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## Senate

The Senate met at 9:45 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

### PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Almighty and everlasting God, the center of our joy, give us this day what we need to honor Your Name. Provide us with a steadfastness of purpose that will enable us to accomplish shared objectives. Strengthen us with the willingness to bear burdens and the courage to persevere. Impart to us the wisdom to know what is right and the strength to do it. Empower us to forget our failures and to press toward the prize of becoming more like You.

Give our Senators a faith that will not shrink though pressed by many a foe. As they seek to do Your will, direct their paths. Grant us the vision and the power to transform dark yesterdays into bright tomorrows.

We pray in Your Holy Name. Amen.

### PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

### RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

### EXECUTIVE SESSION

**NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES—Resumed**

The PRESIDENT pro tempore. Under the previous order, the Senate will pro-

ceed to executive session for the consideration of Calendar No. 317, which the clerk will report.

The legislative clerk read the nomination of John G. Roberts, Jr., of Maryland, to be Chief Justice of the United States.

The PRESIDENT pro tempore. Under the previous order, the time from 10 a.m. until 11 a.m. will be under the control of the majority leader or his designee.

### RECOGNITION OF THE ACTING MAJORITY LEADER

The acting majority leader is recognized.

Mr. MCCONNELL. Thank you, Mr. President.

### SCHEDULE

Mr. President, shortly, we will resume consideration of John Roberts to be Chief Justice of the United States. Last night, we locked in a consent which provides for the final vote on confirmation. That vote will occur at 11:30 a.m. on Thursday.

Today, we have controlled time to allow Senators to come to the Chamber to give their statements on this extremely important nomination. As usual, we will recess from 12:30 until 2:15 for the weekly policy luncheons.

As mentioned last night, the Appropriations Committee is expected to report the Defense appropriations bill tomorrow. We expect the Senate to begin consideration of that bill on Thursday following the Roberts nomination.

I also remind my colleagues that we need to pass a continuing resolution by the close of business this week.

Finally, I once again alert all Members that we are working under a very compressed schedule. Next week, we will need to accommodate the Rosh Hashanah holiday, and therefore we will be stacking rollcall votes for midweek. Given this schedule, it is extremely important that we use our time wisely, both this week and obviously next week as well. Therefore, Members should anticipate busy sessions Thursday and Friday of this week. Friday

will be a working day as we make progress on the Defense appropriations bill. Senators should plan their schedules accordingly.

Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

The PRESIDING OFFICER (Mr. SUNUNU). Without objection, it is so ordered.

Mr. DURBIN. Mr. President, I ask unanimous consent to speak as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

### DISASTER ASSISTANCE

Mr. DURBIN. Mr. President, it is very clear from Hurricane Rita and Hurricane Katrina that America is now learning how to be prepared for disasters. Many more positive things happened as a result of the threat of Hurricane Rita than happened just a few weeks before in Louisiana, Mississippi, and Alabama. We now know that it is not a question of pointing the finger of blame, but those of us in leadership in Washington need to get to the bottom of this—not so we can decide who was wrong in days gone by but, frankly, to make sure this doesn't happen again.

The American people do not want to know who wins the game of "gotcha" here; they want to know if America is ready for the next disaster. We were clearly not prepared for Hurricane Katrina. The scenes we all saw night and day on television of helpless victims in New Orleans and other communities remind us over and over again that the Federal Emergency Management Agency was not prepared for this challenge. We came to that realization when Mr. Brown was asked to leave FEMA. I believe that was the right decision.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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But I was stunned to learn that he is still on the payroll. It is hard to imagine that this man who was at FEMA with such a thin résumé and such limited experiences dealing with disasters was asked to leave and be replaced and then continues on as a consultant to FEMA. He is going to be scrutinized today by a panel in the House of Representatives that may ask him some questions about what he did. The first thing they should ask him is by what standard is he still on the Federal payroll. Why is this man still being paid by the Federal Government? The administration clearly cannot investigate itself when it comes to Hurricane Katrina, and this decision to keep Mr. Brown on the payroll reflects on what he did in the past but, more importantly, what he might do in the future. He doesn't have the skill set needed for the disasters that could come as soon as tomorrow. Why is he still there? I don't believe this is the right way to approach a natural disaster or a terrorist disaster. We need to put people in place who understand how to deal with it.

I believe the President was right in removing Mr. Brown and putting in his place Commander Allen from the Coast Guard. I have met with him in New Orleans. He is a man who apparently takes control of the situation and does it very well, and I believe we should give him a chance to lead—to make certain that we handle that past disaster but also that we are prepared for the next one.

But this is a recurring problem. It isn't just a question of Michael Brown being replaced by Commander Allen. It is a question of whether there are people in other key spots in this Government who do not have the qualifications to lead.

Make no mistake about it: Every President brings in people of their own political persuasion and friendship. This happened from time immemorial. It is understandable that sometimes these people do an excellent job. I can recall when President Clinton suggested that Jamie Lee Witt from Arkansas, his emergency management director, was coming up to run FEMA in Washington. I want to tell you that when I heard that, I thought: Here we go again, an old political friend is going to come up here and run this important agency. This could be awful. I am happy to report I was wrong. Jamie Lee Witt did an extraordinary job. I never heard a word of criticism about the job he did for 8 years in Washington. He had skills, extraordinary skills, and brought them to the job. But we need at this moment in time to ask critical questions as to whether there are men and women in this administration such as Michael Brown who are not prepared to deal with the next challenge to the United States.

I ask unanimous consent to have printed in the RECORD an article from Time magazine of this week entitled "How Many More Mike Browns Are Out There?"

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From TIME Magazine, Sep. 25, 2005]  
HOW MANY MORE MIKE BROWNS ARE OUT THERE?

(By Mark Thompson, Karen Tumulty, and Mike Allen)

In presidential politics, the victor always gets the spoils, and chief among them is the vast warren of offices that make up the federal bureaucracy. Historically, the U.S. public has never paid much attention to the people the President chooses to sit behind those thousands of desks. A benign cronyism is more or less presumed, with old friends and big donors getting comfortable positions and impressive titles, and with few real consequences for the nation.

But then came Michael Brown. When President Bush's former point man on disasters was discovered to have more expertise about the rules of Arabian horse competition than about the management of a catastrophe, it was a reminder that the competence of government officials who are not household names can have a life or death impact. The Brown debacle has raised pointed questions about whether political connections, not qualifications, have helped an unusually high number of Bush appointees land vitally important jobs in the Federal Government.

The Bush Administration didn't invent cronyism; John F. Kennedy turned the Justice Department over to his brother, while Bill Clinton gave his most ambitious domestic policy initiative to his wife. Jimmy Carter made his old friend Bert Lance his budget director, only to see him hauled in front of the Senate to answer questions on his past banking practices in Georgia, and George H.W. Bush deposited so many friends at the Commerce Department that the agency was known internally as "Bush Gardens." The difference is that this Bush Administration had a plan from day one for remaking the bureaucracy, and has done so with greater success.

As far back as the Florida recount, soon-to-be Vice President Dick Cheney was poring over organizational charts of the government with an eye toward stocking it with people sympathetic to the incoming Administration. Clay Johnson III, Bush's former Yale roommate and the Administration's chief architect of personnel, recalls preparing for the inner circle's first trip from Austin, Texas, to Washington: "We were standing there getting ready to get on a plane, looking at each other like: Can you believe what we're getting ready to do?"

The Office of Personnel Management's Plum Book, published at the start of each presidential Administration, shows that there are more than 3,000 positions a President can fill without consideration for civil service rules. And Bush has gone further than most Presidents to put political stalwarts in some of the most important government jobs you've never heard of, and to give them genuine power over the bureaucracy. "These folks are really good at using the instruments of government to promote the President's political agenda," says Paul Light, a professor of public service at New York University and a well-known expert on the machinery of government. "And I think that takes you well into the gray zone where few Presidents have dared to go in the past. It's the coordination and centralization that's important here."

The White House makes no apologies for organizing government in a way that makes it easier to carry out Bush's agenda. Johnson says the centralization is "very intentional,

and it starts with the people you pick . . . They're there to implement the President's priorities." Johnson asserts that appointees are chosen on merit, with political credentials used only as a tie breaker between qualified people. "Everybody knows somebody," he says. "Were they appointed because they knew somebody? No. What we focused on is: Does the government work, and can it be caused to work better and more responsibly? . . . We want the programs to work." But across the government, some experienced civil servants say they are being shut out of the decision making at their agencies. "It depresses people, right down to the level of a clerk-typist," says Leo Bosner, head of the Federal Emergency Management Agency's (FEMA's) largest union. "The senior to mid-level managers have really been pushed into a corner career-wise."

Some of the appointments are raising serious concerns in the agencies themselves and on Capitol Hill about the competence and independence of agencies that the country relies on to keep us safe, healthy and secure. Internal e-mail messages obtained by TIME show that scientists' drug-safety decisions at the Food and Drug Administration (FDA) are being second-guessed by a 33-year-old doctor turned stock picker. At the Office of Management and Budget, an ex-lobbyist with minimal purchasing experience oversaw \$300 billion in spending, until his arrest last week. At the Department of Homeland Security, an agency the Administration initially resisted, a well-connected White House aide with minimal experience is poised to take over what many consider the single most crucial post in ensuring that terrorists do not enter the country again. And who is acting as watchdog at every federal agency? A corps of inspectors general who may be increasingly chosen more for their political credentials than their investigative ones.

Nowhere in the federal bureaucracy is it more important to insulate government experts from the influences of politics and special interests than at the Food and Drug Administration, the agency charged with assuring the safety of everything from new vaccines and dietary supplements to animal feed and hair dye. That is why many within the department, as well as in the broader scientific community, were startled when, in July, Scott Gottlieb was named deputy commissioner for medical and scientific affairs, one of three deputies in the agency's second-ranked post at FDA.

His official FDA biography notes that Gottlieb, 33, who got his medical degree at Mount Sinai School of Medicine, did a previous stint providing policy advice at the agency, as well as at the Centers for Medicare and Medicaid Services, and was a fellow at the American Enterprise Institute, a conservative think tank. What the bio omits is that his most recent job was as editor of a popular Wall Street newsletter, the *Forbes/Gottlieb Medical Technology Investor*, in which he offered such tips as "Three Biotech Stocks to Buy Now." In declaring Gottlieb a "noted authority" who had written more than 300 policy and medical articles, the biography neglects the fact that many of those articles criticized the FDA for being too slow to approve new drugs and too quick to issue warning letters when it suspects ones already on the market might be unsafe. FDA Commissioner Lester Crawford, who resigned suddenly and without explanation last Friday, wrote in response to e-mailed questions that Gottlieb is "talented and smart, and I am delighted to have been able to recruit him back to the agency to help me fulfill our public-health goals." But others, including Jimmy Carter-era FDA Commissioner Donald Kennedy, a former Stanford University president and now executive editor-in-chief

of the journal *Science*, say Gottlieb breaks the mold of appointees at that level who are generally career FDA scientists or experts well known in their field. "The appointment comes out of nowhere. I've never seen anything like that," says Kennedy.

Gottlieb's financial ties to the drug industry were at one time quite extensive. Upon taking his new job, he recused himself for up to a year from any deliberations involving nine companies that are regulated by the FDA and "where a reasonable person would question my impartiality in the matter." Among them are Eli Lilly, Roche and Proctor & Gamble, according to his Aug. 5 "Disqualification Statement Regarding Former Clients," a copy of which was obtained by TIME. Gottlieb, though, insists that his role at the agency is limited to shaping broad policies, such as improving communication between the FDA, doctors and patients, and developing a strategy for dealing with pandemics of such diseases as flu, West Nile virus and SARS.

Would he ever be involved in determining whether an individual drug should be on the market? "Of course not," Gottlieb told TIME. "Not only wouldn't I be involved in that . . . But I would not be in a situation where I would be adjudicating the scientific or medical expertise of the [FDA] on a review matter. That's not my role. It's not my expertise. We defer to the career staff to make scientific and medical decisions."

Behind the scenes, however, Gottlieb has shown an interest in precisely those kinds of deliberations. One instance took place on Sept. 15, when the FDA decided to stop the trial of a drug for multiple sclerosis during which three people had developed an unusual disorder in which their bodies eliminated their blood platelets and one died of intracerebral bleeding as a result. In an e-mail obtained by TIME, Gottlieb speculated that the complication might have been the result of the disease and not the drug. "Just seems like an overreaction to place a clinical hold" on the trial, he wrote. An FDA scientist rejected his analysis and replied that the complication "seems very clearly a drug-related event." Two days prior, when word broke that the FDA had sent a "non-approvable" letter to Pfizer Inc., formally rejecting its Oporia drug for osteoporosis, senior officials at the FDA's Center for Drug Evaluation and Research received copies of an e-mail from Gottlieb expressing his surprise that what he thought would be a routine approval had been turned down. Gottlieb asked for an explanation.

Gottlieb defends his e-mails, which were circulated widely at the FDA. "Part of my job is to ask questions both so I understand how the agency works, and how it reaches its decisions," he told TIME. However, a scientist at the agency said they "really confirmed people's worst fears that he was only going to be happy if we were acting in a way that would make the pharmaceutical industry happy."

The Oporia decision gave Pfizer plenty of reason to be unhappy: the drug had been expected to produce \$1 billion a year in sales for the company. Pfizer's stock fell 1.4% the day the rejection was announced. The FDA has not revealed why it rejected the drug, and Pfizer has said it is "considering various courses of action" that might resuscitate its application for approval.

Health experts note that Gottlieb's appointment comes at a time of increased tension between the agency and drug companies, which are concerned that new drugs will have a more difficult time making it onto the market in the wake of the type of safety problems that persuaded Merck to pull its best-selling painkiller Vioxx from the market last year. The agency's independ-

ence has also come under question, most recently with its decision last month to prevent the emergency contraceptive known as Plan B from being sold over the counter, after an FDA advisory panel recommended it could be. That Gottlieb sits at the second tier of the agency, critics say, sends anything but a reassuring signal.

