WATER RESOURCES RESEARCH ACT AMENDMENTS OF 2005

Mr. ISAKSON. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 139, S. 1017.

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (S. 1017) to reauthorize grants for the water resources research and technology institutes established under the Water Resources Research Act of 1984.

There being no objection, the Senate proceeded to consider the bill which had been reported from the Committee on Environment and Public Works, with amendments.

[Insert the parts shown in italic.]

S. 1017

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Water Resources Research Act Amendments of 2005''.

SEC. 2. WATER RESOURCES RESEARCH.

(a) AUTHORIZATION OF APPROPRIATIONS.—Section 104(f) of the Water Resources Research Act of 1984 (42 U.S.C. 10303(f)) is amended—

(1) in the subsection header, by striking ''IN GENERAL'';

(2) by striking paragraph (1) and inserting the following:

''(1) IN GENERAL.—There is authorized to be appropriated to carry out this section, to remain available until expended—

''(A) $12,000,000 for each of fiscal years 2006 through 2008; and

''(B) $13,000,000 for each of fiscal years 2009 and 2010.''; and

(3) in paragraph (2), by striking ''(2) Any'' and inserting the following:

''(2) FAILURE TO OBLIGATE FUNDS.—Any''.

(b) ADDITIONAL APPROPRIATIONS WHERE RESEARCH FOCUSED ON WATER PROBLEMS OF INTERSTATE NATURE.—Section 104(g) of the Water Resources Research Act of 1984 (42 U.S.C. 10303(g)) is amended—

(1) by redesignating paragraph (2) as paragraph (4); and

(2) in paragraph (1)—

(A) in the first sentence—

(i) by striking ''*(1)* There'' and inserting the following:

''(1) IN GENERAL.—There''; and

(ii) by striking ''$3,000,000 for fiscal year 2001, $4,000,000 for *each of* fiscal years 2002 and 2003, and $6,000,000 for *each of* fiscal years 2004 and 2005'' and inserting ''$6,000,000 for each of fiscal years 2006 through 2008 and $7,000,000 for each of fiscal years 2009 and 2010'';

(B) in the second sentence, by striking ''Such'' and inserting the following:

''(2) NON-FEDERAL MATCHING FUNDS.—The''; and

(C) in the third sentence, by striking ''Funds'' and inserting the following:

''(3) AVAILABILITY OF FUNDS.—Funds''.

Mr. ISAKSON. Mr. President, I ask unanimous consent that the committee-reported amendments be agreed to, the bill, as amended, be read a third time and passed, the motion to reconsider be laid upon the table, and that any statements related to the bill be printed in the RECORD.

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

The committee amendments were agreed to.

The bill (S. 1017), as amended, was read the third time and passed.

GULF COAST EMERGENCY WATER INFRASTRUCTURE ASSISTANCE ACT

Mr. ISAKSON. Mr. President, I ask unanimous consent that the Committee on Environment and Public Works be discharged from further consideration of S. 1709 and the Senate proceed to its immediate consideration.

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (S. 1709) to provide favorable treatment for certain projects in response to Hurricane Katrina, with respect to revolving loans under the Federal Water Pollution Control Act, and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. ISAKSON. Mr. President, I ask unanimous consent the amendment at the desk be agreed to, the bill, as amended, be read the third time and passed, the motion to reconsider be laid upon the table, and any statements relating to the bill be printed in the RECORD.

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

The amendment (No. 1873) was agreed to, as follows:

(Purpose: To provide a complete substitute)

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Gulf Coast Emergency Water Infrastructure Assistance Act''.

SEC. 2. DEFINITION OF STATE.

In this Act, the term ''State'' means—

(1) the State of Alabama;

(2) the State of Louisiana; and

(3) the State of Mississippi.

SEC. 3. TREATMENT OF CERTAIN LOANS.

(a) DEFINITION OF ELIGIBLE PROJECT.—In this section, the term ''eligible project'' means a project—

(1) to repair, replace, or rebuild a publicly-owned treatment works (as defined in section 212 of the Federal Water Pollution Control Act (33 U.S.C. 1292)), including a privately-owned utility that principally treats municipal wastewater or domestic sewage, in an area affected by Hurricane Katrina or a related condition; or

(2) that is a water quality project directly related to relief efforts in response to Hurricane Katrina or a related condition, as determined by the State in which the project is located.

(b) ADDITIONAL SUBSIDIZATION.—

(1) IN GENERAL.—Subject to paragraph (2), for the 2-year period beginning on the date of enactment of this Act, a State may provide additional subsidization to an eligible project that receives funds through a revolving loan under section 603 of the Federal Water Pollution Control Act (33 U.S.C. 1383), including—

(A) forgiveness of the principal of the revolving loan; or

(B) a zero-percent interest rate on the revolving loan.

(2) LIMITATION.—The amount of any additional subsidization provided under paragraph (1) shall not exceed 30 percent of the amount of the capitalization grant received by the State under section 602 of the Federal Water Pollution Control Act (33 U.S.C. 1382) for the fiscal year during which the subsidization is provided.

(c) EXTENDED TERMS.—For the 2-year period beginning on the date of enactment of this Act, a State may extend the term of a revolving loan under section 603 of that Act (33 U.S.C. 1383) for an eligible project described in subsection (b), if the extended term—

(1) terminates not later than the date that is 30 years after the date of completion of the project that is the subject of the loan; and

(2) does not exceed the expected design life of the project.

(d) PRIORITY LISTS.—For the 2-year period beginning on the date of enactment of this Act, a State may provide assistance to an eligible project that is not included on the priority list of the State under section 216 of the Federal Water Pollution Control Act (33 U.S.C. 1296).

SEC. 4. PRIORITY LIST.

For the 2-year period beginning on the date of enactment of this Act, a State may provide assistance to a public water system that is not included on the priority list of the State under section 1452(b)(3)(B) of the Safe Drinking Water Act (42 U.S.C. 300j–12(b)(3)(B)), if the project—

(1) involves damage caused by Hurricane Katrina or a related condition; and

(2) is in accordance with section 1452(b)(3)(A) of that Act (42 U.S.C. 300j–12(b)(3)(A)).

SEC. 5. TESTING OF PRIVATELY-OWNED DRINKING WATER WELLS.

On receipt of a request from a homeowner, the Administrator of the Environmental Protection Agency may conduct a test of a drinking water well owned or operated by the homeowner that is, or may be, contaminated as a result of Hurricane Katrina or a related condition.

The bill (S. 1709), as amended, was read the third time and passed.

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

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

EXECUTIVE SESSION

NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES—Continued

Mr. DODD. Mr. President, I believe the time will be allocated to my colleague from Michigan, Senator LEVIN, but he has agreed to allow me to use his time to speak. He will speak at a later time today.

The PRESIDING OFFICER. The Senate is under the control of the Democrats from 3:45 on, so the Senator can speak.

Mr. DODD. Mr. President, the outcome of this nomination is now all but certain. In that regard, what I am about to say will have little impact on the fate of this nominee.

Nevertheless, it is exceedingly rare that the Senate is asked to consider a nominee to fill a vacancy in the office of Chief Justice of the United States. Indeed, there have only been 16 Chief Justices in our Nation's history. Further, it is difficult to overstate the importance of the next Chief Justice on our Nation's future.

For these reasons, I feel compelled to come to the floor today to explain how I will vote on the nomination of John Roberts to be our country's next Chief Justice.

Every vote we cast as Senators is important. But some votes are more important than others. In my view, the most important votes that we cast in this body are those giving the President authority to go to war, those amending the United States Constitution, and those that fill vacancies in the judicial branch.

These votes, more than any others, can permanently affect the essential character of our Nation. They involve fundamental questions about whether our Nation will spend blood and treasure in armed conflict; about whether the cornerstone document of our Republic will be modified; and about the make-up of a third, separate, coequal branch of our Government—the principal duty of which is to make real for each American the promise of equal justice under the law.

Of the votes that we cast regarding judicial nominees, a small percentage is cast for Supreme Court Justice. An even smaller number of votes is cast for Chief Justice. In nearly a quarter of a century in this body, I have had the privilege of casting 8,415 votes—more than all but 16 of our colleagues. This is only the 10th time in that period that I have had the duty to consider a vote for Supreme Court Justice. And it is only the second time that I have considered a nominee for Chief Justice.

In casting these votes—and in casting other votes for judicial nominees—I have supported the vast majority of candidates nominated by this and prior presidents. That includes nominees to the Supreme Court. I have supported six of the last nine nominees to the High Court. Of the current president's 219 judicial nominees, only five have failed to win confirmation. I, like all of our colleagues, have supported the overwhelming majority of these nominees.

In reviewing a nomination for the judicial branch, I believe the Senate has a duty to undertake a higher degree of independent review than might be appropriate for a nomination to the Executive branch. There are two reasons for that heightened degree of scrutiny:

First, because we are considering nominees who will populate—and in this case, lead—a separate, coequal branch of government; and

Second, because Article III nominees, when confirmed, are confirmed for life. That makes them unique among all other Federal officials.

In reviewing judicial nominees, I have never imposed any litmus tests.

Indeed, I have supported nominees—including to the Supreme Court—whose views and philosophy I did not necessarily share. I did so because they met what I consider to be the three crucial qualifications that every judicial nominee must meet:

First, that they possess the legal and intellectual competence required to discharge the responsibilities of their office;

Second, that they possess the qualities of character required of a judge or justice—including reason, wisdom, and fairmindedness; and

Third, that they possess a commitment to equal justice for all under the law, which is the legal principle that is the foundation for all of our laws.

With respect to the nomination now before the Senate, I have reviewed the record. I have read the briefs, if you will, of both sides. I have heard the case both for and against Judge Roberts.

In so doing, I would be remiss not to thank the distinguished chairman Senator SPECTER, and ranking member of the Judiciary Committee PATRICK LEAHY of Vermont, for the extraordinary service they have rendered to the Senate and to the country. The hearings into this nomination were thorough, thoughtful, and deliberate, and I have watched many over the years. They are to be congratulated for the manner in which they led the committee in discharging its duties.

I approached Judge Roberts' nomination with an open mind. I harbored no hidden proclivity to oppose his nomination because of his conservative record. Nor did I carry a presumption to support it because he is ''the President's choice'', or because he was described by the President as a ''gentleman'', or because of his stellar legal credentials.

The written and testimonial record with respect to this nominee is mixed. It does lead this Senator to unequivocally conclude that his nomination should be supported or opposed. For those of us concerned about the right to privacy, about a woman's right to choose, about equal opportunity, about environmental protection, about ensuring that all are truly equal before the bar of justice—in short, for those of us concerned about keeping America strong and free and just—this is no easy matter.

The record in several respects provides cold comfort for those of us seeking to preserve and expand America's commitment to equal justice for all. I was concerned about numerous written statements he made during his previous stints in Federal service—about voting rights, about the right to privacy, about Roe v. Wade, about equality between men and women, about restricting the ability of courts to strike down racially discriminatory laws and practices, and about environmental protection.

Nor did Judge Roberts' hearing testimony do much to dispel my concerns about those earlier statements. On multiple occasions, he explained that he was reflecting the views of his superiors, rather than voicing his own personal opinions. Yet, when invited to explain his personal views, he repeatedly demurred—explaining that to state his own views would potentially telegraph his position on sensitive matters that could come before the Court.

I can certainly understand the nominee's reluctance to prejudge a matter. No responsible nominee would do that; it would be inherently injudicious to do so. Yet, it is hard to escape the conclusion that these were answers of convenience, as well as duty.

At the very least, his refusal to answer certain questions leaves us wanting. We certainly know less about this nominee than many of us would like to know.

For that reason, I understand and respect the decision by those of our colleagues—including the Democratic Leader, Senator REID, Senator KENNEDY, Senator BIDEN, Senator FEINSTEIN, and others—who feel that they cannot vote to confirm this nominee in large part because the Senate has been denied additional information about his background and views.

Nevertheless, we are required to make a judgment based on the information we know, as well as in consideration of what we do not know. The record is incomplete. But unfortunately it is all we have. It cannot and should not be read selectively. The question for this Senator is not whether the record is all I would like it to be, but whether it provides sufficient information to determine whether the nominee meets the three qualifications I have just set forth—competence, character, and a commitment to equal justice.

On the question of competence, there is absolutely no doubt that John Roberts possesses the capabilities required to serve not only as a Justice on the Supreme Court, but as Chief Justice, as well. He has been described as one of finest lawyers of his generation—if not the finest. His academic and legal qualifications are superior. Even those who oppose his nomination readily agree that he has proven himself an outstanding advocate and jurist.

On the question of character, there is no real question that this nominee possesses the qualities of mind and temperament that make him well-suited to serve as Chief Justice. He impressed me as someone who is personally decent, level-headed, and respectful of different points of view. In his answers to questions and in his demeanor, he convinced me that he will exercise judgment based on the law and the facts of a particular matter.

Judge Roberts demonstrated that he understands the unsurpassing importance of separating his personal views—including his religious views—from his judicial reasoning in arriving at decisions. And I believe that his decisions as a Federal appellate judge demonstrate his ability to do that.

I was particularly intrigued and impressed by Judge Roberts' discussion of former Justice Robert Jackson. Justice Jackson was known for opinions protecting first amendment freedoms and placing principled checks on the power of the President. These opinions—including Board of Education v. Barnette, the ''Steel Seizure Cases'', and the Korematsu case—were all the more remarkable for the fact that Jackson went to the Court directly from his position as Attorney General under President Roosevelt. In the Youngstown case, Justice Jackson actually disagreed with a position he had taken as Attorney General.

In these and other cases, Jackson demonstrated a remarkable capacity for independent, progressive thought, and a deep commitment to uphold the constitutional rights that belong to each and every American, regardless of their station in life. Judge Roberts cited Justice Jackson with admiration. That provides some reassurance to those of us looking for him to demonstrate an understanding that as a Justice of the Supreme Court he will carry no brief for a particular party or president, but rather for the Constitution and the people it governs.

On the question of competence, and on the question of character, this nominee clears the high bar required of a Supreme Court Justice. We are left, then, to consider the question of his commitment to the fundamental principle of our law: that all men and women are entitled to equal justice.

In so doing, we do not have a crystal ball. We cannot say with certainty how he will rule on the critical issues that the Court is likely to face in months and years to come: on privacy, on choice, on civil rights, on the death penalty, on presidential power, and many others.

However, I believe that the record contains sufficient information to provide a reasonable expectation of how Judge Roberts will go about making decisions if confirmed. His approach, in my view, is certainly within the mainstream of judicial thinking. Allow me to briefly discuss two critical aspects of that approach as I see it.

First, he demonstrated an appropriate respect for precedent. This respect is the first and most important quality that a good judge must possess. If a judge is unwilling or unable to consider settled precedent, then the law is unsettled—and our citizenry cannot know with assurance that the rights, privileges, and duties that they possess today will continue to exist in the future.

This is a delicate area, for the obvious reason that some precedents deserve to be overruled. Cases such as the Dred Scott decision and Plessy v. Ferguson come to mind. But in many other instances, precedent is of enormous importance in maintaining and strengthening our system of laws.

Judge Roberts acknowledged as much in his discussion of the right to privacy. In vigorous questioning by the Judiciary Committee, he made clear that he respects Supreme Court precedents that recognize a constitutional right to privacy. He stated further that this right is protected by the liberty clauses of the 5th and 14th Amendments to the Constitution, as well as by the 1st, 3rd, and 4th Amendments. Moreover, he asserted that this right is a substantive one, and not merely procedural. This view stands in stark contrast to that of Justice Scalia, for instance, who believes that the right to privacy has no basis in the Constitution.

In discussing the right to privacy, Judge Roberts favorably cited both the Griswold and Eisenstadt cases, which recognize the right to privacy with respect to birth control for married and unmarried couples, respectively. Moreover, he stated that Roe v. Wade and Planned Parenthood v. Casey are settled law and therefore deserving of respect under principles of stare decisis.

The second aspect of his approach to judging that places him squarely in the mainstream is his view of the role of judges in our constitutional system. He made clear that he rejects theories that view the judicial function as one where the Constitution is considered as a static document. He rejects in my view, the notion that the job of the judge is to place himself into a time machine and decide cases as if he or she lived in the 19th century.

In his view, the Framers intended the Constitution, by its very language, to live in and apply to changing times. A judge by that view is neither a mechanic nor a historian.

Words like ''liberty,'' ''equal protection'' and ''due process'' are not sums to be solved, but vital principles that must be applied to the untidiness of human circumstances—including those circumstances that the Framers themselves could never have envisioned.

In that sense, the ''original intent'' of the Framers, if you will, was that their marvelous handiwork be interpreted in light of modern concepts of liberty and equal justice—not just those concepts as they were understood 218 years ago.

At the same time, Judge Roberts rejects the notion that judges may act as superlegislators. His discussion of the 1905 Lochner case which crippled the ability of Congress to pass laws protecting children and workers—was pivotal in articulating the dangers of judges who substitute their policy preferences for those of the legislative branch.

Here again, in my view, he reiterated his view that judges act on the basis of the facts and the law, not their own personal preferences. In this regard, it is worth noting that he indicated a willingness to examine recent Supreme Court decisions that severely restrict Congressional authority under the Commerce Clause to protect the public well-being.

Mr. President, in closing, today I am deciding not to vote on the basis of my fears about this nominee and I have them Rather, I choose to vote on the basis of my hopes that he will fulfill his potential to be a superb Chief Justice of the Supreme Court. He is a person of outstanding ability and strong character who possesses in my view a deep commitment to the law and the principle of equal justice for all.

As Chief Justice, John Roberts will have a great deal to do with what kind of country America will become in the 21st century. On the personal note, he will have a lot to say about what kind of lives my two young daughters will lead.

His relative youth, his intellect, his decency, and his dedication to justice provide him with a unique opportunity to shape the destiny of our Nation. For the sake of children like my daughters who will grow up in a world with opportunities and challenges we can barely imagine—and for the sake of the country we all love—I will support his nomination for Chief Justice of the United States and do so with my highest hopes for his success.

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

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

The bill clerk proceeded to call the roll.

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 know many will provide us with their views on this nominee for the Supreme Court, and I will make a couple points today as I describe the process by which I arrived at my decision.

Mr. President, the Constitution of this country establishes three branches of Government. When you look at this Constitution and read it, it is quite a remarkable document in all of the history of governments around the world. It was 1787 when in Philadelphia, in a hot room called the Assembly Room, 55 white men went into that room, pulled the shades because it was warm in Philadelphia that summer and they had no air-conditioning, and they wrote the Constitution; the Constitution that begins with the words, ''We the people.'' What a remarkable document. And that Constitution creates a kind of framework for our Government that is extraordinary and that has worked in the most successful way of any democracy in the history of mankind. In that Constitution they provided for what is called separation of powers, and for three branches of Government. One of those branches is the judiciary, and the Supreme Court is the top of the judiciary structure which interprets the Constitution in our country. Further, it is the only area in which there are lifetime appointments.

When we decide on a nominee for the Federal bench to become a Federal judge, as is the case with respect to the

Supreme Court, we decide yes or no on a nominee sent to us by the President. That person will be allowed to serve for a lifetime—not for 10 years or 20 years but for a lifetime. So it is a critically important judgment that the Senate brings to bear on these nominations.

The President sends us a nomination and then the Senate gives its advice and consent; America approves or disapproves. Even George Washington was unable to get one of his Supreme Court nominees approved by the Senate. He was pretty frustrated by that. But even George Washington failed on one of his nominees.

The role of the Senate is equal to the role of the President. There is the submission of a nominee by the President, and the yes or no by the Senate. Regrettably, in recent years, these issues have become almost like political campaigns with groups forming on all sides and all kinds of campaigning going on for and against nominees. It did not used to be that way, but it is in today's political climate.

I want to talk just a little about the nominee who is before us now, Judge John Roberts, for the Chief Justice of the Supreme Court. The position of Chief Justice is critically important. He will preside over the Supreme Court. And, it is a lifetime appointment proposed for a relatively young Federal judge. John Roberts, I believe, is 50 years old. He is likely to serve on the Supreme Court as Chief Justice for decades and likely, in that position, to have a significant impact on the lives of every American.

I asked yesterday to meet once again with Judge Roberts. I had met with him previously in my office. He came to my office again yesterday and we spent, I guess, 40 or 45 minutes talking. I wanted to meet with him just to discuss his views about a range of issues. There were a number of things that happened in the Judiciary Committee that triggered my interest—civil rights issues, women's rights, the right of privacy, court striping, and many others. Some of his writings in his early years, incidentally, back in the early 1980s also gave me some real pause.

So I asked to meet with him yesterday morning, and at 9:30 we had a lengthy discussion about a lot of those issues. But I confess that Judge Roberts did not give me specific responses that went much beyond that which he described publicly in the Judiciary Committee hearings. Nonetheless, by having met with Judge Roberts twice and having had some lengthy discussions about these many issues, he is clearly qualified for this job. That has never been in question. He has an impressive set of credentials, probably as impressive a set of credentials as any nominee who has been sent here in some decades. He clearly is smart, he is articulate, he is intense.

The question that I and many others have had is, Who is this man, really? What does he believe? What does he think? Will he interpret the Constitution of this country in a way that will expand or diminish the rights of the American people? For example, there are some, some who have previously been nominated to serve on the Supreme Court, who take the position there is no right to privacy in this country; that the Constitution provides no right to privacy for the American people. I feel very strongly that is an error in interpretation of the Constitution, and the nominees who have suggested that sort of thing would not get my support in the Senate. Those who read the Constitution in that manner, who say there is no right to privacy in the U.S. Constitution, I think, misread the Constitution.

I think at the conclusion of his hearings, it is interesting that advocates from both the left and the right had some concerns as a result of those hearings. I believe the conservatives worried at the end of his hearings that he wasn't conservative enough. I think liberals and progressives worried that he was too conservative.

Well, Judge Roberts clearly is a conservative. I would expect a Republican President to nominate a conservative. But from the discussions I have had with him, I also believe that Judge John Roberts will be a Chief Justice who will honor precedent and who will view his high calling to an impartial interpretation of the laws of this country.

Having now spent two occasions visiting with him about a number of issues, I believe he has the ability to serve this Nation well as Chief Justice, and I have decided, as a result, to vote for the confirmation of the nomination of Judge John Roberts. Some of my colleagues have announced they will vote for him, and they are voting their hopes rather than their fears. I would not characterize my vote that way. I think he is qualified, and I don't think he is an ideologue off to the far right—who believes there is no right to privacy and who wants to take us back in time in ways that would diminish the rights of the American people. As a result of that feeling, I intend to vote for this nominee. I recognize there is plenty of room for disagreement, that there is much that we don't know, not only about this nominee, but about everyone who comes before this Senate. And I fully respect the opinions of those who come to a different conclusion and who have reached a different point on this issue. But for me, this nominee, in my judgment, is well qualified to be a good Chief Justice for the country.

