

And I will be looking to understand your views on the constitutional provision for providing for the separation of church and state. Once again, history. For centuries, individuals have been persecuted for their religious beliefs. During the Roman Empire, the Middle Ages, the Reformation, and even today, millions of innocent people have been killed or tortured because of their religion.

A week ago, I was walking up the Danube River in Budapest when I saw on the shore 60 pair of shoes covered in copper—women's shoes, men's shoes, small, tiny children's shoes. They lined the bank of the river.

My time is already up? May I just finish this one paragraph?

Chairman SPECTER. Yes.

Senator FEINSTEIN. During World War II, it turned out that Hungarian Fascists and Nazi soldiers forced thousands of Jews, including men, women, and children, to remove their shoes before shooting them and letting their bodies float down the Danube. These shoes represent a powerful symbol of how religion has been used in catastrophic ways historically.

The rest of my comments we will have to wait for.

Thank you very much, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Senator Feinstein. Senator Sessions?

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM
THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Mr. Chairman. And Judge Roberts, recalling the words of former Senator Alan Simpson when Justice Scalia was here, welcome to the pit.

[Laughter.]

Senator SESSIONS. Congratulations on your nomination to be our Nation's 17th Chief Justice. You are one of our Nation's premier lawyers. Some have called you the finest appellate lawyer of your generation. You have won the respect of your colleagues, adversaries, and judges for your integrity, professionalism, and legal skill. And I salute President Bush for choosing you for this important position.

But as you have already seen, our confirmation process is not a pretty sight. Time and again you will have your legal positions, your predecisional memoranda, even as a young lawyer, distorted or taken out of context. These attacks are driven most often by outside groups. They will dig through the many complex cases you have dealt with in an effort to criticize your record. They will produce on cue the most dire warnings that civil liberties in America will be lost forever if you are confirmed as a Federal judge. It is really a form attack sheet. All they have to do is place your name in the blank space. These tactics, I think, are unfair and sometimes have been dishonest.

My advice to you is this: Keep your famous good humor, take your time, and explain the procedural posture of the cases and exactly how you ruled as a judge or the position you took as a lawyer. Americans know these matters are complex and they will appreciate your answers.

The American commitment to the rule of law is one of our most exceptional characteristics as a people. It is the foundation of our liberties and our productive economic system, it is a product of centuries of development. In his magnificent speech in March of 1775 in the House of Commons urging King George not to go to war against the Colonies, Edmund Burke described America's commitment to the rule of law by saying, "In no country perhaps in the world is the law so general a study," adding, "I hear they may have sold as many of Blackstone's Commentaries on the Law in America as in England."

But activism by a growing number of judges threatens our judiciary. And frankly, that is what I am hearing as I talk to my constituents and hear from the American people. Activism is when a judge allows his personal views on a policy issue to infect his judgments. Activist rulings are not based on statutes or the Constitution, but reflect whatever a judge may think is decent or public policy.

This should not be. But even some members of our body have encouraged this thinking. Indeed, Judge Roberts, one Senator in recent weeks, the man did not know whose side you are on before he voted. His statement provides a direct glance, I think, into the philosophy of activism. When we have an activist judiciary, the personal views of a judge become everything. Who the judge is and whose side the judge is on, not the law and the facts, will determine the outcome of a case. Since judges hold their offices for as long as they live or choose to serve, and are unaccountable to the citizenry, activist rulings strike at the heart of democracy. Five members of the Court may effectively become a continuing constitutional convention on important questions such as taking of private property, the definition of marriage, the Pledge of Allegiance, or a moment of silence before a school day.

If a Congress acts wrongly, new members may be elected and a result changed by a simple majority. A Supreme Court decision founded on the Constitution can be changed by the people only by constitutional amendment, which requires a two-thirds vote of both houses and three-fourths of the State legislatures.

This result-driven philosophy of activism does not respect law. It is a post-modern philosophy that elevates outcomes over law. Today many believe the law does not have an inherent moral power and that words do not have and cannot have fixed meanings. Judges are thus encouraged to liberally interpret the words to reach the result the judge believes is correct. Activist Supreme Court judges have done this in recent years by saying they are interpreting the plain words of the Constitution in light of evolving standards of decency. This phrase has actually formed the legal basis for a number of recent decisions. But as a legal test, it utterly fails because the words can mean whatever a judge wants them to mean. It is not objective, cannot be consistently followed, and is thus by definition not law, but a license.

Such vague standards provide the Court a license to legislate, a power the Constitution did not provide judges. Indeed, recently this license has led some judges to conclude they may look beyond American standards of decency to the standards of foreign nations in an attempt to justify their decisions. The arrogant nature of this

concept is further revealed by a Supreme Court ruling in 2003, when the Supreme Court explicitly declared that the Constitution prohibits the elected representatives of the people—us—from relying on established morality as a basis for the laws they pass. The Court thus declares itself free to, in effect, amend the Constitution by redefining its words to impose whatever it decides is evolving standards of decency. Yet at the same time, it prohibits legislatures from enacting laws based on objective standards of morality.

