a fair, non-ideological approach to the law. As Judge Roberts explained:

''The ideal in the American justice system is epitomized by the fact that judges, Justices, do wear the black robes, and that is meant to symbolize the fact that they're not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs.''

KOHL QUESTIONING, SEPTEMBER 13, 2005

I think it important that Judge Roberts condemned judicial activism of all stripes, from the left and the right. I found it telling that when asked for an example of ''immodesty'' in judging, Judge Roberts began with an example of conservative judicial activism:

''I would think the clearest juxtaposition would be the cases from the *Lochner* era. If you take *Lochner* on the one hand and, say, *West Coast Hotel*, which kind of overruled and buried the *Lochner* approach on the other, and the immodesty that I see in the *Lochner* opinion is in its re-weighing of the legislative determination. You read that opinion, it's about limits on how long bakers can work. And they're saying we don't think there's any problem with bakers working more than 13 hours. . . . Well, the legislature thought there was, and they passed a law about it, and the issue should not have been, Judges, do you think this was a good law or do you think bakers should work longer or not? It should be: Is there anything in the Constitution that prohibits the legislature from doing that?

SCHUMER QUESTIONING, SEPTEMBER 14, 2005

This is a view, I should note, echoed in the work of a young John Roberts of nearly 24 years ago. In November 1981, Judge Roberts wrote that judicial activism is ''a concern that does not depend upon political exigencies.'' The young John Roberts pointed to *Lochner* and explained, ''The evils of judicial activism remain the same regardless of the political ends the activism seeks to serve.'' [Document AG7–5508]

Unlike Justice Scalia, who declined even to opine on *Marbury* v. *Madison*, Judge Roberts not only reaffirmed his commitment to Marbury, but also indicated his support for the seminal Commerce Clause case of *Wickard* v. *Filburn*.

In response to questioning by Senator Schumer, Judge Roberts stated that *Wickard* ''was reaffirmed in the *Raich* case and that is a precedent of the court, just like *Wickard*, that I would apply like any other precedent. I have no agenda to overturn it. I have no agenda to revisit it. It's a precedent of the Court.''

SCHUMER QUESTIONING, SEPT. 13, 2005.

Nevertheless, I was not wholly persuaded by Judge Roberts' explanation in seeking to distance himself from memoranda which he had written as an Assistant to Attorney General William French Smith or as an Associate White House counsel in the Reagan Administration.

My overall impression of Judge Roberts is that he has grown considerably in the intervening twenty years. Phyllis Schlafly, President of the conservative Eagle Forum, characterized that potential growth from his youthful position that women should be homemakers instead of lawyers. Ms. Schlafly characterized that as a smart-alecky comment from a young bachelor who hadn't seen a whole lot of life at that point. The fact that Judge Roberts is now married to a successful lawyer, who is a homemaker as well, demonstrates a different current view.

In any event, I conclude that Judge Roberts is a very different man today than he was when he wrote the early memoranda and that a more appropriate way of evaluating him would be on the basis of his 45 opinions and 4 concurrences in two years on the Circuit Court, the extensive testimony he gave, and the insights of the many witnesses who have known him intimately over the intervening years.

The subtle minuet of the confirmation hearing for Judge Roberts turned bombastic

and confrontational at times, but he kept his cool and responded within reasonable parameters. The Judiciary Committee and the full Senate cannot be guarantors that Judge Roberts will fulfill ours or anyone's expectations. The Court's history is full of justices who have surprised or disappointed their appointers or inquisitors.

But the process has been full, fair and dignified. On some questions, Judge Roberts, as the song about the Kansas City burlesque queen in the stage play ''Oklahoma'' says: ''She (he) went about as far as she (he) could go'' without committing himself to votes on cases likely to come before the court. When all the facts are considered, my judgment is that Judge Roberts is qualified, has the potential to serve with distinction as Chief Justice and should be confirmed. I will vote ''yea.''

Mr. SPECTER. I thank the Chair, yield the floor, and, in the absence of any Senator seeking recognition, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. DEWINE). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

The PRESIDING OFFICER. Morning business is now closed.

AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2006

The PRESIDING OFFICER. Under the previous order, the hour of 3 p.m. having arrived, the Senate will resume consideration of H.R. 2744, which the clerk will report.

The bill clerk read as follows:

A bill (H.R. 2744) making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2006, and for other purposes.

