

said that the Constitution means today what it meant when it was written, and he even uses an 18th century dictionary to understand what the 1789 words meant.

Do you believe judges pick and choose? I mean, how do you do a literal interpretation?

Mr. ROBERTS. Well, we talked about this some at the first hearing. Again, the Supreme Court has given some guidance on particular areas and said that when you're interpreting this particular provision, this is the kind of approach you should use. The example I like to give is the Seventh Amendment. The Court has said: We take a very historical approach to deciding whether you have a right to a jury trial because of the way the Seventh Amendment is worded.

So even if I decided I am going to be a textualist or an originalist or whatever, I do not have the flexibility, when I get to a Seventh Amendment case. The approach, not just the particular results, but the approach is laid out as well there.

Now, when you get to the Eleventh Amendment, the one thing we know from the Supreme Court's decision is that strict adherence to a text doesn't give you what the Supreme Court says are the right answers. You have to look at the historical context a little more, and it varies with provisions, as we've said. There's a provision in the Constitution that says a two-thirds vote of the Senate is required. Well, even if you think provisions should be interpreted in light of evolving standards, that doesn't mean two-thirds can become three-fifths.

Unreasonable searches and seizures, that's a little more difficult to say just based on the text I know what's unreasonable and what's not. You have to look beyond the text in interpreting that.

Senator LEAHY. Thank you. I will have further questions. I will submit some for the record, and I know that the distinguished Chairman intends to have a Committee vote next week, and I would urge you to get answers back in time so that we can have a chance to review them in case there are follow-ups.

Mr. ROBERTS. Thank you, Senator.

Senator LEAHY. It is good to see you again.

Mr. ROBERTS. Thank you.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Kennedy. Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

Welcome back.

Mr. ROBERTS. Senator Kennedy, thank you.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR  
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. We welcome the nominee back to the Committee to continue the hearing which began 3 months ago.

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 of the Framers' design, not only for themselves, but for all future generations, and we do not sit here today merely to express our individual preferences about particular judges or even to express the preference 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 coordinate and co-equal responsibility for the third branch, the undemocratic branch, in which the judges are insulated from us, and 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 6-year terms, longer the House, longer the President. We were given staggered terms so no more than a third of us would be elected 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 had the constitutional obligation to assure the Judicial Branch remains free and independent, is not a political tool of the Executive, that its obligation is to the constitutional principles, 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.

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

His nomination is a special one because he has been nominated for a special court. The D.C. Circuit makes the decision with national impact on the lives of all of the American people.

Its decisions govern the scope and the effectiveness of our Occupational Health and Safety laws, of our consumer protection laws, of Federal labor laws, of fair employment laws, including race, gender, disability and discrimination cases, of 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 laws enacted by Congress, and so we must take special care with this and all other appointments to this court.

No one has the right to be appointed to any Federal appellate court. The burden is on the President and the nominee to demonstrate that the nomination should have our consent. 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 prenomination consultation has not occurred, leaving an even heavier burden on the process that we conduct today. So let us approach it with the seriousness of purpose and deliberation it deserves.

Mr. Roberts, you responded to questions, the written questions, for which I am grateful. I would like to pick up on some of these.

You describe your judicial philosophy as insisting that judges confine themselves to adjudication of the cases before them and not legislate. You want judges to show an essential humility, grounded

in the limited role of an undemocratic judiciary, reflected in deference to legislative policy judgments and judicial restraint, not shaping policy.

Now, as you are well aware, in the recent years, we in Congress have made bipartisan legislative judgments about policy on issues vital to the public, based on extensive hearings and findings, yet we have had our policy discussion second-guessed by appellate judges.

How would you describe the presumption of validity that should attach to our actions, and what do you think we can do to insulate ourselves from this second-guessing on policy issues by judges who do not adhere to the humility and deference standard you prescribe?

And what in your writings, in your professional record, should demonstrate and reassure us that, as a judge, you would, in fact, act with the humility and deference to Congressional judgments which you claim is your philosophy?