David Safavian didn't have much hands-on experience in government contracting when the Bush Administration tapped him in 2003 to be its chief procurement officer. A law-school internship helping the Pentagon buy helicopters was about the extent of it. Yet as administrator of the Office of Federal Procurement Policy, Safavian, 38, was placed in charge of the \$300 billion the government spends each year on everything from paper clips to nuclear submarines, as well as the \$62 billion already earmarked for Hurricane Katrina recovery efforts. It was his job to ensure that the government got the most for its money and that competition for federal contracts—among companies as well as between government workers and private contractors—was fair. It was his job until he resigned on Sept. 16 and was subsequently arrested and charged with lying and obstructing a criminal investigation into Republican lobbyist Jack Abramoff's dealings with the Federal Government.

Safavian spent the bulk of his pre-government career as a lobbyist, and his nomination to a top oversight position stunned the tightly knit federal procurement community. A dozen procurement experts interviewed by TIME said he was the most unqualified person to hold the job since its creation in 1974. Most of those who held the post before Safavian were well-versed in the arcane world of federal contracts. "Safavian is a good example of a person who had great party credentials but no substantive credentials," says Danielle Brian, executive director of the Project on Government Oversight, a nonprofit Washington watchdog group. "It's one of the most powerful positions in terms of impacting what the government does, and the kind of job—like FEMA director—that needs to be filled by a professional." Nevertheless, Safavian's April 2004 confirmation hearing before the Senate Governmental Affairs Committee (attended by only five of the panel's 17 members) lasted just 67 minutes, and not a single question was asked about his qualifications.

The committee did hold up Safavian's confirmation for a year, in part because of concerns about work his lobbying firm, Janus-Merritt Strategies, had done that he was required to divulge to the panel but failed to. The firm's filings showed that it represented two men suspected of links to terrorism (Safavian said one of the men was "erroneously listed," and the other's omission was an "inadvertent error") as well as two suspect African regimes. Ultimately, the committee and the full Senate unanimously approved Safavian for the post.

His political clout, federal procurement experts say privately, came from his late-1990s lobbying partnership with Grover Norquist, now head of Americans for Tax Reform and a close ally of the Bush Administration. Norquist is an antitax advocate who once famously declared that his goal was to shrink the Federal Government so he could "drag it into the bathroom and drown it in the bathtub." As the U.S. procurement czar, Safavian was pushing in that direction by seeking to shift government work to private contractors, contending it was cheaper. Federal procurement insiders say his relationship with Norquist gave Safavian the edge in snaring the procurement post. But Norquist has "no memory" of urging the Administration to put Safavian in the post, says an associate speaking on Norquist's behalf. A White

House official said Norquist "didn't influence the decision." Clay Johnson, who was designated by the White House to answer all of TIME's questions about administration staffing issues and who oversaw the procurement post, says Safavian was "by far the most qualified person" for the job. Perhaps it also didn't hurt that Safavian's wife Jennifer works as a lawyer for the House Government Reform Committee, which oversees federal contracting.

In addition, Safavian had worked at a law firm in the mid-'90s with Jack Abramoff, one of the capital's highest-paid lobbyists, a top G.O.P. fund raiser and a close friend of House majority leader Tom DeLay. Abramoff was indicted last month on unrelated fraud and conspiracy charges. In 2002, Abramoff invited Safavian on a weeklong golf outing to Scotland's famed St. Andrews course (as Abramoff had done with DeLay in 2000). Seven months after the trip, an anonymous call to a government hotline said lobbyists had picked up the tab for the jaunt. That wasn't true; Safavian paid \$3,100 for the trip. But the government alleges that he lied when he repeatedly told investigators that Abramoff had no business dealings with the General Services Administration, where Safavian worked at the time. Prosecutors alleged last week, however, that Safavian worked closely with Abramoff—identified only as "Lobbyist A" in the criminal complaint against Safavian—to give Abramoff an inside track in his efforts to acquire control of two pieces of federal property in the Washington area. Safavian, who is free without bail, declined to be interviewed for this story. His attorney, Barbara Van Gelder, said the government is trying to pressure her client to help in its probe of Abramoff. "This is a creative use of the criminal code to secure his cooperation," she said.

Three days after the Sept. 12 resignation of FEMA's Michael Brown, Julie Myers, the Bush Administration's nominee to head Immigration and Customs Enforcement (ICE) came before the Senate Homeland Security and Governmental Affairs Committee. The session did not go well. "I think we ought to have a meeting with [Homeland Security Secretary] Mike Chertoff," Ohio Republican George Voinovich told Myers. "I'd really like to have him spend some time with us, telling us personally why he thinks you're qualified for the job. Because based on the résumé, I don't think you are."

Immigration and Customs Enforcement is one of 22 agencies operating under the umbrella of the Department of Homeland Security, but its function goes to the heart of why the department was created: to prevent terrorists from slipping into the U.S. If that weren't enough, the head once must also contend with money launderers, drug smugglers, illegal-arms merchants and the vast responsibility that comes with managing 20,000 government employees and a \$4 billion budget. Expectations were high that whoever was appointed to fill the job would be, in the words of Michael Greenberger, head of the University of Maryland's Center for Health and Homeland Security, "a very high-powered, well-recognized intelligence manager."

Instead the Administration nominated Myers, 36, currently a special assistant handling personnel issues for Bush. She has experience in law enforcement management, including jobs in the White House and the Commerce, Justice and Treasury departments, but she barely meets the five-year minimum required by law. Her most significant responsibility has been as Assistant Secretary for Export Enforcement at the Commerce Department, where, she told Senators, she supervised 170 employees and a \$25 million budget.

Myers may appear short on qualifications, but she has plenty of connections. She

worked briefly for Chertoff as his chief of staff at the Justice Department's criminal division, and two days after her hearing, she married Chertoff's current chief of staff, John Wood. Her uncle is Air Force General Richard Myers, the outgoing Chairman of the Joint Chiefs of Staff. Julie Myers was on her honeymoon last week and was unavailable to comment on the questions about her qualifications raised by the Senate. A representative referred TIME to people who had worked with her, one of whom was Stuart Levey, the Treasury Department's Under Secretary for Terrorism and Financial Crime. "She was great, and she impressed everyone around her in all these jobs," he said. "She's very efficient, and she's assertive and strong and smart, and I think she's wonderful."

To critics, Myers' appointment is a symptom of deeper ills in the Homeland Security Department, a huge new bureaucracy that the Bush Administration resisted creating. Among those problems, they say, is a tendency on the part of the Administration's political appointees to discard in-house expertise, particularly when it could lead to additional government regulation of industry. For instance, when Congress passed the intelligence reform bill last year, it gave the Transportation Security Administration (TSA) a deadline of April 1, 2005, to come up with plans to assess the threat to various forms of shipping and transportation—including rail, mass transit, highways and pipelines—and make specific proposals for strengthening security. Two former high-ranking Homeland Security officials tell TIME that the plans were nearly complete and had been put into thick binders in early April for final review when Deputy Secretary Michael Jackson abruptly reassigned that responsibility to the agency's policy shop. Jackson was worried that presenting Congress with such detailed proposals would only invite it to return later and demand to know why Homeland Security had not carried them out. "If we put this out there, this is what we're going to be held to," says one of the two officials, characterizing Jackson's stance. Nearly six months after Congress's deadline, in the wake of the summer's subway bombings in London, TSA spokeswoman Amy Von Walter says the agency is in the process of declassifying the document and expects to post a short summary on its website soon.

In the meantime, Myers' nomination could be in trouble. Voinovich says his concerns were satisfied after a 35-minute call with Chertoff, in which the Homeland Security Secretary argued forcefully on Myers' behalf. But other senators are raising questions, and Democrats have seized on Myers' appointment as an example of the Bush Administration's preference for political allies over experience.

The Post-Watergate law creating the position of inspector general (IG) states that the federal watchdogs must be hired "without regard to political affiliation," on the basis of their ability in such disciplines as accounting, auditing and investigating. It may not sound like the most exciting job, but the 57 inspectors general in the Federal Government can be the last line of defense against fraud and abuse. Because their primary duty is to ask nosy questions, their independence is crucial.

But critics say some of the Bush IGs have been too cozy with the Administration. "The IGs have become more political over the years, and it seems to have accelerated," said A. Ernest Fitzgerald, who has been battling the Defense Department since his 1969 discovery of \$2 billion in cost overruns on a cargo plane, and who, at 79, still works as a civilian Air Force manager. A study by Rep-

resentative Henry Waxman of California, the top Democrat on the House Government Reform Committee, found that more than 60% of the IGs nominated by the Bush Administration had political experience and less than 20% had auditing experience—almost the obverse of those measures during the Clinton Administration. About half the current IGs are holdovers from Clinton.

Johnson says political connections may be a thumb on the scale between two candidates with equal credentials, but rarely are they the overriding factor in a personnel decision. Speaking of all such appointments, not just the IGs, he said, "I am aware of one or two situations where politics carried the day and the person was not in the job a year later."

Still, several of the President's IGs fit comfortably into the friends-and-family category. Until recently, the most famous Bush inspector general was Janet Rehnquist, a daughter of the late Chief Justice. Rehnquist had been a lawyer for the Senate Permanent Subcommittee on Investigations and worked in the counsel's office during George H.W. Bush's presidency before becoming an IG at the Department of Health and Human Services. In that sense, she was qualified for the job. But a scathing report by the Government Accountability Office asserted that she had "created the perception that she lacked appropriate independence in certain situations" and had "compromised her ability to serve as an effective leader." Rehnquist also faced questions about travel that included sightseeing and free time, her decision to delay an audit of the Florida pension system at the request of the President's brother, Governor Jeb Bush of Florida, and the unauthorized gun she kept in her office. She resigned in June 2003 ahead of the report.

Three weeks ago, however, Joseph Schmitz supplanted Rehnquist as the most notorious Bush IG. Schmitz, who worked as an aide to former Reagan Administration Attorney General Ed Meese and whose father John was a Republican Congressman from Orange County, Calif., quit his post at the Pentagon following complaints from Senate Finance Committee chairman Charles Grassley, Republican of Iowa. In particular, Grassley questioned Schmitz's acceptance of a trip to South Korea, paid for in part by a former lobbying client, according to Senate staff members and public lobbying records, and Schmitz's use of eight tickets to a Washington Nationals baseball game. But those issues aren't the ones that led to questions about his independence from the White House. Those concerns came to light after Schmitz chose to show the White House his department's final report on a multiyear investigation into the Air Force's plan to lease air-refueling tankers from Boeing for much more than it would have cost to buy them. After two weeks of talks with the Administration, Schmitz agreed to black out the names of senior White House officials who appeared to have played a role in pushing and approving what turned out to be a controversial procurement arrangement. Schmitz ultimately sent the report to Capitol Hill, but Senators are irked that they have not yet received an original, unredacted copy.

Congressional aides said they are still scratching their heads about how Schmitz got his job. He now works for the parent company of Blackwater USA, a military contractor that, in his old job, he might have been responsible for investigating.

Mr. DURBIN. Mr. President, I will tell you, when we hear about the contracts that are being let for Hurricane Katrina and other natural disasters, it raises similar questions. Just last week, the head of procurement in the

White House, Mr. Safavian, was arrested. He was the top man in the White House when it came to procurement and contracts. Because of some misrepresentations that he apparently made—it has been alleged that he made these misrepresentations—he has been asked to step down from this spot in the White House.

But we have to ask about the contracts that are being let now for Hurricane Katrina. The Senate and House approved some \$60 billion for emergency aid. So far, 80 percent of the contracts that FEMA has let are no-bid contracts. They have just awarded them to companies without any competitive bidding whatsoever.

The New York Times on September 26 said as follows:

More than 80 percent of the \$1.5 billion of contracts signed by FEMA alone were awarded without bidding, or with limited competition, government records show, provoking concerns among auditors and government officials about the potential for favoritism and abuse. Already questions have been asked about the political connection of major contracts.

And the article goes on:

Questions are being raised as to whether this money is actually going to the victims and is actually being well spent. It raises a question of compensation, not just to make certain these victims and communities get back on their feet as quickly as possible but to make certain we are prepared for the next disaster that may face the United States. We have seen and read of serious problems which have occurred with Hurricane Katrina. Some of the same occurred with Hurricane Rita.

In Texas, in Express News on September 26, it is written that:

Jefferson County Texas Judge Carl Griffith said the county has encountered problems gaining access to troops, equipment and supplies needed to help rebuild the storm-battered region. The judge said local authorities weren't able to use about 50 generators the State had prepositioned at an entertainment complex until late Sunday night because no clearance had been given to release them. Mr. Johnson, Jefferson County Administrator, said he had asked for generators to supply power to St. Elizabeth's Hospital and was told there were none available. Then he said, "I had to show the FEMA representatives the generators were sitting in the parking lot."

So there clearly is a need for us to increase the level of competency and performance when it comes to dealing with these disasters.

The bottom line is this: If we want to find out what went wrong and learn how to avoid it in the future, there is one thing that we can do and do now as a Congress which will reach that goal—an independent, nonpartisan commission, not a commission created by Republicans or Democrats in Congress of their own Members, nor an investigation initiated by the administration to look at wrongdoing that it might have committed itself, but an independent, nonpartisan commission. Some have argued against it, saying we waited a year for the 9/11 Commission, why shouldn't we wait a year to look into the problems of Katrina? We waited a year because the White House opposed

the creation of that Commission. Ultimately, it was created and did a great service to this country.

The force that kept the 9/11 Commission moving—this independent, non-partisan commission—was the families who were victims of 9/11. That same force needs to come forward here. The victims of Hurricane Katrina and Hurricane Rita should be the moving force for the creation of an independent, nonpartisan commission.

The Republican leadership in Congress and the Democratic leadership in Congress should acknowledge the obvious: If we are going to get clear answers as to what went wrong so those mistakes will not be made again, we need an independent, nonpartisan commission. We shouldn't be fearful of them. If they point a finger of blame at Congress, so be it. If they point a finger of blame at State and local leaders, so be it. The important thing is not who was wrong before, the important thing is let us make certain that America is safe in the future.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, what is the time allocation?

The PRESIDING OFFICER. The time between 10 a.m. and 11 a.m. is under the control of the majority leader or his designee.

Mr. HATCH. Thank you.

Mr. President, I rise once again to speak in favor of the nomination of John Roberts. I urge all of my colleagues in the Senate to vote to make John Roberts the next Chief Justice of the United States.