Mr. President, I yield the floor, and I make a point of order that a quorum is not present.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. REED. I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. REED. I thank the Chair.

Mr. President, we are at a moment of great importance in our Nation's history: the chance to choose a new Chief Justice for a lifetime appointment on the U.S. Supreme Court.

The Constitution makes the Senate an equal partner in the appointment and confirmation of Federal judges. Article II, section 2, clause 2, of the Constitution states that the President ''shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.''

Neither this clause itself, nor any other text in the Constitution, specifies or restricts the factors that Senators should consider in evaluating a nominee. It is in upholding our constitutional duty to give the President advice and consent on his nominations to Federal courts that I believe we have our greatest opportunity and responsibility to support and defend the Constitution.

This is the first nominee to the Supreme Court that this body has had the opportunity to vote upon in 11 years. Like Members of this Chamber, this is my first opportunity to review and vote on a candidate for the Supreme Court.

My test for a nominee is simple, and it is drawn from the text, the history, and the principles of the Constitution.

A nominee's intellectual gifts, experience, judgment, maturity, and temperament are all important, but these alone are not enough. In this regard, I want to say something about the difference between a nomination to a lower court, including a court of appeals, and to the Supreme Court. The past decisions of the Supreme Court are binding on all lower courts. Therefore, even if a judge on a circuit court disagrees with well-established precedent about the rule of law, he or she is bound to apply that law in any case. However, the Supreme Court alone can overturn established legal precedent. As a result, I need to be convinced that a nominee for Supreme Court Justice will live up to the spirit of the Constitution.

The nominee needs to be committed not just to enforcing laws, but to doing justice. The nominee needs to be able to make the principles of the Constitution come alive—equality before the law, due process, full and equal participation in the civic and social life of America for all Americans, freedom of conscience, individual responsibility, and the expansion of opportunity. The nominee also needs to see the unique role the Court plays in helping balance the often conflicting forces in a democracy between individual autonomy and the obligations of community, between the will of the majority and the rights of the minority. A nominee for Supreme Court Justice needs to be able to look forward to the future, not just backward. The nominee needs to make the Constitution resonate in a world that is changing with great rapidity.

Judge Roberts' testimony before the Judiciary Committee and the legal documents he has produced throughout his career have not convinced me that he will meet this last test, that he will protect the spirit as well as the letter of the Constitution. In Judge Roberts' work as a private lawyer, and in two Republican administrations, he has created a long trail of documents revealing his judicial philosophy to be narrow and restrictive on issue after issue.

He has attempted to distance himself from some of his record by saying he was merely representing his clients and stating his clients' view. I cannot fully accept this argument. With a degree from Harvard Law School and a Supreme Court clerkship, this man could have chosen any legal role he wanted, but he chose to become a political activist in the Reagan and Bush I administrations, to advocate for the ideas he believed in. He knew what he believed then, and he chose his clients to pursue his own constitutional agenda.

We only have insight into this nominee's political activism because of papers obtained from the Ronald Reagan Presidential Library. I will point out, as others have, that our deliberations have been handicapped because this administration has refused to turn over documents that would be illustrative of his views, his ideas, his principles, and his passions. We only received the documents we have on his early career in the Government because they were in the custody of the Ronald Reagan Presidential Library. That, to me, has hobbled his nomination. I hope in the future, when a nominee is sent to us by the White House, they will be willing to release pertinent documents that will illustrate more clearly the positions of that nominee.

The Bush administration, though, repeatedly refused requests to give Senators records from Judge Roberts' time in the U.S. Solicitor General's Office. If Judge Roberts did wish to disassociate himself from the agenda he has advocated throughout his legal career, he had that opportunity during his hearings before the Judiciary Committee. Each of my colleagues on that committee asked him extensive questions about his judicial philosophy, his understanding of important legal issues, and his opinion of major Supreme Court precedents. Judge Roberts had the burden to convince this body that he would be a judicious and balanced member of the Supreme Court that would uphold the spirit of the Constitution. He had numerous opportunities to do so by releasing legal documents he had written and by candidly discussing his views on previously decided cases and broad areas of the law.

However, Judge Roberts failed to pass this test. He failed, in my view, to inform this body of his views on important constitutional issues. He stonewalled the release of important documents. He evaded fair and important questions, instead of offering honest and insightful answers, and he failed to demonstrate that he would uphold not just the letter of the law but also the spirit. As a result, I cannot support his lifetime nomination to the highest Court in America.

Now I would like to turn to some of the areas I have the most concern about regarding this nominee. The Constitution relies on a careful system of checks and balances between the judiciary, the legislature, and the executive. If the judiciary becomes a blank check for executive desires, this careful balance will break down. As a political appointee in the Reagan White House and Justice Department, however, Judge Roberts advocated expansive Presidential powers. For example, in a July 15, 1983, memorandum to White House counsel Fred Fielding, Roberts supported reconsidering the role of independent regulatory agencies like the FCC and the FTC, bringing them within the control of the executive branch. We lack sufficient information about his advocacy within the Reagan and Bush I administrations. But from his short tenure on the court of appeals, we already have two examples of cases where Judge Roberts has deferred to the administration. Judge Roberts has not had the chance to hear that many cases in his brief stint on the DC Circuit. However, these two are troubling, and they both give the President sweeping and unprecedented powers.

In Hamdan v. Rumsfeld, Roberts joined an opinion that upheld the military commissions this administration has created to try foreign nationals at Guantanamo Bay and agreed with the Bush administration that the Geneva Conventions did not apply to Hamdan. Judge Roberts' majority opinion argued that under the Constitution, the President ''has a degree of independent authority to act'' in foreign affairs and, for this reason and others, his construction and application of treaty provisions is entitled to ''great weight.''

But part of this decision was rejected by concurring senior judge Stephen Williams, a distinguished jurist and Republican appointee. He wrote that the United States, as a signatory to the Geneva Convention, was bound by its ''modest requirements of 'humane treatment' and 'the judicial guarantees which are recognized as indispensable by civilized peoples.'''

That was not the only case. In another case, Acree v. Republic of Iraq in 2004, Judge Roberts, alone among three judges, supported the Bush administration's position that a Presidential order validly divested the Federal courts of jurisdiction to hear suits against Iraqi officials brought by American prisoners of war for torture they suffered during the first Gulf War. For a man who has so little judicial experience, opinions in support of the administration's expansive powers in two different cases presents a troubling pattern to me.

Finally, if I may add, Judge Roberts' refusal to cooperate in turning over documents from his service in two presidential administrations to this body indicates his support for and compliance in this administration's unprecedented secrecy of executive branch operations. Indeed, memos he wrote in the 1980s show that he agreed with the administration's overly expansive claims of executive privilege to shield documents from the Congress and the public.

A number of cases on Presidential authority are likely to come before the Court in the near future. Although I am reassured that during the hearings Judge Roberts declared his support for the analytical framework established in Youngstown Sheet & Tube Company v. Sawyer, which some in the current administration have not done, I am still concerned about his respect for the balance of power required by the Constitution.

At the same time that Judge Roberts' record suggests he has been excessively deferential to the actions and whims of the executive branch, he has shown a troublesome activism in overruling the sovereign acts of this Congress. In recent years, a narrow majority on the Supreme Court and some lower court judges and right-wing academics and advocates have launched a Federalism revolution, cutting back on the authority of this Congress to enact and enforce critical laws important to Americans' rights and interests. These judges have overturned settled precedent by narrowly construing the commerce clause and section 5 of the 14th amendment, while broadly interpreting the 11th amendment and reading State sovereignty immunity into the text. Judge Roberts' short record raises troubling signs that he may subscribe to this new Federalism revolution.

In one case, Rancho Viejo v. Norton, Judge Roberts issued a dissent from the decision by the full DC Circuit not to reconsider upholding the constitutionality of the Endangered Species Act in this case. In other words, Judge Roberts viewed part of the Endangered Species Act as unconstitutional because he believed its application was an unconstitutional exercise of Federal authority under the commerce clause. This narrow reading of Congress's constitutional authority could undermine the ability of Congress to protect not just the environment but other rights and interests of the American people.

Judge Roberts' reasoning suggests he may subscribe to an extremely constricted interpretation of the commerce clause recently rejected by the Supreme Court in the medical marijuana case, Gonzales v. Raich. There the Court followed longstanding precedent, dating back to the 1940s, to hold that Congress commerce clause authority includes the power to regulate some purely local activities.

And this is not just about endangered species. Congress uses its constitutional authority under the commerce clause for all sorts of purposes in representing the American people. Other

environmental protections of clean air and clean water come from the commerce clause. So, too, the commerce clause provides civil rights safeguards, minimum wage, and maximum hour laws, and workplace safety protections.

Although Judge Roberts affirmed that the Constitution does contain a right to privacy, this declaration did not tell me much at all. As we know, at least three Justices on the current Supreme Court believe in a right to privacy but don't believe it extends to a woman's right to choose. Furthermore, Judge Roberts' written record shows that he did not believe there was, in his words, a ''so-called right to privacy'' in the Constitution. This places a higher burden on him to answer questions regarding this constitutional line of cases. Not only did Judge Roberts fail to answer any direct questions on this issue, he also failed to answer questions about whether he would uphold this line of cases as precedents that a generation of Americans have come to rely upon. Senator SPECTER repeatedly asked questions about how his view on precedent might inform his decisions regarding the constitutional right to privacy. Senator SPECTER pointed out that Chief Justice Rehnquist had ultimately agreed to uphold the Miranda rule, even though he disagreed with the original Miranda case, because he believed the warnings to criminal subjects had become part of our national culture. Judge Roberts refused to agree that the right to certain types of privacy were equally embedded in our national culture.

In fact, Judge Roberts pointedly refused to answer questions about whether the right to privacy applies to either the beginning or end of life. The only decided case in this area he was willing to talk about was in response to a question from Senator KOHL regarding Griswold v. Connecticut, the case that says the Constitution's right to privacy extends to a married couple's right to use contraception. However, in response to a followup question from Senator FEINSTEIN, Judge Roberts did not make it clear if he agreed with the Supreme Court's opinion in Eisenstadt v. Baird, which upheld the right of single people to use contraception, saying only that ''I don't have any quarrel with that conclusion.'' I found it hard to tell whether he was embracing the right to privacy in this context or just restating what the Supreme Court has said.

So what might this all mean? For me, it is again a question of whether Judge Roberts will uphold not just the letter but the spirit of the Constitution. Since he has a written record demonstrating his lack of support for the so-called right of privacy, I believe Judge Roberts owed us more candid responses to questions regarding these issues. There are a number of cases coming before the Supreme Court this term on these issues, and there will be many more in the future. These cases are not just about parental notification or the relationship between doctors and their patients, they go to core constitutional protections for all members of our society, particularly women.

I am also concerned that as a young lawyer in the Reagan administration, Judge Roberts appears to have joined in its efforts to dismantle the civil rights gains of the 1960s and 1970s. For example, Judge Roberts wrote vigorous defenses of a proposal to narrow the reach of the 1965 Voting Rights Act. That act is now up for reauthorization, and I am proud to see that this Congress and the country as a whole have come to see how important and successful it has been in giving all Americans the ability to participate in our democracy. And we should not have a Justice who would wish for anything less.

In other civil rights cases, Judge Roberts' record suggests that he wished to limit the Congress's authority to protect and enforce civil rights. Recently released documents show that Judge Roberts, when working in the Reagan Justice Department, disagreed with Ted Olsen, himself a strong conservative, on this issue, with Roberts arguing that Olsen's position wasn't conservative enough. In other documents, he challenged arguments by the U.S. Commission on Civil Rights in favor of busing and affirmative action. He described a Supreme Court decision broadening the rights of individuals to sue States for civil rights violations as causing ''damage'' to administration policies, and he urged that legislation be drafted to reverse it. In the context of the 1984 case of Grove City College v. Bell, he wished to limit the use of title 9, endorsing a narrow reading of that statute that Congress would later overrule in 1988.

Perhaps the issue I am most bothered about in the civil rights area is Judge Roberts' apparent support for court stripping. In the 1980s, there were a number of bills introduced in Congress to effectively gut Brown v. Board of Education. There were other bills proposed to strip courts of the ability to hear cases involving school prayer or reproductive rights, essentially stripping away the right of a citizen to go before a court and claim that they have been aggrieved.

Judge Roberts was supportive of these court stripping bills and wrote several memos trying to influence the administration to support them as well. Although he ultimately appears to have lost the debate in the administration on this issue, I believe these bills would have stripped the Federal courts of the ability to be the final arbiter of what the Constitution means, as well as an assault on the separation of powers.

Perhaps these memos are especially troubling to me since this Congress just passed legislation to strip the courts of the power to hear cases involving the negligence of gun dealers and manufacturers. This legislation is likely to end up before the Supreme Court in the near future and effectively strips ordinary citizens who have been injured from being able to take their grievances to court. Again, this makes me question Judge Roberts' desire to uphold the spirit of the Constitution.

From what we know about Judge Roberts, I am also concerned about his commitment to upholding the constitutional separation of church and state. As is true with many areas of constitutional law, he has not expressed his personal views on these topics in articles or speeches. But the briefs he wrote while in the Solicitor General's Office, if indicative of his views, suggest Judge Roberts would move the Court in a more conservative direction, allowing far more governmental involvement with religion.

One of the geniuses of our Constitution is its separation of church and state. The first amendment has allowed a multitude of religions to flourish in our country. Indeed, I find it ironic, as we try to create a constitution in Iraq that allows a number of religions to flourish, we are not more aware of the importance of our own Constitution in making that possible in America. As well-funded religious movements attempt to inject religion into Government, the Supreme Court remains an important bulwark against going down such a path.

For example, while at the Solicitor General's Office, Judge Roberts authored a brief arguing that school officials and local clergy should be allowed to deliver prayers at public school graduation ceremonies. The Government brief, written by Roberts, contended that religious ceremonies should be permitted in all aspects of ''our public life'' in recognition of our Nation's religious heritage. The brief argued for no limits on the content of prayers, allowing even overtly proselytizing messages. The Supreme Court, in a 5-to-4 opinion written by Justice Kennedy, rejected Judge Roberts' argument on behalf of the Government, finding that it ''turns conventional first amendment analysis on its head.''

The Supreme Court in Lee v. Weisman, and elsewhere, has stated it would not reconsider the longstanding Lemon v. Kurtzman test, which is the benchmark for evaluating issues of church and state relations. The Lemon test forbids Government officials from acting with a religious agenda, endorsing religion, or excessively entangling Government and religion. Roberts has advocated that the Lemon test be scrapped and replaced by a far more permissive standard, the coercion test. Under this view, the Government would violate the first amendment only if it literally established a church or coerced religious behavior. Critics of the Lemon test believe Government should be able to give money to religious schools for religious instruction. They believe it is proper for the Government to display profoundly religious symbols in a way that clearly and unambiguously endorses religion.

I worry that a Court with Judge Roberts has the potential to dramatically change the law with regard to the establishment clause. These changes could lead to many activities which today, wisely, are beyond the endorsement of Government and in the province of religion, as they should be.

As a judge, private lawyer, and Government attorney, Judge Roberts also has repeatedly argued to narrow the protections of the Americans with Disabilities Act. He argued in one case before the Supreme Court that a woman who developed severe bilateral carpal tunnel syndrome and tendinitis from working on an auto manufacturing assembly line was not a person with a disability because she was not sufficiently limited in major life activities outside of her job.

Judge Roberts has long held these views. In 1982, Judge Roberts wrote a memo while at the Reagan Justice Department criticizing a trial court and appeals court decision that a Federal law required a deaf student to have a sign language interpreter to assist her in school. Even the conservative Justice Department of that administration disagreed with this view and supported the student. This is just one more area where, based on what we know, it appears Judge Roberts would roll back freedoms and rights this Congress and the American people have long fought for.

Some on the Supreme Court, to judge by their dissenting and concurring opinions, would use the bench to impose a dramatic change in the meaning of the Constitution on the American people. With one or two more votes, they could overturn dozens, even hundreds, of important precedents going back decades. They could dismantle rights and freedoms Americans have fought for and come to rely on: the right to privacy, civil rights, the ability of Congress to fight discrimination, to protect consumers, workers, and the environment.

The next Justice appointed will likely sit on the Court for 25, maybe even 35 years. He or she will be in a position to decide important constitutional questions, not only for our generation, but for our children and our grandchildren. The precedents he or she helps to create will bind our country for the 21st century and beyond. They will be the definitive interpretation of our founding document, not just in the Supreme Court, but in all the Federal appellate courts and all the district courts in the land. They will affect every American, from the earliest days of their childhood through the closing days of their life.

The Supreme Court will cast rulings on every issue of importance to the American people. The list is familiar: right to privacy, civil rights, freedom of speech and religious liberty, environmental, labor, and consumer protections. But these are only the issues we are aware of now. The Court will also confront future issues beyond our foresight or imagination. From cloning and bioethics to control of intellectual property and access to information in a global economy, the Supreme Court in the years to come will face challenging issues we cannot yet even conceive.

A lifetime nomination to the Supreme Court presents an awesome power and responsibility, one that transcends our time. The Supreme Court has been a pillar of America's constitutional democracy, and its responsibility for upholding and protecting the Constitution has proven a model for emerging constitutional democracies around the world. Alexander Hamilton wrote in Federalist No. 78, in defending the Constitution's creation of an independent judiciary with lifetime appointments to judges:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

I intend to vote against the nomination of Judge Roberts to be the Chief Justice of the U.S. Supreme Court because I am not convinced he will discharge this great responsibility in the way he should. He has not convinced me that he will protect minority communities in our country, that he will halt dangerous innovations from the executive branch, or that he will guard the Constitution and the rights of all individuals. Judge Roberts has not convinced me he will uphold not just the letter of the Constitution, but the spirit of the Constitution as well.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KYL. 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. KYL. Mr. President, I rise to speak on the nomination of Judge John Roberts to be the Chief Justice of the United States and I am delighted to indicate my support for his confirmation.

First, I would like to make a couple of preliminary comments about things that others have spoken to, one of which is the question of whether additional documents from the Solicitor General's Office, the Department of Justice, should have been provided as part of a record to consider Judge Roberts.

There were something like 80,000 pages of documents produced. That does not count the scores of pages of opinions he had written as a judge, speeches, law review articles, notes for courses he taught, and a whole variety of other documents he had written—probably more documents than had ever been produced for any other nominee in the history of the United States.

I think it is inappropriate for Members to suggest that Judge Roberts somehow withheld documents. He withheld nothing. He had no documents in his possession that were relevant that were not turned over to the committee. In fact, as I recall, his answers to the committee's questionnaire were some 80 pages, voluntarily provided by him. He did not withhold any documents.

The only documents the administration did not produce were those private memoranda between lawyers in the Solicitor General's Office, of whom he was one, and the other officials of the Solicitor General's Office, including the Solicitor General himself. Those are private attorney/client work product kind of memoranda that should not be produced and, of course, were not produced by the administration.

Judge Roberts is not in possession of those. He did not refuse to turn those documents over and it is proper we retain the precedent that those private communications between attorney and client not be produced.

There was a great hullabaloo, correctly so, in this Chamber when it was discovered that a staffer had broken into the computers of some Democratic members of the Judiciary Committee and found private communication between members of their staff and the Senators. This was rightly condemned as having a chilling effect. If the public is becoming aware now of the communication between staff and a Senator, that would chill the communication between the staff and Senator. It might cause them not to fully and candidly express their views. That is correct. That is why that was wrong and why the people responsible were punished.

The same thing applies here. One cannot get into the private communications between an attorney and a client any more than one would want to in the Solicitor General's Office.

Secondly, there has been some suggestion that the administration did not produce these documents because it had something to hide.

I ask unanimous consent that a letter from the Department of Justice dated September 9, 2005 to Senator LEAHY, the ranking Democrat, be printed in the RECORD.

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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 9, 2005.

Hon. PATRICK J. LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: I write in response to your letter dated September 7, 2005, regarding your request that the Department disclose confidential legal memoranda from Judge John Roberts' tenure in the Office of the Solicitor General. As you know, we have been working closely with the Committee on the Judiciary to facilitate the Committee's consideration of Judge Roberts' nomination,

and we look forward to continuing to do so. The Department recently produced to the Committee another 1,300 pages of documents relating to Judge Roberts' government service, bringing to approximately 76,000 the number of pages the White House and the Department have provided. That number does not include the voluminous production made by Judge Roberts himself.

With regard to your request, we remain unable to provide memoranda disclosing the internal deliberations of the Solicitor General's office. The privileged nature of those documents is widely recognized, and the Department has traditionally declined to breach that privilege. We have considered carefully the legal arguments you make in support of disclosure. As discussed below, the authorities your letter cites relate to contexts very different from this one and have no relevance here.

Your letter cites an opinion by Attorney General Robert H. Jackson and argues that this opinion supports disclosure to the Committee of internal Solicitor General documents. We believe this is an inaccurate characterization of that memo. To be sure, Attorney General Jackson stated that in the context of executive nominations, certain otherwise-confidential documents would be provided to the Senate. But the documents in question were FBI reports of criminal investigations. The Attorney General's opinion that the Senate should be informed of a nominee's criminal activities does not support your request that we disclose privileged and deliberative attorney communications. In fact, the opinion lists several examples of Attorneys General faithfully discharging the ''unpleasant duty'' of declining to produce to Congress information that should remain confidential. 40 U.S. Op. Atty. Gen. 45, 48.

Your letter also includes a charge that the Department's unwillingness to breach the traditional confidentiality of internal deliberations raises an inference adverse to Judge Roberts. We disagree with this argument on both legal and factual bases.

First, it is a matter of well-settled law that no inference of any kind may be drawn from a decision not to release privileged documents. Notably, none of the judicial decisions you cite dealt with privileged documents. With regard to claims of privilege, the law is clear. As one federal court of appeals recently recognized, ''the courts have declined to impose adverse inferences on invocation of the attorney-client privilege.'' Knorr-Bresme Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp., 383 F.3d 1337, 1345 (Fed. Cir. 2004). Another court of appeals explained the justification for this firmly established rule: ''This privilege is designed to encourage persons to seek legal advice, and lawyers to give candid advice, all without adverse effect. If refusal to produce an attorney's opinion letter based on claim of the privilege supported an adverse inference, persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions. Such a penalty for invocation of the privilege would have seriously harmful consequences.'' Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 226 (1999), overruled on other grounds, Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003); see also Parker v. Prudential Ins. Co., 900 F.2d 772, 775 (4th Cir. 1990).