Mr. ROBERTS. Well, the Supreme Court has, throughout its history, on many occasions described the deference that is due to legislative judgments. Justice Holmes described assessing the constitutionality of an act of Congress as the gravest duty that the Supreme Court is called upon to perform.

I'm familiar with those quotations because I've used them in briefs many times when I was in the Justice Department representing the United States and defending acts of Congress before the Supreme Court, and it's a principle that is easily stated and needs to be observed in practice, as well as in theory.

Now, the Court, of course, has the obligation, and has been recognized since *Marbury v. Madison*, to assess the constitutionality of acts of Congress, and when those acts are challenged, it is the obligation of the Court to say what the law is.

The determination of when deference to legislative policy judgments goes too far and becomes abdication of the judicial responsibility, and when scrutiny of those judgments goes too far on the part of the judges and becomes what I think is properly called judicial activism, that is certainly the central dilemma of having an unelected, as you describe it correctly, undemocratic judiciary in a democratic republic. And certainly the most gifted commentators we've had have struggled with that.

I think the doctrines of deference that have developed over the years, when you're assessing a legislative classification and an area that doesn't implicate a protected class like race or gender, disability, then all you have to show is a rational basis, and that shouldn't be too hard.

If you're in one of those other areas, the Court has developed a stricter scrutiny because they think in those areas there is more reason to probe a lot more deeply. But you asked what in my work sort of shows that, I guess I would look to the job I did when I was deputy solicitor general and was defending acts of Congress before the Supreme Court.

Senator KENNEDY. I am going to come back to the judicial deference in a minute. We had, in your exchanges with Senator Leahy about the power of the Congress, we have seen that the Supreme

Court has limited the ability to legislate under the Commerce Clause, the *Lopez* case.

And under Section 5 of the Fourteenth Amendment—that is the ADA case and the RFRA case—we had extensive hearings, listened to Republican and Democrat Attorneys General. There is no even suggestion at that time that we were not going to meet the constitutional requirement.

For some of us, the last great authority is the spending power, and the concern that many of us have is where you are going to be on this issue, further limitation of the power of the Congress in using the spending power. The Supreme Court has ruled on this, as you well know, that in the Dole case involving Congress, could, under the Spending Clause, condition Federal highway funds on States, raise the minimum drinking age. Rehnquist authored the opinion. White, Marshall, Blackmun, Powell, Stevens, even Scalia, agreed with that.

What is your own view about the authority in the Spending Clause and the power of Congress to use the Spending Clause to achieve its objectives? Is there anything, in terms of your own view, that would, in any way, find that that Spending Clause would be compromised to permit to—to undermine the Dole case?

Mr. ROBERTS. Well, first of all, of course, if I were to be confirmed, my own personal views would not be relevant. I would follow the Supreme Court precedent.

There is not a lot of precedent in this area.

Senator KENNEDY. The only problem is we have seen the changes and the difference in the interpretation by the Court in the Commerce Clause and in Section 5 of the Fourteenth Amendment. I mean, I was the Chairman of the Committee when we had those, and we listened, and there was not going to be a problem on that. And, of course, there were decisions that were made that reinterpreted past history on it.

I want to know whether we are taking a chance with you on the Spending Clause. That is the last real authority for us.

Mr. ROBERTS. You discussed the Dole case, *South Dakota v. Dole*, and in that case, the justices you listed reaffirmed Congress's power to say: If you're going to accept Federal funds, here's what you've got to do.

Senator KENNEDY. You are not troubled by that?

Mr. ROBERTS. No, it's a basic principle, and I would just point out, as an aside, you listed the justices who agreed with that, the justices who disagreed and dissented in *South Dakota v. Dole* were Justices Brennan and O'Connor. It is not necessarily the sort of division, sort of the typical conservative/liberal lines at all.

In *South Dakota v. Dole*, the Court referred to a prior precedent. I think it is the Stewart Machine case. And the argument has been made, well, aren't—the issue that I think the Court will address is are there limits on that; is it if you accept one dime of Federal money you have to do all sorts of things, even if they're not germane or proportional? Those are the two standards that had been developed in the prior cases. It wasn't an issue in *South Dakota v. Dole*.

