

what every nominee of every Republican President and every Democratic President has done: decline to answer any question that you feel would compromise your ability to do your job. The vast majority of the Senate, I am convinced, will not punish you for doing so. Rather, I am convinced that the vast majority of the Senate will respect you for this decision because it will show you are a person of deep integrity and independence, unwilling to trade your ethics for a confirmation vote.

Again, let me say welcome to you again before the Committee, and thank you for your continued willingness to serve this great Nation.

Chairman SPECTER. Thank you, Senator Cornyn.
Senator Durbin?

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman.

Judge Roberts, welcome to you and your family. Congratulations on your nomination. The Committee hearing began with the Chairman telling us that you had shared the wisdom of 47 individual Senators by visiting their office, some of them on several different occasions, and many people believe that that fact alone should earn you confirmation before the United States Senate.

Twelve years ago, at the nomination hearing of Justice Ruth Bader Ginsburg, my friend, Illinois Senator Paul Simon, said something worth repeating. He said to the nominee, and I quote, "You face a much harsher judge . . . than this Committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

I think Senator Simon put his finger on how the United States Senate should evaluate a nominee for a lifetime appointment to the Federal bench.

Judge Roberts, if you are confirmed to be the first Supreme Court Justice in the 21st century, the basic question is this: Will you restrict the personal freedoms we enjoy as Americans, or will you expand them?

When we met in my office many weeks ago, I gave you a biography of a judge I admire greatly. His name was Frank Johnson, a Federal district judge from Alabama and a lifelong Republican. Fifty years ago, following the arrest of Rosa Parks, Judge Johnson ruled that African-Americans in Montgomery, Alabama, were acting within their constitutional rights when they organized a boycott of the buses, and he later ruled that Martin Luther King, Jr., and others could march from Selma to Montgomery. As a result of those decisions, the Ku Klux Klan branded Johnson the most hated man in America. Wooden crosses were burned on his lawn. He received so many death threats that his family was under constant Federal protection from 1961 to 1975.

Judge Frank Johnson was denounced as a judicial activist and threatened with impeachment. He had the courage to expand freedom in America. Judge Roberts, I hope that you agree America must never return to those days of discrimination and limitations on our freedom.

Now, some of the memos you wrote—that I talked to you about in my office—many, many years ago in the Reagan administration have raised some serious concerns about where you stand on civil rights and women’s rights, concerns that have led some of the most respected civil rights groups in America to openly oppose your nomination.

So it is important for you at this hearing to answer the questions and to tell us your views on civil rights and equality and the role of courts in protecting these basic freedoms. This hearing is your opportunity to clarify the record, to explain your views. We cannot assume that time or maturity has changed your thinking from those Reagan-era memos. The refusal of the White House to disclose documents on 16 specific cases you worked on as Deputy Solicitor General denies this Committee more contemporary expressions of your values. Only your testimony before this Committee can convince us that John Roberts of 2005 will be a truly impartial and open-minded Chief Justice.

Concerns have also been raised about some of the things you wrote relative to the right of privacy. We have gone through *Griswold*, we know what that Supreme Court decision meant in 1965, 40 years ago, when the Court struck down the Connecticut statute which made it a crime for married couples to buy and use birth control. They said there was a fundamental right of privacy in that Constitution, though you can search every word of it and not find the word “privacy.” But it is far from settled law in the minds of many. Forty years later, there have been new efforts to restrict the right of privacy—attempts to impose gag rules on doctors when they speak to their patients about family planning. You saw it in the sad debate over the tragedy of Terri Schiavo, a debate that led some members of Congress to threaten judges who disagreed with their point of view with impeachment. And you can find it in the eagerness to authorize the Government to pry into our financial records, medical records, and library records.

Whether the Court continues to recognize and protect America’s right to privacy will have a profound impact on every American from birth to death. In your early writings, that we have to rely on here, you referred to this right of privacy as “an abstraction.” We need to know if that is what you believe.

We also need to hear your views on another basic issue, and that is executive power. They do not teach this subject much in law school. It is not tested on any bar exam. It has not been a major focus in many Supreme Court hearings. Yet it is very important today.

Some aspects of your early record when you were an attorney for a President, suggest you might be overly deferential to the executive branch. We need to know where you stand. Throughout history during times of war, Presidents have tried to restrict liberty in the name of security. The Supreme Court has always been the guardian of our Constitution. It has usually been up to the task, but sometimes it has failed—such as in the notorious *Korematsu* decision.

