

discharged from the Committee on the Judiciary and that it be referred to the Committee on Energy and Natural Resources.

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

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ORDERS FOR WEDNESDAY,  
SEPTEMBER 28, 2005

Mr. COBURN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m., Wednesday, September 28; I further ask that following the morning prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved, and the Senate proceed to executive session to continue consideration of Calendar No. 317, John Roberts to be Chief Justice of the United States; I further ask consent that the time from 10 to 11 be under the control of the majority leader or his designee; the time from 11 to 12 be under the control of the Democratic leader or his designee; 12 to 1 under the majority control; 1 to 2 under Democratic control; 2 to 3 under majority control; 3 to 4 under Democratic control; 4 to 5 under majority control; 5 to 6 under Democratic control; 6 to 7 under majority control; 7 to 8 under Democratic control.

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

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PROGRAM

Mr. COBURN. Mr. President, this week the Senate has been considering the nomination of Judge Roberts. Tomorrow we will continue making statements on this important nomination, with the vote on Mr. Roberts' nomination occurring at 11:30 a.m. Thursday. The majority leader is asking that all Senators be seated at their desk for this historic vote. As a reminder, the leader has announced that the Senate will turn to the Defense appropriations bill on Thursday, and votes are expected on Thursday and Friday of this week. The Senate will also need to act on a continuing resolution before the close of business this week.

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ORDER FOR ADJOURNMENT

Mr. COBURN. If there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the previous order, following the 60 minutes allocation of time for the other side which begins at 6:45 and that the Senate now resume executive session.

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

Mr. DURBIN. Mr. President, may I inquire, are we in a quorum call?

The PRESIDING OFFICER. We are in morning business.

Mr. DURBIN. May I inquire of the Chair, it is my understanding that the

remaining 60 minutes in executive session on Judge Roberts is allocated to the minority?

The PRESIDING OFFICER. That is correct.

Mr. DURBIN. Could the Chair tell me when that 60-minute period begins?

The PRESIDING OFFICER. It begins at 6:45 p.m.

Mr. DURBIN. Until 6:45, if no other Senators are seeking recognition, may I speak in morning business?

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

Mr. DURBIN. I thank the Chair.

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NOMINATION OF JOHN ROBERTS  
TO BE CHIEF JUSTICE

Mr. DURBIN. Mr. President, the Senate is considering the nomination of John G. Roberts, Jr. to be Chief Justice of the United States. This is a rare occurrence, rare for us to even consider a Supreme Court vacancy, let alone a Chief Justice. I have been honored to be a member of the Senate Judiciary Committee and have spent the week before last, a major part of it, in hearings where Judge Roberts came and testified. They were historic in nature. I am surprised, as I go back home to Illinois, how many people followed them and listened, either over the radio or watched them on television, and followed the questions and answers so closely.

It has been a very difficult process for many. I can't think of a more challenging assignment than to try to measure a person and try to decide how a person will react to certain questions and challenges over the rest of their natural lifetime. But that is our responsibility. Filling this vacancy on the Supreme Court means choosing a person of Judge Roberts' age, for example, who could serve for 20 or 30 years. That is the reality of this decision-making process.

The greatest compliment one can pay a judge is not that he is smart or has great intelligence. The greatest compliment one can pay a judge is that he is wise, that in his work on the bench, he has shown the wisdom of Solomon.

In the Scriptures, Solomon was often described as the wisest man who ever lived. But in chapter 3 of First Book of Kings, we learn what Solomon wanted even more than wisdom. It is written:

In Gibeon, the Lord appeared to Solomon in a dream at night, and God said, "Ask what you wish me to give you." Then Solomon said, "So give your servant an understanding heart to judge your people, to discern between good and evil. For who is able to judge this great people of yours?"

Many questions were asked of John Roberts at his hearings. If there was any effort to determine whether he had a great legal mind or great intelligence, he certainly satisfied every question. But then if you look at the questions more carefully, more closely, you will find we were asking even more fundamental questions of John Roberts. We were asking and trying to de-

termine not his knowledge but his wisdom, whether he had, as Solomon wished, an understanding heart.

Some have argued that it is unfair for any Senator to raise that kind of a question. Senator LINDSEY GRAHAM of South Carolina is my friend. He said it was not fair to get into this whole line of questioning about what is in your heart. I disagree. I believe we are not being fair to the American people if we don't understand the values of people who serve on the Supreme Court, if we don't strive to understand their philosophies, and if we don't try to put ourselves inside the mind and heart of someone we are entrusting with a lifetime position to serve on the highest Court in the United States.

In 1991, at his confirmation hearing, Justice Souter said that judges must understand that since they are people who have the power to "affect the lives of other people and who are going to change their lives by what they do, we had better use every power of our minds and our hearts and our beings to get these rulings right."