If you didn't lower the drinking age, you lost highway funds. There was certainly a relationship between underage drinking and

highway accidents. So the Court ruled in that case that that was an appropriate proportional and germane response.

I worked on a brief in that case with my—I was an associate at that time—

Senator KENNEDY. You understand this is the law, and this would be the precedent that you would follow.

Mr. ROBERTS. The South Dakota case.

Senator KENNEDY. Yes, the Dole.

Mr. ROBERTS. Yes.

Senator KENNEDY. Let me move on, if I could. I do not mean to cut you off.

You talked about the judicial activism. Would you agree that activism can come from both sides of the ideological spectrum?

Mr. ROBERTS. Certainly.

Senator KENNEDY. Could you give us some examples of any of the appellate cases you believe that show impermissible activism on each side.

Mr. ROBERTS. Well, I cited in my written responses a case from California, an old case from the California Supreme Court, because I thought it was important to avoid criticizing binding Supreme Court precedent, in which the California Supreme Court—it was a Lochner era-type case—struck down, on substantive due process grounds, a California law that required employers to pay employees at certain intervals. Their reasoning was that employees are free to negotiate whatever agreements they want, and if they don't negotiate that, you shouldn't interfere with their liberty of contract.

Several Supreme Court cases follow the same principle in what people loosely call the Lochner era. I think that's an example of judicial activism. A policy judgment had been made by the State legislature in that case to address a real problem, the inequity in negotiating positions, the fact that employers were frequently not paying employees. I think there were a lot in the mining industry that were directly affected when wages were due, but many months later, and that was a policy judgment. I don't think that was a constitutional evaluation.

Senator KENNEDY. How about on the other side of the philosophical spectrum, do you see other examples? I mean, conservative/liberal, how would you find? Do you think there has been activism on both sides of the spectrum? And, if so, how would you define that?

Mr. ROBERTS. Well, I do think there has been activism on both sides. I haven't given any thought to a particular Supreme Court case that I thought exhibited liberal judicial activism. Again, I feel reluctant to criticize pending or binding—

Senator KENNEDY. Well, I can understand that, but we are trying to give life to your words. You talk about your professed philosophy of deference and humility as real and not just words. That is what I am trying to see from your own kind of experience, in response to those questions, whether you had examples that would give light to those words.

President Bush ran on a platform of selecting judges who will be like Justice Scalia and Justice Thomas. We all understand that meant judges who will be activists in reducing the power of Congress to protect people's rights. You must understand, as everyone

else does, that you were selected because those at the White House and the Justice Department knew your record and assured the President your decisions would please President Bush.

What can you tell us which will reassure us that you will not necessarily follow the lead of Justice Scalia and Thomas?

Mr. ROBERTS. Well, I will follow the lead of the Supreme Court majority in any precedents that are applicable there. And if Justices Scalia and Thomas are in dissent in those cases, I am not going to follow the dissent. I'm going to follow the majority.

Senator KENNEDY. Are there any cases which you believe that either one of them showed insufficient deference to Congress and became judicial activists?

Mr. ROBERTS. No, I haven't gone through and looked for particular occasions. If they were majority opinions by either of those justices, I would not feel it appropriate for me to criticize those because I would have to apply that majority opinion, whether I agree with it or not.

And I think it's important for the Committee to understand I have been asked questions in some areas I think because people wonder whether I'm going to follow a particular precedent or because they're concerned I might not, and in other areas the concern seems to be that I might, depending on whether a particular questioner is critical or supportive of those decisions.

I am going to follow both the decisions I agree with and the decisions that I don't agree with, regardless of any personal view.

Senator KENNEDY. Well, as you understand, I am not trying to get the outcome of your judgment on a particular fact situation, but I have listened for 40 years nominees say that they are going to follow the precedent and interpret the law, and yet every single day on just about every single court, they come out in different directions. Some are in the majority and some are in the minority, and they have sat here and given similar kind of answers.