The central focus this week is properly on the nomination of Judge Roberts. In addition, the manner in which the Senate acts on this nomination also will be subject to public scrutiny. In this regard, I join those who have commended Senator SPECTER and Senator LEAHY and other members of the Judiciary Committee for working together to plan and carry out a fair series of hearings on the Roberts nomination.

This week, the full Senate faces the challenge of debating the merits of John Roberts to serve as our Nation's 17th Chief Justice. A widely respected journalist, David Broder, observed about the Roberts nomination:

He is so obviously ridiculously well equipped to lead government's third branch that it is hard to imagine how any Democrat can justify a vote against his confirmation.

To put a fine point on it, if Democrats do not vote for John Roberts, is it fair to ask whether some Democrats will ever give a fair shake to any Republican Supreme Court nominee?

I recognize that many leftwing special interest groups are putting a lot of pressure on Democratic Senators to vote against this extraordinarily qualified nominee. For example, last Wednesday, September 21, 2005, the newspaper Rollcall contained an article with the headline "Liberal Groups

Lecture Democrats on Roberts." Let me read a portion of this article:

... Sens. Dick Durbin and Charles Schumer received a sharp rebuke at a weekend meeting in Los Angeles from wealthy activists such as television producer Norman Lear over Roberts' glide path to confirmation.

At an event on behalf of People for the American Way, the first of the major liberal groups to announce opposition to Roberts, Lear lashed out at the Democrats for not mounting more determined resistance to the nomination, according to several sources familiar with the event.

Schumer, chairman of the Democratic Senatorial Campaign Committee, confirmed that the event included a 'frank discussion' between activists and the Senators.

That says it all, the pressure on our colleagues on the other side: lectures, sharp rebukes, frank discussions. It sounds as if there may be some dissension in "All in the Family." One can only wonder if "the Meathead" took part in this harangue against the Senators. I have no doubt that pressure from some liberal groups was substantial.

There are compelling reasons why the health of both the Senate and Judiciary require that this vote should be about, and only about, John Roberts' qualification to serve as Chief Justice. Some leftwing special interest groups seem to be urging a "no" vote on this highly qualified nominee in large part to somehow send a message to President Bush, as he deliberates on how to fill the remaining vacancy on the Supreme Court. If that is the case, it is a garbled, misguided message.

I understand the political fact of life that some outside interest groups normally affiliated with the Republican side of the aisle might have preferred that Republican Senators would have voted against the Supreme Court nominees of President Clinton. But I also respect the political reality that he who wins the White House has the right under the Constitution to nominate judicial nominees, including filling Supreme Court vacancies.

In undertaking our advice and consent role, the Senate, due to the Constitution, prudence, and tradition, owes a degree of deference to Presidential nominees. This helps explain why the two Supreme Court nominations made by President Clinton were given broad bipartisan support by the Senate once they were found to possess the intellect, integrity, character, and mainstream judicial philosophy necessary to serve on the Court. When the votes were counted for these two Clinton nominees, both of whom were known as socially liberal, Justice Breyer was confirmed by 87 to 9, and Justice Ruth Bader Ginsburg was approved by a 96-to-3 vote. Given the already stated opposition of both the minority leader and the assistant minority leader and many other Democratic Senators, it does not appear likely that Judge Roberts will receive the same level of support from Democrat Senators as Republican Senators provided for the last two Democrat nominees.

This is unfortunate, unjustified, and unfair. Comity must be a two-way street.

At least during the debate of this extremely well-qualified nominee the distinguished Senator from Massachusetts has not renewed his over-the-top pledge "to resist any Neanderthal that is nominated by this President of the United States."

Frankly, I do not think that much of the opposition against the nominee can be wholly explained by anything that Judge Roberts said or did or did not say over the course of his exemplary 25-year career as a lawyer.

I commend the growing number of Democrats, including the ranking Democrat member of the Senate Judiciary Committee, Senator LEAHY, for their decisions to support Judge Roberts. I hope many others across the aisle will join them.

I also commend President Bush for consulting closely with the Senate and for sending a truly outstanding nominee in John Roberts. By all accounts, the President is continuing his practice of consulting widely with the Senate in filling the remaining vacancy on the Court.

Turning to the merits of this nomination, I take a few moments to briefly discuss John Roberts' education and experience to help explain why so many think so highly of this nominee. Too often in this debate, Judge Roberts' opponents quickly acknowledged his brilliance and qualifications before launching into a series of speculative if's, and's, or but's that somehow justify a vote against the confirmation in their eyes.

The American public realizes John Roberts has the right stuff. John Roberts graduated from Harvard College *summa cum laude* in 3 years. He went on to Harvard Law School where he graduated *magna cum laude* and was managing editor of the Harvard Law Review.

Judge Roberts began his career by clerking for two leading Federal appellate judges, Judge Henry Friendly and Justice William Rehnquist. Judge Roberts began his career in the executive branch by serving as a Special Assistant to Attorney General William French Smith. Next, he was Associate Counsel in the White House Counsel's Office.

In the administration of President George H.W. Bush, John Roberts served as Principal Deputy Solicitor General of the Department of Justice. Upon departing Government and moving back into private practice, he was justifiably recognized as one of the leading appellate lawyers in the country. He has argued an almost astounding number of 39 cases before the Supreme Court.

John Roberts has represented a diverse group of clients, including environmental, consumer, and civil rights interests and has taken seriously his obligation to provide voluntary legal services to the poor, including criminal defendants.

Just 2 years ago, John Roberts was confirmed in the Senate without objection; not one Senator raised an objection to his nomination for a seat on the U.S. Court of Appeals for the District of Columbia Circuit. The American Bar Association evaluated Judge Roberts four times in the last 4 years, and each time he earned the highest ABA rating of "well-qualified." And four times in a row this "well-qualified" rating was unanimous. This must be some kind of a record for ABA ratings.

John Roberts has the temperament, integrity, intelligence, judgment, and judicial philosophy to lead the Supreme Court and Federal Judiciary well into the 21st century.

The Senate and the American public heard directly from John Roberts as he testified for over 20 hours before the Judiciary Committee. Most of us liked what we saw and heard. Judge Roberts told us he would bring back to the Supreme Court no agenda—political, personal, or otherwise. He told us he would consider each case based solely on the merits of the relevant facts and the applicable laws. With Judge Roberts, all litigants will continue to receive the bedrock American right of equal justice under the law.

Here is what Judge Roberts said about the rule of law during his hearing:

Somebody asked me, "Are you going to be on the side of the little guy?" And you want to give an immediate answer. But if you reflect on it, if the Constitution says the little guy should win, the little guy should win in court before me. But if the Constitution says the big guy should win, well, the big guy should win, because my obligation is to the Constitution. . . . The oath that a judge takes is not that "I'll look out for special interests" . . . the oath is to uphold the Constitution and laws of the United States and that's what I would do.

It seems to me that Judge Roberts got it exactly right. I cannot say the same thing about those, including the distinguished Senator from Massachusetts and the distinguished Senator from California, Mrs. BOXER, who embraced results-oriented litmus tests when they repeatedly asked just whose side will Judge Roberts be on in deciding cases. As Judge Roberts explained, a judge has to hear the case and consider the law before he or she decides who should prevail under the law.

I also greatly appreciated Judge Roberts' comments on judicial activism and judicial restraint. Judge Roberts believes that in our system of government, judges "do not have a commission to solve society's problems, but simply to decide cases before them according to the rule of law."

I found enlightening Judge Roberts' description about how he decides cases through a careful process of reviewing briefs, participating in oral arguments, conferring with other judges at conference, and, finally, writing the decision. He noted that he often adjusts his view of the case throughout the course of the deliberative process.

Both in his opening testimony and in answering questions, Judge Roberts

stressed the response of judges exercising institutional and personal modesty and humility. I have no doubt that this view is genuinely held by this nominee. I can say that an overwhelming majority of my fellow Utahans say they are fairly impressed with Judge Roberts' attitude toward the law and the role of judges.

Some, particularly many leftwing special interest groups, do not share my enthusiasm for Judge Roberts. Despite the fact that Judge Roberts answered dozens of questions on many topics, some complain that Judge Roberts did not answer all the questions.

Let us be clear. Under the Canons of Judicial Ethics, it would have been inappropriate for Judge Roberts to comment on matters that could come before the Court. These liberal groups apparently have forgotten that back in 1993 when Democrat nominee, Ruth Bader Ginsburg, appeared before the Judiciary Committee in connection with her 96-to-3 confirmation to the Supreme Court, she took a position of "no hints, no forecasts, no previews," on many questions.

This was consistent with what the distinguished Senator from Massachusetts, Mr. KENNEDY, said back in 1967 with respect to the Supreme Court nomination of Thurgood Marshall. He said:

We have to respect that any nominee to the Supreme Court would have to defer any comments on any matters which are either before the court or very likely to appear before the court.

Some critics argue that the administration should have turned over memos that Judge Roberts wrote in his former capacity as Deputy Solicitor General, when the fact is that several years ago a bipartisan group of seven former Solicitors General, four of whom were Democrats, wrote to the Judiciary Committee to tell us that, generally, providing these documents to the Senate and making them public was a bad idea given the unique role of the Solicitor General's Office.

Some critics assert that Judge Roberts is insufficiently sensitive to their views in some areas of the law, including civil rights, voting rights, women's rights, and abortion, Presidential power and the commerce clause. A careful analysis of Judge Roberts' professional record over the last 25 years, coupled with the rigorous review of the hearing transcript, leads to the conclusion that Judge Roberts is well within the mainstream on his general perspectives on these issues and has pledged to be fair and openminded on any future litigation involving these and other areas. I take him at his word.

For example, the distinguished Senator from Massachusetts has attempted to suggest that Judge Roberts is somehow against voting rights and other civil rights. Yet in response to questions from Senator KENNEDY, Judge Roberts clearly stated that he believed that voting is the preservative of all other rights. It is this principle

that undergirds the leading case of *Baker v. Carr* that brought us into the one man-one vote era that changed the political landscape of America.

Moreover, Judge Roberts acknowledges the importance of the Voting Rights Act, and he has supported its reauthorization and said he is unaware of any fundamental legal deficiency in the statute.

While in the Solicitor General's Office, John Roberts joined several briefs urging the Supreme Court to adopt broad interpretations of the Voting Rights Act. For example, in the 1993 case of *Voinovich v. Quilter*, Roberts successfully argued in a brief on behalf of the United States for a reading of the Ohio redistricting plan that made it easier to create minority legislative districts. The Supreme Court concurred.

To claim John Roberts is hostile to voting rights is simply not true. Nor is he hostile to, or predisposed against, any other rights, interests, or legal claims. John Roberts is committed to hearing every case in a fair, unbiased manner.

Let me conclude by saying that some, including some members of the Judiciary Committee, having failed to make a substantial case against this stellar nominee, have resorted to suggesting we are somehow "rolling the dice" or "betting the house" with this nominee.

To me, supporting John Roberts is a sound investment and, I will say, a sound investment in our Nation's future, not some long-shot bet.

John Roberts' long and distinguished record as an advocate and judge over the past 25 years, buttressed by his recent confirmation hearing testimony, demonstrates he is a bright, careful, and thoughtful legal professional of the highest integrity and character. He is not an ideologue inclined to, or bent on, high court mischief.

I think it likely one day historians will conclude that in making John Roberts our 17th Chief Justice, the President and Senate made a wise choice that helped maintain and advance the rule of law for all present and future citizens of the United States.

Mr. President, I will vote aye to confirm Judge Roberts, and I hope the vast majority of Senators will do likewise.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Alaska.

Mr. STEVENS. Mr. President, I ask unanimous consent that I be allowed to speak for a minute as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. STEVENS are printed in today's RECORD under "Morning Business.")

Mr. STEVENS. 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. GRAHAM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRAHAM. Mr. President, I would like to be recognized to speak on behalf of Judge Roberts.

The PRESIDING OFFICER. The Senator is recognized.

Mr. GRAHAM. Mr. President, as Senator HATCH indicated, I do not think we are "rolling the dice" at all to vote for this uniquely qualified man. It is not about whether he gets confirmed. He will be confirmed in the Senate by the close of business on Thursday, unless something major happens that no one anticipates now. Judge Roberts will then become the 17th Chief Justice of the U.S. Supreme Court, and his confirmation will receive somewhere in the range of 70-plus votes probably. So his nomination is not in doubt.

But I think this whole process will be viewed by scholars of the Court and those who follow the confirmation process, in the Senate particularly, in a very serious way because the vote totals do matter. He will get well over 50 votes, but the reasons being offered to vote "no" I think suggest a change in standard from the historical point of view of how the Senate approaches a nominee.

One of the things I think they will look at in the Roberts confirmation process is: What is the standard? If it is an objective standard of qualifications, character, integrity, has the person lived their life in such a way as to be able to judge fairly, not to be ideologically driven to a point where they cannot see the merits of the case, then Judge Roberts should get 100 votes. The reason I say that is, not too long ago in the history of our country President Clinton had two Supreme Court vacancies occur on his watch. One was Justice Ginsburg, who sits on the Court now. I believe she received 96 votes. The other was Justice Breyer, who sits on the Court now, who received well over 90 votes. Shortly before that, under President Bush 1's watch, Justice Scalia—a very well-known conservative—received 98 votes.

What is the difference between then and now? I think that is a very important point for the country to spend some time talking about. If he receives 70 or 75 votes, then, obviously, there has been a reduction in the vote total for someone who I think is obviously qualified. But in terms of qualifications, I am going to read some excerpts from what some Senators have said about Judge Roberts.

Senator BIDEN: Incredible. Probably one of the most schooled appellate lawyers . . . at least in his generation.

Senator BOXER: A brilliant lawyer. Well qualified. Well spoken. Affable. Unflappable.

Senator CORZINE: Eloquent. A great lawyer. A great litigator.

Senator DURBIN: A judge [who] will be loyal and faithful to the process of

law, to the rule of law. A great legal mind.

Senator FEINSTEIN: Very full and forward-speaking. Eloquent. Very precise.

Senator KENNEDY: An outstanding lawyer. A highly intelligent nominee. Well-educated and serious. A very pleasant person. Intelligent.

Senator KERRY: Obviously qualified in his legal education and litigation experience. Earnest. Friendly. Incredibly intelligent. A superb lawyer.

Senator LANDRIEU: Very well credentialed.