Second, the implication that the Department's decision is motivated by an attempt to hide something assumes that the decisionmakers have some knowledge of the documents' contents. That assumption is factually wrong. No one involved with the Administration's Supreme Court nomination process has reviewed the documents you request. The decision not to disclose the internal deliberations of the Solicitor General's office is made by the Department as a matter of principled regard for preservation of the Solicitor General's ability to represent the United States effectively.

In summary, for the reasons stated above and in my letters of August 5, 2005, and August 18, 2005, we cannot agree to your request to produce the internal, privileged communications of the Office of the Solicitor General. We nonetheless remain committed to providing the Committee full and prompt assistance in its consideration of Judge Roberts' nomination.

Sincerely,

WILLIAM E. MOSCHELLA,
Assistant Attorney General.

Mr. KYL. I will read part of one paragraph:

No one involved with the Administration's Supreme Court nomination process has reviewed the documents you request. The decision not to disclose the internal deliberations of the Solicitor General's office is made by the Department as a matter of principled regard for preservation of the Solicitor General's ability to represent the United States effectively.

So for anybody to suggest that somebody had something to hide is to ignore the facts. This letter was widely distributed. Every Senator should know that the administration had not even looked at the material, so they obviously could not be hiding something.

There has been some reference—I would almost even refer to it as guilt by association—that John Roberts worked in the Reagan administration. I remind my colleagues that this is the Reagan administration which was reelected with, as I recall, 59 percent of the vote and 49 of our 50 States. I would be pleased to debate any of my colleagues in this Chamber about the record of the Reagan administration, and I can say in advance that I will take the affirmative side of that debate that it should be defended. John Roberts has nothing to apologize for because he worked for President Ronald Reagan.

I want to express in a more formal way my support for Judge Roberts. So much has already been said about his intellect, his character, his qualifications, his experience, his eloquently expressed commitment to the rule of law, and I certainly agree with all of those who have been impressed with those qualities. I believe these are the qualities that should govern this body's advise and consent role. In other words, that intelligence, character, experience, and commitment to the rule of law are the qualities we should be looking for in a nomination for the U.S. Supreme Court and other courts as well. We should not be looking to how this particular nominee might rule in a future case. We certainly should not play a bargaining process with the nominee, in effect saying, if you will tell me how you will rule on these future cases and if I agree with that, then I will support your confirmation. That would, of course, undermine the impartiality and the independence of our courts, and it is improper.

I noted recently that fellow Arizonian Justice Sandra Day O'Connor spoke in Arizona and she said judicial independence is hard to create and easier than most people imagine to destroy.

Well, I think she is exactly right on that. Judge Roberts made a similar comment during his opening statement. He said:

President Ronald Reagan used to speak of the Soviet constitution, and he noted that it purported to grant wonderful rights of all sorts to people. But those rights were empty promises, because that system did not have an independent judiciary to uphold the rule of law and enforce those rights. We do, because of the wisdom of our Founders and the sacrifices of our heroes over the generations to make their vision a reality.

In other words, that rule of law is what lies at the foundation of the American system of ordered liberty. Judges owe their loyalty to the law, not to political parties, not to interest groups, and they must have the courage to make tough decisions, however unpopular. Consider, for example, how Judge Roberts answered a question of whether he would stand up for the little guy. He said:

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

That is the essence of the rule of law as enforced by independent judges, doing what the Constitution and the law demand, regardless of the political or economic power of the parties. Indeed, that is the best way to ensure that the voice of the little guys will, in fact, be heard.

Judge Roberts often spoke of the rule of law during his hearing. Considering this additional excerpt, he explained that he used to represent the U.S. Government before the Supreme Court when he was the Deputy Solicitor General, and then he stated:

But it was after I left the Department and began arguing cases against the United States that I fully appreciated the importance of the Supreme Court and our constitutional system.

Here was the United States, the most powerful entity in the world, aligned against my client. And yet, all I had to do was convince the Court that I was right on the law and the government was wrong and all that power and might would recede in deference to the rule of law. That is a remarkable thing.

It is what we mean when we say that we are a government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world—because without the rule of law, rights are meaningless.

I was struck by this comment when I heard Judge Roberts make it, because it reminded me of my earlier career as a private attorney practicing before the State and Federal courts, including the Supreme Court. Parties, be they corporations or civil plaintiffs or governments or criminals, all put their faith in judges to adhere to legal principles and make decisions based on the rule of law, not based on what they personally believe to be right. Parties

have disputes that require a neutral arbiter who is beholden to nobody, and who will not be dissuaded from doing his duty, no matter what the cost. As Judge Roberts later emphasized, ''This is the oath.'' This is what the Constitution and an independent judiciary demand.

Of course, it is equally important to understand what judicial independence is not. Judicial independence does not mean the judge has the right to disregard the Constitution or the statutes passed by legislatures. Judicial independence does not mean that because of a lifetime appointment, the judicial role is unconstrained by precedent and by principle, and judicial independence is not an invitation to remake the Constitution or the laws if it does not lead to the result the judge prefers. Nor is judicial independence an invitation to the judge to legislate and resolve questions that properly belong to the democratic branches of our Government, no matter how wise a particular judge might be.

Judicial independence gives judges tremendous freedom, but it is a freedom to do their duty to the law, not a freedom from or independence from the constraints of the law. When judges confuse the freedom to follow the law with the freedom to depart from it, we see the unhinged judicial activism that has infuriated so many Americans throughout my lifetime.

Consider what Justice Antonin Scalia wrote while dissenting from one of the Ten Commandments cases the Supreme Court decided this past spring, McCreary v. ACLU. He said:

> What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that, thumbs up or thumbs down, as their personal preferences dictate.

I focus on the need for judicial independence and respect for the rule of law because I am very concerned about threats to judicial independence that have infected the confirmation process. During Judge Roberts' hearings, we saw efforts to demand political promises in exchange for confirmation support. Specifically, some Senators demanded to know how Judge Roberts will vote on issues that will come before the Supreme Court. In doing this, Senators risk turning the confirmation process into little more than a political bargaining session in which the Senators refuse to consent to a fully qualified nominee unless the nominee promises under oath to vote a certain way in future cases.

Yet during this confirmation process, some Senators said they would not support Judge Roberts unless they knew where he stood on important issues of the day. In fact, the only reason they asked the question is because they thought the issue might be before the Court; otherwise, there would be no reason to find out how he might rule.

When the Judiciary Committee voted last week, more than one Senator explained that while Judge Roberts was a brilliant man who would be a thoughtful Chief Justice, they were not going to support him because they could not learn enough about his views on issues that they thought would come before the Court.

The Senate must reject this improper politicization of our judiciary. A judicial nominations process that required nominees to make a series of specific commitments in order to navigate the maze of Senate confirmation would bring into disrepute the entire enterprise of an independent judiciary.

In July, I asked the Senate Republican Policy Committee, which I chair, to examine the canons of judicial ethics and the views of the sitting Supreme Court Justices on this matter.

I ask unanimous consent that the resulting report entitled ''The Proper Scope of Questioning for Judicial Nominees'' be printed after my remarks.

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

(See exhibit 1.)

Mr. KYL. Judge Roberts confronted this challenge repeatedly during the hearing. Senators would ask him, sometimes directly, sometimes obliquely, how he felt about certain issues. To his credit, he resisted answering those questions that could have jeopardized his judicial independence. As he explained, the independence and integrity of the Supreme Court requires that nominees before the committee for a position on that Court give no forecast, predictions, nor give hints about how they might rule in cases that might come before the Court.

Judge Roberts' formulation is exactly right. If judges were forced to make promises to Senators in order to be confirmed, constitutional law would become a mere extension of politics. If we allow this radical notion to take hold, and if Senators can demand such promises, then what would become of litigants' expectations of impartiality and fairness in the courtroom? The genius of our system of justice is that people are willing to put their rights, their property, and even their lives before a judge, to be dealt with as he or she sees fit. People do this because of the expectation that they will be treated fairly by a judge, with no preconceived notion of how their case should be decided.

That is a pretty remarkable thing, to have that much confidence in the system that we would literally place our lives, our rights, our property in the hands of one person. Yet we do that every day all over this country because we have confidence in the system. And that system says the judge will decide your case free of any preconceived notion, so we as Senators should not be seeking to find out in advance how that judge might rule.

Let me be clear. I share my colleagues' curiosity about how Judge Roberts and the next nominee will rule on the hot-button issues of the day. For example, I hope he will join most Americans in recognizing that partial-birth abortion does not deserve constitutional protection. Similarly, it is my personal wish that the Supreme Court will allow States to pass laws requiring minor girls to gain the consent of—or at least to notify—their parents before getting an abortion. We remain a Nation at war, and I believe it is crucial to our national security that the Supreme Court support commonsense rules governing the war on terror without requiring that foreign terrorists be treated the same as American criminals with the same constitutional rights as citizens. I would like him to resist the siren songs of those judges who would craft a constitutional right to same sex marriage. I would strongly prefer he uphold legislative efforts to guarantee that crime victims have a substantial role in the prosecution and sentencing of perpetrators. And I hope he will help clean up the Supreme Court's habeas corpus jurisprudence so we do not have to wait 20 years for justice to be done.

On these and many other matters I have a deep interest and strong opinions about what the Supreme Court ought to do. But I did not ask John Roberts for commitments on these matters. Of course, I am curious but I didn't ask him how he would rule because, had I done so, I would have been encouraging him to violate his judicial ethics as a sitting judge as well as to jeopardize the independence of the Supreme Court itself.

Should a nominee fully answer questions? Absolutely. But should a nominee engage in political bargaining by prejudging an issue or a case? Absolutely not. Nobody disputes that John Roberts will be confirmed later this week. I am encouraged by the strong bipartisan support for John Roberts, and I am cautiously optimistic that the size of this vote represents a repudiation of the politicization of the judiciary, but I am concerned that others will see the number of votes against Judge Roberts as justification for the proposition that one should not support a nominee who refuses to indicate how he will rule in future cases.

This vote should represent a fresh start. The President sent us a brilliant and distinguished nominee who had the character and commitment to the rule of law to deserve the Senate's support. The nominee is a Republican who clerked for one of the great conservative judges of the 20th century. He served in the executive branch for Republican Presidents. He advocated conservative policies on those Presidents' behalves. Yet that political background will not be a bar to Judge Roberts' confirmation. Equally important, Judge Roberts' refusal throughout his hearings to make promises to Senators in exchange for their support is being affirmed as an appropriate adherence to judicial ethics. The courage that

John Roberts has shown in upholding his ethical standards should not be punished.

Justice O'Connor stated earlier this month:

We must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies.

Once again, my fellow Arizonan was right. The Senate will exercise that vigilance later this week by confirming Judge Roberts and by rejecting the politicization of the confirmation process. In the coming weeks, the Senate will consider the nominee to replace Justice O'Connor. It is my hope that Senators will exercise that same vigilance. The rule of law demands it.

EXHIBIT 1

THE PROPER SCOPE OF QUESTIONING FOR JUDICIAL NOMINEES

INTRODUCTION

Some Senate Democrats are demanding that Supreme Court nominee John G. Roberts announce his positions on constitutional questions that the Supreme Court will be deciding after he is confirmed. [FN1: For example, Senator Charles Schumer has said, ''Every question is a legitimate question, period.'' New York Post, July 6, 2005. Senator Schumer has also said that he will ask how Mr. Roberts will rule on issues that the Supreme Court certainly will consider, including free speech, religious liberty, campaign finance, environmental law, and other political and legal questions. Foxnews.com, July 19, 2005. Likewise, Senator Ted Kennedy has demanded to know ''whose side'' Judge Roberts will favor, and ''where he stands'' on legal questions before the Supreme Court. Congressional Record, July 20, 2005. Just yesterday, Senator Evan Bayh picked up this theme: ''You wouldn't run for the Senate or for Governor or for anything else without answering people's questions about what you believe. And I think the Supreme Court is no different.'' CNN ''Inside Politics,'' July 25, 2005.] Although these Senators are quick to say that they do not seek pre-commitments on particular cases, the ethical rules governing judicial confirmations are not limited to preventing prejudgment of particular cases. As nominees in the past have recognized, it is inappropriate for any nominee to give any signal as to how he or she might rule on any issue that could come before the court, even if the issue is not presented in a currently pending case.

If these novel ''prejudgment demands'' were tolerated, the judicial confirmation process would be radically transformed. While questions about judicial philosophy in general have always been appropriate, any effort to learn how particular constitutional questions will be resolved has always been out of bounds. It was for this reason that all sitting Supreme Court Justices declined to answer some questions on constitutional issues or past cases of the Supreme Court. For example:

Justice Sandra Day O'Connor expressly refused to answer questions about past cases that she believed would later come before the Supreme Court. [FN2: Confirmation Hearing, July 1994, at p. 199.]

Justice Ruth Bader Ginsburg testified during her hearing: ''I must avoid giving any forecast or hint about how I might decide a question I have not yet addressed.'' [FN3: Confirmation Hearing, July 1993, at p. 265.]

Then-Chairman Joseph Biden advised Justice Ginsburg during her hearing: ''You not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms . . . over your tenure on the Court.'' [FN4: Confirmation Hearing, July 1993, at p. 275.]

There is a reason for this longstanding precedent: to demand that a judicial nominee ''prejudge'' cases and issues threatens the independence of the federal judiciary and jeopardizes Americans' expectation that the nation's judges will be fair and impartial. That is why the canons of judicial ethics prohibit any judicial nominee from prejudging any case or issue. [FN5: ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2003).] Judges should only reach conclusions after listening to all the evidence and arguments in every case. Americans expect judges to keep an open mind when they walk into the courtroom—not to make decisions in the abstract and then commit to one side before the case begins. No judge can be fair and impartial if burdened by political commitments that Senators try to extract during confirmation hearings. Otherwise, judicial nominees will be forced to sacrifice ethics and impartiality to be confirmed.

Senators naturally want to know how future cases will be decided, but curiosity must yield to the greater value—the preservation of an independent judiciary and the guarantee of equal justice. The following materials provide detailed support for why the traditional norms should be upheld, and why the Senate would tread into very murky waters if it were to upset these settled practices.

THE CANON OF JUDICIAL ETHICS

''[A] judge or a candidate for election or appointment to judicial office shall not . . . with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. . . .''—ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2003).

ALL NINE SUPREME COURT JUSTICES DISAGREE WITH REQUIRING NOMINEES TO PREJUDGE ISSUES AND CASES

Justice Ruth Bader Ginsburg

''A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process. Similarly, because you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue, were I in your shoes, were I a legislator, are not what you will be closely examining.''—Confirmation Hearing, July 1993, at p. 52.

''Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.''—Confirmation Hearing, July 1993, at p. 52. Justice Ginsburg was a judge on the D.C. Circuit when nominated to the Supreme Court.

''I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. . . . If I address the question here, if I tell this legislative chamber what my vote will be, then my position as a judge could be compromised. And that is the extreme discomfort I am feeling at the moment.''—Confirmation Hearing, July 1993, at p. 188.

''When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest.''—*Republican Party of Minnesota* v. *White*, 536 U.S. 765,816 (2002) (Ginsburg, J., dissenting).

''[H]ow a prospective nominee for the bench would resolve particular contentious issues would certainly be 'of interest' to the President and the Senate in the exercise of their respective nomination and confirmation powers. . . . But in accord with a longstanding norm, every member of this Court declined to furnish such information to the Senate, and presumably to the President as well.''—*Republican Party of Minnesota* v. *White*. 536 U.S. 765, 807 n.1 (2002) (Ginsburg, J., dissenting).

''This judicial obligation to avoid prejudgment corresponds to the litigants'' right, protected by the Due Process Clause of the Fourteenth Amendment, to an 'impartial and disinterested tribunal in all civil and criminal cases. '',—*Republican Party of Minnesota* v. *White*, 536 U.S. 765, 813 (2002) (Ginsburg, J., dissenting) (internal citation omitted).

Justice Sandra Day O'Connor

''I feel that is improper for me to endorse or criticize a decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts. I do not think we have seen the end of that issue or that holding and that is the concern I have about expressing an endorsement or criticism of that holding.''—Confirmation Hearing, September 1981, at p. 199.

Justice Stephen Breyer

''I do not want to predict or to commit myself on an open issue that I feel is going to come up in the Court. . . . There are two real reasons. The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. . . . The other reason, which is equally important, is . . . it is so important that the clients and the lawyers understand the judges are really open-minded.''—Confirmation Hearing, July 1994, at p. 114.

''The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.'' Confirmation Hearing, July 1994, at p. 138 (regarding the right to an abortion).

''Until [an issue] comes up, I don't really think it through with the depth that it would require. . . . So often, when you decide a matter for real, in a court or elsewhere, it turns out to be very different after you've become informed and think it through for real than what you would have said at a cocktail party answering a question.''—Remarks at Harvard Law School, December 10, 1999, quoted in Arthur D. Hellman, Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals. 34 U. C. Davis L. Rev. 425, 462 (2000).

Justice John Paul Stevens

''A candidate for judicial offices who goes beyond the expression of 'general observations about the law . . . in order to obtain favorable consideration' of his candidacy demonstrates either a lack of impartiality or a lack of understanding of the importance of maintaining public confidence in the impartiality of the judiciary.''—*Republican Party of*

Minnesota v. *White*, 536 U.S. 765,800 (2002) (Stevens, J., dissenting) (internal citation omitted).

Justice David Souter

''[C]an you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?''—Confirmation Hearing, September 1990, at p. 194.

Justice Anthony Kennedy

''[The] reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues [is that] the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.''—Confirmation Hearing, January 1987, at p. 287.

Chief Justice Rehnquist

''For [a judicial nominee] to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.''—*Laird* v. *Tatum*, 409 U.S. 824, 836 n.5 (1972) (Mem. on Motion for Recusal).

Justice Clarence Thomas

''I think it's inappropriate for any judge who is worth his or her salt to prejudge any issue or to sit on a case in which he or she has such strong views that he or she cannot be impartial. And to think that as a judge that you are infallible I think totally undermines the process. You have to sit, you have to listen, you have to hear the arguments, you have to allow the adversarial process to work. You have to be open and you have to be willing to work through the problem. I don't sit on any issues, on any cases that I have prejudged. I think that it would totally undermine and compromise my capacity as a judge.''—Confirmation Hearing, September 1991, at p. 173.

Justice Antonin Scalia

''I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.''—Confirmation Hearing, August 1986, at p. 37.

ADDITIONAL OPPOSITION TO PREJUDGMENT OF ISSUES

Justice Thurgood Marshall

''I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am continued and sit on the Court, when a Fifth Amendment case comes up, I will have to disqualify myself.''—Confirmation Hearing, August 1967.

Senator Joseph Biden

In 1989, then-Chairman Joseph Biden crafted the question that is now asked of all nominees to the federal bench: ''Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.''

''I believe my duty obliges me to learn how nominees will decide, not what they will decide, but how they will decide.''—Confirmation Hearing for Ruth Bader Ginsberg, July 1993, at p. 114.

''You not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms . . . over your tenure on the Court.''—Confirmation Hearing for Ruth Bader Ginsberg, July 1993, at p. 275–276.

Democrat-Controlled Senate Judiciary Committee Report on Abe Fortas Nomination

''Although recognizing the constitutional dilemma which appears to exist when the Senate is asked to advise and consent on a judicial nominee without examining him on legal questions, the Committee is of the view that Justice Fortas wisely and correctly declined to answer questions in this area. To require a Justice to state his views on legal questions or to discuss his past decisions before the Committee would threaten the independence of the judiciary and the integrity of the judicial system itself. It would also impinge on the constitutional doctrine of separation of powers among the three branches of Government as required by the Constitution.''—Committee Report on Nomination of Abe Fortas to be Chief Justice of the United States, September 20, 1968.

CONCLUSION

Every sitting Supreme Court Justice disagrees with the approach urged by some Senate Democrats—for good reason. Nothing less than judicial independence and the preservation of a proper separation of powers is at stake. The Senate should not allow short-term curiosity about particular issues to override the settled procedures that have governed this process for so long.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. I am pleased to speak on the matter of the nomination of John Roberts to be Chief Justice of the Supreme Court of the United States. The authors of our Constitution were at the same time profound idealists about the human spirit and cold-blooded realists about the evil people are capable of. They had witnessed how even heroism can turn into tyranny, so they wrote a document that struck a balance between power and accountability that has remained level through a Civil War, World War, depressions, booms, and many social upheavals.

We are part that have process in this debate. Our job is not to add value to the Constitution but to conserve as much of its value as we can. We are a government of laws and not men and women. But men and women make and interpret and apply those rules. The voters choose us. The President that the people chose makes the choice of Justices of the Supreme Court, with our advice and consent. It is a solemn and momentous transition in our history when we put a new Justice on the Court to sit for the next generation.

First of all, I commend the President for the quality of his appointment. John Roberts is a person of brilliant mental capacity. We all know Lord Acton's statement about how absolute power corrupts absolutely. But in this case, I also want us to invoke Barbara Tuchman's reply that weakness, which must depend on compromises and deals to maintain its position, corrupts even more.

Judge Roberts is as mentally strong as a person can be. He has the kind of mental strength that does not rely on intimidation, manipulation or style points to carry his argument. It was wonderful to watch his mind work during the nominee confirmation process. Whether you are for or against this nomination, the strength of his intellect has never been in doubt.

The President's choice is also a person of integrity. The word ''integrity'' has the same root as the mathematical term ''integer,'' which is a whole number. Integrity means that all the pieces fit together to make a consistent whole. Judge Roberts has been in many situations which sorely tested his integrity, and he has held together and held consistent in a remarkable way. Through his writings and testimony, Judge Roberts has demonstrated he knows his historical place. Judge Roberts is not a person driven by ego or ambition. He knows we all have a part to play in this constitutional design and to step out of the role would be to step into the place of others. Respectful humility in the wielding of power is an indispensable attribute that Judge Roberts has shown.

In his own words, Judge Roberts testified before the Senate Judiciary Committee and said:

My obligation is to the Constitution—that's the Oath.

My colleague from Arizona told about that wonderful exchange between Judge Roberts and members of the committee when he was asked about the big guy and the little guy, how he would decide a case.

There are some in this body who, with past nominees, have looked at the status of the person before the Court as somehow that should be determinative of whether they win. So if they were the little guy or they were a woman or this or that, that somehow that was more important; if they didn't win, that somehow that was a negative to the person who made the decision.

Judge Roberts responded: If the Constitution says that the little guy should win, the little guy is going to win. But if the Constitution dictates that the big guy wins, then the big guy will win.

Little guys need the Constitution because in other places and at other points in times in other countries it is your status that determines whether you win. Typically, it is a person with wealth and power that would use that status to win. So the little guy needs the Constitution. John Roberts is respectful of the Constitution.