Pending:

Bennett-Kohl amendment No. 1726, to amend the Rural Electrification Act of 1936.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. COCHRAN. Mr. President, we are pleased to present to the Senate today the fiscal year 2006 appropriations bill for the Department of Agriculture, rural development, and related agencies. The bill is before the Senate and is open for amendment or discussion and debate. I am pleased to announce to the Senate that this reflects a lot of hard work through hearings, examining the President's budget request for these Departments for this next fiscal year.

The subcommittee was very capably managed by the distinguished Senator from Utah, Mr. BENNETT, who is chairman of this subcommittee. The bill is within the budget authority outlined by the budget resolution adopted by the Senate. Specifically, section 302(b) of the budget resolution allocates $17.348 billion to this subcommittee's authority for appropriations. It is within the outlay allocation of $18.816 billion.

Throughout the past 7 months, the committee has reviewed suggestions by Senators and others who are interested in the provisions of this bill. The bill, as reported by the subcommittee, was approved unanimously and submitted to the full committee. And after review by a bipartisan group of Senators in that subcommittee, all of the Senators in the full committee approved the allocation and the appropriation of funds as reported in this bill.

We hope if any Senators have any suggestions for amendments, they will bring them to the attention of the managers of the bill. We will be happy to discuss those and review them. We hope we can complete action on this bill at an early date. There are other bills that need to be considered by the Senate, so we hope we can take up these suggestions, and if there are amendments, we can vote on them expeditiously.

We appreciate Senator KOHL, who is the ranking minority member of this subcommittee, for his hard work and leadership in the development of this bill. Their staff has worked with the staff on the majority side in a cooperative way. This is a truly bipartisan effort. The Senate appreciates that fact. I congratulate all who have been actively involved in the development of the legislation.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. Mr. President, I rise as a member of the Agriculture Appropriations Subcommittee to discuss the fiscal year 2006 Agriculture appropriations bill. I applaud the chairman, Senator COCHRAN of Mississippi, as well as Chairman BENNETT and Ranking Member KOHL for their diligence on this spending bill and for ensuring that we have arrived at as sound a financial package as was possible, given the pending budget resolution's mandate to cut funds from USDA. At a time of significant budgetary deficits and increasingly tight funding, I worked with my colleagues to maintain a secure package for our producers and rural communities, especially in light of a sorely inadequate proposed USDA budget from the administration.

Producers and ranchers in my State of South Dakota and across the Nation would simply prefer a fair price for what they produce at the day's end. USDA programs and Federal funding are crucial for producers, however, when markets are challenging and prices are depressed. The farm bill that was hammered out in 2002 is a contract with rural America, with South Dakota, to ensure adequate safety nets and increased opportunities for rural communities. Numerous Members of Congress, as well as agricultural organizations concerned with the President's proposed budget, have pointed out that the farm bill has already come in at $14 billion under its original projected costs.

At a time when producers need the contract negotiated by Congress and signed into law by this President, the administration proposed limiting the benefits promised to producers. We cannot balance the national deficit on the backs of our Nation's producers. I voted to restore the cuts that were made to the agricultural spending package, and I am concerned for the adjustments that will be made to the agricultural spending bill in light of the budget reconciliation instructions advocated by this administration. I am concerned for the impact these cuts will have on our rural communities and our producers.

There are several initiatives, however, that I am pleased to see in this spending measure. I would like to touch on a few of those priorities. As a member of the Agriculture Appropriations Subcommittee, there are a few South-Dakota-specific items that I am pleased are included in this measure. A few of them include funding for a collaborative four-State effort led by South Dakota State University. These funds will increase opportunities for South Dakota sheep and cattle producers, building a better climate for livestock feeding in our State. There is funding to work at South Dakota State University to integrate pulse crops in crop rotations for South Dakota farmers. By integrating pulse crops into rotations, farmers can increase profits and improve soil quality.

There is some funding for the Seed Technology Center at South Dakota State University. Funds will be used to conduct seed technology and biotechnology research to benefit agricultural producers and consumers, enhancing profitability for producers and resulting in better food production.

Lastly, there is funding for the South Dakota Game, Fish, and Parks Department to continue animal damage control work. The funds allow the South Dakota Game, Fish, and Parks Department to continue to meet the growing demands of controlling predatory nuisance and diseased animals. SDSU, a land grant university in Brookings, is significantly impacted by Hatch, McIntire-Stennis, and animal health Federal formula funds. SDSU is an institution that makes enormous contributions to our agricultural industry through the research initiatives that it spearheads.

The President's proposed cuts on their research centers would have greatly impacted this land grant institution's ability to function in an effective manner. The President's proposed budget would have cut 45 faculty and staff at South Dakota State University, with a 25- to 50-percent reduction in graduate students. These cuts would have resulted in closure of at least one