Senator OBAMA: Qualified to sit on the highest court in the land. Humble. Personally decent. Very able. Very intelligent. Unflappable.

Senator REID: A very smart man. An excellent lawyer. A very affable person. A thoughtful mainstream judge on the D.C. Circuit Court of Appeals.

Senator SCHUMER: Brilliant. Accomplished. Clearly brilliant. A very bright and capable man. Very, very smart man. Outstanding lawyer. Without question, an impressive, accomplished and brilliant lawyer. A decent and honorable man.

There is more, and I will read those later. I would hope half that could be said about me in any job I pursued. The reason those testimonials were offered is, it is obvious to anyone who has been watching the hearings and paid any attention to what has gone on here in the last week or so that we have in our midst one of the most well-qualified people in the history of our Nation to sit on the Supreme Court—probably the greatest legal mind of his generation or maybe of any other generation. I think when history records President Bush's selection of Judge Roberts, it will be seen historically as one of the best picks in the history of this country.

The man is a genius. I was there in his presence a whole week. He never took a note. He never asked anybody how to say something or what to say, or get any advice from anyone as to how to answer a question. He had almost complete total recall of memos from 20-some years in the past. Not only did he understand every case he was questioned upon without notes, he understood how the dissenting opinions did not reconcile themselves. I have been around a lot of smart people. I have never been around anyone as capable as Judge Roberts.

Now, why would he not get 96 or 98 or 100 votes? Well, some people have said all these glowing things but said that is not enough. There comes the problem. If him being intelligent, brilliant, a superb lawyer, the greatest legal mind of our generation, and well qualified is not enough, what is? What are some of the reasons that have been offered in terms of why anyone could not support this eminently qualified man?

Most of the reasons I think have to do with a subjective analysis of the nominee that apparently was not used before. Because if a conservative went down the road of something other than

qualifications, character, and integrity, I doubt if a conservative could have voted for Justice Ginsburg or Justice Breyer, if you wanted to use some subjective test as to how they might vote on a particular case or if you had a philosophical test in place of a qualifications test. I will talk about that a bit later.

One of the reasons people have offered for a "no" vote is that during the questioning period he would not give complete answers to constitutional issues facing the country. I think Senator KERRY said: He is a superb, brilliant lawyer, but I can't vote for him because I don't know how he will come out on the great constitutional issues of our time.

Well, I would say that is good. You are not supposed to know how he is going to decide the great constitutional questions of our time because that is done in a courtroom with litigants before the judge. It is not done in a confirmation process where you have to tell people before you go on the Court how you are going to rule.

At least one Senator has said: I can't vote for this man because he won't tell me if he will buy into the right of privacy and uphold *Roe v. Wade*. If that becomes the standard, the hearing could be limited to one question: Will you uphold *Roe v. Wade*, yes or no? And that is the end of the deal.

I would argue if we go down that road as a nation, using one case, an allegiance to one line of legal reasoning, or a particular case, whether you uphold it or whether you will reverse it, then you have done a great disservice to the judiciary because we are not looking for judges to validate our pet peeves as Senators in terms of law. We are looking for judges to sit in judgment of our fellow citizens who will wait until the case is being litigated, listen to the arguments, read the briefs, and then decide.

That is not unknown to the Senate. The idea that Court nominees in the past would refuse to give specific answers to specific cases is not unknown at all.

Mr. President, I have excerpts from past nominees and questions that were asked.

I will read some of these excerpts.

This is an abortion question by Senator Metzenbaum to Justice Ginsburg: After the *Casey* decision, some have questioned whether the right to choose is still a fundamental right. In your view, does the *Casey* decision stand for the proposition that the right to choose is a fundamental constitutional right?

That is a very direct question: Do you buy into the precepts of *Roe v. Wade*?

Ginsburg: What regulations will be permitted is certainly a matter likely to be before the Court. Answers depend in part, Senator, on the kind of record presented to the Court. It would not be appropriate for me to go beyond the Court's recent reaffirmation that abortion is a woman's right guaranteed by

the 14th amendment. It is part of the liberty guaranteed by the 14th amendment.

She recited the current law and said: There will be lines of attack on the right to privacy. I am going to wait until the record is established.

Good answer.

Voting rights. Senator Moseley-Braun: I guess my concern in Presley really is a matter of your view of the language of the statute, the specific language of section 5 of the Voting Rights Act, and given the facts of that case whether or not the Court gave too narrow an interpretation of the language in such a way that essentially frustrated the meaning of the statute as a whole.

That is a topic before the Senate now.

Ginsburg: I avoided commenting on Supreme Court decisions when other Senators raised that question, so I must adhere to that position.

The death penalty. Senator SPECTER: Let me ask you a question articulated the way we ask jurors, whether you have any conscientious scruple against the imposition of the death penalty.

Ginsburg: My own view of the death penalty I think is not relevant to any question I would be asked to decide as a judge. I will be scrupulous in applying the law on the basis of the Constitution, legislation, and precedent.

Who does that sound like?

Ginsburg: As I said in my opening remarks, my own views and what I would do if I were sitting in the legislature are not relevant to the job for which you are considering me, which is the job of a judge.

A very good answer.

Ginsburg: So I would not like to answer that question any more than I would like to answer the question of what choice I would make for myself, what reproductive choice I would make for myself. It is not relevant to what I will decide as a judge.

Now, within that answer she does two things that I think are important. She refuses to give a personal view of the death penalty based on the idea that: My personal views are not going to decide how I will judge a particular case. And for me to start commenting in that fashion will compromise my integrity as a judge. She also said: I am not going to play the role of being a legislator because that is not what judges do.

So I would argue not only did she give the right answers, but that is all Judge Roberts has done. When he is advising the President of the United States about conservative policies initiated by the Reagan administration, he is doing so as a lawyer, advising a client. He several times indicated that his personal views about matters are not going to dictate how he decides the case. What will dictate how he decides the case are the facts presented, the law in question, and the record.

All right, more about the death penalty.

Senator HATCH: But do you agree with all the current sitting members that it is constitutional, it is within the Constitution?

Again, talking about the death penalty. This is Senator HATCH trying to get Judge Ginsburg to comment on sitting members of the Court.

Ginsburg: I can tell you that I agree that what you have stated is the precedent and clearly has been the precedent since 1976. I must draw the line at that point and hope you will respect what I have tried to tell you, that I am aware of the precedent and equally aware of the principle of stare decisis.

Now, who does that sound like? That sounds like Roberts on Roe v. Wade, but she is talking about the death penalty.

HATCH: It isn't a tough question. I mean I am not asking—

Ginsburg: You asked me what was in the fifth amendment. The fifth amendment used the word "capital." I responded when you asked me what is the state of current precedents. But if you want me to take a pledge that there is one position I am not going to take, that is what you must not ask a judge to do.

So Senator HATCH was trying to draw her out on the death penalty and follow a particular line of reasoning. She says, no, I am not going to pledge to get on the Court to tip my hand there.

HATCH: But that is not what I asked you. I asked you, is it in the Constitution, is it constitutional?

Again, he was talking about the death penalty.

Ginsburg: I can tell you the fifth amendment reads, no person shall be held to answer for a capital or otherwise infamous crime unless, and the rest. But I am not going to say to this committee that I reject the position out of hand in a case as to which I have never expressed an opinion. I have never ruled on a death penalty case. I have never written about it. I have never spoken about it in a classroom.

SPECTER, on women's rights: Would you think it is appropriate for the court to employ in general terms the original understanding of the 14th amendment which you wrote about in the Washington University Law Quarterly as interpretive to women's rights?

Ginsburg: I have no comment on that, Senator SPECTER. I have said that these issues will be coming before the Court. I will not say anything in the legislative Chamber that will hint or forecast how I will vote in cases involving particular classifications.

It goes on and on. I have 30 pages here. I will put them in the RECORD. The idea that Judge Roberts, during his time before the committee, was evasive or unresponsive, different than people who came before him, is not supported by the record. What we have in this confirmation process is a frontal assault on the nominee in terms of pledging allegiance to Roe v. Wade, something that didn't happen to Ginsburg as directly.

There is at least one Senator who appears to be basing her vote on the idea that he won't tell me whether he will uphold Roe v. Wade; therefore, I can't vote for Judge Roberts. Again, I argue if that is the standard for a yes or no vote, the standard has changed dramatically. It will be unhealthy for the country as a whole. It will do great damage to the judiciary. It will be a standard Democrats would not want to be applied in the future, I can assure my colleagues.

The other issue is about the idea of civil rights, that somehow Judge Roberts' position during the Reagan administration was unfriendly to civil rights to the point that we can't vote for him. Bottom line is, of all the reasons given, that is the most distorted. That is a reason, that is a cut-and-paste job we have seen too much of to try to cast someone in a bad light for doing what their job required of them. John Roberts was in his 20s, working for the Reagan administration. The idea that he would be advising President Reagan about conservative policy initiatives shouldn't surprise anyone. That was his job.

The issue of civil rights is important to all of us. One of the worst things you can do is try to question someone's character, integrity, to the point that it puts a shadow of who they are in terms of being sensitive to other people based on race or any other difference. The idea that John Roberts, when he was working for the Reagan administration, showed a hard heart and insensitivity to people's ability to fairly vote is a shameful attack, not supported by the record. It is a cut-and-paste job. It is a distortion of what he said then, what he said now, and we ought to reject it.

The issue that was being discussed was whether Ronald Reagan's position of reauthorizing the Civil Rights Voting Act as written was extreme. The Reagan administration said: We will reauthorize the Voting Rights Act as written. The problem in the early 1980s was that you had a Supreme Court decision, the Boulder case, where the Supreme Court said that when it comes to section 2, where you look at the effects of voting patterns and whether there is discrimination being applied based on race and voting and representation, the test to determine that would be the intent test. Did the people who drew the lines setting up the voting procedures and the voting districts, was it their intent to racially discriminate and undermine African-American voting rights in the States in question. That was the test the Supreme Court applied.

Senator KENNEDY and others wanted to change that test to the effects test, where you would look at the effects of how the lines were drawn and how the districts were set up. It was an honest debate.

The third concept no one has talked much about is proportionality. The Reagan administration was against

proportional representation which is basically an electoral quota. You look at a district based on race, and you come to the conclusion that the elected officials within that district have to mirror the population. In other words, you will have a racial quota. If 40 percent of the district is of a particular race, then 40 percent of the people have to be of that race. I don't think most Americans want that. What we want is people to have a chance to run for office, be successful and vote their conscience, without anything interfering and without bad forces standing in the way. I don't think most Americans want to decide the election based on race before you cast any ballot.

That was the debate in the 1980s. The Reagan administration was against proportionality. They were standing for the Civil Rights Act as written in the 1960s. Then you had the Supreme Court case that interjected a new concept. What Judge Roberts, then a lawyer in the Reagan administration, was advising was that the current law was the intent test. The Reagan administration was supporting the Supreme Court's intent test. How that has been twisted and turned to show or to make the argument that John Roberts is insensitive to people's ability to vote and has stood in the way of people having their fair day at the ballot box, to me is a complete distortion of who he is and the position he took.

At the end of the day, here is what happened. There was a legislative compromise. The Supreme Court intent test was replaced by a totality of the circumstances test which is somewhere between the effects and intent test. I know this is a bit hard to follow, but the bottom line is, there was a compromise legislatively dealing with a Supreme Court decision. John Roberts' legal advice to the Reagan administration was very much in the mainstream of where America is, very much in the mainstream of the Reagan position. To say his legal memos arguing that proportionality was inappropriate and the intent test was based on sound legal reasoning, to somehow go from that legal reasoning to the idea that the man, the person, is insensitive to people's voting rights, again, is quite shameful.

He said in the hearing, it is the right of which everything else revolves around, the ability to go to the ballot box and express yourself.

This has happened to Judge Pickering, and it is going to happen to the next nominee. I will put the Senate on record from my point of view, coming from the South, there have been plenty of sins where I live in the South. The Voting Rights Act has cured a lot of those sins. But one of the things we should not lay on John Roberts is the idea that because he represented the Reagan administration, arguing that the Supreme Court was right, somehow he, as a person, is insensitive to minority rights.

The reason that is a bogus argument is because there is not one person who

came before the Senate Judiciary Committee or otherwise to say John Roberts has ever lived his life in a way that would suggest he is insensitive to people's rights based on race. As a matter of fact, one of the witnesses before the committee analyzed the cases Judge Roberts presented to the Supreme Court dealing with civil rights. They found out he won 71 percent of his cases dealing with civil rights issues. That says not only does he understand civil rights law well, he is arguing mainstream concepts. When he looked at how Justices agreed or disagreed with him, apparently Thurgood Marshall agreed with John Roberts, the advocate, over 60 something percent of the time. So if you look at the way he has lived his life, the way he has argued the law and who he has represented, there is not one ounce of evidence to suggest John Roberts the man is in any way insensitive to people's ability to vote based on race.

Tomorrow we will come back and we will look at the other reasons to say no to this fine man. I think we are getting into a dicey area, if we are going to play this game of voting no based on "you won't tell me how you will vote on a particular case" or that we take someone's legal advice and use the client's position against that person, that you are going to set a standard that will chill out a lot of people wanting to be members of the Court. There are other things being said about this fine man that would be dangerous if the Senate adopted as the test in the future. I will talk next time about how the sitting Justices would not fare so well. The bottom line is there is a reason that Scalia, Ginsberg, and Breyer received well over 90 votes apiece. They were well qualified. They were people of good character and good integrity.

If this man, John Roberts, after all that has been said about him in terms of his qualifications, doesn't get 90-plus votes, the Senate needs to do some self-evaluation because we have gone down the wrong road.

I yield the floor.

THE PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, let me associate myself with the remarks of the Senator from South Carolina. He so clearly lays out the foundational basis by which we ought to be reviewing nominees to our highest Court. At the same time, he brings a lot of valid criticism to those who would choose to be tremendously selective not by character but by philosophy of those who are sent to us to consider.

Like many of our colleagues engaged in the confirmation process of John Roberts to the position of the Chief Justice of the Supreme Court, I have been here before. Maybe that is one way of saying it. The last time John Roberts came before the Senate, he was confirmed for his position by unanimous consent. He was placed on the District of Columbia's Circuit Court of Appeals, the second highest in the land

as it relates to our judicial system. However, unlike most of our colleagues, I was a member of the Senate Committee on the Judiciary at that time, and his was one of the first confirmations before the committee that session. That only increased my sense of duty to thoroughly review his fitness for a lifetime appointment to the court.