Justice Breyer in 1994 said:

That is why I always think that law requires both a heart and a head. If you do not have a heart, it becomes a sterile set of rules removed from human problems and will not help. If you do not have a head, there is a risk that in trying to decide a particular person's problem in a case that may look fine for that person, but cause trouble for a lot of other people, making their lives worse. So it is a question of balance.

I asked John Roberts if he could meet the test that my mentor and predecessor, Illinois Senator Paul Simon, brought to the Judiciary Committee questioning years ago. Senator Simon asked of the judicial nominees: Is this nominee committed to expanding the freedom enjoyed by all Americans, or will he or she restrict it? I also asked Judge Roberts whether he had the courage of Frank Johnson, an Alabama Federal judge and a Republican appointee who stood up for civil rights in the 1960s at a time and place when it was very unpopular to do so. What did we learn? Regrettably, we learned very little about Judge Roberts during the 20 hours of testimony.

Senator FEINSTEIN and Senator BIDEN asked an important line of questions that I followed carefully. They asked of Judge Roberts what he would do, not as a judge, not as a lawyer, but as a father in a family circumstance where someone you love has left instructions to you that at the closing moments of their life, they do not want any extraordinary life support. This happens thousands of times every day. Families face this decision, and it is an important decision, not just on a personal and emotional basis but on the basis of our right of privacy in America. In the Terry Schiavo case—that tragedy in Florida—this sad woman was on a support system for some 15 years, if I am not mistaken. The case went through the courts year after year, and finally, when all the appeals in Florida had been exhausted, there was an effort

made by some in the House of Representatives to have the Federal courts intervene and try to make the decision for that family, a decision which her husband believed had already been made. It was unfortunate that Judge Roberts, even on a personal basis, would not address that issue. We were looking for an insight into his thinking about a family decision that many will face.

I asked him as well about his decision as a private attorney to represent an HMO in a case called *Rush Prudential HMO v. Moran*. That was a case that was important because this patient had an expensive surgery that cost over \$90,000. When the doctor said the patient needed the surgery and went ahead with it, the HMO said: No, we didn't approve it, and refused to pay.

John Roberts as a private attorney represented the HMO. He went before the Supreme Court and argued that the HMO should not have to pay for this patient's expensive surgery. I asked Judge Roberts: When you took that case, did you ever consider the fact that if you won that case, millions of Americans could lose their health insurance protection? Did you have any reservations about taking a case where so many people could suffer as a result?

He said no. And he said something more. He said: If the other side on that case had walked in first and asked me to be their lawyer, I would have represented the other side as well.

The following day, I asked him questions about cases he had taken, cases he pointed to with pride, so-called pro bono cases where lawyers work for free when people cannot afford a lawyer, a case where he represented welfare recipients in the District of Columbia who were about to lose benefits, and another case where he represented people with different sexual orientation, gays and lesbians, who were afraid they would be discriminated against because of a Colorado law.

I asked him: In both of those cases you pointed to with pride, you represented the people who were asserting their rights, asking for their freedom, asking not to be discriminated against. From what you said yesterday, could you have represented the other side in those cases, taking away the rights and the freedoms of individuals?

He said: Yes.

So you have to understand that many of us come to the Chamber, having listened to several days of questions and answers, still uncertain about John Roberts and the values he would bring to the U.S. Supreme Court.

Many questions were asked about the power of the President in a time of war. We asked Judge Roberts about a recent decision, *Hamdan v. Rumsfeld*. Judge Roberts signed on to an opinion in that case which concludes that a detainee can challenge his detention in court but has no legal rights that are enforceable in court. In other words, John Roberts seems to believe that de-

tainees of the Government can get to the courthouse door but cannot come inside. His approach seems to be inconsistent with Supreme Court law. What if detainees claimed they were being tortured or even executed? Would Judge Roberts say the Court has no right to review the Government's actions?

Unfortunately, Judge Roberts would not respond, and I still don't know when it comes to so many issues where he stands.

Fifty-five different times, he said: I will follow the rule of law. But we know that following the rule of law is neither automatic nor something that is easily predicted. Oliver Wendell Holmes, Jr. once wrote:

The life of the law has not been logic; it has been experience.

Whenever we asked Judge Roberts basic questions about his moral compass and his life experience, he declined to answer. I asked him at one point: What could you say to a poor person in America, a minority in America, a disenfranchised person in America, a powerless person in America, what can you say about your life experience that would lead them to believe that if their case came before your court, they had a fighting chance?

I acknowledged the fact that Judge Roberts was raised in a comfortable middle-class family in the Middle West. When it was all said and done, he could not point to many life experiences which suggest he would have an understanding of those people in his Court. His response again, as it was so many times, was that he would follow the rule of law.