And what I am trying to find out is what is behind those answers so that we can give some light to it. Because, as you understand, every single day people are applying what they understand is the law and applying what the President—and there is, in many, many instances, a wide difference. Certainly, there is even in the courts.

So our ability for—you give words about, particularly on the authority and responsibility of Congress, you are talking you would be a nonjudicial activist, and we are trying to find out what these words mean in terms of your own kind of life experience, either by your writings, your statements or your opinions about this, and that I think we are entitled to find out.

Mr. ROBERTS. I guess what I would point to, Senator—I'm obviously not a sitting judge. I don't have decisions—but I do have a history of litigating cases, and when you talk about the ability to set aside personal views and apply precedent without regard to personal ideology or personal views, that's something I've been able to do in my practice.

My practice has not been ideological in any sense. My clients and their positions are liberal and conservative across the board. I have argued in favor of environmental restrictions and against takings claims. I've argued in favor of affirmative action. I've argued in

favor of prisoners' rights under the Eighth Amendment. I've argued in favor of antitrust enforcement.

At the same time, I've represented defendants charged with anti-trust cases. I've argued cases against affirmative action. And what I've been able to do in each of those cases is set aside any personal views and discharge the professional obligation of an advocate.

And I would urge you to look at cases on both sides. Look at the brief, look at the argument where I was arguing the pro environmental position. Take a brief and an argument where I was arguing against environmental enforcement on behalf of a client. See if the professional skills applied, the zealous advocacy is any different in either of those cases. I would respectfully submit that you'll find that it was not.

Now, that's not judging, I understand that, but it is the same skill, setting aside personal views, taking the precedents and applying them either as an advocate or as a judge.

Senator KENNEDY. Well, now, I hear you on this. But, every day, responsible disagree with one another, and there is an implicit band of discretion in the decisions before them. In many cases, there is an explicit role for judicial discretion. That is what I am interested in. That is what I am interested in.

Do you really believe that the judge's sensitivity to the purpose and the result of the laws they interpret is irrelevant to the way they will exercise their discretionary review of other judges or review other judge's exercise of discretion. I am interested in what in your background or expertise demonstrate you will be sensitive to the human impact of your decisions.

You are going to be a judge that is going to be making judgments and decisions on these range of issues—health and safety, consumer protection, the labor laws, fair employment, gender, race, disability, Clean Air, workers' rights, Freedom of Information, a whole range, a whole range, a whole range.

What can you tell us, in your own experience, would reflect on your judgment in being sensitive to the human conditions that are going to be involved in the great numbers of cases there are going to be for that?

Mr. ROBERTS. I don't know if this is responsive or not because, of course, when you are an advocate, you're advocating a client's position, and you're concerned about a particular human impact and not others. Certainly, when you're a judge, you want to apply the law and, yes, you have to be sensitive to the impact of your decision, but at the same time apply the law fairly without regard—what the judicial oath says—without regard to persons.

At the same time, I appreciate the fact that the law has impact on people in society, and I think it's, for example, an important obligation of a lawyer to do pro bono work, to address the situation of people impacted by the law who don't have the resources to respond.

Senator KENNEDY. Maybe you can tell us. Talk about that.

Mr. ROBERTS. One of the cases I handled before the D.C. Court of Appeals was *Little v. Barry*. I represented a class of general public welfare recipients in the District who had had their welfare benefits terminated, and we argued, and argued on the basis of *Goldberg v. Kelly*, a landmark civil rights case, that those individuals

were entitled to individualized hearings before their welfare benefits were terminated. I argued that before the court of appeals on a pro bono basis. And that was a case where the law had a very real and direct impact on the most needy citizens in our country, and I was happy to take that case on behalf of that class of welfare recipients.

Senator KENNEDY. If there are others, I would be interested in it.

Mr. ROBERTS. Well, there are other—

Senator KENNEDY. We can talk now, but there is going to be this band of discretion. You are going to apply the law, as you have outlined. You can be on the pro and con. You have answered that kind of question, but there is that band of discretion which judges are exercising, and this court makes judgments on matters that have enormous impact in terms of the quality of life and rights of individuals. And I am looking for that ingredient in your kind of life experience that would help to show that the human element that is being considered in this is something that you both understand, appreciate and would be concerned with.