Undoubtedly, one of the most serious duties of a Senator is the constitutional obligation and opportunity to confirm the President's judicial nominees. At that time I was satisfied that John Roberts was a superior candidate for the job. A review of his record for the past 20 months only proves that decision to have been the correct one. Not a single question has been raised as to his competence or his character during that time serving on the DC Circuit. Furthermore, in his time on the court, John Roberts has shown he does not bring an agenda to work with him in the morning. Rather, he takes an intellectual approach to each case, basing his rulings on the facts and the law, not any personal bias.

To the extent there has been a debate over the nomination, it has not been about Judge Roberts' qualifications to sit on the Supreme Court. Rather, he has been subject to an ideological litmus test.

I submit that this is not the job of the Senate. We are not social engineers, even though some of my colleagues might like to be, and it is not our role to pack the courts with members of certain ideologies.

Judge Roberts points out that he is not standing for election, and appropriately so. I agree with this critical distinction. We are not here to debate his politics or whether we agree with them. Our duty is to give advice and consent to our President's nominations.

To politicize this duty of supreme importance, I think is fundamentally wrong, but it is occurring with this nominee. For the last 2 weeks, we have been subjected to some of that rhetoric coming out of the Judiciary Committee which is purely political and an attempt to politicize the process. Politicizing the confirmation hearings runs contrary to the idea of an unbiased judiciary. As Judge Roberts himself has suggested, it undermines the integrity of that judicial process.

That being the case, we must ask why anyone would want to bring issues of politics to the process. The simple answer is that opponents of Judge Roberts are not looking impartially. They want a nominee who will agree with their beliefs. Judge Roberts has said, time and time again, he would not engage in bargaining or state his beliefs on specific issues.

Let me suggest that a Member who votes against this nominee because he will not state his position on a specific case or ruling is voting against an unbiased judiciary. In other words, they want a bias in the Court to fit their political beliefs instead of the unbiased

Court that our Founding Fathers envisioned.

While some seem bound and determined to inject politics into the Court and have applied intense pressure to secure his assistance in that effort, Judge Roberts has stood by his commitment to the rule of law, and that is what a judge should do.

This speaks highly of his integrity, but again his integrity is not in question. No one had brought forth any evidence to suggest that he is not a person of high moral character. In fact, many of the Members who say they will vote against his confirmation say that he appears to be a very fine fellow—smart, witty, thoughtful. So where are they going and what are they attempting to dredge up? His judicial demeanor is also not in question.

The overwhelming assessment of Judge Roberts' performance before the Senate Committee on the Judiciary is that he did an outstanding job. He remained calm, thoughtful, impartial, and unshaken. In a word, he was judicial.

I said during my tenure on that committee and during confirmation processes, while I may agree or disagree, what I was looking for was the character of the individual, the judicial demeanor: How would he or she perform on the court? Would they bring integrity to the court in those kinds of rulings to which they would be subjecting their mind and their talent?

Some believe that all documents related to Judge Roberts during his service as Deputy Solicitor General should be disclosed even though this would violate attorney-client and deliberate process privileges. He will not infringe upon past employers' rights and privileges. He knows this would discourage consultation and new ideas and reduce the effectiveness of the Office of Solicitor General. This is a man who truly exemplifies integrity. Although he is criticized for not releasing some documents, it is his integrity that will not allow that to happen. If it were not unethical to disclose these documents, I am sure the judge would release them. In fact, those that would not infringe upon his integrity have been released.

We have reviewed some 76,000 pages of documents, including documents for more than 95 percent of the cases he worked on in the Solicitor General's Office. Our access has been restricted to a mere 16 out of 327 cases. Finding Judge Roberts unfit to be Chief Justice on the grounds of undisclosed privileged internal deliberations is not only unfair, I believe it is illegal and, at any test, it is ludicrous.

Judge Roberts' competence is not being called into question, not in any sense by any Senator. It would be very difficult to find a better candidate anywhere to serve as Chief Justice. He seems to have done extremely well in whatever he has undertaken. Graduating *summa cum laude* says that this man is bright. Managing editor of the *Harvard Law Review*—that only comes

to the top of the class. Later, he clerked for Judge Friendly of the U.S. court of appeals in Manhattan and for Supreme Court Justice William Rehnquist. He has tried 39 cases before the Supreme Court, both as a private litigant and as a Government litigant while serving as the Deputy Solicitor General. Judge Roberts now serves, as I mentioned, on the U.S. Court of Appeals for the DC Circuit.

His credentials are impeccable. This man deserves a unanimous vote, as he received 20 months ago. But that will not be the case today because some have chosen to inject politics into this process. Thank goodness Judge Roberts has stood unwaveringly not allowing that to happen when it comes to himself. His integrity is not in question. That is why he was nominated by the President of the United States to serve as the Chief Justice of our highest Court.

He deserves my vote. He will get my vote. He deserves the vote of every Senator serving in the Senate.

I yield the floor.

The PRESIDING OFFICER. The Senator from Kentucky.

SENATOR BILL FRIST

Mr. MCCONNELL. Mr. President, I first met BILL FRIST 11 years ago when he was a world-renown heart transplant surgeon from the neighboring State of Tennessee. He was considering a career change to public service in the Senate. Then, as now, I believe he was one of the most gifted, hard-working, and honest people I had ever met. He is a bit of a rarity in this town. He has more talent and less ego than almost anyone I can think of.

There has been this question raised about the sale of some stock. Of course, a bit lost in this dustup is the simple fact that the Senate Ethics Committee preapproved the sale. However, this is Washington, and sometimes even honest actions are questioned.

I have absolutely no doubt that the facts will demonstrate that Senator FRIST acted in the most professional and the most ethical manner, as he has throughout his distinguished medical and Senate career.

Senator FRIST has been clear that he welcomes the opportunity to meet with the appropriate authorities and put this situation in its proper context as a completely—a completely—appropriate transaction.

Furthermore, Senator FRIST has my full and unconditional support. He is a great majority leader. I find myself agreeing with my good friend from Nevada, the Democratic leader, HARRY REID, who said he knew Senator FRIST would not do anything wrong. Senator REID has it right.

Finally, I think there are few settled facts in this contentious capital of ours, but there is one fact of which I am completely certain: BILL FRIST is a decent, honest, hard-working man who puts public service before private gain.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. ISAKSON). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, we have had several people on the Senate floor this morning speaking of the Roberts nomination. I understand that we have several Senators on this side of the aisle who are going to speak in a few minutes, and I will yield the floor when they arrive.

I hope the American people will listen to this discussion. The outcome is sort of foreordained because we know the number of people who are going to vote for Judge Roberts, as am I. The reason it is important to hear all the different voices is that we are a nation of 280 million Americans. But for the Chief Justice of the United States, only 101 people have a say in who is going to be there and, of course, they are the President, first and foremost, with the nomination, and the 100 men and women in this Senate.

We have to stand in the shoes of all 280 million Americans. Can we be absolutely sure in our vote of exactly who the Chief Justice might be as a person, somebody who will probably serve long after most of us are gone, certainly long after the President is gone and actually long after several Presidents will be gone? No. We have to make our best judgment. I have announced how I am going to vote. With me, it is a matter of conscience.

I see the distinguished Senator from Colorado. I know he wishes to speak, and I will be speaking later about this issue. I will yield the floor to the distinguished Senator from Colorado.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. SALAZAR. Mr. President, I thank my wonderful friend from Vermont for his great leadership in the Senate Judiciary Committee, along with Senator SPECTER.

I rise today concerning the nomination of Judge John Roberts to be Chief Justice of the U.S. Supreme Court. I have interviewed and recommended the appointment of many men and women who serve as State and Federal judges in my home State of Colorado. I am no stranger to analyzing the record of a candidate for the judiciary. I am no stranger to evaluating the character and temperament of people to serve in these positions. Yet I know this confirmation vote is special. It is one of the most significant votes that I will cast during my tenure as a Senator. I know this vote is likely to endure the rest of my life and the lives of those who serve in this Chamber.

The decisions of the Supreme Court significantly affect the everyday lives of the people in my State and all the people who live throughout our great Nation. The Chief Justice is first

among equals among the nine Justices who make these decisions. The Chief Justice's ability to run the Court's conferences and to assign opinions gives the Chief Justice important influence on the directions taken by the Court. The Chief Justice molds and defines the cohesiveness of the Court in the sense that he or she can lead efforts to reduce separate and complicated opinions and to make the opinions of the Court clear and understandable to all. This is an especially important influence to reduce confusion in the law.

Finally, the Chief Justice sits at the very pinnacle of our Federal judicial branch. The Chief Justice leads the judges and the rest of the 21,000 employees of the Federal court system. The Chief Justice is responsible for making sure the Federal courts run effectively and efficiently. The administrative responsibilities of the Chief Justice are important for another reason. The Chief Justice can lead the judicial branch to become a place of inclusion, a place where women are as welcome as men, and where people work together who are black, brown, yellow, white, and every other color of human skin.

The Chief Justice can make the judicial branch a shining example of diversity and inclusiveness. This is not an abstraction. When people of any background come to the Court they should be looking in the mirror. The faces of the Court should be the same as the faces of those who come before the Court. In my view, this is an essential aspect of justice.

I commend the Senate Judiciary Committee for its fair, serious, and dignified hearings on the Roberts nomination. Chairman SPECTER, Ranking Member LEAHY, and all members of the committee have earned our gratitude. They have performed a very valuable service for our country. These Senators gave us a wonderful example worthy of repetition in the Senate of how the Senate should operate in the interest of our Nation. They did their work with courtesy, civility, and in the spirit of the parties working together in good faith to discuss their differing views. Our Nation is better for their efforts.

I also want to take a minute to thank Democratic Leader REID. I have been surprised and taken aback by the attacks on him from some people in this debate. To read the musings of Washington insiders, Senator REID is somehow guilty of not uniting Democrats, and at the same time not being too beholden to Democratic interest groups. As is the usual case in the debates in Washington, the truth can be found elsewhere.

Senator REID made very clear to this Senator and to the entire caucus that this is a vote of conscience. To suggest otherwise is unfair and dishonest. Our leader, a man of unshakable faith and conviction, helped ensure that this Senate lived up to its constitutional obligation of advice and consent.

I want to speak briefly about the history of America and our Constitution concerning equality under the law and the key role of the U.S. Supreme Court. The history of equal protection is a reminder of the most painful and at the same time the most promising moments of our Supreme Court and our Nation. We must not forget that history and its lessons, for to do so would undo our progress as a nation.

In retracing our history, the inevitable conclusion is that we have made major progress over four centuries. That history includes 250 years of slavery in this country, 100 years of legal segregation of the races, and the struggle in the new and recent times to achieve another age and celebrate the age of diversity.

We must look back at that history so that we do not forget its painful lessons. We must never forget that for the first 250 years of this country, after the European settlers reached the shores of Mexico and New England, the relationship between groups was characterized by slavery and the subjugation of one group for the benefit of another.

In Mexico and in the Southwest, the Spanish enslaved Native Americans. In the East and the South, the Americans brought Blacks from Africa and treated them as property. In the Dred Scott decision in 1857, the U.S. Supreme Court, in a terrible moment for our Nation, reasoned that Blacks were inferior to Whites and therefore the system of slavery was somehow justified.

At that point, the U.S. Supreme Court was endorsing the untenable proposition that one person could own another person as property simply because of their race. But the march toward freedom and equality would not be stopped by the U.S. Supreme Court in the Dred Scott decision.

The Civil War ensued. Let us never forget that the Civil War became the bloodiest war in American history, with over 500,000 Americans killed in battle. In the end, the 13th, 14th and 15th amendments to the U.S. Constitution ended the system of slavery and ushered in a new era of equal protection under the laws. Yet even with the end of slavery and the civil rights amendments to the Constitution, equal protection under the laws for the next 100 years would still require the segregation of the races.

The law of the land in many States and cities required the separation of the races in schools, theaters, restaurants, and public accommodations. It was not until 1954 that the U.S. Supreme Court marked the end of legal segregation by the Government in its historic decision of *Brown v. Topeka Board of Education*.

In that decision, Chief Justice Warren, writing for a unanimous Supreme Court, stated that in the field of public education the doctrine of separate but equal has no place. The *Brown* decision marked an historic milestone for the U.S. Supreme Court and our Nation about the relationships between groups.

Over the next decade, the U.S. Supreme Court struck down laws that required segregation on golf courses, parks, theaters, swimming pools, and numerous other facilities. These changes were met with intense controversy, marked by marches, protests, riots, and assassinations. Because of the leadership of Dr. Martin Luther King, Presidents Kennedy and Johnson, Robert Kennedy, and thousands of civil rights activists, Congress ushered in the sweeping civil rights reforms of the 1960s.

We, as an American society, began to understand that the doctrine of separate but equal truly had no place in America and that the age of diversity truly was upon us. But the age of diversity has been marked by significant and continuing tension. A part of that debate was put to rest only recently with the majority opinion authored by Justice Sandra Day O'Connor in the University of Michigan Law School case.

There, Justice O'Connor said:

Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

Justice O'Connor continued:

The Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity.

She explained further:

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.

What is more, high-ranking retired officers and civilian leaders of the U.S. military assert that, and she quotes:

[B]ased on [their] decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security.

She continued:

. . . To fulfill its mission, the military must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.

We agree that [i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.

I believe Justice Sandra Day O'Connor was a beacon of wisdom at this moment in our Nation's history. We know we have had beacons of wisdom in our past to help guide us in our future. I am hopeful that Judge Roberts will be that kind of Chief Justice.

In 1896, Justice Harlan was a beacon of wisdom when he dissented in *Plessy v. Ferguson* against his colleagues on the U.S. Supreme Court when they decided to sanction the right to segregation under the law. Then Justice Harlan stated in his dissent:

The destinies of the races, in this country, are indissolubly linked together and the interests of both require that the common government law shall not permit the seeds of

race hate to be planted under the sanction of law.

I do not know exactly how Judge Roberts will provide us with that beacon of wisdom for the 21st century, but the doctrine of inclusion is somehow at the heart of the answer, and I expect and implore Judge Roberts to follow that doctrine.

