ther-in-law had just arrived in the D.C. area to celebrate the recent birth of my second son, Brendan. Shortly after my father-in-law arrived, he was admitted to the intensive care unit of Arlington Hospital. After a three-and-a-half-month battle for his life, he eventually died.

Judge Roberts reacted the way we wish everyone would. The minute he found out about my father-in-law's illness, he offered his sympathy and support. He rearranged my assignments to make it possible for me to make my family my first priority. He often checked in on me, always with a thoughtful gesture and a kind word. And when my father-in-law passed away, he released me from all of my assignments on a moment's notice, placed me on paid leave of absence so I could take care of my family when it needed me, even though I was facing a number of deadlines and doing so would mean taking on considerable work himself.

When I returned, he welcomed me back with open arms, without a single word about the problems caused by the abruptness of my departure. For John Roberts, it was all very simple. It was just the right thing to do.

At the same time, Judge Roberts has a humility that is somewhat surprising in someone so accomplished.

Chairman SPECTER. Professor Yoo, would you please summarize at this point?

Mr. YOO. In short, I am convinced that John Roberts possesses the open-mindedness, compassion, and humility that the Senate seeks in the members of our Nation's highest court. He combines these qualities with a respect for the law and for the Supreme Court as an institution that leave no doubt in my mind that he would make an admirable Chief Justice.

Thank you.

[The prepared statement of Mr. Yoo appears as a submission for the record.]

Chairman SPECTER. Thank you, Professor Yoo. That was a good transition, to ask you to summarize and to go right to "in short."

Our next witness and final one on this panel is Professor David Strauss. And extraordinary academic background. A member of the Magna Cum Laude Harvard Law School Club—not too many of you. Judge Roberts is one. Two years at Oxford. An attorney advisor in the Carter Justice Department. Worked on the Judiciary Committee here as special counsel during the Justice Souter nomination proceedings. And has been at the University of Chicago for some time, 18 cases before the Supreme Court.

You're on, Professor Strauss.

STATEMENT OF DAVID STRAUSS, HARRY N. WYATT PROFESSOR OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILLINOIS

Mr. STRAUSS. Thank you very much, Mr. Chairman, members of the Committee. It is an honor to appear before you.

My purpose here is, really, not to pass judgment on John Roberts, someone I admire very much in many ways, but rather to speak about a development in the subject I teach and study, constitutional law, something that has happened in that area in the last generation that is very significant and directly relevant to this

hearing and to the judicial appointments process generally, and that development is a change in the nature of judicial conservatism. You can see the change if you look at what President Nixon said when he appointed Justice Rehnquist, and what President Bush, who of course has nominated Justice Rehnquist's successor has said.

President Nixon said he wanted to appoint a judicial conservative, and he identified his model. His model was Justice Harlan. President Bush, of course, has identified his models, and his models are Justice Scalia and Justice Thomas. All these people are judicial conservatives, but there is a world of difference between the two different kinds of conservatism. The hallmarks of Justice Harlan's work were deference to Congress and respect for precedent. The hallmarks of the new conservatism is something close to the opposite of that, a skeptical attitude toward the work of Congress, and a willingness to overturn precedent. And it is really that difference, not the difference between liberals and conservatives, but the difference between these two different kinds of conservatism that make the stakes in the judicial appointments process very high at this point in our history.

I identified a number of areas in my written remarks where I think the stakes are high. Let me just mention two here. The first is Congress's power to address the problems facing the American people and to protect the rights of the American people. I think it is fair to say that the power of Congress to do those things is under challenge in the judiciary today in a way it has not been since before the Great Depression, and this is true not just in the case of the now-famous toad, but in area after area, and many of which the hearings have discussed, in the area of environmental protection, workplace safety, consumer protection, campaign finance, the rights of the disabled as we heard, the free exercise of religion, age discrimination, gender discrimination, the protection of intellectual property rights, and all of those areas there are significant efforts under way in the judiciary to limit in important ways the power of Congress to do what it has been doing now for the better part of a century, protecting the rights and serving the needs of the American people.

The other area is of course the right of privacy. The modern right of privacy was essentially an invention of Justice Harlan, a judicial conservative that President Nixon cited as a model when he appointed Justice Rehnquist. It was an opinion Justice Harlan wrote that was the font of privacy law that has extended not just in the case of abortion, but in many other areas, not just in the case of reproductive rights, but in many other areas today.

Justice Harlan took a view of privacy that rested on a general and expansive reading of American traditions. He did not expect people claiming rights to point to some specific tradition or some specific body of law. He understood that the questions were more difficult than that. The right of privacy now, if anything, is more important, indeed much more important than it was when Justice Harlan wrote, "With changes in reproductive technology and end-of-life technologies that make these questions all the more acute."

The question whether we will have a Justice Harlan-like approach to the right of privacy or a skeptical approach to the right

of privacy that questions whether it even exists and evinces a desire to confine it as narrowly as possible, that question it seems to me is very much on the table, and will be a question that will be with us for the next generation.

I don't want to be alarmist about this. The law doesn't change overnight. These are not changes that will occur maybe not even with this appointment, but there are points in the history of the Supreme Court—the New Deal was one, the civil rights revolution was one—there are points in the history of the Supreme Court where the Court rethinks and redefines its relationship to the other branches of Government and its relationship to the rights of individuals. We may be at such a point. There are indications that we are at such a point. We have not passed it yet, but the next few appointments to the Supreme Court will determine whether this is an era in which the Supreme Court redefines its relationship in a way that is basically unknown to Americans living today. Those are the stakes presented by this appointment and by other appointments that this Committee will face.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Strauss appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Strauss, for those profound comments.

This is an extraordinary panel which could yield a lot of fruits with a lot of questioning, except that we have six more witnesses and it is almost 6 o'clock.

I am going to start by yielding to Senator Feinstein.

Senator FEINSTEIN. I have no questions. Thank you, Mr. Chairman.

Chairman SPECTER. I am glad I yielded to you, Senator Feinstein.

[Laughter.]

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. Mr. Fried, it is an honor to have you with us. I was a member of the Department of Justice when you served as Solicitor General and you represent the best in American law, and I am pleased to see you are at Harvard and teaching students what American law is all about.

I notice that the legal publications have declared that Judge Roberts is the premier appellate court practitioner in America, in a generation. You argued before the Supreme Court. I do not think you are personal friends with Judge Roberts, but from your observations, how do you rank him as a scholar and as a practitioner in the Supreme Court?

Mr. FRIED. As a practitioner, he is the best. As a scholar, he does not exist. He does not purport to be a scholar. He has not written scholarly articles. That is not his business. And in that respect he is very much like some of the greats. Earl Warren was not a scholar when he went on the Court and had no written articles. Henry Friendly wrote all his articles after he became a judge. Similarly, I think with Benjamin Nathan Cardozo. So it does not denigrate Judge Roberts to say scholarly is not what he has done. Perhaps he shall, but he has not so far.