I voted against Judge Roberts two years ago when he was a nominee for the U.S. Court of Appeals for the DC Circuit. I was upset with the way the vacancies were created in that circuit in an effort to fill them with Republicans when President Bush was elected. Perhaps I went a little too far in my language about that with my frustration, but I said at the time that I could not support Judge Roberts because I just didn't know who he was or for what he stood.

When this process began, I promised Judge Roberts that we would start with a clean slate. Sadly, when the process was over, it was largely an empty slate.

I am uncertain about Judge Roberts' commitment to civil rights. He wrote some memos during the Reagan administration which reflect a very narrow view of voting rights in America, a right which he calls the preservative right, which is so important for preserving a democracy. When it came to interpreting the Voting Rights Act under the Reagan administration, he took a position that was ultimately rejected and discredited. We listened as Senator KENNEDY and others asked him many questions about that, and we did not learn too much about his thinking today and whether it has changed.

I asked him about his criticism of a historic case, *Plyler v. Doe*. This 1982

Supreme Court case held that it is unconstitutional to deny elementary education to children on the basis of their immigration status. The Supreme Court struck down a Texas law that allowed elementary schools to refuse entrance to undocumented children. It has been called the "Brown v. Board of Education" for Hispanics in America.

On the day it was decided, Judge Roberts, then a Reagan staffer, coauthored a memo that criticized the Solicitor General's Office for failing to file a brief in support of the Texas law. His memo disagreed with the administration's position, so he could not seek refuge in the common answer: I was just doing my job for the administration.

It has been 23 years since *Plyler v. Doe* was decided. Millions of children have been educated. Many have become good citizens. They serve in our military, they have become doctors, police officers, people who constitute the fabric of our society—thanks to the Supreme Court decision that Judge Roberts found objectionable.

So at the hearing, I said to him: As you reflect on this 23 years later, do you agree it was the right decision and should be settled law to offer education to these children? He was unwilling to say that.

It is no surprise that Judge Roberts' nomination is opposed by the League of United Latin American Citizens, LULAC, the organization which for the first time in its history opposes a Supreme Court nominee, as well as by the Mexican American Legal Defense and Educational Fund, MALDEF. The President of MALDEF, Ann Marie Tallman, testified as a witness against Judge Roberts and said that his opinions "often place him in opposition not only to equal justice for Latinos, but opposed to positions taken by bipartisan majorities in Congress and the Reagan administration that he served."

One of the most compelling witnesses against Judge Roberts is a man who is one of my personal heroes, Congressman JOHN LEWIS of Atlanta, GA. Those who don't know JOHN LEWIS should read about this man who literally risked his life time and again during the civil rights movement and now serves a constituency in the House of Representatives. JOHN LEWIS opposes the nomination of John Roberts because he does not believe John Roberts is as sensitive to the issue of civil rights as he should be.

So I asked JOHN LEWIS this. I said: JOHN, I happen to believe in the power of redemption, both politically and personally. I ask you, JOHN, can't people change? Wouldn't you think Judge Roberts may have changed some of his hard-line views from the Reagan days?

This is what Congressman LEWIS said:

[W]hen you believe and feel and know from your experience, or maybe from the law and from history that you have been wrong, you show some sign. And you are not afraid to

talk about it. You are not afraid to go on the record. Judge Roberts has been afraid to show or demonstrate any signs that he has changed. I wonder whether it is part of his mindset.

To follow the words of JOHN LEWIS, we don't have from John Roberts a demonstration of the kind of courage of Frank Johnson, that Alabama Federal judge who issued rulings that allowed Martin Luther King, Jr. as well as JOHN LEWIS and others to march from Selma to Montgomery, rulings that permitted African Americans to organize a boycott of the city of Montgomery's segregated bus system following the arrest of Rosa Parks.

Judge Johnson was also called the most hated man in Alabama by the Ku Klux Klan and received so many death threats that he and his family were under constant Federal protection from 1961 to 1975, with crosses burned on the lawn of his family.

Judge Johnson's enemies, incidentally, called him a "judicial activist." So when you hear that term being used around here today, excuse me if I happen to believe that it has been used in cases where it was entirely inappropriate. Judge Frank Johnson spoke out for civil rights at a moment in America's history when we needed a judge with courage, and risked a lot to do so. He showed courage to do so. If that is judicial activism, then thank goodness for a judicial activist who was sensitive to civil rights in America.

Many conservatives have also railed against the Supreme Court's references to international laws and legal opinions in recent cases. This was an interesting sideline to this hearing. Putting John Roberts on the spot: Does he promise, if he goes on the bench, that he won't be looking to legal opinions from foreign countries.

I was disappointed to hear Judge Roberts' reply. He embraced this hostility toward even considering lessons of foreign law. What does it say of us as a nation when we try to promote democratic ideas around the world and yet recoil at the thought of another country having useful ideas for our own Nation to consider?