That doctrine means that we should be inclusive of all, and that doctrine means that there is something wrong when we look around and we see no diversity in the people who surround us, and that doctrine means that the motto on our American coins, "E Pluribus Unum," can only be achieved if we include all those who make the many of us into one nation.

My criteria for the confirmation of judges remain the same as they have been. I reviewed Judge Roberts' record for fairness, impartiality, and a proven record for upholding the law. I have given this difficult decision the careful deliberation it deserves. I have reviewed his writings. I have read his cases. I have reviewed his testimony to the Judiciary Committee. I have met twice with Judge Roberts, the second time last Friday, asking him pointed and specific questions to gauge the measure of the man.

I am grateful for his courtesies and appreciative of his time. I concluded that a vote to confirm Judge Roberts as the next Chief Justice of the U.S. Supreme Court is the appropriate vote to cast. Judge Roberts' intellect is unquestioned. His technical legal skills are unquestioned. He is a lawyer that other lawyers respect, those who have worked with him as well as those who have worked against him.

Judge Roberts has convinced me that he understands the constitutional need for judicial independence. He believes in the bedrock principle that decisions of the Supreme Court must be carefully based upon the facts of the case and the law. He believes that all cases must be decided on their specific merits by a judge with an open and fair mind. These concepts lie at the heart of our judicial system. They differentiate the courts from other institutions of government. They are critical to our freedom.

I am favorably impressed by Judge Roberts' statement to do his best to heal the gaping fractures in the opinions of the Supreme Court in recent years. When the Court issues three or five or nine opinions in a single case, it is a recipe for confusion and uncertainty for judges, lawyers, and litigants. This is bad for the law.

I believe Judge Roberts has a clear understanding of the jolts to the system that disrupt the country when the Court overturns settled law, and he is equally understanding and determined to avoid these jolts. I lived through that type of difficult and expensive disruption as Colorado attorney general, when the Supreme Court changed long-settled expectations about sentencing by judges in criminal cases. The crimi-

nal justice system in Colorado and across the Nation was thrown into turmoil. It still has not recovered.

I believe Judge Roberts has an understanding of the Supreme Court's role to guide the lower courts, lawyers, and litigants, with clear and understandable direction. I have been particularly interested in Judge Roberts' views on diversity and inclusion of all people, women as well as men, in our country. I have lived my life by the bedrock principle that people of all backgrounds and both genders should be included in all aspects of our society. This is very important to me. So I have asked Judge Roberts directly and personally about his commitment to diversity and inclusiveness in our country. He has assured me of his commitment to this principle.

Finally, Judge Roberts passes a simple test that I will apply to judicial candidates for as long as I am a Senator. I do not believe he is an ideologue. He is not the kind of judge—like some—for whom anyone can predict the outcome of a case before the case is briefed and argued. The ideologue's approach to the law makes a mockery of judicial independence, and it is the opposite of being openminded and fair.

In conclusion, I have reached my decision to vote for Judge Roberts based upon his word that, first, he will stand up and fight for an independent judiciary and defend the judiciary from unwarranted attacks on its independence; second, he will not roll back the clock of progress for civil rights and recognizes that the equal protection provided under the Constitution extends to all Americans, including women and racial and ethnic minorities; third, he will respect the rule of law and the precedents of the U.S. Supreme Court, including the most important decisions of the last century; fourth, he understands the importance of the freedom of religion and religious pluralism as a cornerstone of a free America; and five, he will work to create a Federal judicial system that embraces diversity and has a face that reflects the diverse population of America.

I will vote to confirm Judge Roberts to be the Chief Justice of the United States. I wish Judge Roberts the very best as he assumes his new responsibilities on behalf of our Nation.

I yield the floor to my wonderful and good friend from the State of Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. LIEBERMAN. Mr. President, I thank my friend from Colorado for his very thoughtful and eloquent statement.

I rise to speak on the President's nomination of John Roberts of Maryland to be Chief Justice of the U.S. Supreme Court. During my 17 years as a Member of the Senate, I have had the opportunity on four previous occasions to consider nominees to the Supreme Court—two from the first President Bush and two from President Clinton.

On three of those occasions—Justices Souter, Ginsburg and Breyer—I carried out my constitutional responsibility by giving not only advice but consent. On the fourth, Justice Thomas, I withheld my consent.

I must say that on each of those preceding four occasions, I was struck, as I am again now in considering President Bush's nomination of John Roberts, by the wisdom of the Founders and Framers of our Constitution and by the perplexing position they put the Senate in when we consider a nominee to the U.S. Supreme Court.

As we know, our Founders declared their independence and formed their new government to secure the inalienable rights and freedoms which they believed are the endowment of our Creator to every person. But from their knowledge of history and humanity, and from their own experiences with the English monarch, they saw that governments had a historic tendency to stifle, not secure, the rights and freedoms of their citizens. So in constructing their new government, they allocated power and then they limited it, time and time again. Theirs was to be a government of checks and balances, except for one institution which is, generally speaking, unchecked and unlimited, and that is the Supreme Court.

I understand that Congress can reenact a statute that has been struck down by the Court as inconsistent with the Constitution, but I also know that the Court can then nullify the new statute. I understand, too, that the people may amend the Constitution to overturn a Supreme Court decision with which they disagree, but that is difficult and cumbersome and therefore rare in American history. So the Supreme Court almost always has the last word in our Government. It can be, and has been, a momentous last word, with great consequences for our national and personal lives.

Why then, in constituting the Supreme Court, did our Nation's Founders vary from their system of limited government, of checks and balances? I believe one reason is that they were wise enough to know that to be orderly, to function, a system must have a final credible point where disputation and uncertainty end and from which the work of society and government proceeds. But there was a larger reason, I am convinced, consistent with their highest value, and that was their understanding, again from their knowledge of history and humanity, that freedom can just as easily be taken by a mob of citizens as it can by a tyrannical leader. So they created a Supreme Court that was to be insulated from the political passions of the moment and that would base its decisions not only on transitory public opinion but on the eternal values of our founding documents—the Declaration, the Constitution, the Bill of Rights—and the rule of law.

They did this, these Founders and Framers, not just by giving the Court

such enormous power but also by giving its individual members life tenure. The President nominates Justices, the Senate advises and decides whether to consent, and then the Justice who is confirmed serves for as long as he or she lives or chooses to serve, absent the unusual possibility of impeachment, of course; limited in that service only by the Justice's own conscience, intellect, sense of right and wrong, understanding of what the Constitution and law demand, and by the capacity of the litigants who appear before the Court and by the Justice's own colleagues on the Court to convince him or her.

This gets to why I have described the Senate's responsibility to act on nominations to the Supreme Court as perplexing. It is our one and only chance to evaluate and influence the nominees, and then they are untouchable and politically unaccountable. But the Senate is a political body. We are elected by and accountable to the people. So naturally during the confirmation process we try to extract from the nominees to this Court, on this last chance that we have, commitments, political commitments that they will uphold the decisions of the Court with which we agree and overrule those with which we disagree; and they naturally try to avoid making such commitments.

We are both right. Because the Supreme Court has such power over our lives and liberties, we Senators are right to ask such questions. But because the Court is intended to be the nonpolitical branch of our Government, the branch before which litigants must come with confidence that the Justices' minds are open, not closed by rigid ideology or political declaration, the nominees to the Court are ultimately right to resist answering such questions in great detail. I understand that I am describing an ideal which has not always been reached by individual Justices on the Court. But on the other hand, the history of the Supreme Court is full of examples of Justices who have issued surprisingly different opinions than expected, or even than expressed before they joined the Court; and also of Justices who have changed their opinions over the years of their service on the Court. That is their right, and I would add the responsibility the Constitution gives to Justices of our Supreme Court.

Our pending decision on President Bush's nomination of John Roberts to the Supreme Court is made more difficult because it comes at an excessively partisan time in our political history. That makes it even more important that we stretch to decide it correctly and without partisan calculations, whichever side we come down on. Judge Roberts, after all, has been nominated to be Chief Justice of the highest Court of the greatest country in the world, and our decision on whether to confirm him should be a decision made above partisanship.

Today in these partisan times, it is worth remembering that seven of the

nine sitting Justices were confirmed by overwhelmingly bipartisan votes in the Senate. Justices O'Connor by 99, Stevens and Scalia by 98, Kennedy by 97, Ginsburg by 96, Souter by 90, and Breyer 89. So it was not always as it is now, and it is now hard to imagine a nominee who would receive so much bipartisan support. That is wrong and it is regrettable.

One reason for this sad turn, is that our recent Presidential campaigns have unfortunately made the Supreme Court into a partisan political issue, contrary to the intention of the Founders of our country as I have described it, with candidates in each party promising to nominate only Justices who would uphold or overrule particular prevailing Supreme Court decisions. I know that is not the first time in our history this has happened.

But it nonetheless today undercuts the credibility and independence of the Supreme Court, and I might add it complicates this confirmation process. Because President Bush promised in his campaign that he would nominate Supreme Court Justices in the mold of Justices Scalia and Thomas, an extra burden of proof was placed on Judge Roberts to prove his openness of mind and independence of judgment.

All of that is one reason why earlier this year I was proud to be one of the "group of 14" Senators. I view the agreement of that group of 14 as an important step away from partisan politicizing of the Supreme Court. By opposing the so-called nuclear option, we were saying—7 Republicans and 7 Democrats—that a nominee for a lifetime appointment to the Supreme Court should be close enough to the bipartisan mainstream of judicial thinking to obtain the support of at least 60 of the 100 Members of the Senate. That is not asking very much for this high office.

When I was asked during the deliberation of the group of 14 to describe the kind of Justice I thought would pass that kind of test, I remember saying it would be one who would not come to the Supreme Court with a prefixed ideological agenda but would approach each case with an open mind, committed to applying the Constitution and the rule of law to reach the most just result in a particular case. I remember also saying the agreement of the group of 14 could be read as a bipartisan appeal to President Bush which might be phrased in these words:

Mr. President, you won the 2004 election and with it came to the right to fill vacancies on the Supreme Court. We assume you will nominate a conservative but we appeal to you not to send us an extreme conservative who will confront the court and the country with a disruptive, divisive, predetermined ideological agenda. Send us an able, honorable nominee, Mr. President, who will take each case as it comes, listen fully to all sides, and try to do right thing.

Based on the hours of testimony Judge Roberts gave to the Judiciary Committee under oath, the lengthy personal conversation I had with him,

a review of his extraordinary legal and judicial ability and experience, and the off-the-record comments of people who have known or worked with Judge Roberts at different times of his life, and volunteered them to me, and uniformly testified to his personal integrity and decency, I conclude that John Roberts meets and passes the tests I have described. I will, therefore, consent to his nomination.

In his opening statement to the Judiciary Committee on September 13, Judge Roberts said:

I have no platform.

Judges are not politicians who can promise to do certain things in exchange for votes. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability.

I could not have asked for a more reassuring statement.

During the hearings, some of our colleagues on the Judiciary Committee challenged Judge Roberts to reconcile that excellent pledge with memos or briefs he wrote during the 1980s or early 1990s, or opinions he wrote on the Circuit Court in more recent years. They were right to do so. I thought Judge Roberts' answers brought reassurance, if not total peace of mind. But then again, I have no constitutional right to total peace of mind as a Senator advising and deciding whether to consent on a Justice of the Supreme Court.

From his statements going back more than 20 years, I was troubled by, and in some cases strongly disagreed with, opinions or work he had been involved in on fundamental questions of racial and gender equality, the right of privacy, and the commerce clause. But in each of these areas of jurisprudence, his testimony was reassuring.

On questions of civil rights, Judge Roberts told the Judiciary Committee of his respect for the Civil Rights Act and the Voting Rights Act, as precedents of the Court, and he said they "were not constitutionally suspect."

He added that he "certainly agreed that the Voting Rights Act should be extended."

When asked by Senator KENNEDY whether he agreed with Justice O'Connor's statement in upholding an affirmative action program that it was important to give "great weight to the real world impact of affirmative action policies in universities," Judge Roberts answered, "You do need to look at the real world impact in these areas and in other areas as well." He also told Senator DURBIN that he believed the Reagan administration had taken the "incorrect position" on Bob Jones University.

I have said, and I say again, that I found those answers to be reassuring.

With regard to the right of privacy, Judge Roberts gave a lengthy and informed statement: "The right of privacy is protected under the Constitution in various ways."

He said:

It's protected by the Fourth Amendment which provides that the right of people to be secure in their persons, houses, effects, and papers is protected.

It's protected under the First Amendment dealing with prohibition on establishment of a religion and guarantee of free exercise.

It protects privacy in matters of conscience.

These are all quotes from Judge Roberts, and I continue:

It was protected by the framers in areas that were of particular concern to them—: The Third Amendment protecting their homes against the quartering of troops.

And in addition the Court—has recognized that personal privacy is a component of the liberty protected by the due process clause.

The Court has explained that the liberty protected is not limited to freedom from physical restraint and that it's protected not simply procedurally, but as a substantive matter as well.

And those decisions have sketched out, over a period of years, certain aspects of privacy that are protected as part of the liberty in the due process clause of the Constitution.

I thought that was a learned embrace of the constitutional right of privacy, particularly when combined with Judge Roberts' consistent support of the principle of *stare decisis*, respect for the past decisions and precedents of the Court in the interest of stability in our judicial system and in our society.

Regarding *Roe v. Wade*, Judge Roberts specifically said, "That is a precedent entitled to respect under the principles of *stare decisis* like any other precedent of the Court."

When asked by Senator FEINSTEIN to explain further when, under *stare decisis*, a Court precedent should be revisited, Judge Roberts said:

Well, I do think you do have to look at those criteria. And the ones that I pull from these various cases are, first of all, the basic principle that it's not enough that you think that the decision was wrongly decided. That's not enough to justify revisiting it. Otherwise there would be no role for precedent, and no role for *stare decisis*. Second of all, one basis for reconsidering the issue of workability (And) . . . the issue of settled expectations, the Court has explained you look at the extent to which people have conformed their conduct to the rule and have developed settled expectations in connection with it.

Again, specifically with regard to *Roe v. Wade*, I found those answers reassuring.