Judge Roberts believes in a judicial philosophy that defers to legislative judgments and refuses to insert judges into disputes in which the Constitution gives the judiciary no role.

Judge Roberts told us:

I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor to the best of my ability.

Judge Roberts' approach to the law is one of restraint. He is not an ideologue, intent on imposing his views on the law. Those who know him say Judge Roberts possesses an ideal judicial temperament. He has a balanced view of the power of the Federal Government that is respectful of Supreme Court precedent.

During his hearings, Judge Roberts described his understanding of the Supreme Court's commerce clause jurisprudence and explained that he had no agenda to overrule established cases. Judge Roberts also demonstrated his respect for the authority of Congress to make factual findings that form the basis for legislation under the commerce clause.

As Judge Roberts explained at the hearings:

> One of the warning flags that 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 reevaluating legislative findings, because that does not look like a judicial function. It is not an application of analysis under the Constitution. It is just another look at findings.

Both in private practice and on the bench, Judge Roberts has established, beyond any doubt, that he is a fair judge within the judicial mainstream. Judge Roberts' judicial decisions reflect a fair approach and a scrupulous unwillingness to impose his own policy preferences on law. I commend Chairman SPECTER and the members of his committee for the way they have brought this nomination to the floor. We are a political people, and there were some politics at play. In past times, a nominee of Judge Roberts' intellect and integrity and caliber would receive 96, 97, 98 votes in confirmation. I believe Justice Ginsburg received 86 votes. I also believe Justice Scalia received 98 votes. I suspect that will not happen on Thursday. Special interests and single interests have driven a wedge into this Senate body, and that is lamentable. At times, I wondered if committee members were using the hearing to assess Judge Roberts or to lobby him about future cases. Standards that some Democratic members of the committee have applied to Judge Roberts were the opposite of those applied when appointees of their party's President sent up Justices Ginsburg and Breyer.

Earlier, they counseled judges not to answer specific questions, and now they fault Judge Roberts for being insufficiently specific. But I would say, on a whole, the hearing was fair and dignified. I hope we are making progress toward a consistent standard to apply to judicial nominees, Supreme Court nominees.

A Supreme Court confirmation is not a rehashing of the last Presidential campaign or a preview of the next one. The people chose a President, and that person has a right to appoint a judge who they believe is consistent with their view of the role and the direction the Court should take. This is a conservative approach. They chose us in the Senate not to substitute our judgment for the President's, but to provide a check against a Justice who was deficient in some clear way. That is why I have stated that whether a Republican or Democrat is President, my standard will be: Is the person qualified? Do they have the requisite integrity? Do they have the temperament and commitment to be stewards of the rule of law?

Judge Roberts meets that test with flying colors. He not only will be a strong Chief Justice, he will be a role model for the rest of the Nation. His predecessor and mentor, William Rehnquist, was a midwesterner, as is Judge Roberts. Those of us who call the Midwest home have the utmost respect for those who have the humility to keep their brilliance a secret. My own remarkable State of Minnesota has been compared to a dog that is too shy to wag its own tail. Our license plates say: The Land Of 10,000 Lakes. I actually think we have closer to 15,000, but humility, I think, is a Minnesota way. It certainly is the style of Judge Roberts. We admire Judge Roberts for his grace and humility as he takes on the awesome power of his position. We admire his commitment to equal justice under the law. These are turbulent times in America. The people need a confidence builder. The President has given them one with this nomination, and we can and should add to it with a strong bipartisan vote to confirm Judge Roberts to be Chief Justice of the Supreme Court. On Thursday, the Senate will exercise its solemn advice-and-consent responsibility on the nomination of John Roberts to be Chief Justice of the Supreme Court of the United States. I will vote to give my consent to the Roberts nomination. I will vote in favor of John Roberts.

I yield the floor.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Maine.

The PRESIDING OFFICER. The Senator from Maine is recognized.

Ms. COLLINS. Mr. President, I rise today to speak in favor of the nomination of John Roberts to serve as Chief Justice of the United States.

The Chief Justice is commonly referred to as the ''first among equals,'' a title reflecting the significance of this position in terms of shaping the Court, and serving as the head of the Judicial branch. Assuming he is confirmed, Judge Roberts will be only the 17th person in our Nation's history to serve as Chief Justice.

In confirming a Chief Justice, we entrust this individual with considerable power—the power to interpret the Constitution, to say what the law is, to guard one branch against the encroachments of another, and to defend our most sacred rights and liberties. Along with these powers, this individual also bears a responsibility to act with an understanding of the limited role of judicial review and the need for judicial restraint.

The cases that come before the Supreme Court each year present legal issues of tremendous complexity and import. Given the difficulty of the questions presented, it is not surprising that most good Justices do not know how they will rule before a case comes before them. Their decisions are rendered only after extensive briefing, argument, research, and discussion with the other Justices. Indeed, when any person goes before the Court, he or she has a right to expect that the Justices will approach the case with an open mind and a willingness to fully consider all of the arguments presented.

Some of our colleagues have called on nominees to announce beforehand how they would rule in cases that have yet to come before them. Yet, a good judge will not know, and would not try to say—even hazarding a guess could raise questions about judicial impartiality and integrity.

Similarly, our ability to question nominees about future cases is limited by the difficulty of predicting the issues that will come before the Court over the next several decades. Twenty years ago, few would have expected that the Court would hear issues related to a presidential election challenge, would try to make sense of copyright laws in an electronic age, or would confront questions on how to protect our cherished civil liberties in light of a new domestic terrorism threat.

And even if nominees were to indicate how they would rule, the reality is that we are not in a position to hold them to their word. Appointments to the Court are, of course, lifetime appointments.

While we can not know with certainty how a nominee will rule on the many questions that may come before him or her, we can and must strive to take the measure of the person: carefully assessing the excellence of the nominee's qualifications, integrity, and judicial temperament, as well as the principles that will guide the nominee's decisionmaking.

Does the nominee have the intellect and learning necessary to be a superb jurist? Is he or she open-minded and pragmatic? Does he or she have a sense of restraint and humility concerning the role of a judge? Does the nominee take seriously the role of our courts in protecting our basic liberties and rights from the passions and fads of the moment? And for Judge Roberts, the answer to these questions is yes.

The excellence of his legal qualifications is beyond doubt. He is a superb attorney and one of the finest legal minds of his generation. Prior to his appointment to the D.C. Circuit in 2003, Judge Roberts had argued an impressive 39 cases before the Supreme Court, and more often than not, his arguments were accepted by a majority of the Court. The American Bar Association Standing Committee on the Judiciary has reviewed his qualifications

for his nominations to the Court of Appeals and the United States Supreme Court on three separate occasions. In every instance, it has given Judge Roberts its highest possible rating.

Earlier this month, I met with Judge Roberts to discuss his judicial philosophy, his views on the importance of precedent, and the role of the judiciary. I was extremely impressed by his answers to my questions, which reassured me that he will be a justice dedicated to the rule of law—not someone who bends the rules to suit personal preferences or to advance a particular agenda.

At our meeting, I asked Judge Roberts about his views regarding the importance of stare decisis—the principle that courts should adhere to the law set forth in previously decided cases. I asked Judge Roberts whether a judge should follow precedent, even if he believed that the original case was incorrectly decided in the first instance. He told me that overruling a case is a ''jolt to the legal system'' and said that it is not enough that a judge may think the prior case was wrongly decided. He emphasized the importance that adherence to precedent plays in promoting evenhandedness, fairness, stability, and predictability in the law.

Following my personal meeting with Judge Roberts, I felt confident that Judge Roberts was eminently qualified to serve as Chief Justice. The Judiciary Committee hearings have only further confirmed my view that he is the right person for this weighty position.

Without question, these hearings demonstrated Judge Roberts' keen legal intellect and commanding knowledge of the law and the precedents of the Supreme Court. He demonstrated a winning and collegial style while under fire, and his testimony has been justifiably praised. Most important, he demonstrated an understanding of the limited role of the judiciary and a deep and abiding commitment to the rule of law.

During the confirmation process, I was impressed by Judge Roberts' statement that he wants to be known, he said, ''as a modest judge.'' This simple phrase is one that speaks volumes about the approach he brings to the Court. It tells us that he knows a judge must be restrained by the law, and by the principles, the practices, and the common understandings that make up our legal tradition.

It tells us that he has an abiding respect for our Constitution, for the separation of Federal powers it describes, and for the powers it reserves for the States and for the people. Perhaps most important, it tells us that his rulings will not be influenced by his own political views and personal values, whatever they may be.

Given the increasing concerns about judicial activism and the desire by some to use the courts to achieve the political ends that have eluded them, I believe that Judge Roberts' modest and disciplined approach to the law will serve our Nation well.

The President, in consultation with the Senate, has selected an outstanding nominee. We have fulfilled our advice and consent responsibility through extensive interviews, investigations and hearings. Judge Roberts has emerged from this process remaining true to his ideals of the proper role of a judge, and demonstrating beyond a doubt his fitness for the office.

Based on my personal discussions with Judge Roberts, my review of his record, and his testimony before Judiciary Committee, I am confident that Judge Roberts will be a Justice committed to the rule of law and one who will protect the liberties and rights guaranteed by our Constitution. I believe he will exercise his judicial duties with an understanding of the limited role of the judiciary to review and decide the specific cases before them based on the law—not to make policy through case law. He will be guided not by his own personal view of what the law should be, but by a disciplined review and analysis of what the law is. He understands that the very integrity of our judicial system depends on judges exercising this restraint.

For these reasons, I look forward to voting to confirm Judge Roberts, and I applaud the President for making an outstanding choice.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mrs. HUTCHISON. Mr. President, I rise today to speak about the nomination of Judge John Roberts to be Chief Justice of the United States.

We have had a lot of debate on the Senate floor. We certainly had Judiciary Committee hearings talking about our view of this nominee, exercising our right of advice and consent for the President's nomination, and each of us comes to this role of advice and consent with our own set of criteria.

What do I look for in the Chief Justice of the United States? First, and most importantly, are academic qualifications. Certainly John Roberts started his academic career looking toward a future of academic excellence. He has the background and the intelligence, which he exhibited in his hearings and in the meetings we had one-on-one with him. He also has proven his academic qualifications by excelling at Harvard in every discipline he studied.

Experience: You look for someone who has been tested by life. Someone who is in his 20s probably is not yet ready for cases and laws that will be interpreted for our country because he has not had all of life's experiences to mold him into the person he is going to be—knowing life's difficulties and what the laws are like to live with in the private sector. Looking for experience is very important to me.

Judge Roberts is 50 years old. I think that is exactly the right age to have the requisite experience and is, at the same time, young enough to help shape the Supreme Court. If confirmed, Judge Roberts would be one of the younger Justices in the history of our country.

I believe he will make a very important mark on the Court, and certainly as Chief Justice. From the beginning, he will have the opportunity to weigh in and do what he thinks is right in interpreting our Constitution and keeping the Supreme Court as an equal—not better, not lower—branch of our government.

Of course, the balance of powers in the three branches of Government is what has kept our democracy, our Republic, and our Constitution so relevant for the entire history of our country. The checks and balances in the three branches of Government have been what has allowed the Constitution to stay true to the democracy that it has supported for more than 200 years.

With regard to knowledge of the law and the key rulings of the Supreme Court, I do not think any of us have ever seen a nominee, for any level of the judiciary, sit before the Judiciary Committee without notes and talk about all of the key rulings of the Supreme Court—not only talking about the majority opinions and who wrote them, but also citing from the minority opinions and dissecting what those opinions meant in the context of the question. It was awesome to hear his knowledge of the law and of the key rulings of the Supreme Court.

Humility. A lot has been said about Judge Roberts' humility. It is good that he is a humble man and that he has talked about modesty. However, it was not a factor in my decision-making that he is modest. To me, he could have been an arrogant, smart man with experience, and I still would have supported him. The fact that he is modest is one added advantage that is worth noting, although it was not the prime factor in my decision.

Humility does relate to one other point that is important and worth mentioning; that is, the role of a judge with a lifetime appointment. When we have a lifetime appointment, it is, in my opinion, almost a leap of faith by those who are consenting to him, and certainly by the President who is nominating him, about what kind of accountability that judge will enforce on him or herself. It is a self-enforced accountability on which we must depend. As a matter of fact, when there is a lifetime appointment, unless something patently illegal is done, one will be in that position for an indefinite period of time, maybe even beyond the years of productivity. Having a judge who starts out humble is an advantage though not a deciding factor.

The role of a judge, as Judge Roberts has said on many occasions, is one of being a referee, an umpire; not the batter, not the pitcher. That is a good analogy. A judge with a lifetime appointment certainly is not accountable to an electorate and is no longer accountable to the people who appointed him or her and the people who consented to the nomination. You have to

appoint someone who has a pretty good feel for his role in society and in the government. You hope that person is going to remain in the role of a judge, interpreting the law and being faithful to the Constitution, and not step out of that role to become a lawmaker or a decision-maker of the law.

Judge Roberts said during all of his hearings, in response to the questions that were asked of him, the rule of law was so important to him it was the central point that made him want to be a lawyer. I believe the rule of law protects the rights and liberties of all Americans against the tyranny of the majority and against the tyranny of the minority. It is the rule of law, as Theodore Roosevelt once said, that was very simply stated: ''No person beneath the law; no person above the law.''

Judge Roberts testified he became a lawyer, or at least developed as a lawyer, because he believes in the rule of law. He put it best when he said, if ''you believe in civil rights, you believe in environmental protection, whatever the area might be, believe in rights for the disabled, you're not going to be able or effectively to vindicate those rights if you don't have a place that you can go where you know you're going to get a decision based on the rule of law. . . .So that's why I became a lawyer, to promote and vindicate the rule of law.''

It is this commitment to the rule of law we must expect in our judiciary. I remember in particular during the hearings the answer to a question I appreciated very much. One of the members of the Judiciary Committee was trying so hard to find out how Judge Roberts would rule—even lean—in a case, so he gave an example. And he said: ''Now, what I am trying to find out is, will you vote for the little guy?''

Judge Roberts said:

If the law is on the side of the little guy, I will vote for the little guy. If the law is on the side of the big guy, I will vote for the big guy.

That is what the rule of law is. As one senior justice on the Fifth Circuit Court of Appeals remarked, the Honorable Tom Reavley:

The social order and well-being of our country depends upon the preservation of and allegiance to the rule of law.

You can tell a lot about a person by whom he admires and why. I thought one part of Judge Roberts' testimony told us a lot about him. It was about Judge Henry Friendly. Judge Friendly is one of the great justices in the history of our judiciary. He said Judge Friendly had a total devotion to the rule of law and the confidence that if you just worked hard enough at it, you would come up with the right answers. He especially pointed out that Judge Friendly kept at every stage of deciding a case, including reversing his opinion when he found, while writing an opinion, that his original decision—the one he had already written a majority decision on—no longer seemed to be the right one. Then he would take the best majority opinion he could to the other judges and explain that he had changed his mind, and he was going to vote the other way.

Finally, you could see Judge Roberts' admiration for Judge Friendly when he described his humility. He remarked that Judge Friendly was a genius and that most people would agree he would have made a better decision on most matters than the legislature or a Federal agency. Still, Judge Roberts explained that Judge Friendly insisted on deferring to them, the other branches of Government, because those decisions were supposed to be made by the other branches rather then a judge who was supposed to simply consider whether their decisions conformed to the law.

In these remarks Judge Roberts made about his mentor, as well as his own reflections on the rule of law, we clearly see the kind of Chief Justice that Judge Roberts will be. He is the sort of Chief Justice our Nation should have, that our Nation needs. I will support Judge John Roberts to be elevated to Chief Justice of the United States.

I am very pleased this process has gone as smoothly as it has. The President nominated Judge Roberts after direct consultation with almost every Member of the Senate—certainly every Member who had an opinion to give. The hearing process and the time devoted to looking into the background of the nominee was certainly sufficient. The Judiciary Committee had ample time to ask its questions, and we were enlightened by his answers. I believe the Senate will overwhelmingly confirm Judge Roberts. I think he will be one of the great Chief Justices in the history of our country.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. SUNUNU. Mr. President, I rise in support of the nomination of John Roberts to be Chief Justice to the Supreme Court.

I note, as did the Senator from Texas, this has been a relatively smooth process. We should all be glad for that. It has been one that maybe has taken a little bit longer than some would have hoped. Everything seems to take longer in the Senate. Maybe that is part of the process. It is a process that is straightforward and clear. This is a life appointment, and for that reason alone it should be a process that is very deliberate and thorough.

It is unfortunate that some people have used the deliberate nature of the process to accentuate the dramatic. There has probably been an excess of hyperbole and an excess of rhetoric probably on both sides of the aisle as we consider this nomination. This is something that has been done before; it will be done again for decades to come. The Senate approves nominations for the judiciary all the time. It should be something we are accustomed to and feel comfortable in doing and do in the natural course of things rather than deal with the rhetoric and the hyperbole and sometimes the partisan tactics we have seen, even in this nomination, albeit it has been relatively smooth.

The hearings are a case in point. One would expect the bulk of nomination hearings to be taken up by testimony from the nominee to be a Justice, to be the Chief Justice of the Supreme Court, the bulk of the hearings to be taken up by that nominee answering questions or responding to queries. For those who did watch the hearings, they would agree the bulk of the hearings seemed to be taken up by very lengthy, and at times self-indulgent speeches by members of the committee. I don't think that serves the institution particularly well when we view the nomination process or these hearings as an opportunity to talk about ourselves, to talk about our view of the world, to talk about what we want, rather than to talk about what the country or the judiciary needs.

We seek—and I think opponents and supporters of Judge Roberts would agree with this statement—individuals who are well-qualified to serve on the bench. I argue, to the chagrin of ideologues on both sides, we have found just that in John Roberts. I say to the chagrin of people on both sides because in the past the smallest perceived or argued concern about an individual's qualification would be used as a screen or as a justification for voting against a nominee. In the absence of that decoy, the truth is laid bare that the only reason to object to such a qualified nominee is on partisan or ideological grounds.

Judge Roberts is eminently qualified. I don't need to describe his unbelievably strong record not just as a judge but as an individual bringing cases before the court. He has very distinguished experience in the private sector, as well as Harvard Law School. In recognizing this individual is among the most qualified ever to come before the Senate, his opponents are forced to recognize that their vote against him is simply because he fails their litmus test of partisan ideology because he refuses to tell legislators how he is going to vote on cases that are yet to come before the court because he believes that Justices should decide cases and not write the law.

There are some Members who have already stated their decision to vote against him for just these reasons. But those are the very reasons, or the very principles, that should be the foundation of an independent and impartial judiciary. So when John Roberts' opponents, when those Senators who are going to vote no, say: He is well respected, well qualified, has a great record on the bench, a great academic record and great experience, but I am going to vote against him anyway, they are saying, I am going to vote against him because he does not fit my view of ideology because he has not committed to vote a particular way on

a particular case. That is to say, I am voting against John Roberts because I do not want an impartial or independent judiciary.

That is a wrong and, in fact, dangerous view of what the judiciary should be.

They are opposing a capable, accomplished, well-qualified individual, and in doing so they are casting a vote against an independent and impartial judiciary. Those who will vote would take to this floor and say: No, that is not the case at all; we are for an independent and impartial judiciary. But I cite for them the very example, the very testimony that was cited earlier by the Senator from Texas. She spoke about a question that concluded in the Judiciary Committee: Will you vote for the little guys? That very question indicates that someone had already presupposed what the best vote was for that case, hypothetical or not. And if you are looking for a judge who agrees with your presupposed verdict in a case, or your presupposed vote in a case, then you have no interest in an impartial or independent judiciary. I think it is very difficult to argue the contrary.

This is not just a slippery slope, this is a dangerous precedent to set—left or right, liberal or conservative. To ask any judge, whether it is for the Supreme Court or for the Federal judiciary or the appeals court, to sit in front of a room of elected legislators and ask them about the position that they would take in cases that they are yet to hear is to stand up in front of your constituents, to stand up in public and say: I don't want an independent judiciary. I do not want an impartial judiciary. I just want someone who will commit to me to vote a specific way.

That is not what any judiciary should do. That is not how judges should comport or handle themselves, and that means that I will not always agree with cases and decisions rendered by the Supreme Court or my judge or Justice, but it means that as an elected official or as an American feeling confident that instead of looking for a biased judiciary, a judiciary that handles its job like a politician selling votes to get where they are, I can sleep at night knowing that I have cast votes consistently for an independent, impartial, well-qualified judiciary.

I think if you talk to the Republicans who are in the Senate who voted nearly unanimously for Judge Ruth Bader Ginsburg, they will argue that is exactly what they had in their minds—not casting a vote for a judge that would vote a particular way but voting for someone who at the end of the day they recognized was capable, was well qualified, and therefore would bring those skills and that capability to the judiciary in a direct and impartial way. Judge Roberts, in his testimony, summarized the importance of this approach quite well. He said the role of a judge is limited. The judges are to decide the cases before them; they are not to legislate. They are not to decide cases.

I think it was Justice White who first used those two words to describe the role of a judge as a Supreme Court Justice—decide cases, and decide those cases based on the text of the Constitution as it is written, not as any one of us wishes that it might have been written. I think in Judge Roberts we find just such an individual who is qualified, who is capable, who will, I hope, sit on the bench for a long time supporting, verifying, and validating this very concept of an independent and impartial judiciary. And those who vote against him set a bad precedent in striking a blow and casting a vote against that independence and impartiality that the Framers so hoped for our country for years to come.

I thank the Chair. I yield the floor.

The PRESIDING OFFICER. Under the previous order, the time from 4:45 to 5:45 p.m. will be under the control of the Democratic side.

The Senator from Minnesota.

Mr. DAYTON. I ask unanimous consent that the RECORD show that the remarks of the members of the majority caucus have exceeded their allotted time by 5 minutes, and that the hour allotted under the previous order to the Democratic caucus be extended by those 5 minutes.

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

Mr. DAYTON. I thank the Chair.

I rise today to oppose the nomination of Judge John G. Roberts, Jr., to be the next Chief Justice of the U.S. Supreme Court. The available record of Judge Roberts' writings during his public career in the administrations of President Reagan and the first President Bush and his very brief 2½ years as a judge on the DC Circuit Court of Appeals reveal his persistent opposition to laws enforcing desegregation, protecting minority voting rights, guaranteeing public education to a student with disabilities, and providing damages to a student who had been sexually abused by a teacher.