While these unprincipled decisions are becoming too frequent, I do not want to suggest that such is the common practice in courts in America. Having practiced full-time in Federal court for 14 years, I witnessed this first-hand. Day after day, if the law and facts were on my side, I would win consistently. If they were not, I would lose. This was true regardless of whether a judge was a Democrat, a Republican, a liberal, or a conservative. Certainly our Founders were so adamant that judges be unbiased and committed to the law that they drafted a Constitution that gave them a lifetime appoint and provided that Congress could not even reduce their pay.

My fear today is that many have come to believe that to expect objectivity in judges is hopelessly naive. Liberals and conservatives openly make this point. On one committee, one that Senator Kyl quoted Lloyd Cutler as testifying at, we focused on the question of whether or not ideology could be a factor in a judge's rulings and that we should in effect admit that people have political views and that those political views will infect their rulings and therefore we should openly talk about that. A writer in the conservative *National Review* complained that Republicans are hurting the conservative cause by insisting on "abiding by those outdated norms," in effect suggesting conservatives should get their guys in there to promote their ideas.

While many advocates on the left and right would like a Court that promotes their agenda, I do not want that and neither do the American people. What we must have, what our legal system demands, is a fair and unbiased umpire, one who calls the game according to the existing rules and does so competently and honestly every day. This is the American ideal of law. Ideals are important because they form the goals to which we all strive. We must never abandon our ideal of unbiased judges, judges who rule fairly without regard to politics.

Two important bipartisan commissions, the Miller Center of Public Affairs at the University of Virginia, and the Citizens for Independent Courts, have issued reports that deplore any policies that would tend to politicize the courts. These hearings, therefore, provide this Nation an excellent opportunity to discuss these important concepts. Our Nation cries out for judges who love the law and who work every day to uphold its moral authority. The people rightly demand judges who follow, not make, law.

From everything I have seen and from what I have read, Judge Roberts, you are just the man to fill that need. Straight from central casting. We unanimously confirmed you 2 years ago to the Court of Appeals. I am confident that after this exhaustive process you will be confirmed to the august position of Chief Justice of the United States Supreme Court.

I look forward to participating in the hearing with you and congratulate you on being nominated to the position.

Chairman SPECTER. Thank you very much, Senator Sessions. Senator Feingold?

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Mr. Chairman, thank you, and, Judge Roberts, welcome. Welcome to you and your entire family.

First, I want to say, Mr. Chairman, how much I appreciate the evenhanded way that you and Senator Leahy have approached the preparations for the hearing.

Judge Roberts, I also want to thank you in advance for the long hours you will put in with us this week. I wish you well, and I truly do admire your record and your impressive career.

This is a confirmation proceeding, however, not a coronation. It is the Senate Judiciary Committee's job to ask tough questions. We are tasked by the Senate with getting a complete picture of your qualifications, your temperament, and how you will carry out your duties. Obviously, nominees to the Supreme Court must be subject to the highest level of scrutiny, and so as the nominee to be the Chief Justice of the United States, you will be subject to the ultimate level of scrutiny. Our colleagues in the Senate and the citizens of this country are entitled to a hearing that will actually help them decide whether you should be confirmed. And I am sure you understand that.

This is a lifetime appointment to preside over the Supreme Court and lead the entire Federal judiciary. You are obviously very talented, and you also look healthy. So I am sure—

[Laughter.]

Senator FEINGOLD. I am sure you appreciate the importance of this hearing for the future of our country.

Some have called for a dignified process. So have I. But at times, it sounds like what some really want for the nominee is an easy process. That is not what the Constitution or the traditions of the Senate call for. If by dignified they mean that tough and probing questions are out of bounds, I must strongly disagree. It is not undignified to ask questions that press the nominee for his views on the important areas of the law that the Supreme Court confronts. It is not undignified to review and explore the nominee's writings, his past statements, the briefs he has filed, the memos he has written. It is not undignified to ask the nominee questions he would rather not answer should he prefer to remain inscrutable or, worse yet, all things to all people.

This process is not a game. It is not a political contest. It is one of the most important things that the Senate does—confirm or reject nominees to the highest court in the land—and we as Senators must take that responsibility very seriously.

The most recent nine Justices of the Supreme Court served together almost as long as any other Court in history, more than 11 years. Because the Court has been so stable for so long, and Chief Justice Rehnquist presided over it for 19 years, Members of Congress and lawyers and the public have come to know the views of the Justices pretty well. Many Court watchers have become pretty