One of Judge Roberts' circuit court opinions on the commerce clause gave rise to fears that he would constrict Congress's authority to legislate under that important clause. But in his consistent expressions of deference to the work of Congress and his several references to the Supreme Court's recent decision in *Gonzales v. Raich*, Judge Roberts was once more reassuring.

So I will vote to confirm John Roberts and send him off to the non-political world of the Supreme Court

with high hopes, encouraged by these words of promise he spoke to the Judiciary Committee at the end of his opening statement to that committee as follows:

If I am confirmed, I will be vigilant to protect the independence and integrity of the Supreme Court, and I will work to ensure that it upholds the rule of law and safeguards those liberties that make this land one of endless possibilities for all Americans.

I thank the Chair. I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Thank you, Mr. President.

Mr. President, along with a vote to authorize war, the vote on the nomination of a Supreme Court Justice, especially a Chief Justice, is one of the most important votes that Senators ever cast. Because the Supreme Court is the guardian of our most cherished rights and liberties, the vote on any Supreme Court nominee has enormous significance for the everyday lives of all Americans.

Supporting or opposing a Supreme Court nominee is not—and should not be—a partisan issue. Indeed, in my time in the United States Senate, I have voted to confirm nearly twice as many Republican nominees to the high Court as Democratic nominees. To be sure, there are also some nominees that I have opposed. But that opposition was not based on the political party of the President who nominated them, but on the record—or lack of record—of the testimony and writings of each individual nominee. In hindsight, there are some votes—either for or against—that I wish I had cast differently, but each vote reflected my best, considered judgment at the time, based on the information and record before me. That is what the Constitution calls us to do as Senators.

Yet some of our friends on the other side of the aisle have tried to portray a vote against John Roberts as a reflexive, partisan vote against any nominee by President Bush. Still others have made the sweeping statement that any Senator who can't vote for Roberts can't vote for any nominee of a Republican President. These broad statements are patently wrong and suggest partisan posturing that does serious injustice to the most serious business of giving a lifetime appointment to a Justice on the highest Court in the land.

With full appreciation and awareness of the Senate's solemn obligation to give advice and consent to this all-important Supreme Court nomination by President Bush, I have read the record, asked questions, re-read the record, and asked even more questions. But after reviewing the record such as it is, I am unable to support the nomination of John Roberts to be the Chief Justice of the United States Supreme Court.

Our Founders proclaimed the bedrock principle that we are all created equal. But everyone knows that in the early days of our Republic, the reality was far different. For more than two cen-

turies, we have struggled, sometimes spilling precious blood, to fulfill that unique American promise. The beliefs and sacrifices of millions of Americans throughout the history of our Nation have breathed fuller life and given real world relevance to our constitutional ideals.

With genius and foresight, our founders gave us the tools—the Constitution and the Bill of Rights—that have aided and encouraged our march towards progress. The guarantees in our founding documents, as enhanced in the wake of a divisive Civil War, have guided our Nation to live up to the promise of liberty, equality and justice for all.

We have made much progress. But our work is not finished. We still look to our elected representatives and our independent courts in each new generation to uphold those guiding principles, to continue the great march of progress, and never to turn back or give up hard-won gains.

The commitment to this march of progress was the central issue in the John Roberts hearing. We asked whether he, as Chief Justice, would bring the values, ideals and vision to lead us on the path of continued equality, fairness, and opportunity for all. Or would he stand in the way of progress by viewing the issues that come before the Court in a narrow and legalistic way, thereby slowly turning back the clock and eroding the civil rights and equal rights gains of the past.

We examined the only written record before us and saw John Roberts, aggressive activist in the Reagan Administration, eager to narrow hard-won rights and liberties, especially voting rights, women's rights, civil rights, and disability rights. As Congressman John Lewis eloquently stated in our hearings, 25 years ago John Roberts was on the wrong side of the nation's struggle to achieve genuine equality of opportunity for all Americans. And, despite many invitations to do so, Judge Roberts never distanced himself from the aggressively narrow views of that young lawyer in the Reagan administration.

Who is John Roberts today? Who will he be as the 17th Chief Justice of the United States?

John Roberts is a highly intelligent nominee. He has argued 39 cases before the Supreme Court, and won more than half of them. He is adept at turning questions on their head while giving seemingly appropriate answers. These skills served him well as a Supreme Court advocate. These same skills, however, did not contribute to a productive confirmation process. At the end of the 4 days of hearings, we still know very little more than we knew when we started.

John Roberts said that "the responsibility of the judicial branch is to decide particular cases that are presented to them in this area according to the rule of law."

Of course, everyone agrees with that. Each of us took an oath of office to

protect and defend the Constitution, and we take that oath seriously. But the rule of law does not exist in a vacuum. Constitutional values and ideals inform all legal decisions. But John Roberts never shared with us his own constitutional values and ideals.

He said that a judge should be like an umpire, calling the balls and strikes, but not making the rules.

But we all know that with any umpire, the call may depend on your point of view. An instant replay from another angle can show a very different result. Umpires follow the rules of the game. But in critical cases, it may well depend on where they are standing when they make the call.

The same is true with judges.

As Justice Oliver Wendell Holmes famously stated: "The life of the law has not been logic; it has been experience." He also said that legal decisions are not like mathematics. If they were, we wouldn't need men and women of reason and intellect to sit on the bench—we would simply input the facts and the law into some computer program and wait for a mechanical result.

We all believe in the rule of law. But that is just the beginning of the conversation when it comes to the meaning of the Constitution. Everyone follows the same text. But the meaning of the text is often imprecise. You must examine the intent of the Framers, the history, and the current reality. And this examination will lead to very different outcomes depending on each Justice's constitutional world view. Is it a full and generous view of our rights and liberties and of government power to protect the people or a narrow and cramped view of those rights and liberties and the government's power to protect ordinary Americans?

Based on the record available, there is insufficient evidence to conclude that Judge Roberts' view of the rule of law would include as paramount the protection of basic rights. The values and perspectives displayed over and over again in his record cast doubt on his view of voting rights, women's rights, civil rights, and disability rights.

In fact, for all the hoopla and razzle-dazzle in four days of hearings, there is precious little in the record to suggest that a Chief Justice John Roberts would espouse anything less than the narrow and cramped view that staff attorney John Roberts so strongly advocated in the 1980s.

On the first day of the hearing, Senator KOHL asked, "Which of those positions were you supportive of, or are you still supportive of, and which would you disavow?" Judge Roberts never gave a clear response.

Other than his grudging concession during the hearing that he knows of no present challenge that would make section 2 of the Voting Rights Act "constitutionally suspect"—a concession that took almost 20 minutes of my questioning to elicit—John Roberts has a demonstrated record of strong oppo-

sition to section 2, which is almost universally considered to be the most powerful and effective civil rights law ever enacted. Section 2 outlaws voting practices that deny or dilute the right to vote based on race, national origin, or language minority status—and is largely uncontroversial today.

But in 1981 and 1982, Judge Roberts urged the administration to oppose a bi-partisan amendment to strengthen section 2, and to have, instead, a provision that made it more difficult some say impossible to prove discriminatory voting practices and procedures. Although Judge Roberts sought to characterize his opposition to the so-called "effects test" as simply following the policy of the Reagan administration, the dozens of memos he wrote on this subject show that he personally believed the administration was right to oppose the "effects test."

When Roberts worried that the Senate might reject his position, he urged the Attorney General to send a letter to the Senate opposing the amendment, stating, "My own view is that something must be done to educate the Senators. . . ."

He also urged the Attorney General to assert his leadership against the amendment strengthening section 2. He wrote that the Attorney General should "head off any retrenchment efforts" by the White House staff who were inclined to support the effects test. He consistently urged the administration to require voters to bear the heavy burden of proving discriminatory intent—even on laws passed a century earlier—in order to overturn practices that locked them out of the electoral process.

Judge Roberts wrote at the time that "violations of section 2 should not be made too easy to prove. . . ." Remember, when he wrote those words there had been no African-Americans elected to Congress since Reconstruction from seven of the States with the largest black populations.

The year after section 2 was signed into law, Judge Roberts wrote in a memorandum to the White House Counsel that "we were burned" by the Voting Rights Act legislation.

Given his clear record of hostility to this key voting rights protection, the public has a right to know if he still holds these views. But Judge Roberts gave us hardly a clue.

Even when Senator FEINGOLD asked whether Judge Roberts would acknowledge today that he had been wrong to oppose the effects test, he refused to give a yes-or-no answer.

Judge Roberts responded: "I'm certainly not an expert in the area and haven't followed and have no way of evaluating the relative effectiveness of the law as amended or the law as it was prior to 1982."

So we still don't know whether he supports the basic law against voting practices that result in denying voting rights because of race, national origin, or language minority status.

You don't need to be a voting rights expert to say we're better off today in an America where persons of color can be elected to Congress from any State in the country. You don't need to be a voting rights expert to know there was a problem in 1982, when no African American had been elected to Congress since Reconstruction from Mississippi, Florida, Alabama, North Carolina, South Carolina, Virginia, or Louisiana—where African Americans were almost a third of the population—because restrictive election systems effectively denied African Americans and other minorities the equal chance to elect representatives of their choice.

You don't need to be a voting rights expert to say it's better that the Voting Rights Act paved the way for over 9,000 African American elected officials and over 6,000 Latino elected officials who have been elected and appointed nationwide since the passage of that act.

And you don't need to be an expert to recognize that section 2 has benefited Native Americans, Asians and others who historically encountered harsh barriers to full political participation.

Yet Judge Roberts refused in the hearings to say that his past opposition to section 2 doesn't represent his current views.

Judge Roberts also refused to disavow his past record of opposition to requiring non-discrimination by recipients of federal funds. These laws were adopted because, as President Kennedy said in 1963, "[s]imple justice requires that public funds, to which all taxpayers . . . contribute, not be spent in any fashion which . . . subsidizes, or results in . . . discrimination."

He supported a cramped and narrow view that would exempt many formerly covered institutions from following civil rights laws that protect women, minorities and the disabled. Under that view, the enormous subsidies the Federal government gives colleges and universities in the form of Federal financial aid would not have been enough to require them to obey the laws against discrimination. That position was so extreme that it was rejected by the Reagan administration and later by the Supreme Court. Although Judge Roberts later acknowledged that the Reagan administration rejected this view, he would not tell the committee whether he still holds that view today.

He also never stated whether he personally agrees with the decision in *Franklin v. Gwinnett*, where the Supreme Court unanimously rejected his argument that title IX, the landmark law against gender discrimination, provided no monetary relief to a schoolgirl who was sexually abused by her schoolteacher.

A careful reading of the transcript of his testimony makes clear that he never embraced the Supreme Court's decision to uphold affirmative action at the University of Michigan Law School, nor did he expressly agree with the Supreme Court decision that all

children—including those who are undocumented—have a legal right to public education. He emphasized his agreement with certain rationales used by the court in those cases, but he left himself a lot of wiggle room for future reconsideration of those 5-4 decisions.

Finally, a number of my colleagues on the committee asked Judge Roberts about issues related to women's rights and a woman's right to privacy. On these important matters, too, he never gave answers that shed light on his current views.

No one is entitled to become Chief Justice of the United States. The confirmation of nominees to our courts—by and with the advice and consent of the Senate—should not require a leap of faith. Nominees must earn their confirmation by providing us and the American people with full knowledge of the values and convictions they will bring to decisions that may profoundly affect our progress as a nation toward the ideal of equality.

Judge Roberts has not done so. His repeated reference to the rule of law reveals little about the values he would bring to the job of Chief Justice of the United States. The record we have puts at serious risk the progress we have made toward our common American vision of equal opportunity for all of our citizens.

There is clear and convincing evidence that John Roberts is the wrong choice for Chief Justice. I oppose the nomination. I urge my colleagues to do the same.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ALEXANDER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BURR). Without objection, it is so ordered.

Mr. ALEXANDER. Mr. President, my constituents have been asking me, "Who will President Bush nominate for the second Supreme Court vacancy?" The question reminds me of a story about a punter from California who went all the way to the University of Alabama to play for Coach Bear Bryant. Day after day, this punter would kick it more than 70 yards in practice. Day after day, Coach Bear Bryant watched the punter kick it 70 yards and said nothing. Finally the young kicker came over to the coach and said: Coach, I came all the way from California to Alabama to be coached by you. I have been out here kicking for a week, and you haven't said a word to me.

Coach Bryant looked at him and said: Son, when you start kicking it less than 70 yards, I will come over there and remind you what you were doing when you kicked it more than 70 yards.

That is the way I feel about President Bush and the next Supreme Court nominee. My only suggestion for him

would be respectfully to suggest that he try to remember what he was thinking when he appointed John Roberts and to do it again. Especially for those of us who have been trained in and who have respect for the legal profession, it has been a pleasure to watch the Roberts nomination and confirmation process. It is difficult to overstate how good he seems to be. He has the resume that most talented law students only dream of: editor of the Harvard Law Review and a law clerk to Judge Henry Friendly.

I was a law clerk to Judge John Minor Wisdom in New Orleans, who regarded Henry Friendly as one of the two or three best Federal appellate judges of the last century. In fact, we law clerks used to sit around and think about ideal Federal panels on which three judges would sit. Sometimes Judge Wisdom and Judge Friendly would sit on the same panel, and we tried to think of a third judge. There was a judge named Allgood. We thought if we could get a panel of judges named Wisdom, Friendly, and Allgood, we would have the ideal panel.

So Judge Roberts learned from Judge Friendly. Then he was law clerk to the Chief Justice of the United States. Add to that his time in the Solicitor General's Office, where only the best of the best lawyers are invited to serve; then his success as an advocate before the Supreme Court both in private and in public practice. Then what is especially appealing is his demeanor, his modesty both in philosophy and in person, something that is not always so evident in a person of superior intelligence and such great accomplishment. Then there are the stories we heard during the confirmation process of private kindnesses to colleagues with whom he worked.

Judge Roberts' testimony before the Senate Judiciary Committee demonstrated all those qualities, as well as qualities of good humor and intelligence, and an impressive command of the body of law that Supreme Court Justices must consider. Those televised episodes, which I took time to watch a number of, could be the basis for many law school classes or many civics classes. Judge Roberts brings, as he repeatedly assured Senators on the committee, no agenda to the Supreme Court. He understands that he did not write the Constitution but that he is to interpret it, that he does not make laws—Congress does that—but that he is to apply them. He demonstrates that he understands the Federal system. It is not too much to say that for a devotee of the law, watching John Roberts in those hearings was like having the privilege of watching Michael Jordan play basketball at the University of North Carolina in the early 1980s or watching Chet Atkins as a sessions guitarist in the 1950s in Nashville.