He, regrettably, declined repeated invitations by Senators during the recent Judiciary Committee hearings to recant or modify some of his most extreme and disturbing statements and positions. For example, in the 1981 memo to White House Counsel Fred Fielding, Judge Roberts referred to Mexican immigrants as ''illegal amigos.'' Before the Judiciary Committee he claimed ''it was a play on the standard practice of many politicians, including President Reagan, when he was talking to a Hispanic audience, he would throw in some language in Spanish.''

Pressed again, he replied:

The tone was, I think, generally appropriate for a memo from me to Mr. Fielding.

I strongly disagree.

Also, during the Reagan administration, Judge Roberts was one of the lawyers in the Justice Department fighting against any improvements to the Voting Rights Act, according to William L. Taylor in the New York Review of Books.

Mr. President, I highly commend this article to my colleagues.

Judge Roberts reportedly drafted a letter sent to Senator Strom Thurmond urging him to oppose the bill extending the Voting Rights Act, which the House had passed by a vote of 389 to 24. Despite Judge Roberts' opposition and the opposition of President Reagan, the Senate passed the bill 85 to 8, with Senator Thurmond voting with the majority. President Reagan signed it into law 10 days later.

In the recent judiciary hearings Judge Roberts claimed his respect for precedent, but he clearly showed no respect for the 1965 Voting Rights Act when he opposed it 16 years later.

In 1982, Judge Roberts opposed the claims of a deaf student that she should have the classroom services of a sign language interpreter under the Federal Education for All Handicapped Children Act. He went so far as to write the Attorney General disagreeing with the Solicitor General's support for the student when her case went before the Supreme Court. In Judge Roberts' letter to the Attorney General, he reportedly referred to Supreme Court Justices William Brennan and Thurgood Marshall as ''the activist duo'' who used the Solicitor General to support ''an activist role for the courts.''

That he would write the Attorney General criticizing the Solicitor General does not support his claim that he was then merely a staff attorney reflecting the views of his superiors.

Judge Roberts did not fair so well 10 years later when, as Deputy Solicitor General, he argued that another student, a 10th-grade girl, had no right to damages after having been sexually harassed by a teacher. This time the Rehnquist Supreme Court, which included Justices Scalia and Thomas, rejected Judge Roberts' position and ruled in the girl's favor.

Given these and other indications of Judge Roberts' legal views and judicial philosophy, it is especially troubling that he and President Bush refused Senators' requests for other documents he wrote while he was the Deputy Solicitor General. And given his unwillingness before the Senate Judiciary committee to disavow any of his earlier known writings, I can only assume that later hidden documents contained views as bad or worse.

What Judge Roberts' available writings do show is a man born into wealth and privilege and thereby given all of the advantages to assure his success in life, who consistently opposed even lesser opportunities for Americans born into less fortunate circumstances. He called school desegregation ''a failed experiment.'' He claimed that Federal law entitled the deaf student only to a ''free, appropriate education,'' and denounced the ''effort by activist lower court judges''

to give her more. He opposed compensatory damages for the student sexually harassed by her teacher even though the Federal Government was not a party in the case, writing that it had ''an investment in assuring that private remedies do not interfere with programs funded by title IX.''

My principal concerns are not about Judge Roberts' mind but about his heart.

Of even greater concern, because it was so recent, was Judge Roberts' failure to recuse himself from a case before the court of appeals which involved President Bush as a principal defendant while he was being considered for nomination to the Supreme Court. Reportedly, Judge Roberts' first interview with the U.S. Attorney General regarding his possible nomination to the Supreme Court occurred last April 1, before the case was argued before the appeals court panel on which Judge Roberts was one of the three judges. On May 3, Judge Roberts evidently met with Vice President CHENEY, White House Chief of Staff Andrew Card, Attorney General Gonzales, and senior White House adviser Karl Rove regarding his possible nomination. On May 23, White House Counsel Harriet Miers interviewed Judge Roberts again.

On July 15, Judge Roberts and another judge on the appeals court panel ruled entirely in President Bush's favor and against the plaintiff. Four days later, the President nominated him to the Supreme Court. The plaintiff and his attorney were reportedly unaware of Judge Roberts' job interviews with the President's legal counsel and closest associates until his August response to the Senate Judiciary Committee's questionnaire.

Holding those job interviews, not disclosing them to the plaintiff's counsel, and not recusing himself from the case after the interviews began all violated Federal law under disqualification of judges according to a Slate magazine article, which continued:

> Federal law deems public trust in the courts so critical that it requires judges to step aside if their impartiality might be reasonably questioned even if the judge is completely impartial as a matter of fact.

As Justice John Paul Stevens wrote in a 1988 Supreme Court opinion:

> The very purpose of this law is to promote confidence in the judiciary by avoiding the appearance of partiality whenever possible.

Mr. President, I ask unanimous consent that the Slate magazine article entitled ''Improper Advances: Talking Dream Jobs with the Judge Out of Court'' be printed in the RECORD following my remarks.

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

(See exhibit 1.)

Mr. DAYTON. It seems clear to this Senator that the only way to avoid the appearance of impropriety deciding a case directly involving the President of the United States while being considered by him for nomination to the Supreme Court was for Judge Roberts to remove himself from the appeals court panel. At a minimum he should have disclosed those interviews to the plaintiff and his attorney.

When asked about this case during the Judiciary Committee's hearings, Judge Roberts declined to acknowledge any regret for his actions even with the benefit of hindsight. I find his lack of self-awareness to be shocking. Can an impartial observer not wonder whether Judge Roberts would have been nominated by the President to the Supreme Court if he ruled against the President 4 days earlier?

Obviously, the instances I have cited do not comprise the complete public record of Judge Roberts. Regrettably, as I said earlier, we will not have the complete record because important documents from his tenure as Deputy Solicitor General in the first Bush administration are being withheld from us. These and other similar incidents do, however, raise sufficient doubts and concerns so that I cannot vote to confirm Judge Roberts as the next Chief Justice of the U.S. Supreme Court. My doubts and concerns are magnified by the enormity of his influence over the Court and the country during, given his age and life expectancy, probably the next 30 to 40 years.

I disagree with my colleagues and fellow citizens who view the current Supreme Court as some liberal bastion.

In fact, seven of the nine Justices were nominated by Republican Presidents. During the past decade, the Rehnquist Court rejected congressional actions on affirmative action, violence against women, Americans with disabilities, age discrimination in employment, and enforcement of environmental laws. Many crucial cases were decided by 5-to-4 votes. I view the current Supreme Court as closely divided between this country's conservative center and its far-right extreme. I fear this nominee and the President's next nominee will shift the Court drastically and destructively toward that far-right extreme. That may form the President's political base, but it does not constitute the country's citizen base.

The Supreme Court belongs to all Americans, not just a politically favored minority. Its Justices should be exactly what many right-wing activists don't want—men and women of moderate, independent views who will decide cases from mainstream judicial and social perspectives rather than extreme ideological prisms. How much do the Court's opinions matter to the lives of all Americans? Enormously, more than we realize and much more than we take for granted.

I ask unanimous consent that an article from Harper's magazine by University of Chicago law professor Cass R. Sunstein be printed in the RECORD following my remarks.

The PRESIDING OFFICER (Mr. ALEXANDER.) Without objection, it is so ordered.

(See exhibit 2.)

Mr. DAYTON. He pointed out that in 1920, minimum wage and maximum hour laws were unconstitutional in this country. In 1945, he wrote, the Supreme Court permitted racial segregation, did not protect the right to vote, and gave little protection to political dissent. Fortunately, subsequent Supreme Courts reversed those decisions. Unfortunately, subsequent Supreme Courts can reverse them again.

Millions and millions of Americans depend upon the rights and protections secured by those and other long-standing laws, and they assume those rights and protections are guaranteed, not provisional, and not contingent upon who is sitting on the Supreme Court. Those millions of Americans, most of whom do not share the extreme views of the Republican Party's radical right wing, deserve to continue their lives with the rights and protections established by previous Supreme Courts. Those citizens and this Senate are entitled to know whether a Chief Justice Roberts and a Roberts Supreme Court would respect and uphold those long-established precedents and principles or reject them. Instead, we are being asked to wonder now and wait to find out later. That is too risky a gamble with the future of America and why I will vote against Judge Roberts' nomination.

EXHIBIT 1

IMPROPER ADVANCES—TALKING DREAM JOBS WITH THE JUDGE OUT OF COURT

(By Stephen Gillers, David J. Luban, and Steven Lubet)

Four days before President Bush nominated John G. Roberts to the Supreme Court on July 19, an appeals court panel of three judges, including Judge Roberts, handed the Bush administration a big victory in a hotly, contested challenge to the president's military commissions. The challenge was brought by Salim Ahmed Hamdan, a Guantanamo detainee. President Bush was a defendant in the case because he had personally, in writing, found ''reason to believe'' that Hamdan was a terrorist subject to military tribunals. The appeals court upheld the rules the president had authorized for these military commissions, and it rejected Hamdan's human rights claims—including claims for protection under the Geneva Conventions.

At the time, the close proximity of the court's decision and the Roberts nomination suggested no appearance of impropriety. Roberts had been assigned to hear the appeal back in December, and it was argued on April 7. Surely he had decided the case long before the administration first approached him about replacing Supreme Court Justice Sandra Day O'Connor, who had announced her retirement on July 1. As it turns out, however, the timing was not so simple.

The nominee's Aug. 2 answers to a Senate questionnaire reveal that Roberts had several interviews with administration officials contemporaneous with the progress of the Hamdan appeal. One occurred even before the appeal was argued. Attorney General Alberto Gonzales interviewed the judge on April 1. Back then, it was an ailing Chief Justice William H. Rehnquist, not Justice O'Connor, who was expected to retire. The attorney general, of course, heads the Justice Department, which represents the defendants in Hamdan's case. And as White House counsel, Gonzales had advised the

president on the requirements of the Geneva Conventions, which were an issue in the case.

The April interview must have gone quite well because Roberts next enjoyed what can only be labeled callback heaven. On May 3, he met with Vice President Dick Cheney; Andrew H. Card Jr., the White House chief of staff; Karl Rove, Bush's chief political strategist; Harriet Miers, the White House legal counsel; Gonzales; and I. Lewis Libby, the vice president's chief of staff. On May 23, Miers interviewed Judge Roberts again.

Hamdan's lawyer was completely in the dark about these interviews until Roberts revealed them to the Senate. (Full disclosure: Professor Luban is a faculty colleague of Hamdan's principal lawyer.) Did administration officials or Roberts ask whether it was proper to conduct interviews for a possible Supreme Court nomination while the judge was adjudicating the government's much-disputed claims of expansive presidential powers? Did they ask whether it was appropriate to do so without informing opposing counsel?

If they had asked, they would have discovered that the interviews violated federal law on the disqualification of judges. Federal law deems public trust in the courts so critical that it requires judges to step aside if their ''impartiality might reasonably be questioned,'' even if the judge is completely impartial as a matter of fact. As Justice John Paul Stevens wrote in a 1988 Supreme Court opinion, ''the very purpose of [this law] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.'' The requirement of an appearance of impartiality has been cited in situations like the one here, leading to the disqualification of a judge or the reversal of a verdict.

In 1985, a federal appeals court in Chicago cited the requirement of the appearance of impartiality when it ordered the recusal of a federal judge who, planning to leave the bench, had hired a ''headhunter'' to approach law firms in the city. By mistake—and, in fact, contrary to the judge's instructions—the headhunter contacted two opposing firms in a case then pending before the judge. One firm rejected the overture outright. The other was negative but not quite as definitive. Writing for the Court of Appeals, Judge Richard A. Posner emphasized that the trial judge ''is a judge of unblemished honor and sterling character,'' and that he ''is accused of, and has committed, no impropriety.'' Nevertheless, the court ordered the judge to recuse himself because of the appearance of partiality. ''The dignity and independence of the judiciary are diminished when the judge comes before lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary.'' Although both law firms had refused to offer him employment, the court held that ''an objective observer might wonder whether [the judge] might not at some unconscious level favor the firm . . . that had not as definitively rejected him.''

In the fall and winter of 1984, a criminal-trial judge in the District of Columbia was discussing a managerial position with the Department of Justice while the local U.S. attorney's office—which is part of the department—was prosecuting an intent-to-kill case before him.

Following the conviction and sentence, the judge was offered the department job and accepted. On appeal, the United States conceded that the judge had acted improperly by presiding at the trial during the employment negotiations. It argued, however, that the conviction should not be overturned. The appeals court disagreed. Relying on Judge Posner's opinion in the Chicago case, as well as the rules of judicial ethics, the court vacated the conviction even though the defendant did not ''claim that his trial was unfair or that the [the judge] was actually biased against him.'' The court was ''persuaded that an objective observer might have difficulty understanding that [the judge] did not . . . realize . . . that others might question his impartiality.''

So, the problem in Hamdan is not that Roberts may have cast his vote to improve his chances of promotion. We believe he is a man of integrity who voted as he thought the law required. The problem is that if one side that very much wants to win a certain case can secretly approach the judge about a dream job while the case is still under active consideration, and especially if the judge shows interest in the job, the public's trust in the judiciary (not to mention the opposing party's) suffers because the public can never know how the approach may have affected the judge's thinking. Perhaps, as Judge Posner wrote, the judge may have been influenced even in ways that he may not consciously recognize.

A further complication here is that Roberts' vote was not a mere add on. His vote was decisive on a key question of presidential power that now confronts the nation. Although all three judges reached the same bottom line in the case, they were divided on whether the Geneva Conventions grant basic human rights to prisoners like Hamdan who don't qualify for other Geneva protections. The lower court had held that some provisions do. Judge Roberts and a second judge rejected that view. The third judge said Geneva did apply, but found it premature to resolve the issues it raised. Hamdan has since asked the Supreme Court to hear the case.

Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position. The government litigates too many cases for that to make any sense. But Hamdan was not merely suing the government. He was suing the president, who had authorized the military commissions and who had personally designated Hamdan for a commission trial, explaining that ''there is reason to believe that [Hamdan] was ... involved in terrorism.''

Moreover, the Hamdan appeal is the polar opposite of routine for at least two reasons. First, its issues are central to the much-disputed claims of broad presidential power in the war on terror. Second, the court's decision on the Geneva Conventions has a spillover effect on the legality of controversial interrogation techniques used by the government at Guantanamo and elsewhere. That is because the same provision of the Geneva Conventions that would protect Hamdan from unfair trials also protects detainees from cruel, humiliating, or degrading treatment. The D.C. Circuit's decision rejecting the Geneva Conventions' trial protections—a decision that hinged on Roberts' vote—also strips away an important legal safeguard against cruel and humiliating treatment that may fall just short of torture.

Given the case's importance, then, when Gonzales interviewed Roberts for a possible Supreme Court seat on April 1, the judge should have withdrawn from the Hamdan appeal. Or he and Gonzales, as the opposing lawyer, should have revealed the interview to Hamdan's lawyer, who could then have decided whether to make a formal recusal motion. The need to do one or the other became acute—indeed incontrovertible—when arrangements were made for the May 3 interview with six high government officials. (We don't know how long before May 3 the arrangements were made.)

We do not cite these events to raise questions about Roberts' fitness for the Supreme Court. In the rush of business, his oversight may be understandable. What is immediately at stake, however, is the appearance of justice in the Hamdan and the proper resolution of an important legal question about the limits on presidential power. Although the procedural rules are murky, it may yet be possible for Judge Roberts to withdraw his vote retroactively. That would at least eliminate the precedential effect of the opinion on whether the Geneva Conventions grant minimum human rights to Hamdan and others in his position. Better yet, the Supreme Court can remove the opinion's precedential effect by taking the Hamdan case and reversing it.

EXHIBIT 2

FIGHTING FOR THE SUPREME COURT—HOW RIGHT-WING JUDGES ARE TRANSFORMING THE CONSTITUTION

(By Cass R. Sunstein)

In current political theater surrounding George W. Bush's judicial nominations, and the anxiety over the nomination of John G. Roberts as swing Justice Sandra Day O'Connor's successor, there is surprisingly little discussion of what is actually at stake. For, in truth, the battle over the judiciary is part of a much larger political campaign to determine not only the constitutionality of abortion and the role of religion in public life but also the very character of our Constitution, and thus our national government. Many people assume (no doubt because this is what they are told) that the meaning of the Constitution is set in stone, and that the disputes raging in the Senate and on the Sunday talk shows are between liberal judicial activists and conservative ''strict constructionists'' who adhere to the letter of the text. In fact, the contest is much more complicated and interesting—and, in most important respects, this conventional view of the subject is badly wrong.

Historically, our political disagreements have produced fundamental changes in our founding document. When one president succeeds another, for example, and the makeup of the federal judiciary and the Supreme Court changes, the Constitution's meaning often shifts dramatically. As a result, our most basic rights and institutions can be altered. Participants in the current battle over the judiciary are entirely aware of this point; they know that the meaning of the Constitution will be determined by the battle's outcome, and that significant rights that Americans now take for granted—such as the right to privacy and the power of ordinary citizens to have access to the federal courts—are very much at stake.

In 1920 minimum-wage and maximum-hour laws were unconstitutional. As the Supreme Court interpreted the Constitution at that time, it could not possibly have permitted a Social Security Act or a National Labor Relations Act. In the 1930s, President Franklin Delano Roosevelt sought to legitimate the New Deal, whose centerpieces included minimum-wage and maximum hour laws, the Social Security Act, and the National Labor Relations Act. Roosevelt didn't try to change a word of the Constitution, but by 1937 a reconstituted Supreme Court upheld nearly everything that Roosevelt wanted. In 1945 the Constitution permitted racial segregation, did not protect the right to vote, permitted official prayers in the public schools, and gave little protection to political dissent. By 1970 the same Constitution prohibited racial segregation, safeguarded the right to vote, banned official prayers in the public schools, and offered broad protection not only to political dissent but also to speech of all kinds. If American citizens in 1945 were placed in a time machine, they would have a hard time recognizing their Constitution merely twenty-five years later.

In recent years a new form of judicial activism has emerged from private organizations, law schools, and the nation's courtrooms. Purporting to revere history, the new activists claim that they are returning to the original Constitution—which they sometimes call the Lost Constitution or the Constitution in Exile. The reformers include a number of federal judges, such as Supreme Court Justices Clarence Thomas and Antonin Scalia (though Scalia is more circumspect). Appointed by Ronald Reagan, George H.W. Bush, or George W. Bush, these judges do not hesitate to depart radically from longstanding understandings of constitutional meaning. They would like to interpret the Constitution to strike down affirmative-action programs, gun-control legislation, and restrictions on commercial advertising; they also seek to impose severe restrictions on Congress's powers and to invalidate campaign-finance regulations, environmental regulations, and much else. Justice Thomas would allow states to establish official religions. The logic of the new approach would even permit the federal government to discriminate on the basis of race and sex.

It is tempting to think that what we are seeing today is merely a periodic swing of some hypothetical judicial pendulum, that the courts are returning to a period of restraint after the liberal activism of the past sixty years. And, in fact, some principled conservatives have favored exactly that. But they increasingly find themselves on the defensive. Today, many people are seeking a kind of constitutional revolution—one that involves activism rather than restraint. Many right-wing activists are willing to undo what they readily acknowledge to be the will of the people. Their intentions are no secret; they are publicly proclaimed in articles, judicial opinions, and speeches. There is no question, moreover, that some of these extremists seek to curtail or abolish rights that most citizens regard as essential parts of our national identity. Indeed, it is difficult to escape the conclusion that it is precisely because their ideological goals are politically unachievable that they have turned to the courts.

This ambitious program is the culmination of a significant shift in conservative thought. In the 1960s and 1970s, many conservatives were committed to a restrained and cautious federal judiciary. Their major targets included Roe v. Wade, which protected the right to abortion, and Miranda v. Arizona, which protected accused criminals; conservatives saw these rulings as unsupportable judicial interference with political choices. Democracy was their watchword; they wanted the courts to back off. They asked judges to respect the decisions of Congress, the president, and state legislatures; they spoke insistently of the people's right to rule themselves. This is no longer true. Increasingly, the goal has been to promote ''movement judges,'' judges with no interest in judicial restraint and with a demonstrated willingness to strike down the acts of Congress and state government. Movement judges have an agenda, which overlaps, as it happens, with that of the most extreme wing of the Republican Party.

In many areas, the new activists have enjoyed important victories. Consider the fact that the Rehnquist Court has overturned more than three dozen federal enactments since 1995, a record of aggression against the national legislature that is unequaled in the nation's history. In terms of sheer numbers of invalidations of acts of Congress, the Rehnquist Court qualifies as the all-time champion. A few illustrations:

The Rehnquist Court has thrown most affirmative-action programs into extremely serious doubt, suggesting that public employers will rarely be able to operate such programs and that affirmative action will be acceptable only in narrow circumstances.

The Rehnquist Court has used the First Amendment to invalidate many forms of campaign-finance legislation, with Justices Scalia and Thomas suggesting that they would strike down almost all legislation limiting campaign contributions and expenditures.

For the first time since the New Deal, the Rehnquist Court has struck down congressional enactments under the Commerce Clause. As a result of the Court's invalidation of the Violence Against Women Act, a large number of federal laws have been thrown into constitutional doubt. Several environmental statutes, including the Endangered Species Act, are in trouble.

Departing from its own precedents, the Rehnquist Court has sharply limited congressional authority to enforce the Fourteenth Amendment. In the process, the Court has struck down key provisions of the Americans with Disabilities Act, the Religious Freedom Restoration Act, and the Violence Against Women Act—all of which received overwhelming bipartisan support in Congress.

The Rehnquist Court has used the idea of state sovereign immunity to strike down a number of congressional enactments, including parts of the Age Discrimination in Employment Act and the Americans with Disabilities Act.

For the first time in the nation's history, the Rehnquist Court has ruled that Congress lacks the power to give citizens and taxpayers the right to sue to ensure enforcement of environmental laws.

Even so, the Rehnquist Court has not been a truly radical court, in large part because Justice O'Connor resisted large-scale change. The Court has hardly returned to the 1920s. It has not overruled Roe v. Wade. It has rejected President Bush's boldest claims of authority to detain suspected terrorists. It has struck down laws that criminalize same-sex relationships. It has not entirely eliminated affirmative-action programs. In especially controversial decisions, it has invalidated the death penalty for mentally retarded people and for juveniles. But even if those who seek to reorient the Supreme Court have not received all that they wanted, they have succeeded in producing a body of constitutional law that is fundamentally different from what it was twenty years ago. To a degree that has been insufficiently appreciated, the contemporary federal courts are fundamentally different from the federal courts of two decades ago. The center has become the left. The right is now the center. The left no longer exists.