Mr. ROBERTS. Senator, there are other examples. The first case I argued in the Supreme Court was on a pro bono basis on behalf of an individual facing the almighty might of the U.S. Government, going after him criminally and civilly.

I regularly participate, our firm has a Community Services Department that does pro bono work. Whenever there is an appeal involved, I and members of our appellate group help prepare. We have recently done issues involving termination of parental rights. I can't imagine a more direct impact on an individual. Minority voting rights is another case we participated in, in which we prepare the people arguing pro bono for the appeals.

I do a street law program that I think is important.

Senator KENNEDY. With the law school or with—

Mr. ROBERTS. It's done in conjunction with the Supreme Court Historical Society. Every summer high school teachers who are teaching about the courts come to learn a little bit about it, and I talk to them about how the Supreme Court functions, and it's a very, I've always found it very rewarding to sit with the high school teachers and hear what they, the difficulties they have in communicating with their students about the justice system.

Senator KENNEDY. That is very, I am interested in it, and I appreciate your response to these questions and anything else on this would be useful.

I just had one final. I know I am out of time, but I have one final question, Chairman.

In your answers to the committee's questions, you indicate your understanding the Framers insulated the judges from the public pressures. Do you also understand and agree that in keeping the Senate small and giving us the staggered terms, letting us make our own rules for exercising the key responsibility of the advice and consent also intended to insulate us to exercise our authority to prevent the Executive Branch from going too far in the assertion of their powers and the exertion of the Executive Branch powers?

Mr. ROBERTS. Well, I don't know about in particular reference to advice and consent, but certainly, as I understand the structure of

the Constitution, the Senate was, as you indicated earlier, given a longer term, given staggered terms because it was supposed to exercise something of a restraining influence on the more popularly responsive branches of government.

Senator KENNEDY. This is a well-rooted responsibility, as I understand. I mean, we have seen at times when you can take—the most obvious historic would be the court-packing by President Roosevelt, when there would be an important responsibility by the Congress to stand up to a President, actions of the Executive Branch. And as someone who is a constitutional authority, such as yourself, where of that historic responsibility and role and thought about it, if there is anything you can tell—

Mr. ROBERTS. Well, I don't claim to be a constitutional authority, but certainly the Senate obviously has a critical responsibility in this area. My memory may not be correct, but I believe original drafts of the Constitution provided that the Senate would actually be appointing the judges.

[Laughter.]

Senator KENNEDY. There you go. Did you hear that, Orrin?

Chairman HATCH. That is what they think they are doing now.

[Laughter.]

Mr. ROBERTS. Cooler heads prevailed before the end.

Chairman HATCH. I am glad you added that last part.

Mr. ROBERTS. But I am happy to be scrutinized under whatever standard the Committee or the Senate wishes to apply.

Senator KENNEDY. Thank you very much.

Chairman HATCH. We will turn to Senator Durbin now.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you very much, Mr. Chairman.

Mr. Roberts, thank you for coming back. I am glad we had a chance for this hearing, and I thank the Chairman. I think we have reached an accommodation here that may be helpful in moving this Committee forward in a better environment.

I understand my fate in life as a back-bencher in the minority in the Senate with a Republican President, that nominees that come before us are not likely to share my political philosophy. That is a fact of life.

I also understand that I have a responsibility under the Constitution to ask questions of those nominees to satisfy my judgment that they would be well-suited to serve on the Federal bench. Many of the nominees have been forthcoming, and open, and candid in their answers, others have not. As a politician, I can certainly identify with that. I have danced around questions in my life, Waltz steps, Polka steps, Samba steps, I try them all when I do not want to answer a question.

And now I am going to ask you a question, just a limited number of questions relating to some dance steps I see in your answers here.

So, in 1991, you are in the Solicitor General's Office, and in *Rust v. Sullivan*, you end up signing on to a brief which calls for overturning *Roe v. Wade*, one of the more controversial Supreme Court cases of my lifetime. When we asked repeatedly in questions of you