
from the office of
Senator Edward M. Kennedy
of Massachusetts

FOR IMMEDIATE RELEASE
April 30, 2003

CONTACT: Stephanie Cutler
(202) 224-2633

**OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE
JUDICIARY COMMITTEE EXECUTIVE SESSION ON THE
JOHN ROBERTS NOMINATION**

We welcome the nominee back to the Committee to continue the truncated hearing which began three months ago. I hope that the decision to continue this hearing, after the confusion and conflict of the past few months, is a sign that we can restore the broader sense of comity and good will which has characterized the operations of this Committee for most of the four decades during which I have served on it.

The advice and consent function assigned to us by the framers of the Constitution is vital to the proper functioning of our government. It was a major feature of the structure the framers designed not only for themselves but for all future generations. We do not sit here today merely to express our individual preferences about particular judges or even to express the preferences of our constituents. We act today as inheritors of a great tradition and a great responsibility to balance the powers of the Executive branch in selecting the members of the Judicial Branch.

We were given the advice and consent power over judicial appointments so that the two elected branches -- the Executive and the Legislative -- would share co-ordinate and co-equal responsibility for the third branch, the "undemocratic" branch where judges are insulated from us, from the President and from the electorate by lifetime appointments.

But the framers gave us insulation too, so that we could exercise our functions -- including the advice and consent function -- fearlessly and freely even when required to consider the actions of a popular President. We were given six-year terms -- longer than the House and longer than the President. We were given staggered terms, so that no more than a third of us would be at risk at one time. And we were given the authority to set our own rules for the way we exercise our responsibilities, including advice and consent.

We have a historic obligation to assure that the Judicial branch remains free and independent, that it is not a political tool of the Executive, that its obligation is to the Constitutional principles and Constitutional rights which lie at the heart of our democracy. Our role is positive and proactive, not passive and reactive, regardless of whether the President shares our political or philosophical views.

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And we on the Judiciary Committee have a unique role which we cannot fulfill unless we have ample opportunity in Committee to question the nominees and to discuss in detail how we think the advice and consent power should be exercised with respect to each nominee. That process resumes today with respect to Mr. Roberts.

His appointment is a special one because he has been nominated for a special court. The D.C. Circuit makes decisions with national impact on the lives of all of the American people. Its decisions govern the scope and effectiveness of

- occupational health and safety laws
- consumer protection laws
- federal labor laws
- fair employment laws, including race, gender, and disability discrimination cases
- workers' rights to organize
- Clean Air Act rules
- Freedom of information rules
- First Amendment rights in broadcast media

and many other rights of individuals under the Constitution and laws enacted by Congress.

And so we must take special care with this and all other appointments to this court.

No one has a right to be appointed to any federal appellate court. The burden is on the President and the nominee to demonstrate that the nomination should be consented to. Of course, the less weight the President places on the Senate's "advice" role, the more weight must be placed on our consent role. Because the District of Columbia has no Senators of its own, the usual pre-appointment consultation has not occurred, leaving an even heavier burden on the process we conduct today. Let us approach it with the seriousness of purpose and deliberation it deserves.