Consider a few examples. Justices William Brennan and Thurgood Marshall were the prominent liberals on the Court in 1980; they did not hesitate to use the Constitution to protect the most disadvantaged members of society, including criminal defendants, African Americans, and the poor. Brennan and Marshall have no successors on the current Court; their approach to the Constitution has entirely disappeared from the bench. For many years, William Rehnquist was the most conservative member of the Court. He was far to the right of Chief Justice Warren Burger, also a prominent conservative. But Justices Antonin Scalia and Clarence Thomas are far to Rehnquist's right, converting him into a relative moderate.

In 1980 the Scalia/Thomas brand of conservative had no defenders within the federal judiciary; their distinctive approach was restricted to a few professors at a few law schools. But it is extremely prominent on the federal bench today. Justice John Paul Stevens is a Republican moderate, appointed to the Court by President Gerald Ford. For a long period, Justice Stevens was well known as a maverick and a centrist—independent-minded; hardly liberal, and someone whose views could not be put into any predictable category. He is now considered part of the Court's ''liberal wing.'' In most areas, Justice Stevens has changed little if at all; what has changed is the Court's center of gravity.

Of the more cautious decisions in recent years, almost all were issued by a bare majority of 5–4 or a close vote of 6–3. With looming changes in the Court's composition, the moderate decisions might well shift in immoderate directions. We can easily foresee a situation in which federal judges move far more abruptly in the directions they have been heading. They might not only invalidate all affirmative-action programs but also elevate commercial advertising to the same status as political speech, thus preventing controls on commercials by tobacco companies (among others). They might strike down almost all campaign-finance reform; reduce the power of Congress and the states to enact gun-control legislation; and significantly extend the reach of the Fifth Amendment's Takings Clause, thus limiting environmental and other regulatory legislation.

I have said that the new activists believe the Constitution should be understood to mean what it originally meant. Because of their commitment to following the original understanding, we may call them judicial fundamentalists. When President Bush speaks of ''strict construction,'' he is widely understood to be endorsing fundamentalism in constitutional law. Fundamentalists insist that constitutional interpretation requires an act of rediscovery. Their goal is to return to what they see as the essential source of constitutional meaning: the views of those who ratified the document. The key constitutional questions thus become historical ones. Suppose that the Constitution was not originally understood to ban sex discrimination, protect privacy, outlaw racial segregation, or forbid censorship of blasphemy. If so, that's that. Judges have no authority to depart from the understanding of 1789, when the original Constitution was ratified, or 1791, when the Bill of Rights was ratified, or 1868, when the Fourteenth Amendment was ratified.

Fundamentalists are entirely aware that current constitutional law does not reflect their own approach. They know that for many decades, the Court has not been willing to freeze the Constitution in the mold of the eighteenth and nineteenth centuries. For this reason fundamentalists have radical inclinations; they seek to make large-scale changes in constitutional law. Some fundamentalists, like Justice Scalia, believe in respecting precedent and hence do not want to make these changes all at once; but they hope to make them sooner rather than later. Other fundamentalists, including Justice Clarence Thomas, are entirely willing to abandon precedent in order to return to the original understanding. Many conservative activists agree with Thomas rather than Scalia.

Suppose the Supreme Court of the United States suddenly adopted fundamentalism and began to understand the Constitution in accordance with the specific views of those who ratified its provisions. What would happen? The consequences would be extremely dramatic. For example:

Discrimination on the basis of sex would be entirely acceptable. If a state chose to forbid women to be lawyers or doctors or engineers, the Constitution would not stand in the way. The national government could certainly discriminate against women. If it wanted to ban women from the U.S. Civil Service, or to restrict them to clerical positions, the Constitution would not be offended.

The national government would be permitted to discriminate on the basis of race. The Equal Protection Clause of the Fourteenth Amendment is the Constitution's prohibition on racial discrimination—and by its clear language, it applies only to state governments, not to the national one. Honest fundamentalists have to admit that according to their method, the national government can segregate the armed forces, the Washington, D.C., public schools, or anything it chooses. In fact, the national government could exclude African Americans, Hispanics, Asian Americans, whenever it liked.

State governments would probably be permitted to impose racial segregation. As a matter of history, the Fourteenth Amendment was not understood to ban segregation on the basis of race. Of course, the Supreme Court struck down racial segregation in its 1954 decision in Brown v. Board of Education. But this decision was probably wrong on fundamentalist grounds.

State governments would be permitted to impose poll taxes on state and local elections; they could also violate the one-person, one-vote principle. On fundamentalist grounds, these interferences with the right to vote, and many more, would be entirely acceptable. In fact, state governments could do a great deal to give some people more political power than others. According to most fundamentalists, there simply is no ''right to vote.''

The entire Bill of Rights might apply only to the national government, not to the states. Very possibly, states could censor speech of which they disapproved, impose cruel and unusual punishment, or search people's homes without a warrant. There is a reasonable argument that on fundamentalist grounds, the Court has been wrong to read the Fourteenth Amendment as applying the Bill of Rights to state governments.

States might well be permitted to establish official churches. Justice Clarence Thomas has specifically argued that they can.

The Constitution would provide much less protection to free speech than it now does. Some historians have suggested that on the original understanding, the federal government could punish speech that it deemed dangerous or unacceptable, so long as it did not ban such speech in advance.

Compulsory sterilization of criminals would not offend the Constitution. The government could ban contraceptives or sodomy. There would be no right of privacy.

This is an extraordinary agenda for constitutional law, and it provides only a glimpse of what fundamentalism, taken seriously; would seem to require. Should we really adopt it? During the controversy over the 1987 nomination of Judge Robert Bork to the Supreme Court, Judge Richard Posner, a Reagan appointee, produced an ingenious little paper called ''Bork and Beethoven.'' Posner noticed that Commentary magazine had published an essay celebrating Bork's fundamentalism in the same issue in which another essay sharply criticized the ''authentic-performance movement'' in music, in which musicians play the works of great composers on the original instruments. Posner observes that the two articles ''take opposite positions on the issue of 'originalism'—that is, interpretive fidelity to a text's understanding by its authors.'' While one essay endorses Bork's fidelity to the views of people in 1787, the other despises the authentic-performance movement on the grounds that the music sounds awful. If originalism makes bad music (or bad law), Posner asks, ''why should the people listen to it?''

Fundamentalists get a lot of rhetorical mileage out of insisting that their approach is neutral while other approaches are simply a matter of ''politics.'' But there is nothing neutral in fundamentalism. It is a political choice, which must be defended on political grounds. The Constitution doesn't set out a theory of interpretation; it doesn't announce that judges must follow the original understanding. Liberals and conservatives disagree on many things, but most would agree that the Constitution forbids racial segregation by the federal government and protects a robust free-speech principle. If fundamentalism produces a far worse system of constitutional law, one that abandons safeguards that are important to the fabric of American life, that must count as a strong point against it.

Fundamentalists often defend their approach through the claim that it is highly democratic—far more so than allowing unelected judges to give meaning to the constitutional text. But there is a big gap in their argument. Why should living people be governed by the particular views of those who died many generations ago? Most of the relevant understandings come from 1789, when the Constitution was ratified, or 1791, when the Bill of Rights was ratified. If democracy is our lodestar, it is hardly clear that we should be controlled by those eighteenth-century judgments today. Why should we be governed by people long dead? In any case, the group that ratified the Constitution included just a small subset of the society; it excluded all women, most African Americans, many of those without property, and numerous others who were not permitted to vote. Does the ideal of democracy really mean that current generations must follow the understandings of a small portion of the population from centuries ago? Yet fundamentalists want to strike down many laws enacted by the people's representatives. What's democratic about that?

I am not arguing that the Constitution itself should not be taken as binding. Of course it should be. The Constitution is binding because it is an exceedingly good constitution, all things considered, and because many bad things, including relative chaos, would ensue if we abandoned it. We're much better off with it than without it. But no abstract concept, like ''democracy,'' is enough to explain why we must follow the Constitution; and invoking that concept is a hopelessly inadequate way to justify fundamentalism.

Fundamentalists have other problems. It is a disputed historical question whether those who ratified the Constitution wanted judges to be bound by the original understanding. The Constitution uses broad phrases, such as ''freedom of speech'' and ''equal protection of the laws'' and ''due process of law''; it does not include the particular views of those who ratified it. Maybe the original understanding was that the original understanding was not binding. Maybe the ratifiers believed that the Constitution set out general principles that might change over time. If so, fundamentalism turns out to be self-defeating.

In any case, it isn't so easy to make sense of the idea of ''following'' specific understandings when facts and circumstances have radically changed. Does the free-speech principle apply to the Internet? Does the ban on unreasonable searches and seizures apply to wiretapping? To answer such questions, we cannot simply imagine that we have gone into a time machine and posed these questions to James Madison and Alexander Hamilton. For one thing, Madison and Hamilton would have no idea what we were talking about; for another, they probably wouldn't believe us if we explained it to them. Changed circumstances are pervasive in constitutional interpretation. To say the least, they complicate the fundamentalist project; they might even make it incoherent.

Many fundamentalists appeal to the idea of consent as a basis for legitimacy. In their view, we are bound by the Constitution because we agreed to it; we are not bound by the constitution of France or any model constitution that might be drafted by today's best and brightest. Although it's true that we're not bound by those constitutions, it is false to say that we're bound by the Constitution because ''we'' agreed to it. None of us did. Of course we benefit greatly from its existence, and most of us do not try to change it; but it is fanciful to say that we've agreed to it. The legitimacy of the Constitution does not lie in consent. It is legitimate because it provides an excellent framework for freedom and democratic self-government and promotes many other goals as well, including economic prosperity. The fundamentalists' arguments about legitimacy beg all the important questions. Ancient ratification is not enough to make the Constitution legitimate. We follow the Constitution because it is good for us to follow the Constitution. Is it good for us to follow the original understanding? Actually, it would be terrible.

Justice Antonin Scalia emphasizes the stability that comes from fundantalism, which, in his view, can produce a ''rock-hard'' Constitution. True, fundamentalism might lead to greater stability in our constitutional understandings than we have now. Unless readings of history change, the Constitution would mean the same thing fifty years from now as it means today. But fundamentalism would produce stability only by radically destabilizing the system of rights that we have come to know. At least as bad, fundamentalism would destabilize not only our rights but our institutions as well; many fundamentalists would like to throw the Federal Reserve Board, the Securities and Exchange Commission, and the Federal Communications Commission into constitutional doubt. In a way, fundamentalism would promote the rule of law—but only after defeating established expectations and upsetting longstanding practices on which Americans have come to rely.

Stability is only one value, and for good societies it is not the most import one. If an approach to the Constitution would lead to a little less stability but a lot more democracy, there is good reason to adopt it. Since 1950 our constitutional system has not been entirely stable; the document has been reinterpreted to ban racial segregation, to protect the right to vote, to forbid sex discrimination, and to contain a robust principle of free speech. Should we really have sought more stability?

Unfortunately, many fundamentalists are not faithful to their own creed. When their political commitments are intense, their interest in history often falters. Here's a leading example: Fundamentalists on the bench, including Justices Scalia and Thomas, enthusiastically vote to strike down affirmative-action programs. In their view, the Equal Protection Clause of the Fourteenth Amendment requires color blindness. History strongly suggests otherwise. In the aftermath of the Civil War, Congress enacted several programs that provided particular assistance to African Americans. The Reconstruction Congress that approved the Fourteenth Amendment simultaneously enacted a number of race-specific programs for African Americans. The most important examples involve the Freedmen's Bureau, created in 1865 as a means of providing special benefits and assistance for African Americans. The opponents of the Freedmen's Bureau Acts attacked the bureau on, the ground that it would apply to members of only one race. The response was that discrimination was justified in the interest of equality: ''We

need a freedmen's bureau,'' said one supporter, ''not because these people are negroes, but because they are men who have been for generations despoiled their rights.''

Curiously, fundamentalists don't investigate the pertinent history, but one of the explicit goals of the Fourteenth Amendment was to provide secure constitutional grounding for the Freedmen's Bureau Acts. It is peculiar at best to think that the Fourteenth Amendment prohibited the very types of legislation it was designed to legitimate. Voting to strike down affirmative-action programs, fundamentalists haven't offered a hint of a reason to think that such programs are inconsistent with the original understanding.

And this is just the beginning. Fundamentalists would very much like to strengthen the constitutional protection of property, especially by striking down ''regulatory takings''—reductions in the value of property that occur as a result of regulation, including environmental protection. But the historical evidence, which fundamentalists ignore, shows that as originally understood, the Constitution did not protect against regulatory takings. The most careful survey, by legal historian John Hart, concludes that ''the Takings Clause was originally intended and understood to refer only to the appropriation of property''-and that it did not apply to regulation.

Hart demonstrates that regulation was extensive in the founding period and that it was not thought to raise a constitutional question. Buildings were regulated on purely aesthetic grounds, and no one argued that compensation was required. States asked farmers who owned wetlands to drain their lands and to contribute to the costs of drainage—all without any complaints about ''taking.'' Some landowners were forbidden to sell their interests in land, and compensation was not required. In numerous cases, the public interest took precedence over property rights. Of course, government was not permitted literally to ''take'' land. But regulation was pervasive, and it was not considered troublesome from the constitutional point of view.

Fundamentalists usually don't even try to muster historical support for their view that the Constitution protects commercial advertising and bans campaign-finance legislation. Fundamentalists, including Justices Scalia and Thomas, vote to ban Congress from authorizing taxpayers to bring suit in federal court to enforce environmental laws. But they don't even investigate the historical evidence, which strongly suggests that they're wrong. In England and in early America, it was perfectly conventional for government to-give taxpayers the right to sue to enforce the law. No one suggested that such suits were unconstitutional.

In the same vein, many fundamentalists, including Justice Thomas, believe that the Constitution grants broad ''war power,'' or authority ''to protect the national security,'' to the president. But the text and history of the Constitution strongly suggest a careful effort to divide power between Congress and the president. If we favor ''strict construction,'' we will not believe that the president has a general ''war power.'' Perhaps most notably, Congress, not the president, has the power to ''declare War.'' The Constitution also grants Congress, not the president, the power to ''raise and support Armies.'' It authorizes Congress to ''provide and maintain a Navy.'' The founding document permits Congress to ''make Rules for the Government and Regulation of the land and naval Forces.'' It is Congress that is authorized to raise funds to ''provide for the common Defense and general Welfare of the United States.'' Congress, not the president, is empowered to ''regulate Commerce with foreign Nations.'' Congress is also authorized to ''define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,'' as well as to ''make Rules concerning Captures on Land and Water.''

In this light the Constitution does not repose in the president anything like a general authority ''to protect the national security.'' Fundamentalists neglect the most natural reading of the document, which is that protection of national security is divided between Congress and the president-and that if either has the dominant role, it is the national lawmaker. To be sure, the Commander in Chief Clause does give the president direction of the armed forces, an expansive authority; but even that authority is subject to legislative constraints, because Congress controls the budget and because Congress can choose not to declare war. And if Congress refuses either to authorize the use of force or to declare war, the president is usually not entitled to commence hostilities on his own. In arguing that the Constitution gives the president ''the war power,'' fundamentalists ignore the document itself.

Much of the time, the emphasis on ''original understanding'' turns out to be a sham—a rhetorical smoke screen for an aggressive political agenda that would never survive the scrutiny of the political process. Writing in the midst of World War II, Learned Hand, the great court of appeals judge, wrote that the ''spirit of liberty is the spirit which is not too sure that it is right.'' Claiming their own neutrality, fundamentalists are all too willing to engage in partisan politics under the guise of constitutional law; in so doing, they defy liberty's spirit.

Mr. DAYTON. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. NELSON of Florida. 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. NELSON of Florida. Mr. President, I rise to announce that I will vote to confirm Judge Roberts to serve as Chief Justice of the United States. As I see it, we must ensure that a nominee will serve the interests of the people and interpret the Constitution without any preconceived notions or agendas. On the highest Court in our Nation, the nominee will decide cases with the potential to move our country forward and to strengthen our democracy. This Court, under the leadership of Judge Roberts, if he is confirmed as the next chief justice, likely will hear cases addressing important issues, such as the right to privacy and the role of religion in public life; decisions that will impact all of our lives, as well as the direction of our country, for years to come. We must therefore be deliberative in our decision and, to the extent possible, make sure the President's nominee will not allow any personal bias or political beliefs to color the administration of justice or the interpretation of the Constitution.

On August 10, I met with Judge Roberts in my office. I came back to Washington during the August recess, where I was conducting town hall meetings in Florida, so that I could look Judge Roberts in the eye and get his response to questions that were important to Floridians, and would allow me to assess his fitness to serve. Following that meeting, and in the weeks leading up to today, I have listened to the testimony during his confirmation hearing in the Judiciary Committee. I have reviewed the decisions he wrote as a judge on the D.C. Circuit Court of Appeals, and I have looked at his writings from the time when he was an attorney in the Reagan administration. I also considered the views of my constituents who have called my office and written letters.

In our meeting last August, I could clearly see that he is a man who possesses a certain amount of humility. I found this very attractive. Despite his impressive academic and professional record and legal credentials, he did not appear arrogant, nor did he appear to be inflexible. I specifically talked to him about one of the things that is missing today in America. As we get so divided, we get increasingly highly partisan and ideologically rigid. It makes it difficult to govern a nation as large and as broad and as diverse and as complicated as this Nation is unless we can be tolerant toward one another, unless we can reach out and bring people together. As the Good Book says: Come, let us reason together.

Judge Roberts expressed to me reverence for both the Court and the rule of law. He said he was honored to be a nominee to serve on the same Court on which he used to work as a clerk. And, I told him what a great honor it was for me as a Senator to participate in this constitutional process. His responses to several of the questions I posed to him during our meeting form the basis for my decision to support his nomination. I wish to share some of those responses now.

I asked Judge Roberts whether he believed he could put aside his personal beliefs and be fair. He assured me that any personal beliefs he has, be they based on religion or other issues, personal beliefs that all of us carry, would not factor into any of his decisions. He said that they had not while he served on the D.C. Circuit Court of Appeals, and they would not if he is confirmed to the Supreme Court.

The oath of a judge, he noted, is to faithfully follow the rule of law and set aside personal beliefs. To ensure the fair and objective application of the law so that each litigant appearing before the court receives a fair chance with the same rules applied to each regardless of personal views, with justice meted out to both poor and rich, black and white, equally and based on the law.

Decisions of the Court must be reached with sound explanations, and the facts and the law alone determining the outcome.

I take Judge Roberts at his word.

I also asked Judge Roberts about two issues important to the citizens of

Florida: the right to privacy and the Court's respect for congressional authority, the separation of powers doctrine. When I asked Judge Roberts whether he recognized a right to privacy, either express or implied in the U.S. Constitution, he informed me that he does. He noted several amendments to the U.S. Constitution in which he believed this right was recognized. This response to me on August 10 was consistent with his testimony before the Judiciary Committee. It was during his testimony before that committee that he stated that he believed a right to privacy exists in the 14th amendment, the 4th amendment, the 3rd amendment, and the 1st amendment. This recognition was vital in reassuring me that he would not interpret the Constitution to limit individual freedoms and allow the Government broad powers to intrude into the lives of its citizens—something that makes our society unique compared to other societies in the world. The rule of law protects our citizens from the intrusion of the Government.

Then we had a discussion of Kelo v. New London, CT. It is the Court's recent ruling regarding eminent domain. Judge Roberts refused to relay his own personal opinion as to whether he believed the opinion reached by the Court was correct, the split 5-to-4 decision, of which Justice O'Connor was one of the vigorous dissenting Justices.

In our discussion of the opinion he used the words ''a person's home is their castle.'' He noted that the majority decision in Kelo provided that it was not for the Court to draw the line between what is permissible public use in the taking of private property, and that it was up to the legislative branch of Government to establish limits and to set constraints.

I appreciated that answer.

Now it is important for me to also address the concerns raised by some Floridians who urged me to vote against Judge Roberts' confirmation. They are worried that we are taking a big gamble with Judge Roberts, as we know very little about what he believes, and I share some of those same concerns, particularly with the administration not willing to come forth with some of the documentation that was asked for.

And, if not for his strong legal credentials and his repeated public and private statements and assurances that he would act independently on the bench, not allowing any personal beliefs to color his decisions, then I am not certain that I would have reached the decision to support his confirmation.

It is impossible to predict how Judge Roberts, if confirmed, will vote on any particular case that comes before the Supreme Court. All we can do, as Senators, is look at the nominee's judicial philosophy to determine whether the nominee will be faithful to the rule of law and to the U.S. Constitution and set aside personal or political beliefs and ideologies to ensure that the law and the facts govern judicial decisions; that all citizens of this country can go before the courts of this land and be treated equally and fairly under the law. Judge Roberts has pledged to be that type of Chief Justice, and that is why I have concluded that I will vote for the confirmation of his nomination.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, this will be the 10th Supreme Court nomination on which I will have voted. With every nomination, I have used the same basic test. If the nominee satisfies fundamental requirements of qualification and temperament, there are two traits that I believe should still disqualify a nominee: If a nominee possesses a rigid ideology that distorts his or her judgment and brings into question his or her fairness and openmindedness; or if any of the nominee's policy values are inconsistent with fundamental principles of American law.

Judge Roberts possesses extraordinary credentials suitable for this revered position. That he is highly qualified is not in doubt, and to say that he is highly capable is an understatement. Judge Roberts has an unusually fine legal mind. His ability to cite and to synthesize case law has impressed us all. He has great respect for the law and extensive experience arguing cases before the Supreme Court.

Judge Roberts is articulate and unflappable, with both a judicial temperament and a personal demeanor worthy of our highest Court. It is easy to understand why he is so liked and respected by those who know him.

While nearly everyone agrees he is qualified, concerns have been raised about Judge Roberts' earlier writings, and I share some of those concerns. More important, though, are the views he holds today. Is he an ideologue or is he capable of revising his views as he receives new evidence or hears new arguments?

During the confirmation hearings, Judge Roberts was pressed on many significant issues raised by his prior writings. He did not answer as an ideologue would. For the most part, he gave reassuring responses showing welcomed shifts—some subtle and some not so subtle—away from ideology and toward moderation. Here are a few examples.

As a young White House lawyer, Judge Roberts wrote several times on the question of Executive power, and he was supportive of broadly expanding the power of the President. Yet, relative to the power of the Executive to act in violation of an act of Congress, he said in his confirmation hearing:

> If it's an area in which Congress has legitimate authority to act, that would restrict the executive authority.

In 1981, while working in the Attorney General's Office, Judge Roberts wrote:

> Affirmative action program(s) required the recruiting of inadequately prepared candidates.

During his confirmation hearings, however, Judge Roberts told the Judiciary Committee something that sounded quite different with respect to affirmative action. He stated:

> The court permits consideration of race or ethnic background, so long as it's not sort of a make-or-break test.