Of course, U.S. judges don't base their decisions entirely on foreign law or legal opinions, but the experience of other democracies may help inform their thinking. Just last week, Justice Ginsburg defended the practice of Supreme Court reference to foreign legal opinions, not for precedent but for guidance. She observed:

I will take enlightenment wherever I can get it.

I hope Judge Roberts will reconsider this position and take heart not only in Justice Ginsburg's wise words but also the wise words of the man whose robes he hopes to fill, Chief Justice Rehnquist, who once said:

When many constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly

grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

It amazes me that this has become such a whipping point for some political groups in this town. Of course, we should consider other legal opinions from other countries as Justice Ginsburg and Chief Justice Rehnquist suggested. American law will decide the case, but as Justice Ginsburg said, we should take enlightenment wherever we can find it.

I think Supreme Court nominees carry the burden of proof when they come before the Senate. They must prove they are worthy of a lifetime appointment to the highest Court in the land. In the case of Judge Roberts, the burden of proof is especially heavy because President Bush refused to share memos from the period of time when John Roberts served as the Principal Deputy Solicitor General. Those more contemporary memos would have given us a greater insight into what he really believes on some critical issues, but the Bush administration said "no." They denied us these documents.

When it came to the Reagan-era memos, many times Judge Roberts argued they were so old they should be discounted.

I also think Judge Roberts bears a heavy burden of proof because he has been nominated to serve as Chief Justice. When he is approved this week, we will move from the Rehnquist Court to the Roberts Court for 20 or 30 years to come.

The Chief Justice is the most important and powerful judge in America. We need a Chief Justice who has wisdom, courage, and compassion.

At the beginning of the process, Judge Roberts came by my office. I had a chance to sit down for a few minutes with him. I want to congratulate him and thank him for doing that not only for my benefit but for the benefit of so many other Senators. I like him. During the hearings, I looked at his wife and his kids and I said, This is a man I really could like. As I said earlier, I promised him a clean slate but unfortunately he could not add much to that slate during the course of this process.

Next to a vote on whether America goes to war, the most important votes we cast as Senators are for Justices of the Supreme Court. That Court, more than any other institution in America, is the most important when it comes to America's rights and liberties.

The decision made by those nine Justices can change the face of democracy in America. That Court has done that so many times in the past and can certainly do it in the future. Their decisions, more important than any single law we pass, can decide basic personal freedoms for millions of Americans.

I sincerely wish I believed that John Roberts was the right person for this historic appointment. I will vote no on his nomination, but I will pray that John Roberts proves to be a Chief Jus-

tice with not only a great legal mind but also the courage of Judge Frank Johnson of Alabama and the understanding heart of Solomon.

#### WAR IN IRAQ

Mr. DURBIN. Mr. President, this week, just days before the end of the fiscal year, we are going to consider the Defense appropriations bill. This is an important bill for America's national security. The chairman, ranking member, and their staffs worked long and hard on it. I appreciate their commitment and willingness to work with both sides.

Before we even take up this bill, however, we could and should have voted on the Defense authorization bill, which includes critical policy matters crucial to national security importance. As hard as it may be to understand in the midst of a war in Iraq and Afghanistan, the Republican leadership in the Senate pulled the Defense authorization bill from the calendar in July and replaced it with a bill that was requested by the National Rifle Association.

The gun lobby wanted a bill to excuse them from liability in lawsuits and the Republican leadership in the Senate felt that was more important than the Defense authorization bill, which considered massive policy questions involving hundreds of thousands of men and women in uniform and veterans.

I do not understand that thinking. The appropriations bill we will hopefully take up this week includes \$50 billion for military operations in Iraq and Afghanistan. I said, at the start of the war in Iraq, that while I felt the invasion was a mistake, I would not deny one penny to our troops in the field for body armor, medical supplies, air support, ammunition, equipment, or any other costs associated with our forces and their security.

I have always thought that if it were my son or daughter in uniform, I would not shortchange them one penny, so that they could come home safely with their mission accomplished, and that is still my pledge.

The American people should be aware of what this war is costing us. First and foremost, it continues to cost American lives. This month, while most Americans were glued to their televisions focusing on Katrina and Rita, the hurricanes that struck us in the Gulf of Mexico, 37 more American soldiers died in Iraq.

Last month, while Congress was in recess, 85 Americans were killed in Iraq. All told, 1,921 Americans have been killed as of today and 14,755 have been wounded. Many have suffered devastating permanent injuries.

Senator HARRY REID and his wife Landra went to Bethesda Medical Center yesterday. Senator REID came to tell us this morning the sad experience he had there, where he saw a young soldier in a wheelchair who had clearly been maimed by this war in ways that