Statement
United States Senate Committee on the Judiciary
Nomination of John G. Roberts (Witness List for September 12, 2005)
September 12, 2005

The Honorable Charles E. Schumer
United States Senator , New York

Confirmation Hearing of Judge John G. Roberts, Jr. Opening Statement of Senator Charles E. Schumer

Judge Roberts, welcome to you, Mrs. Roberts and your two beautiful children. I join my colleagues in congratulating you on your nomination to the position of Chief Justice of the United States.

This is indisputably the rarest opportunity in American government. In the entire history of the Republic, we have had but 16 Chief Justices.

But the responsibility is as great as the opportunity is rare.

One need only consider that generations of jurisprudence bear the names of Chief Justices who presided over the Supreme Court - the Marshall Court, the Warren Court, and of course most recently, the Rehnquist Court.

The decisions of the Supreme Court have a fundamental impact on people's lives, and the influence of a Chief Justice far outlasts that of a President.

As the youngest nominee to the High Court's top seat in 204 years, you have the potential to wield more influence over the lives of the citizens of this country than any jurist in history.

I cannot think of a more awesome responsibility – awesome not in the way my teenage daughter would use the word, but in the Biblical sense of the angels trembling in the presence of God.

But before you can assume that responsibility, we Senators – on behalf of the people – have to exercise our own responsibility.

Fundamental to that responsibility is our obligation to ascertain your legal philosophy and judicial ideology.

To me the pivotal question, which will determine my vote is this: Are you within the mainstream – albeit the conservative mainstream – or are you an ideologue who will seek to use the Court to impose your views upon us, as certain judges – past and present, on the left and on the right – have attempted to do.

The American people need to learn a lot more about you before they – and we – can answer that question.

You are without question an impressive, accomplished, and brilliant lawyer. You are a decent and honorable man. You have a remarkable resume.

There are those who say your outstanding and accomplished resume should be enough; that you

should simply promise to be fair, and we should confirm.

I disagree.

To me, the most important function of these hearings – because it is the most important qualification for a nominee to the Supreme Court – is to understand your legal philosophy and judicial ideology.

This is especially true now that judges are largely nominated through an ideological prism by a President who has admitted that he wants to appoint Justices in the "mold" of Antonin Scalia and Clarence Thomas.

I began to argue that a nominee's judicial ideology was crucial four years ago. Then, I was almost alone. Today there is a growing and gathering consensus on the left and on the right that these questions are legitimate, important, and often crucial.

Therefore, I – and others on both sides of the aisle – will ask you about your views.

Here is what the American people need to know beyond your resume:

They need to know who you are and how you think.
They need to assess not only the sharpness of your mind, but also the fullness of your heart.
They need to believe that an overachiever can identify with an underdog who has nothing but the Constitution on his side.
They need to understand that your first-class education and advantaged life will not blind you to the plight of those who need help and who rely on the protections of the Constitution – which is every one of us at one point or another.
They need to be confident that your claim of judicial "modesty" is more than easy rhetoric, that your praise of legal "stability" is more than mere lip-service.
They need to know – above all – that if you take stewardship of the High Court, you will not steer it so far out of the mainstream that it founders in the shallow waters of extremist ideology.
As far as your own views go, however, we have only scratched the surface.

In a sense, we have seen maybe 10 percent of you – just the visible tip of the iceberg, not the 90 percent that is still submerged. And we all know that it is the ice beneath the surface that can sink the ship.

For this reason, it is our obligation to ask – and your obligation to answer – questions about your judicial philosophy and legal ideology.

If you cannot answer these questions, how are we to determine whether you are in the mainstream? A simple resume, no matter how distinguished, cannot answer that question.

This is particularly important for you as compared to other nominees, because you are more of a tabula rasa than many other nominees in terms of your judicial philosophy. You have served only two years on the bench; much of your career has been spent making arguments for others; and we have not received many documents which would reveal your thinking from your days in the Solicitor General's Office.

So, for me, the first criterion upon which I will base my vote is whether you will answer questions fully and forthrightly. I do not want to trick you, badger you, or play a game of "gotcha." That is why

I met with you privately three times; that is why I gave you a list of questions in advance of these hearings.

There is only one purpose here. It rests on the Advise and Consent Clause of the Constitution: to find out what kind of judge you will be and to determine with much greater clarity your judicial philosophy and method of legal reasoning.

Every federal court candidate – who will serve for life – should explain his or her judicial philosophy and method of legal reasoning. That obligation is even more fundamental for a Supreme Court nominee, and most important for one named to lead the entire federal judiciary.