We are being tested again. Will we stand by our Constitution in this age of terrorism? That challenge will fall especially on our Supreme Court and on you, Judge Roberts, if you are confirmed.

We also need to know what you think about religious liberty. Over the past few decades, the Supreme Court has maintained a delicate yet, what I believe, proper balance between church and state. Justice Sandra Day O'Connor said it so well in the recent Ten Commandments decision, and I quote: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

I asked you a question when you came by to see me, which I am not sure either one of us could answer at that moment. I asked you who has the burden of proof at this hearing. Do you have the burden to prove that you are a person worthy of a lifetime appointment to the Supreme Court, or do we have the burden to prove that President Bush was wrong in selecting you? Your position as Supreme Court Chief Justice gives you extraordinary power to appoint 11 judges on the FISA court, which has the authority to issue warrants for searches and wiretaps of American citizens, all the way to the establishment of rules of criminal and civil procedure. No one has the right to sit on that court. No one has the right to be Chief Justice. But they can earn it through a hearing such as the one which we have today.

I spoke earlier about the courage of Frank Johnson. A few months ago, another judge of rare courage testified before this Committee. Her name is Joan Lefkow. She is a Federal judge in Chicago, and I was honored to recommend her. Last February, her husband and mother were murdered in her home by a deranged man who was angry that she had dismissed his lawsuit. In her remarks to the Committee, Judge Lefkow said that the murders of her family members were "a direct result of a decision made in the course of fulfilling our duty to do justice without fear or favor." In my view, that is the only proper test for a Supreme Court justice. Will he do justice without fear or favor? Will he expand freedom for all Americans, as Judge Frank Johnson, the condemned judicial activist, once did?

I congratulate you, Judge Roberts, on your nomination and on your accomplished career. I look forward to these hearings to give you your chance in the next several days not to rely on 20-year-old memos or innuendos and statements by those who are not part of the hearing, but in your own words, a chance to tell us and to tell the American people what you truly believe. If you believe that you have the burden at this hearing to establish why you are worthy of this, the highest-ranking position of a judge in America, I hope that you will be forthcoming. If you do not answer the questions, if you hold back, if you believe, as some on the other side have suggested, that you have no responsibility to answer these questions, I am afraid that the results will not be as positive. I certainly hope that they will be positive.

Thank you.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Durbin.

I recognize now Senator Brownback, and also recognize today is his birthday.

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR
FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you very much. This is certainly a long way to spend it. It is seeming like a long birthday. Judge Roberts, as one of my colleagues was just saying, I hope we are done before my birthday ends.

I welcome you to the Court, delighted to have you and your family here. I want to congratulate you on your lifetime of service thus far, and I look forward to future service that you will have for this great land.

I recall the enjoyable meeting that you and I had in my office, as many of the members here have had as well. You said two things in our meeting that I particularly took away and hung on to as an indicator of how you would look at the courts and also what America needs from our courts. One of the statements was that we need a more modest Court. And I looked at that and I thought, that is exactly the way the American people would look at the situation today. We need a more modest Court—a Court that is a court, and not a super-legislature. That looks at the Constitution as it is, not as we wish it might be, but as it is, so that we can be a rule-of-law Nation.

You had a second point that was very apt, I thought, when you talked about the courts and baseball. The analogy you draw, I found very appealing. You said it is a bad thing when the umpire is the most watched person on the field. In today's American governance, the legislature can pass a bill, and the Executive can sign it, but then everybody holds their breath, waiting to see how the Court is going to look at this and how it is going to interpret it. It seems as if the Court is the real mover of what the actual law is. And that is a bad thing. The umpire should call the ball fair or foul, it is in or it is out, but not become actively involved as a player on the field. Unfortunately, we have reached a point where, in many respects, the judiciary is the most active policy player on the field.

I was struck by your statement when you originally were nominated, that you had “a profound appreciation for the role of the Court in our constitutional democracy.” That is something I think we all respect and we look for in what we need to do.

Democracy, I believe, loses its luster when Justices on the High Court—who are unelected and not directly accountable—invent constitutional rights and alter the balance of governmental powers in ways that find no support in the text, the structure, or the history of the Constitution. Unfortunately, the Court in recent years, I believe, has gone into that terrain.

In our system of government, the Constitution contemplates that Federal courts will exercise limited jurisdiction. They should neither write nor execute the laws, but simply “say what the law is,” as Chief Justice Marshall said in *Marbury v. Madison*. The narrow