

easier and cheaper for seniors and the Federal Government as well by allowing seniors to receive their drugs through Medicare and instructing the Secretary of Health and Human Services to negotiate the best price for seniors and America's taxpayers.

ORDER OF PROCEDURE

Mr. DURBIN. Mr. President, I would like to clarify for the Record the time periods allocated on the Democratic side to make certain that the Record for tomorrow's debate reflects what the Chair understands is my understanding: That the time on the Democratic side that will be allocated will be from 11 a.m. to 12; from 1 to 2 p.m., from 5 to 6 p.m., and from 6:20 p.m. to 7:20 p.m. During the period through 4 p.m., it is anticipated this will be a period open to anyone desiring to use it. Is that the understanding of the Chair?

The PRESIDING OFFICER. Without objection, the order is so modified.

Mr. DURBIN. I thank the Chair. Mr. President, 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. SARBANES. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.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

Mr. SARBANES. Mr. President, in the complex institutional framework established by our Founding Fathers, members of all three branches of our national government take an oath to support the Constitution. However, it falls uniquely to the Supreme Court of the United States to expound and interpret the Constitution and the laws passed pursuant to it so that our governing law remains true to the basic principles upon which the Nation was founded.

The Senate's role in giving advice and consent to the nomination of the men and women who serve on the Supreme Court for a life tenure is amongst the Senate's most important constitutional responsibilities.

The argument is made by some that the President is entitled to the confirmation of his or her nominee unless that person is shown to have a serious disqualification. On the contrary, it is my view that the Senate's duty to advise and consent on nominations is an integral part of the Constitution's system of checks and balances among our institutions of government. Nomination does not constitute an entitlement to hold the office.

Although all Presidential nominations require the most careful and

independent review, judicial nominations differ from nominations to the executive branch in two important respects. Within the constitutional framework, the judiciary is a third co-equal branch of government, independent of both the executive and legislative branches. Those who sit on the Federal bench receive lifetime tenure and are to render independent judicial decisions. In contrast, appointees to the executive branch are meant to carry out the program of the President who nominates them, and they serve only at the pleasure of the President or for limited tenure. The bar must, therefore, be set very high when we consider a judicial nomination, especially when the nomination is to the Supreme Court and, as in the matter pending before the Senate, to the position of Chief Justice of the United States.

While qualifications and intellect are important criteria, obviously, in considering a nomination to the Supreme Court, the Senate must also take into consideration the judicial philosophy and constitutional vision of any nominee for appointment to the Supreme Court. As Chief Justice Rehnquist, for whom Roberts clerked, wrote in 1959, well before he went on the Court:

[U]ntil the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Inquiring into a nominee's judicial philosophy does not mean discovering how he or she would decide specific cases. Rather, it seeks to ascertain the nominee's fundamental perspective on the Constitution: how it protects our individual liberties, ensures equal protection of the law, maintains the separation of powers and checks and balances. The Constitution is a living document. Its strength lies in its extraordinary adaptability and applicability over more than 200 years to conditions that the Framers could not have anticipated or even imagined.

The confirmation process provided Judge Roberts with an opportunity to outline his general approach to the Constitution in critical areas—among them, the rights and liberties guaranteed to our citizens, the extent of Congress's power under the Commerce Clause, and the balance of power among the three branches of government. Regrettably, he declined to do so, saying that he does not have an overarching judicial philosophy and comparing the role of a Justice to that of an umpire. The New York Times put it succinctly in an editorial:

In many important areas where Senators wanted to be reassured that he would be a careful guardian of Americans' rights, he refused to give any solid indication of his legal approach.

The uncertainty arising from the hearings is compounded by the refusal of the administration to provide documents from Judge Roberts' service as

principal Deputy Solicitor General, which members of the Judiciary Committee had requested in the course of carrying out their constitutional responsibility.

As a result, we must try to infer his underlying philosophy and views from the earlier documents made available to the committee. Those documents are not reassuring. I am deeply concerned that the documents we have from John Roberts raise questions about his approach and his thinking on such basic issues as voting rights, affirmative action, privacy, racial and gender equality, limitation on executive authority, and congressional power under the commerce clause.

Given the importance of the position of Chief Justice, in deciding whether to give consent to this nomination it is essential that it be an informed consent—an informed consent.

As the New York Times editorial pointed out:

That position is too important to entrust to an enigma, which is what Mr. Roberts remains.

I will vote against confirming John Roberts to be the Chief Justice of the United States.

I yield the floor.

Ms. CANTWELL. Mr. President, I rise to share my concerns about the nomination of Judge John Roberts.

Let me say to my colleagues who have taken the floor through the last couple of days and have been eloquent I think on both sides of the aisle in their views, that I really do believe that we are at a very unique point in time at our history, that we are at the tip of the iceberg as it relates to the information age, and that this issue of personal privacy is only going to gain in importance over the lifetime of the next nominee to the Supreme Court.

And that is why this discussion and debate is so important, and that is why a diversity of voices I think should be heard on this issue.

Now, I am not a member of the Judiciary Committee but I did spend 2 years on the Judiciary Committee, and I made it clear in my time there that I had the intention to ask every nominee about their views on the rights to privacy and how they existed in the Constitution and what they thought was settled law as it relates to that and how they viewed some of the important decisions of the Courts in the past.