He also stated:

> If a measured effort that can withstand scrutiny is affirmative action of that sort, I think it's a very positive approach.

In 1991, during his work as the Principal Deputy Solicitor General, Mr. Roberts was a signatory to a Government brief that stated in part:

> We continue to believe that Roe v. Wade was wrongfully decided and should be overruled.

However, Judge Roberts was asked during the recent hearings:

> Do you think there's a liberty right of privacy that extends to women in the Constitution?

He replied:

> Certainly.

Judge Roberts also stated regarding Roe v. Wade that ''it's settled as a precedent of the court, entitled to respect under the principles of stare decisis.''

There have also been questions about positions he took while in private practice. As a private lawyer, Judge Roberts argued a number of times against the power of Congress to legislate in several areas—attempting to limit the scope of the Americans with Disabilities Act, the Clean Water Act, and against the ability of Congress to withhold Federal funds from States with a drinking age lower than 21.

While I disagree with the positions he took, he was advocating the position of his clients, not necessarily his own positions. And during his confirmation hearings, Judge Roberts said with respect to congressional power under the commerce clause:

> It would seem to me that Congress can make a determination that this is an activity, if allowed to be pursued, that is going to have effects on interstate commerce.

There were times in the past when it appears he went beyond the position of his client to advocate for his own more restrictive views. For example—although I do not believe it was the position of the Reagan administration regarding Federal habeas corpus—Judge Roberts suggested that the Supreme Court could lessen its workload if habeas corpus petitions were taken off its docket.

On this issue, too, though, his thinking appears to have evolved. Judge Roberts said to the Judiciary Committee and reiterated to me his belief that habeas corpus is an important and legitimate tool in the search for due process and justice. Judge Roberts said that in those early memos he was opposing the repetitious habeas corpus petitions that appeared to be gaming the system, not the core right of access to Federal courts for a habeas corpus petition.

An observer of the legal scene for whom I have great respect, Cass Sunstein, professor at the University of Chicago Law School, said the following recently about the Federal judiciary and this nomination:

At this point in our history, the most serious danger lies in the rise of conservative judicial activism, by which the interpretation of the Constitution by some Federal judges has come to overlap with the ideology of right wing politicians. For those who are concerned about that kind of activism on the Supreme Court, opposition to the apparently cautious Judge Roberts seems especially odd at this stage.

Professor Sunstein also wrote:

In [Judge Roberts'] two years on the Federal bench, he has shown none of the bravado and ambition that characterize the fundamentalists. His opinions are meticulous and circumspect. He avoids sweeping pronouncements and bold strokes, and instead pays close attention to the legal material at hand.

That is not what I consider to be the description of an ideologue.

One troubling aspect of the confirmation hearings was Judge Roberts' excessive reluctance at times to share his own views. While caution is understandable from a nominee, I wish Judge Roberts had been more willing to answer appropriate questions from Senators on a number of issues.

The administration has also made this process more difficult than it should be. Reasonable requests for relevant requests were denied. Although we have memos from his early service as a young lawyer in the Reagan administration, we still do not have his writings from the period when he was Deputy Solicitor General during the first Bush administration. The papers that were sought and denied were perhaps more significant than the ones that we received. The administration's refusal to provide those documents inevitably raises questions about what they might contain.

Frankly, I believe the administration has too often treated the confirmation process as something to escape from rather than an opportunity to assure the American people that a nominee shares their basic values. The nominations of John Bolton and Alice Fisher are recent examples of where relevant documents and information were denied the Senate. This is not helpful to the confirmation process nor to the Senate's ability to make an informed decision.

In an attempt to glean more information about the views of Judge Roberts, I asked him to meet with me, and he agreed to do so, although my request came late. Judge Roberts' responses gave me further confidence that he has an open mind and is not driven by ideology.

At our meeting, I reviewed his approach to the interpretation of the Constitution. I asked him whether he agreed with the Chief Justice in the Dred Scott case who wrote that the Constitution ''must be construed now as it was understood at the time of its adoption, [and] it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers.''

Judge Roberts assured me that he meant what he said to the Judiciary Committee relative to interpreting the Constitution. In response to a question at his hearing about constitutional intent, Judge Roberts had answered:

Just to take the example that you gave of the equal protection clause, the framers chose broad terms, a broad applicability, and they state a broad principle. And the fact that it may have been inconsistent with their practice may have meant that . . . their practices would have to change—as they did—with respect to segregation in the Senate galleries, with respect to segregation in other areas. But when they adopted broad terms and broad principles, we should hold them to their word and [apply] them consistent with those terms and those principles.

Judge Roberts continued, and this was to the Judiciary Committee:

And that means, when they've adopted principles like liberty, that doesn't get a crabbed or narrow construction. It is a broad principle that should be applied consistent with their intent, which was to adopt a broad principle.

And then he said the following:

I depart from some views of original intent in the sense that those folks, some people view it as meaning just the conditions at that time, just the particular problem. I think you need to look at the words they use, and if the words adopt a broader principle, it applies more broadly.

I also asked Judge Roberts about his 1982 memo which argued that ''Congress has the constitutional authority to divest the Supreme Court of appellate jurisdiction in school prayer cases.''

He assured me he was assigned to argue that position internally for discussion purposes in the Attorney General's office as a young lawyer and that, as he said at the Judiciary Committee hearing:

If I were to look at the question today, to be honest with you, I don't know where I would come out.

At our meeting, I told Judge Roberts his answer to the question I had submitted for the Judiciary Committee's record as part of his confirmation hearing was counterintuitive and difficult to accept. This was my question to him, whether between January 2005 and the President's announcement of his nomination:

Did you discuss with [Vice President CHENEY, Andrew Card, Karl Rove, Alberto Gonzales, Scooter Libby, and Harriet Miers] or others your views on the following: a, whether or not abortion related rights are covered by the right of privacy in the Constitution; b, powers of the President; c, constitutionality of allowing prayer in public places; d, the scope of the right of habeas corpus for prisoners; e, the extent of congressional authority under the Commerce Clause of the Constitution; f, affirmative action; and g, the constitutionality of court stripping legislation aimed at denying Federal courts the power to rule on the constitutionality of specific activities or subject matter.

Judge Roberts' answer to the Judiciary Committee was:

I do not recall discussing my views on any of these issues with anyone during the relevant period of time in connection with my nomination.

When I met with Judge Roberts, I asked him:

Wouldn't you surely remember if discussions on these subjects had taken place?

He looked me square in the eye and said they did not take place, nor did such discussions occur when the White House was considering him for his present job on the Court of Appeals.

I must take Judge Roberts at his word. The Senate is being asked to confirm John Roberts to the highest position on the highest Court of the land. I believe he is qualified to assume that awesome responsibility. To vote against Judge Roberts, I would need to believe either that he was an ideolog whose ideology distorts his judgment and brings into question his fairness and openmindedness or that his policy values are inconsistent with fundamental principles of American law. I do not believe either to be the case.

Judge Roberts has modified some of his views over time, which I take as evidence that he is not an ideolog and has not only a keen mind but a mind open to argument and consideration of our Nation's experience. I will vote to confirm John Roberts to be Chief Justice of the United States.

I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. NELSON of Florida. 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. NELSON of Florida. Mr. President, I ask unanimous consent, since we are in executive session, to speak as in morning business.

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

ENERGY INDEPENDENCE

Mr. NELSON of Florida. Mr. President, I am going to continue to speak out on the vulnerable position our country finds itself in with regard to our dependence on foreign oil. Somewhere between 58 percent and 60 percent of our daily consumption of oil comes from foreign shores. If that in and of itself is not enough to alarm us—and I think the collective Nation has put its head in the sand to ignore the ramifications of that fact—certainly the two hurricanes, Katrina and Rita, hitting the gulf coast at a very vulnerable position of our oil supply as well as our oil refining capacity has reminded us.

So now with several of the refineries shut down first from Katrina in the New Orleans region and the gulf coast region of Mississippi, but now with some additional refineries that will be shut down in the Lake Charles, LA, region as a result of Hurricane Rita, it

all the more underscores how vulnerable we are on this thin thread of oil supply and oil distribution.

I think we need an Apollo project or a Manhattan project for energy independence. I do not think we ought to make decisions for the governing of our country and the comfort and protection of our people based on a system of supply and distribution of energy that makes us so subject to the whims of things that can happen beyond our control. I think we are likely to see this play out in the concern that we are not going to have enough home heating fuel for this winter because of the disruption that has already occurred. We clearly know what the disruption has done already to the prices, but I want to remind the Senate that the prices were very high before Hurricane Katrina happened.

In the townhall meetings I was conducting throughout the month of August in Florida, continuously people were telling me: Senator BILL, we cannot afford to drive to work or, Senator, we cannot afford to drive to the doctor.

That is when the price was at $2.70. After Katrina, of course, it went to $3. Who knows what the effect is going to be now as a result of Rita. We are living on a thin little margin of error in our supply, in our distribution of oil products.

Is this not enough to wake us up to the fact that this Nation collectively ought to come together and say we are going to reduce and ultimately eliminate our dependence on foreign oil? We can do that in so many different ways.

Yesterday, I spoke about the coal gasification process for which we have put incentives in the energy bill that was signed into law, a process that cooks coal, emitting the gas that is a clean-burning gas. But that is just one process. Remember, we have 300 years of reserves of coal in this country. We do not have to worry about going elsewhere in the world to get oil if we are able, through technology development, to convert that coal so that it is a clean-burning fuel. That is what I spoke about yesterday.

Today, I tell my colleagues about a process that was actually developed back in the first part of the last century by the Germans, that is the making of synthetic fuel from coal that is clean burning. The South Africans did it, and a lot of the transportation vehicles in South Africa run on this synthetic fuel—I think it is a kind of diesel—that powers almost all of their vehicles and some of their airplanes. Well, we certainly have the resource. We have the coal. Do we have the will? The technology is certainly here. It has been here since the early part of the last century and one country has already employed it and employed it very successfully.

Tomorrow I am going to come to the Senate floor again and I am going to talk about another technology that will help us move toward energy independence and to stop this dependence that has put us in such a vulnerable position with regard to the defense interests of our country and certainly our economic interests. Look what has happened to Delta Airlines already. They were in trouble economically long before the price of fuel started shooting up, but that is just one consequence. Look at the ripple effects of the thousands of people who are going to be laid off. Look at the ripple effects of what this Congress is going to have to do as we consider the protection of those employees' pensions.

So here it goes. It all comes back to one thing, and that is our dependence on an economy that runs on oil when we have known for years that we were going to reach the crisis point. It happened with Katrina, but it happened back in the early 1970s when there was an oil embargo out of the Middle East. It happened again in the late 1970s when there was another embargo. When is America going to wake up?

Each of us has our own ideas, but whenever we try one little thing, we cannot get a consensus in the Senate. For the last 4 years, we have brought an amendment to the floor, a simple little amendment on doing nothing more than raising miles-per-gallon on SUVs, phased in over a 10-year period so it would not hurt anybody, and we cannot get the votes on this floor to pass that.

Are we beginning to wake up because of what we are facing with Katrina? I hope so. This Senator is going to continue to speak out. My State, Florida, is in a vulnerable position because we are a peninsula that sticks down into these wonderful seas that surround us. But that energy has to be brought in. We are a State that does not have a natural resource such as oil or coal. We are a State that has to import that, and we have to bring it usually from long distances.

I will continue my dialog with the Senate of the United States tomorrow, bringing forth another technology that we can develop if we but have the will to change our dependence on foreign oil.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the time from 5:45 to 6:45 p.m. will be under the control of the majority.

The Senator from Alaska is recognized.

Ms. MURKOWSKI. Mr. President, I rise this afternoon to join many of my colleagues speaking in strong support of the nomination of Judge John Roberts to the position of Chief Justice to the United States. It is unquestionable that Judge Roberts is eminently qualified to take on the position of Chief Justice. He has an impeccable resume. You can look at that and say: There is a person who has given his life to the law. An encyclopedic recitation of the law and a solid record as both a lawyer and a judge void of an ideological agenda indicate that he will be a thoughtful and impartial Justice.

I had an opportunity to speak with Judge Roberts. There are some individuals whose knowledge of the law is so overwhelming and so impressive that, quite honestly, they are leaps and bounds above the rest of us and it is difficult to follow the conversation. The conversation I had with John Roberts was one where you are carrying on a conversation, he is able to bring in and impart his legal knowledge and continue a conversation that both flows and is comfortable. That is a unique talent.

Of interest to me and my State of Alaska is that John Roberts has litigated on behalf of Alaskan clients. When the Mayor of Juneau, who was Bruce Botelho, testified on behalf of Judge Roberts before the Judiciary Committee, he did so as a former attorney general for the State of Alaska and as a Democrat. He had this to say in his testimony about Judge John Roberts. He said:

> Working with Judge Roberts, I was fortunate to get to know the most remarkable and inspiring lawyer I have ever met. He will lead the Court in a way that will instill public confidence in the fairness, justice and wisdom of the judiciary.

When he was attorney general, Mayor Botelho retained John Roberts to represent Alaska in cases, to defend Alaska's sex offender registry, Alaska's right to submerged lands, and most notably a case involving Indian country, an Alaska Native Claims Settlement Act.

While he was retained by the State of Alaska, John Roberts, I think very eagerly, traveled up to the State to learn firsthand those things that he was going to be speaking to. He toured the waters of Glacier Bay in a Fish and Game boat, went out on a little riverboat, a skiff by most people's standards, in the Yukon-Kuskokwim Delta for a couple of days just traveling around. He traveled around and not only talked with the other lawyers who might be with the group, but he spoke with the people. He talked to the crews on the fishing boats. He engaged the people where they were. He talked with them about their local concerns. He practiced the pronunciation of the native village names. He was engaged. He was a real person to those Alaskans he met.

So often when we have kind of your east coast lawyers coming back to visit us up North, they are viewed with a little bit of suspicion. But I think it is fair to say that John Roberts made a very serious and a very genuine effort to know and appreciate firsthand the facts that were going to be presented to him, the facts he was going to be arguing. He was not just going to read some brief in the comfort of his study, he was going to come and learn for himself.

As Alaskans, we are fortunate to have a nominee who understands Alaska's unique landscape, our people, and its laws. We have some Federal laws and acts that are unique to where we

are and our people and our land up there, so much so that it is very difficult to become well versed in the law. Sometimes I think it is fair to say we think those on the outside, those in the lower 48, just don't get what happens up North and how it applies with us. But I think we have learned with Judge John Roberts that he will take the time to know and understand not only Alaska's people but the facts and circumstances all over.

As Americans, we have yet to imagine some of the legal questions John Roberts will consider in his tenure. But with his breadth of experience and his desire to wholly understand the legal matters before him, I believe Judge John Roberts will serve the court with integrity, thoughtfulness, and dedication to the law.

John Roberts has made it clear as a judge that it is not his place to use the law to further politics or to seek to question settled law. The role of justice is one of great restraint, of strict application of the law and not judicial activism. I believe John Roberts when he unequivocally pledged to uphold impartiality in the law.

Judge Roberts has explicitly assured us that his respect for the law and legal principle vastly outweigh his personal values, his views, or loyalty to anyone or anything other than the rule of law. This is the basis, the fundamental standard from which we should consider Judge Roberts' nomination. In my mind, there is simply no clear cause for opposing his nomination.

If in his testimony Judge Roberts did not communicate his views on legal matters which may come before the Court during his tenure, he was entirely forthcoming on his judicial philosophy. Judge Roberts stated repeatedly that he would bring no agenda to his work as Chief Justice. He stated he would judge each issue on its merits and approach each case with an open mind, that legal precedent and not his personal views would be his guide.

Perhaps more so than any other recent nominee, Judge Roberts has demonstrated a sound understanding and appreciation of the role of a Justice and the necessary constraints within which the third branch of government should operate. So today, I call on my Senate colleagues to take a step back from our politically charged setting to consider fairly a man who is incredibly qualified to become our Chief Justice.

I will quote from Roberts' testimony as I end here. He said:

> The rule of law—that's the only client I have as a judge. The Constitution is the only interest I have as a judge. The notion I would compromise my commitment to that principle . . . because of views toward a particular administration is one that I reject entirely. That would be inconsistent with the judicial oath.

John Roberts has what it takes to be the Chief Justice of the United States, which is complete love for the law, an erudite legal mind, and judicial modesty. I lend my support to the nominee and look forward to this body confirming him.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I rise in support of Judge Roberts to be the next Chief Justice of the U.S. Supreme Court. That probably comes as no great surprise to anyone who has followed my career, but I think my reasoning hopefully will illuminate a little bit as to the difference between my passions as a Member of the Senate and as a legislator and my duty as a Senator to confirm nominees to the courts of this country because I do see them as different.

My job as a Senator is to be a passionate advocate for the things I believe are best for my State, for the constituents I represent, and best for the country and ultimately the world. I come here, as my colleagues have noted on occasions, with a fair degree of energy and passion and commitment to those causes.

When I approach the issue of nominations, particularly to a position of this import, judicial nominations, I come with a different agenda. A court is not a place for zealous advocates to impose their will upon the American public. It is not a place for people who believe their views as judges are superior to the views of the democratically elected officials in this country—better put, that their views are better than the people's views because we are, in fact, accountable to the people we represent. When I look at the confirmation process for judges, I try to step back and use a different criteria—not whether I agree with the judge's points of view on a variety of different issues but whether I believe the judge can carry out the role of a judge.

It is interesting in this debate that we have heard here in the Chamber and we have been hearing across this country now for the better part of 3 or 4 years since we have been locked up in the judicial confirmation battle that it has been a battle about ideology. It has been a battle about interpretations of the Constitution and rights derived from that Constitution and whether they will be upheld or whether they will be struck down or whether they will be modified. I believe that is an unfortunate debate. It is unfortunate that those who are applying or have been nominated for judicial positions are put in the positions of now being questioned as if they are running for political office, under the scrutiny of someone who is running for political office and make judgments about public policy as opposed to what the traditional role of the Court has been up until the last 40 or 50 years, just to decide the case before them in a narrowly tailored fashion, to do justice to the parties, in concert with the Constitution of this country—applying the law in this narrowly tailored fashion to come up with a just result for the parties in the case.

In the last 40 or 50 years, that type of justice has been rarer and rarer to find in our decisions, particularly on the Supreme Court.

As I come here, I again don't come here as a conservative. A lot of my supporters have said I am not sure Judge Roberts is a conservative. My response is, I am not sure either. Further, I am not sure it matters. What I am sure of is Judge Roberts will be a good judge, will be someone who sits and judges the case on the merits of the arguments as they apply to the Constitution of this country, and will do so in a way that comports with the great tradition in the last 40 or 50 years of the American judiciary. I am confident of that.

I think if there is anything that those on both sides of the aisle would say it is that Judge Roberts understands the limited role of the courts.

When Judge Roberts came into my office shortly after he was nominated, he stunned me. I have met with a lot of nominees who wanted to be judges from Pennsylvania, from the circuit courts as well as district courts. This was my first opportunity to meet a nominee for the Supreme Court. I have been here 11 years, and this is the first nomination for the Supreme Court in my 11 years here in the Senate. But having met many people who wanted to aspire to be judge, he was the first nominee I met with who used terms such as ''humility'' and ''modesty'' when describing the role of a judge in his role in the judicial process. Words such as ''judicial restraint'' again are not hallmarks of this judicial debate we have been engaged in now for the last few years. That may give some pause to conservatives who would like to see an activist conservative reversing lots of decisions conservatives are concerned about which the Court has passed down in the last few decades.

But to me, it gives me comfort to know this is a judge who will apply the law, who will not seek to replace the role of the legislature, or the President, State legislatures, and the Governors, township supervisors, county councils, but that he will do justice with the facts before him in the case in solving the dispute that has been presented to him.

As I said, we have had far too little of that kind of justice over the last few years.

As a result, I have written and spoken about the concern I have in this country that the judiciary is taking an ever increasing and dominant role in our society and in our Government. We are supposed to be a government that has checks and balances. When you talk about checks and balances, most people think about Republicans and Democrats. Of course, checks and balances were written long before there were such things as Republicans and Democrats. Checks and balances are the remainder of power between the branches of Government, one to check the other to make sure this finely

tuned and crafted document, the Constitution, that establishes these three branches would stay in equilibrium.

There were concerns at the time about a strong President running roughshod over the Congress and the judiciary and a strong Congress doing the same. Very few had concerns about the judiciary, particularly Hamilton in the Federalist Papers. He showed very little concern about a judiciary getting out of control. One exception to that was Thomas Jefferson. It was not at the time of the writing of the Constitution but years later, after a few court decisions had been handed down which gave power to the courts, which I am not sure many of the writers of the Constitution envisioned.

But having given them power as a result of earlier court decisions, Jefferson wrote in 1821, ''The germ of destruction of our Nation is in the power of the judiciary, an irresponsible body working like gravity by night, and by day gaining a little today and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction until all shall render powerless the checks over one branch over the other, and will become as venal and oppressive as the government from which we were separated.''

That was Jefferson's concern about our judiciary, this ''irresponsible'' body, in his terms—irresponsible in the sense that it owes no responsibility or duty, has no real ability over the executive or legislative branches to be checked.

Why do I go off on this discussion about the courts? It is because of this penchant of the judiciary to grab more authority, to act as a superlegislature and lord itself over the rest of society that we need men such as John Roberts on this Court who understand as Chief Justice the danger a judiciary of this kind is to the United States of America and to our democracy.

While I am not sure John Roberts is a conservative, I am not sure he will overturn cases which I believe should be overturned, I am sure he will do justice. He will execute his duties with restraint, modesty, and humility as the Founders who had no concern about the judiciary believed those in positions on the Court would do. He is someone whom our Founders would be proud of to serve in that position. He is someone we desperately need to speak in the Court, to speak to the Court, and lead the Court in a direction that usurps less the powers reserved for the people in our Constitution.

I strongly support John Roberts. I hope the President in his next nomination will nominate someone very much in the vein of John Roberts. This Court and this country need people such as John Roberts.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MARTINEZ. 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. MARTINEZ. Mr. President, today I rise for the first time as a U.S. Senator to exercise my constitutional obligation to provide advice and consent to a presidential nominee for Chief Justice to the United States Supreme Court. It is a high privilege that carries with it great responsibility. The responsibility to ensure, in so much as is possible, that the nominee is not only of the highest intellect, integrity and character, but that he or she comes to the process with no personal ideological agenda. That the nominee recognizes there is no room in the business of judging for the personal policy ideals of individual judges and that the symbolism of the judge's black robe to shield both the litigants and the country from the personal idiosyncrasy must be carried out in the discharge of the heavy responsibilities of the Court.