It is not enough to say that you will be fair. If that were enough, we would have no need for a hearing. I have no doubt that you believe you will be a "fair" judge. I also have no doubt that Justice Scalia thinks he is fair and that Justice Ginsburg thinks she is fair.

But in case after case after case, they rule differently; they approach the Constitution differently; and they affect the lives of 280 million Americans differently. That is so, even though both undoubtedly believe that they are fair.

You should be prepared to explain your views of the First Amendment, civil rights, environmental rights, religious liberty, privacy, worker's rights, women's rights, and a host of other issues relevant to the most powerful lifetime post in the nation.

Now, having established that ideology and judicial philosophy are important, what is the best way to go about questioning on those subjects? The best way, I believe, is through understanding your views about particular past cases.

It is not the only way, but it is the best and most straightforward way.

Some have argued that questioning a nominee about his or her personal views of the Constitution or about decided cases indicates prejudgment about a future case.

It does nothing of the sort. Most nominees who have come before us – including Justice Ginsburg, whose precedent you often cite – have answered such questions.

Contrary to popular mythology, when she was a nominee, Justice Ginsburg gave lengthy answers to scores of questions about Constitutional law and decided cases, including individual autonomy, the First Amendment, criminal law, choice, discrimination, and gender equality.

Although there were places where she said she did not want to answer, she spoke about dozens of Supreme Court cases and often gave her unvarnished impressions, suggesting that some were problematic in their reasoning while others were eloquent in their vindication of important Constitutional principles.

Other nominees, from Powell to Thomas to Breyer, answered numerous questions about decided cases, and no one has ever questioned their fitness to hear cases on issues raised during their confirmation hearings.

A large majority of the American people – whose lives will be profoundly affected by the next Chief Justice – believe that they have the right to know where you stand on important legal and

Constitutional issues and on past cases. They have an innate wisdom about these things, and here their views are consistent with those of Senators and scholars.

So, I hope that you will answer questions about decided case, which so many other nominees have done.

If you refuse to talk about already decided cases, the burden is on you – one of the preeminent litigators in America – to figure out a way, in plain English, to help us determine whether you will be a conservative – but mainstream conservative – Chief Justice, or an ideologue.

Here are some of the specifics that we need to know:

For example, you told me in one of our meetings that you believe in judicial "modesty," implying that you deeply respect settled precedent; yet as a younger man you celebrated the late Chief Justice's attempt to "revolutionize" the settled law involving the Establishment Clause and criticized another opinion as "lame" for relying on stare decisis. That raises more questions. What does modesty really mean in terms of respect for precedent?
You gave testimony at your last hearing that you endorsed "the vital role of the federal government in vindicating national interests"; yet in the Reagan Administration you repeatedly fought against federal involvement in various issues of national urgency. That gives rise to a question. What do you really think now?
You told me when we met that you believe that there is a right to privacy that extends to the bedroom; yet in your younger years you referred derisively to the "so-called" right of privacy. That too gives rise to a question. Which view will you take to the bench now that you are no longer bound by precedent?
You told me that you are not ideologue and that you share my "aversion" to ideologues; yet you have been embraced by some of the most extreme ideologues in America, like the leader of Operation Rescue. That gives to rise to a question. What do they know that we don't know?
Let me be clear. I know that you are conservative, and I do not expect your views to mirror mine. After all, President Bush won the election, and everyone understands that he will nominate conservatives to the Court. But while we certainly do not expect the Court to move to the left under this President, it should not move radically to the right.

Let me make one final point: balance on the Supreme Court is also important. It matters a great deal, now more than ever, at a time when the Court is so divided. I have often said that a Supreme Court with one Scalia and one Brennan would be a vibrant and interesting Court; but five of either would be utterly imbalanced.

One factor I will weigh is that you have now been nominated to replace the late Chief Justice Rehnquist – one of the most reliably conservative votes – rather than Justice O'Connor, the Court's most important swing-vote.

But, regardless of whom you have been nominated to replace, it is your burden to prove that you are worthy of confirmation; it is not the Senate's burden to prove that you are unworthy.

Judge Roberts, if you want my vote, you need to meet two criteria. First, you need to answer questions fully so we can ascertain your judicial philosophy. And second, once we have ascertained your philosophy, it must be clear that it is in the broad mainstream.

Judge Roberts, if you answer important questions forthrightly and convince me that you are a jurist in

the broad mainstream, I will be able to vote for you.

And I would like to be able to vote for you.

If you do not, I will not be able to vote for you.

I have high hopes for these hearings. I want – the American people want – a dignified and respectful hearing process – open, fair, thorough, full, and above-board. One that brings not only dignity, but even more importantly, information about your views and ideology to the American people.

I, along with the American people, look forward to hearing your testimony.