One doesn't have to be a great student of the law to recognize there is unusual talent here.

If Judge Roberts' professional qualifications and temperament are so uni-

versally acclaimed, why do we now hear so much talk of changing the rules and voting only for those Justices who we can be assured are "on our side"? That would be the wrong direction for the Senate to go. In the first place, history teaches us that those who try to predict how Supreme Court nominees will decide cases are almost always wrong. Felix Frankfurter surprised Franklin Roosevelt. Hugo Black surprised the South. David Souter surprised almost everybody. In the second place, courts were never intended to be set up as political bodies that could be relied upon to be predictably on one side or the other of a controversy. That is what Congress is for. That is why we go through elections. That is why we are here. Courts are set up to do just the opposite, to hear the facts and apply the law and the Constitution in controversial matters. Who will have confidence in a system of justice that is deliberately rigged to be on one side or the other despite what the facts and the law are?

Finally, failing to give broad approval to an obviously well-qualified nominee such as Judge Roberts—just because he is "not on your side"—reduces the prestige of the Supreme Court. It jeopardizes its independence. It makes it less effective as it seeks to perform its indispensable role in our constitutional republic.

For these three reasons, Republican and Democratic Senators, after full hearings and discussion, have traditionally given well-qualified nominees for Supreme Court Justice an overwhelming vote of approval. I am not talking about the ancient past. I am talking about the members of today's Supreme Court, none of whom are better qualified than Judge Roberts. For example, Justice Breyer was confirmed by a vote of 87 to 9 in a Congress composed of 57 Democrats and 43 Republicans. Justice Ginsburg was confirmed by a vote of 96 to 3 in the same Congress. Justice Souter was confirmed by a vote of 90 to 9 in a Congress composed of 55 Democrats and 45 Republicans. Justice Kennedy was confirmed by a vote of 97 to 0 in a Congress composed of 55 Democrats, 45 Republicans. Justice Scalia, no shrinking violet, was confirmed by a vote of 98 to 0 in a Congress composed of 47 Democrats as well as 53 Republicans. Justice O'Connor was confirmed by a vote of 99 to 0 in a Congress composed of 46 Democrats and 53 Republicans. And Justice Stevens was confirmed by a vote of 98 to 0 in a Congress composed of 61 Democrats and 37 Republicans. The only close vote, of those justices on this Court, was for the nomination of Justice Thomas, following certain questions of alleged misconduct by the nominee. Thomas was confirmed by a vote of 52 to 48. However, even in that vote, 11 Democrats crossed the aisle to support the nominee.

If almost all Republican Senators can vote for Justice Ginsburg, a former counsel for the American Civil Liberties Union, and a nominee who also

declined, as Judge Roberts occasionally did, to answer questions so as not to jeopardize the independence of the Court on cases that might come before her. If every single Democratic Senator could vote for Justice Scalia, then why cannot virtually every Senator in this Chamber vote to confirm John Roberts?

I was Governor for 8 years in Tennessee. I appointed about 50 judges. I looked for the qualities that Judge Roberts has so amply demonstrated: intelligence, good character, respect for the law, restraint, and respect for those who might come before the court. I did not ask one of my nominees how he or she might vote on abortion or on immigration or on taxation. I appointed the first woman circuit judge, as well as men. I appointed the first African-American chancellor and the first African-American State supreme court justice. I appointed some Democrats as well as Republicans. That process, looking back, has served our State well. It helped to build respect for the independence and fairness of our judiciary.

I hope that we Senators will try to do the same as we consider this nomination for the Supreme Court of the United States. It is unlikely in our lifetime that we will see a nominee for the Supreme Court whose professional accomplishments, demeanor, and intelligence is superior to that of John Roberts. If that is so, then I would hope that my colleagues on both sides of the aisle will do what they did for all but one member of the current Supreme Court and most of the previous Justices in our history and vote to confirm him by an overwhelming majority.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. NELSON of Florida. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### ENERGY

Mr. NELSON of Florida. Mr. President, I am going to vote for Judge Roberts as Chief Justice. I will be making a lengthy statement later on in the day as there is time allowed, since the time allocated right now under the previous order is very limited.

However, I did want to take this opportunity to say, with the fresh memories of Katrina and now Rita, I think it is incumbent upon us to finally get our collective heads as Americans out of the sand and face up to the fact that we are dependent on foreign energy sources, and that since we cannot drill our way out of the problem because the development of those resources of oil would take years and years to complete, one of the great natural resources of this country is coal.

Of course, that does not affect my State of Florida; we have 300 years of

reserves of coal, and we now have the technology to cook this coal with highly intense heat in what is known as a coal gasification project. It burns off the gas, and that is a clean-burning gas.

It would be my hope that this country will start getting serious about weaning ourselves from dependence on foreign oil by using our technology to address this problem.

So that is what I wanted to share with my colleagues, since there were a couple of minutes under the previous order, and then I will be making my statement about Judge Roberts later in the day.

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. I ask unanimous consent that the time be extended until the end of my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CHAMBLISS. Mr. President, I rise in support of the nomination of John G. Roberts to be Chief Justice of the United States. By his nomination of Judge Roberts to be Chief Justice, President Bush has not only fulfilled his constitutional responsibility but he has demonstrated sound judgment and great wisdom by this nomination.

In bipartisan fashion, our colleagues on the Judiciary Committee have similarly demonstrated such judgment and wisdom in recommending that we consent to that nomination. I urge my colleagues to follow the committee's recommendation.

Judge Roberts is an able jurist, a decent man, and he should be the next Chief Justice of the Supreme Court of the United States. Both by his professional career and his answers to questions during the committee's consideration of his nomination, Judge Roberts has demonstrated his unwavering fidelity to the Constitution and commitment to the rule of law.

"The rule of law" is a phrase often used in public discourse. It trips easily off the tongue. Too often, it seems, we recite it with a banality that comes with the assumption that it is self-evident and self-executing. It is neither.

Jefferson wisely taught that eternal vigilance is the price of liberty. So, too, the rule of law requires both vigilance and continuous oversight.

Far beyond fulfilling the constitutional responsibilities of this body, the confirmation process involving Judge Roberts has served as an essential reminder of the constitutional role of judges and the judiciary under our Republican form of government. At a time when too many of those in the judicial branch have sought to use their lifetime-tenured position to advance their own personal ideological or political preferences in deciding matters which come before them, at a time when too many within the legal, media, and political elites have sought to recast the role of the judiciary into a superlegislature, approving of and

even urging judges to supplant their views for those of the elected representatives of the American people, Judge Roberts has served to remind us that such actions and such views are anticonstitutional and contrary to the rule of law itself.

The American people have listened to Judge Roberts in this regard. They like what they have heard because it rings true with what we all learned but some have forgotten, from high school civics class and what we profess in doctrines of separation of powers among the branches of our Federal Government.

Let me repeat some of what Judge Roberts has said:

Judges and Justices are servants of the law, not the other way around.

Judges are not to legislate, they're not to execute the laws.

Judges need to appreciate that the legitimacy of their action is confined to interpreting the law and not making it.

Judges are not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs.

These are simple but profound statements. They go to the heart of our constitutional system and what we mean by the rule of law.

As Chief Justice of the United States, John Roberts will not only serve as the Chief Justice of the Supreme Court but he will also serve as the leader of the entire Federal judiciary, setting the standards, showing the way, and speaking for an entire branch of our Federal Government. Every judge in our Federal system and every person who aspires to join its ranks at some future date should hear and receive Judge Roberts' words and seek to follow them with fidelity. A lot is riding on their willingness to do so.

Judicial independence is another phrase bantered about of late by judges and others who feel threatened by legitimate congressional oversight of the judiciary. Judicial independence does not exist to shield judges from congressional and public scrutiny from improper judicial actions. Judicial independence does not shield judges from the inquiry of impeachment and removal from office for lawless actions on the bench. Federal judges, appointed for life, subject to removal only upon impeachment, are afforded this extraordinary power precisely to permit them to follow the law, even when following the law may be politically unpopular.

Describing his own fidelity to the Constitution and to the rule of law, Judge Roberts told the Judiciary Committee:

As a judge I have no agenda. I have a guide in the Constitution and the laws and the precedents of the Court, and those are what I would apply with an open mind, after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench.

We should confirm Judge Roberts not merely because he said that; we should

confirm him because he has lived it. We can ask no more of our judges but we must ask no less. Let this be the standard we apply to this nominee and to future nominees, both to the Supreme Court and to lower courts.

I urge my colleagues to confirm the President's nomination of Judge John G. Roberts as Chief Justice of the United States.

I yield the floor.

#### RECESS

The PRESIDING OFFICER. Under the previous order, the hour of 12:30 p.m. having arrived, the Senate will stand in recess until 2:15 p.m.

Thereupon, the Senate, at 12:38 p.m., recessed until 2:20 p.m. and reassembled when called to order by the Presiding Officer (Mr. CHAMBLISS).

#### EXECUTIVE SESSION

NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES—Continued

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, what is pending before the Senate?

The PRESIDING OFFICER. Under the previous order, the time from 2:15 to 2:45 p.m. will be under the control of the majority. We are on the Roberts nomination.

Mr. SESSIONS. Mr. President, I appreciate the opportunity to share some thoughts on this important matter and I probably will speak again before this final vote occurs.

Mr. President, this is an important process. What we are doing here is more important than the average confirmation, in my view. What has been going on for virtually the entire time I have been in the Senate, going on 8 years, and certainly in the last 5 years, has been a rigorous and vigorous debate over the role of courts in American life. The American people have become very concerned that those we appoint and confirm to the Federal judiciary and have been given a lifetime appointment, as a result of that are unaccountable to the American people; that they are not, therefore, any longer a part of the democratic process and can only be removed from office on causes relating to an impeachment or their own resignation or death.

This has raised concerns because these lifetime-appointed, unaccountable officials of our Government have set about to carry out political agendas. There is no other way to say it. I hate to be negative about our courts because I believe in our courts. The courts I practiced before, the Federal courts in Alabama, are faithful to the law. If a Democratic judge or Republican judge, a liberal or conservative, is faithful to the law, I do not see a problem. Overwhelmingly, in the courts of America today, justice is done.

But we have a growing tendency among the members of our Supreme Court. Many of them have been there for many years. It strikes me that perhaps they have lost some discipline. They have forgotten they were appointed and not anointed. As my good friend said—a former judge, now deceased, Judge Thomas, in the Southern District of Alabama: Remember, you were appointed, not anointed.

I think they have forgotten that. I believe they have begun to think it is important for them and the courts to settle disputed social issues in the country; that they are somehow an elite group of guardians of the public health and that they should protect us from ourselves on occasion.

We have seen that. We have seen a series of opinions that, as a lawyer, I believe cannot be justified as being consistent with the words or any fair interpretation of the words of the Constitution of the United States. That is what a judge is sworn to uphold.

These issues are important, as I said, because if this is true, and if judges are going beyond what they have been empowered to do, and they are twisting or redefining or massaging the words of the Constitution to justify them in an unjustified act of imposing a personal view on America, then that is a serious problem indeed, and I am afraid that is what we have.

They say it is good. The law schools, some of them, these professors, believe judges should be strong and vigorous and active and should expand the law and that the Constitution is living. So, therefore "living" means, I suppose, you can make it say what you want it to say this very moment.

But Professor Van Alstyne at Duke once said to a judicial conference I attended many years ago: If you love this Constitution, if you really love it, if you respect it, you will enforce it—"it"—as it is written. When judges don't do that they therefore do not respect the Constitution. In fact, they create a situation in which a future court may be less bound by that great document. It can erode our great liberties in ways we cannot possibly imagine today.

The name of Justice Ginsburg sometimes came up at Judge Roberts hearings because of her liberal positions on a number of issues before she went on the bench. Yet she was confirmed overwhelmingly. An argument was made therefore Judge Roberts, who has mainstream views, ought to be confirmed. She just recently made a speech to the New York Bar Association. She said she was not happy being the only female Justice on the Court but she stated:

Any woman will not do. There are some women who might be appointed who would not advance human rights or women's rights.

What about other groups' rights? Do you need to advance all those other rights, too? And what is a right?

Then she dealt with the question of foreign law being cited by the Supreme

Court of the United States. We have had a spate of judges, sometimes in opinions and sometimes in speeches, making comments that suggest their interpretation of the law was influenced by what foreign people have done in other countries. She said:

I will take enlightenment wherever I can get it. I don't want to stop at the national boundary.

Then she noted that she had a list of qualified female nominees, but the President hadn't consulted with her—and I would hope not, frankly.

Why are we concerned about citing foreign law? We are concerned because this is an element of activism. Our historic liberties are threatened when we turn to foreign law for answers.

This is a bad philosophy and a bad tendency because we are not bound by the European Union. We didn't adopt whatever constitution or laws or documents they have in the European Union. What does our Constitution say?

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Not some other one. Not one you would like, not the way you might like to have had it written, but this one. That is the one that we passed. That is the one the people have ratified. That is the one the people have amended. And that is the one a judge takes an oath to enforce whether he or she likes it or not.

You tell me how an opinion out of Europe or Canada or any other place in the world has any real ability to help interpret a Constitution, a provision of which may have been adopted 200 years ago.

I submit not.

You see, we have to call on our judges to be faithful to that. I do not want, I do not desire, and the President of the United States has said repeatedly that he does not want, he does not desire that a judge promote his political or social agenda. That is what we fight out in this room right here, right amongst all of us. We battle it out, and I am answerable to the people in my State, the State of Alabama. That is who I answer to, and each one of us answers to the people in our states; and the President answers to all the people of the United States. That is where the political decisions are made, and we leave legal decisions in the court.

My time to speak is limited. I will close with this: We have never had a judge come before this Senate, in my opinion, who has in any way come close to expressing so beautifully and so richly and so intelligently the proper role of a court. Judge Roberts used a common phrase: You should be a neutral umpire. Certainly he should be that. Absolutely that is a good phrase.

A judge should be modest. He should decide the facts and the law before the