Today I add my voice to that of my colleagues speaking in support of the nomination of John Roberts to become the 17th Chief Justice of the United States of America.

Before the confirmation hearings began, we knew that John Roberts had impeccable academic qualifications to serve as the chief judicial and administrative officer of the highest court in the land.

Before the hearings began we knew that John Roberts had the wholehearted support of prior Solicitors General, in both Democrat and Republican administrations.

We knew that he had the overwhelming support of a majority of members of the District of Columbia bar where he practiced and we knew that he received the highest possible rating from the American Bar Association.

In short, we knew that his qualifications to serve were impeccable and unassailable.

And what we now know after the confirmation hearings, after extensive interaction with Members of the Senate, 20 hours of testimony and the give and take of responding to over 500 questions, is that Judge Roberts is possessed of: a quiet humility; a deep understanding and modest view of his own significance; a healthy appreciation of the role of the Court in the governance of our nation; respect for the limitation of precedent; an awareness of the dangers of looking to foreign jurisdictions for guidance in shaping the laws of our land; and a commitment to respecting the proper role of the courts in interpretation of the law.

I am persuaded that Judge Roberts will look to established precedent, be respectful of the doctrine of stare decisis and will use the constitution and the law as his guideposts as opposed to any personal whim or political agenda.

In my private meeting with Judge Roberts we discussed his view of the role of the Chief Justice. From his thoughtful response, it was clear that he had well considered ideas about providing effective and constructive leadership to his colleagues on the Court. In every institution or endeavor, great leadership finds a way to unite rather than to divide. I am confident that Judge Roberts will provide that leadership.

I want to mention that while a nominee's views issues such as the ''right to privacy'' are unquestionably significant and have occupied a great deal of the time dedicated to the confirmation process, our entire judiciary looks to the Supreme Court for guidance on many other issues other than the ''great constitutional questions of our day.''

I'm hopeful that as we go forward with our next nominee, we can find some time to also discuss issues that are vital to the day-to-day administration of justice.

What are the nominee's views on the cost of litigation in our country or the length of time required for litigants to have their claims adjudicated? Is there a fair mechanism to address legitimate concerns about nonmeritorious cases?

What has the effect of the speedy trial rule been on the ability of litigants in civil case to have a fair and prompt resolution of their claims?

What are the nominee's views on the argument that complex cases involving scientific evidence are beyond the ken of average jurors?

Where does the nominee stand on the difficult issue of sentencing guidelines and the current tension existing between the Congress and the Courts on the appropriateness of giving federal judges discretion in the imposition of sentences?

Where does the nominee stand on the problems of electronic discovery in civil and criminal cases?

What are the nominee's views on the importance of 12 member juries in civil cases? Could juries of 6 serve justice just as well? Why are unanimous verdicts required in civil cases could another method lead to a better quality of justice?

These questions may not make for good headlines, but they surround issues that are vital to the administration of justice in our great country.

It is my hope we will take the time to discuss them in the coming weeks as we go forward with the confirmation process of a nominee to replace Sandra Day O'Connor. These are the questions we should consider as we depoliticize the confirmation process and return our attention to working together to advance the cause of justice in our Nation.

My colleagues should take note that the American Bar Association gave Judge Roberts the rating of ''Well Qualified'' for Chief Justice of the United States.

To earn that rating, the ABA which is viewed as the solo standard, says, ''the nominee must be at the top of the

legal profession, have outstanding legal ability and exceptional breadth of experience and meet the highest standards of integrity, professional competence and judicial temperament.

The evaluation of ''Well Qualified'' is reserved for only those found to merit the Standing Committee's strongest affirmative endorsement.'' In conducting its investigation, the ABA reached out to a wide spectrum of people across political, racial and gender lines, including lawyers, judges and community leaders—people with personal knowledge of Judge Roberts.

The ABA interviewed Federal and state court judges, including all members of the Supreme Court of the United States, members of the United States Courts of Appeals, members of the United States District Courts, United States Magistrate Judges, United States Bankruptcy Judges, and numerous state judges. The results were as follows:

On integrity: ''He is probably the most honorable guy I know and he is a man of his word.'' ''I would be amazed if anyone had any greater integrity on either a personal or professional level.'' ''He's a man of extraordinary integrity and character.''

On judicial temperament: ''He has the kind of temperament and demeanor you would want in a judge.'' ''He was extremely even-tempered and was so good that he could give classes on it.'' ''John Roberts is respectful, polite and understated. He has no bluster and is a fabulous lawyer. He has no need to impress anyone.

On professional competence: ''He is brilliant and he understands the importance of the independence of the judiciary and the role of the rule of law.'' ''His opinions are clear, succinct and very well-written.'' ''His opinions are in the mainstream of American jurisprudence.''

In my own meeting with Judge Roberts, I was particularly impressed with his discussion of the dangers associated with looking beyond the borders for guidance or the support of precedent.

His response reflected a deep and comprehensive understanding not only of the importance of judicial precedent in setting boundaries for the Court, but also the role of the people, the legislative process and our representational form of government. Judge Roberts noted in our meeting and again in his testimony before the committee that our judges are appointed by our elected President and their appointment requires the consent of the duly elected members of the Senate.

This provides a measure of accountability consistent with the intention of the Founding Fathers.

Looking to a foreign source for legal principles deprives the American people of that accountability. To use Judge Roberts words, and I paraphrase, it's a bit like looking out over a large crowd to identify your friends. If you look hard enough, you can find something you like.

To my colleagues who are poised to cast a vote in opposition to the nominee, I would ask them to take a close look at Judge Robert's testimony at the commencement of the hearing:

I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind.

I will fully and fairly analyze the legal arguments that are presented.

I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember it's my job to call balls and strikes, and not to pitch or bat.

I must ultimately arrive at my decision based on a considered judgment as to whether this nominee has the qualifications, temperament and experience required of such high appointment. Does he have the requisite personal ethics and moral code to serve as our nation's highest judicial officer?

I have measured this nominee against this high bar for confirmation and find him qualified in every respect.

I accept Judge Roberts' word as his bond, consistent with his history as a man of unquestioned integrity and commitment to the highest ideals demanded of our judicial officers. I look forward to casting a historic vote in support of this most highly qualified nominee.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. COBURN. Mr. President, first, I have the distinct privilege of being on the Judiciary Committee. I also have the distinct privilege of serving with three other members on that committee who are nonlawyers so I bring to that committee not a legal background but a citizen background. One of the things I found very refreshing during the hearings was the fact that we have a person in the name of John Roberts who recognizes the role of the judiciary as outlined by our Founders. I will go into that in a minute.

I will address, first, some issues that are important.

We heard today some criticisms of Judge Roberts in sitting and hearing the Hamdan case while he was under consideration for this position. For the record, I show that Justice Ginsburg, during her consideration, decided 24 cases. Justice Breyer decided 15 cases during the period of time he was under consideration. I have the attestation of ethicists who have made statements in support of the fact that Judge Roberts violated no ethical creed and did nothing but his job as an appellate justice while hearing this, and I ask unanimous consent to have them printed in the RECORD.

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

GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL,
Washington, DC, August 18, 2005.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: A recent story in the Washington Post suggested that it might have been improper for Judge John Roberts to participate on the D.C. Circuit panel that decided the recent case of *Hamdan* v. *Rumsfeld*. The Post story relied heavily on a short article written by three professors, Stephen Gillers, David Luban and Steven Lubet, and published on the internet in slate.com.

I write to provide perspective on the issues raised by these articles and to make clear that Judge Roberts' participation on the panel was proper. To briefly suggest my background to draw such a conclusion, I have taught and written in the field of legal and judicial ethics for over thirty years. The law school text that I co-author has long been the most widely used in the country, and it covers judicial ethics in considerable detail.

There are several points on which all observers would agree. First, 28 U.S.C. §455 requires Judge Roberts or any other federal judge to disqualify himself ''in any proceeding in which his impartiality might reasonably be questioned.'' The key term, of course, is ''reasonably.'' Anyone could assert that a given judge was not impartial. Indeed, a litigant might be expected to do so whenever he or she preferred to have someone else hear their case. Thus, the statute does not allow litigants (or reporters or professors) to draw a personal conclusion about the judge's impartiality; the conclusion must be ''reasonable'' to a hypothetical outside observer.

Second, saying as some cases do, that judges must avoid even ''the appearance of impropriety'' adds nothing to the analysis. Unless the ''appearance'' is required to be found reasonable by the same hypothetical outside observer, the system would become one of peremptory challenges of judges. That is not the system we have, nor would it be one that guarantees the judicial authority and independence on which justice ultimately depends.

Third, there is no dispute that judges may not hear cases in which they would receive a personal financial benefit if they were to decide for one party over another. The first case cited (albeit not by name) by Professors Gillers, Luban & Lubet was Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). It simply decided that a judge had a personal interest conflict and could not decide a case that would financially benefit a university on whose Board of Trustees the judge sat. In short, the case says nothing relevant to Judge Roberts' conduct.

Fourth, a judge may not hear a case argued by a private firm or government office with which the judge is negotiating for employment. The reason again is obvious. That was the fact situation in the remaining two cases cited by Professors Gillers, Luban & Lubet in their slate.com article. The cases break no new ground and provide no new insights relevant to this discussion.

Critics of Judge Roberts suggest, however, that his ''interviews'' with the Attorney General and with members of the White House staff were analogous to private job interviews. That is simply not the case. A judge's promotion within the federal system has not been—and should not be—seen as analogous to exploration of job prospects outside of the judiciary.

Except for the Chief Justice, every federal judge is at least in principle a potential candidate for promotion to a higher status in the judiciary. One might argue that no district judge should ever be promoted to a

court of appeals, and no court of appeals judge should be elevated to the Supreme Court, but long ago, we recognized that such an approach would deny the nation's highest courts the talents of some of our most experienced and able judges. One need only imagine the chaos it would cause if we were to say that no federal judge could hear a case involving the federal government because he or she might be tempted to try to please the people thinking about the judge's next role in the federal judiciary. Nothing in §455 requires us to say that it would be ''reasonable'' to assume such temptation. We properly assume that judges decide cases on their merits and see their reputation for so doing as their basis for promotion, if any.

To be fair to the critics, they argue that a judge's situation might be different once actual ''interviews'' begin for the new position. The problem with that, of course, is that interviews are only a step beyond reading the judge's decisions in a file, interviewing observers of the judge's work, and the like. That kind of thing goes on all the time, including in the media. Further, all accounts suggest that several judges were being ''interviewed'' and that for most of the period of the interviews, there was not even a Supreme Court opening to fill. Assuming, as even Professors Gillers, Luban & Lubet do, that no improper pressure or discussion took place in the interviews themselves, it is hard to see that physically meeting with White House staff transforms what is inevitable and proper in the judicial selection process into something more suspect.

Again, even Professors Gillers, Luban & Lubet ultimately concede that Judge Roberts should not have had to withdraw from all cases brought by the government as the logic of their criticism would seem to suggest. They argue instead that the Hamdan was special. It was ''important'' to the Administration and therefore required special caution.

I respectfully suggest that an ''importance'' standard for disqualification could not provide sufficient guidance for the administration of the federal courts. Every case is important, at least to the parties. Furthermore, while some cases have greater media interest than others, and some are watched more closely by one interest group or another, every case before the D.C. Circuit that involves the federal government is there because high level Justice Department officials have concluded that the appeal is worth filing or resisting.

Saying that some cases are important and others are not ultimately reveals more about the speaker's priorities than it does about the intrinsic significance of the case. Indeed, earlier this year, the Supreme Court decided United States v. Booker and United States v. Fanfan involving the Sentencing Guidelines. Few decisions have had more impact on the operation of federal courts in recent years, yet it was widely reported that Professor Gillers opined to Justice Breyer—correctly in my view—that he need not recuse himself even though his own work product as a former member of the Sentencing Commission arguably was indirectly at issue. Importance of the case was not the controlling issue for Professor Gillers then, and it is simply not a standard now that can clearly guide a judge as to which cases require disqualification and which do not.

Indeed, the critics of Judge Roberts' remaining a part of the Hamdan panel overlook the fact that judges of the D.C. Circuit are assigned to the cases that they hear on a random basis. That randomness is part of the integrity of the court's process and it guarantees that no panel can be ''stacked'' with judges favorable to one litigant or another. Weakening the standard for a reasonable appearance of impropriety, and making recusal turn on which litigants can place news stories accusing judges with of a lack of ethics would adversely affect the just outcomes of cases more than almost any other thing that might come out of the hearings on Judge Roberts' confirmation.

In short, in my opinion, no reasonable observer can ''reasonably question'' the propriety of Judge Roberts' conduct in hearing the Hamdan case. He clearly did not violate 28 U.S.C. §455. Indeed, he did what we should hope judges will do; he did his job. He participated in the decision of a case randomly'assigned to him. We should honor him, not criticize him, for doing so.

Respectfully,

THOMAS D. MORGAN,
George Washington University Law School.

STATEMENT BY PROFESSOR GEOFFREY C. HAZARD, JR., UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

In my opinion, Judge Roberts could have decided to recuse himself in the Hamdan case but was not obliged to. Hence, it was a matter of professional judgment. These situations, where a judge is being considered for some other or additional possibility, are fairly common these days, hence part of the environment. Also, recusing would require some kind of explanation, which could lead to leaks, which could embarrass other government procedures, such as background checks. I believe that it is reasonable to say that he should, have recused himself, but also reasonable for him to have concluded that it was not obligatory.

Mr. COBURN. I thought it would be important for the American people to hear what our Constitution says about our judges. I also thought it would be important for the American people to hear the oath sworn by a judge.

I have been a Senator for less than a year. When I was campaigning—I also will readily admit I am a pro-life conservative from Oklahoma—but when I was asked during that campaign if I had a litmus test on a Supreme Court nominee, every time I said ''no,'' except one: Integrity. It doesn't matter what position a judge holds. It doesn't matter what their background is. It doesn't matter what their thoughts on any issue are. If they lack integrity, none of the rest of it matters. No one can claim that John Roberts lacks integrity.

During that campaign, I very well explained to the people of Oklahoma that I didn't want a Justice that sided with me. I didn't want a Justice that sided with anybody, except the law and the Constitution.

Here is what article III says about judges:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and in inferior Courts, shall hold their offices during good Behavior, [we heard some conversation about foreign law; Judge Roberts passes the bar on his refusal to use foreign law] and shall at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

[Their power] shall extend to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

It reads in article 6 that:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The oath John Roberts will take and each Justice before him is as follows:

I do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me under the Constitution and the laws of these United States, so help me God.

There are going to be several of my colleagues who will vote against John Roberts. The real reason they will be voting against John Roberts is because he would not give a definite answer on two or three of the social issues today that face us. He is absolutely right not to give a definite answer because that says he prejudges, that he has made up his mind ahead of time. The religious test I spoke about is one of if you don't agree with me and what I believe and if you don't believe there are certain rights to privacy or certain rights that are there that are not spelled out in the Constitution that have become rights, you have set up a religion. The religious test is going to be that if he won't give an answer on those controversial social issues such as abortion today, he will never qualify. Under that religious test, no nominee President Bush will nominate to the Supreme Court will ever get their vote, regardless of whether they are pro-Roe v. Wade or against Roe v. Wade. The fact is, they will not commit.

Therefore, if you can't know or you are suspicious that somebody might take one position or the other ahead of time and you have that as a test, you yourself are violating one of the tests of the Constitution.

I believe John Roberts is a man of quality. Most importantly, he is a man of integrity. I don't want him to rule my way. I want him to rule the right way. The right way is equal justice under the law for all of us. If he does that and if the rest of the Supreme Court starts following him, we will reestablish the confidence that is sometimes lacking in the Court today, and we will also reestablish the balance between the judiciary, executive, and legislative branches.

It is my hope this body will give a vote to John Roberts that he deserves based on his interpretation, knowledge, and honesty with the committee and, fundamentally, with his integrity that is endorsed by the American Bar Association. Everyone who knows him

knows he will do just that, equal justice under the law for every American.

I yield the floor.

Mr. ENZI. I rise today to share my thoughts on the nomination of Judge John Roberts to be the Chief Justice of the U.S. Supreme Court. Like most Americans, I watched the Judiciary Committee hearings with great interest and curiosity. Judge Roberts could potentially be the 17th Supreme Court Chief Justice in the history of the United States. It is amazing to consider that only 16 other people have shared that honor. It is a much shorter line than the number of Presidents back to George Washington—42.

Considering this tie with history, I was thrilled to be watching the proceedings. However, I am also aware of my serious responsibility as a U.S. Senator at this time. The Senate has the duty to give its advice and consent to the President's nomination. Given the comparative youth of Judge Roberts, the vote this week could affect the dispensation of constitutional questions for many decades.

During over 20 hours of questions, I had ample opportunity to consider the qualities and character of Judge Roberts. I observed Judge Roberts' keen intelligence and modesty regarding his accomplishments. I also enjoyed his sense of humor in the midst of intense and repetitive questioning. He convinced me that he is qualified to serve on the highest Federal bench.

During the hearings, I was reminded of a common fallacy where people think judges are politicians. Judges are not politicians. It has been easy to slip into the thinking that we need to know their political allegiance so that we can know what their decisions will be. We also begin thinking that judges should make decisions based on good policy. Finally, we believe that judges have to make us promises on the future decisions so they can win our votes. Judges are not politicians. We need to know their qualifications, not their political allegiances. We need to know that their decisions will be made on the rule of law, not on good policy. We need to know that judges will not make promises to prejudge future cases in order to win votes. Judges are not politicians. A judge's only constituent should be the U.S. Constitution. If the people were the constituents of judges, our confidence in an impartial hearing and ruling on our case would collapse.

A judge should be an intelligent, impartial, open, and unbiased executor of the law. I believe that Judge Roberts meets these qualifications and is fit to serve as the Chief Justice of the Supreme Court. I am pleased that a bipartisan majority of the Judiciary Committee passed him through the committee. I go home to Wyoming most weekends. It lets me personally poll my constituents. That is an advantage of being from the least populated State. I can assure you they are impressed with Judge Roberts. That is probably not a surprise. However, during the week when I am in DC, I visit with the janitors, electricians, picture hangers, and others around the offices. To a person they had comments like ''this man really knows his stuff.'' ''He answers their questions without a single note or staff person whispering in his ear. I bet he could take the bar exam tomorrow and still pass it. This guy is good'' and I think that is the opinion of mainstream America. I look forward to voting on his nomination later this week.

Even after the vote, the Senate's work to fill the Supreme Court will not be complete. We are waiting for another nomination from President Bush to replace retiring Justice O'Connor. I am pleased with the recent precedent set by the Judiciary Committee.

In a bipartisan and timely manner, they voted out a nominee based on his qualifications. They voted him out based on his stated devotion to applying the rule of law. As the Senate prepares to consider the next Supreme Court nomination, it is my hope that the same process will be followed—a timely consideration based upon the qualifications of the nominee and not on scoring political points.

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. COBURN. 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

Mr. COBURN. Mr. President, I ask unanimous consent that there now be a period of morning business with Senators permitted to speak for up to 10 minutes each.

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

MIDDLE EAST OIL

Mr. STEVENS. Mr. President, I ask unanimous consent to have printed in the RECORD a recent article from Petroleum News which is entitled ''Saudi Oil Shock Ahead,'' in which Matthew R. Simmons discusses the relative importance today of oil and gas exploration in the Arctic National Wildlife Refuge and discusses the valuable role this area can play in our national energy policy.

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

[From Petroleum News, Sept. 11, 2005]

SAUDI OIL SHOCK AHEAD—SIMMONS POKES HOLES IN IMAGE OF UNLIMITED MIDDLE EAST OIL; PREPARE FOR WORST

(By Rose Ragsdale)

As Congress turns to legislation that could open a new era of Alaska Arctic oil production, one highly regarded energy analyst says he's convinced the move is critical to the success of a national energy strategy.

Matthew R. Simmons, author of ''Twilight in the Desert: The Coming Saudi Oil Shock and the World Economy,'' (John Wiley & Sons Inc., 2005), says crude from the Arctic National Wildlife Refuge's 1.5-million-acre coastal plain could play a valuable role in the nation's energy policy.

Simmons, an investment banker who holds an MBA from Harvard University, is chairman and chief executive officer of Houston-based Simmons & Co. International, which specializes in the energy industry. He serves on the boards of Brown-Forman Corp. and The Atlantic Council of The United States. He's also a member of the National Petroleum Council and The Council of Foreign Relations.

Simmons recently shared his views with Petroleum News on Alaska's oil and gas industry. He has been busy promoting his book with appearances on several talk shows, including a recent radio interview with Jim Puplava, host of Financial Sense Newshour. ''Twilight in the Desert'' hit the bookstores in the spring and is generating considerable comment in energy, economic and political circles.

Simmons' book is the culmination of years of research, including scrutiny of 200 technical papers, published by the Society of Petroleum Engineers, on problems encountered by professionals working in Saudi Arabia's oil fields. The papers, combined with transcripts from little-noticed U.S. Senate hearings in the 1970s and Simmons' discovery that little actual public and verifiable data exists on Saudi oil reserves, form the backbone of observations and conclusions in the book.

While most energy economists start with the assumption that Middle East oil reserves are plentiful, Simmons questioned that assumption after he found that no one had ever compiled a verifiable list of the world's largest oil fields and the reserves they hold.

His questions first surfaced at a Washington, D.C., workshop, conducted by CIA energy analysts, where top energy experts gathered several years ago.

''We'd spend a day doing a discussion of all the key countries, and how much oil capacity they had in place over the course of the corning three years,'' Simmons recalled. ''And I basically said, 'How do you all even know that? What are the three or four top fields in China?' And no one had any answers.

''So I decided it would be interesting and educational to see if you could actually put together a list of the top 20 oil fields by name,'' he added.

That exercise revealed that Saudi Arabia, like most of the other Middle East countries, extracted 90 percent of its oil production from five huge fields, and the biggest of the fields, Ghawar, had been producing oil for more than 50 years.

''What I also found is that the top 14 fields that still produce over 500,000 barrels per day each, were 20 percent of the world's oil supply, and on average they were 53 years old,'' he observed.

Historically, oil field discoveries fit a pattern that Simmons likens to the nobility of a European country or the pieces on a chessboard. In each of the world's great oil basins, explorers have found a large field first, most often the ''queen'' field but sometimes the ''king.'' Next explorers typically find another large field, usually the other half of the royal pair. After that, oil basins typically yield several moderate-sized fields, or ''lords.'' Beyond that, only small pools of crude reserves or ''peasants'' typically remain, he said.

In ''Twilight in the Desert,'' Simmons not only documents the history of Saudi Arabia and its oil fields, he also questions the Middle East country's claims that it still has