And I think that you have to give a context to the day and age in which we are making this decision on a Supreme Court nominee and the next nominee as it relates to these privacy rights.

We are at a time and age when individual citizens are concerned about their most personal information being obtained by businesses or health care organizations and somehow being released. They are concerned about government and government's overreaching in privacy matters and the use of technology that could be used without probable cause and warrant. We have even seen discussion by courts

and judges and a variety of people on the due process of enemy combatants—even a judge in our State raised concerns about how you balance protecting rights and security interests.

I know in Washington State these are among the key issues that the citizenry of Washington State cares about. They care about their personal privacy and they care about it being protected. They also care about that personal privacy as it relates to a variety of rights that they have come to expect.

In fact, in Washington State, a right of privacy is guaranteed in our Constitution. Article 1, section 7, which says—quote—“no person shall be disturbed in his private affairs or his home invaded without the authority of law.” We adopted this constitutional right of privacy upon the founding of our State and the deep respect that we have for those individual rights.

It has been settled for decades by the courts of Washington State. Washington State law even goes further than the Federal Government in protecting people’s privacy in a search and seizure context, for example. And I think it is very important to understand how much the State of Washington cares about these constitutional protections.

Now, as it relates specifically to a woman’s right to choose, Washingtonians again have been very outspoken. In fact, in 1970, 3 years before the Federal courts spoke on this matter, the residents of my State passed a referendum legalizing abortion rights through the first trimester. That is in 1970. In 1991, the voters of my State passed by initiative a codification of *Roe v. Wade* into State statute.

I would hope that any nominee to the Supreme Court would understand how important the privacy rights are in not just Washington State but throughout the country and how challenged they are going to be in the next decades as the information age rolls out and more and more issues confront Americans about their privacy and the privacy of information about them.

During my tenure on the Judiciary Committee, I heard many conservative nominees express views in opposition

to abortion rights and some were very critical of the decision in *Roe v. Wade*. I did not agree with these views, but where those nominees demonstrated an understanding that privacy in the choice context is an accepted right, and that the Nation and the courts have determined that right should be upheld, I voted to confirm these judges.

Sixty-one percent of Americans said that they wanted Judge Roberts to answer questions about how he would have ruled on past Supreme Court precedent. And I know that more than a majority of Americans believe that we should do our job in asking judicial nominees about their judicial philosophy.

But as my colleagues have pointed out, I have some concerns about Judge Roberts’ views on the rights to privacy as it relates to how those will continue to protect a woman’s right to choose. And I am concerned, as he talks about stare decisis exactly what he will uphold.

Now, I think a very important case that probably hasn’t gotten a lot of attention on the floor but it is something that again Washingtonians care a lot about is Judge Roberts’ dissent in the *Rancho Viejo* case. Judge Roberts went out of his way in this dissent to raise issues about whether Congress had overstepped its bound in enacting the Endangered Species Act. Courts have already decided this issue: Congress has the authority to protect our most precious species without concern that these efforts might be thrown out bit by bit. Judge Roberts has told us how important longstanding precedent is in his philosophy, yet he questions congress’ longstanding authority to enact environmental protections.

In the Northwest, we absolutely rely on a very robust interpretation of the interstate commerce clause, both in its environmental context and with regard to other laws. We have a great, wonderful environment in the Northwest that we want to protect. And just as with the privacy context, Judge Roberts was asked during the hearing about his views on Congress’s power to enact environmental protections and he declined to answer them specifically.

The Pacific Northwest is blessed with incredible beauty, complemented by the diverse wildlife that inhabits our lands and coastal waters. Unfortunately, habitat loss and other pressures threaten some of my State’s most iconic species, whether that be the salmon that spawn our great rivers, birds that depend on old-growth forests, or even the orca whale that holds a special plan in the heart of everyone who lives near the Puget Sound. The Endangered Species Act is helping protect these animals from extinction. I have concerns about what Judge Roberts says about precedent yet in the case of the Endangered Species Act; his concern for following precedent wasn’t there.

I share the concerns of my colleagues who have been to the floor that we want to know how Judge Roberts is going to make his philosophy about the right to privacy clearer for the individuals who have to vote for him. I am not clear what he considers the privacy rights in the Constitution that aren’t enumerated. And I know that that may not be the same opinion of our Members on the floor of the Senate, but I think Washingtonians have come to expect that these privacy rights mean a great deal to them.

And so I cannot vote to confirm Judge Roberts until I know more about his philosophy. I am doing the job that I think the State of Washington wants me to do in fighting for these protections that have been constitutionally guaranteed, that have been voted on by initiative of the people in our State, and for the great protection of those privacy rights that they know need to be protected in the future.

I yield the floor.

ADJOURNMENT UNTIL 9:30 A.M.
TOMORROW

The PRESIDING OFFICER. Under the previous order, the Senate stands adjourned until 9:30 a.m. tomorrow.

Thereupon, the Senate, at 7:40 p.m., adjourned until Wednesday, September 28, 2005, at 9:30 a.m.