

it struck down an act of this body, this Congress, trying to regulate indecent speech. And I'm thinking, sitting there, well, there are six cases, every one of which—again, the labels are not helpful—but every one of which you would describe not as a conservative Court. It's a conservative Court giving criminal defendants a big break, reaffirming *Miranda*, reaffirming *Roe*, striking down regulation of indecent broadcasts, striking down school prayer.

Now, you can tell, if you're being interviewed for public consumption, you can say it's a conservative Court, it's a liberal Court. I think if you want to educate a little bit about what the Court does, they need to know that even when other people would say this is a conservative Court, there are those decisions. It's much more complicated than those labels.

Senator DURBIN. Thank you, Mr. Roberts.

Mr. ROBERTS. Thank you, Senator.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman HATCH. Senator Feingold?

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

Senator FEINGOLD. Thank you, Mr. Chairman.

I would like to welcome Mr. Roberts. Many of us wanted to have you back before the Committee for quite some time. So I want to thank the Chairman for scheduling this hearing. I hope this is a first step toward restoring some measure of regular order to our consideration of judicial nominations, and I do think, Mr. Chairman, if we work together in good faith it will be possible to bridge some of the differences we have on the issues.

Mr. Roberts, I enjoyed your reference to the Missouri Shrink case, which I agree is an important case.

Let me ask you something else. You were interviewed on the radio in 1999 and said, "We have gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a Federal law, whether it is the Violence Against Women Act or anything else. The fact of the matter is conditions are different in different States, and State laws can be more relevant is I think exactly the right term, more attune to the different situations in New York, as opposed to Minnesota, and that is what the Federal system is based on."

That is your quote, and I certainly do not disagree with some of the sentiments of it, but could you elaborate a little bit on the statement. Were you referring there simply to the constitutional limits on Congress's power that were being asserted in the case that challenged VAWA or were you saying that Congress was going too far in trying to address Violence Against Women, even if the Court were to hold that it could constitutionally take the action that it did?

Mr. ROBERTS. I didn't have any particular reference. I think that it was the VAWA case that had come up, if I am remembering the interview correctly, and I didn't mean to be passing either a policy or a legal judgment on the general policy question. I just wanted to make the basic point, and I'm sure it is a judgment that Senators deal with every day, that simply because you have a problem

that needs addressing, it's not necessarily the case that Federal legislation is the best way to address it.

I do think that's correct. And it's a proposition, for example, I know the Annual Report on the Judiciary the point was made at one time that you've got to keep in mind what the impact of these types of cases are going to be on the Federal courts every time you have a new Federal remedy, a new Federal right that has an impact on the Federal courts.

Obviously, there are many areas where the Federal response is not only appropriate, but required because of a variety of circumstances. You don't want different rules in different States, but I was just making the point that every problem doesn't necessarily need a Federal solution.

Senator FEINGOLD. So it is not a situation where you think the constitutional limitation has to do with whether State laws can be more attune to local conditions.

Mr. ROBERTS. Oh, no. No, of course, not. I mean the constitutional limitation doesn't turn on whether it's a good idea. There is not a "good idea" clause in the Constitution. It can be a bad idea, but certainly still satisfy the constitutional requirements.

Senator FEINGOLD. Let me switch to another subject. I supported the National AMBER Alert Act, which I am pleased will become law today as a part of a larger bill. It became part of the Child Abduction Prevention Act. I, and others, were troubled that the final bill also included new and separate departure procedures for sentencing of child-related and sex offenses.

These new rules will take sentencing discretion away from judges, and it was never even debated in the Senate Judiciary Committee before being inserted in the bill. In fact, Chief Justice Rehnquist, who rarely comments on pending legislation, spoke out against the original House version of the new rules. He wrote that the legislation "would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences."

We have heard complaints about these new rules from a diverse group of organizations and individuals about the final bill, including the Judicial Conference, distinguished judges from around the country, the entire current Sentencing Commission, all living former chairpersons of the Sentencing Commission, the American Bar Association, the Washington Legal Foundation, the Leadership Conference on Civil Rights and the Cato Institute.

You may soon become a Federal judge. I would like to know what you think of the efforts of some in Congress to reduce the already limited sentencing discretion of Federal judges. And more specifically what is your impression of the provisions inserted into the Child Abduction Prevention Act during conference that take away or severely hamper the ability of judges to depart downwards when imposing a sentence, but do nothing to limit the ability of judges to depart in the other direction?

Mr. ROBERTS. I haven't looked at those provisions, Senator, so I don't want to comment on those specifically. I do know that under Supreme Court precedent, the determination of appropriate sentences and how they're to be applied is a quintessential legislative

function. It is for the legislature to decide an appropriate sentence and how it's to be administered.

I know judges have strong views on sentencing guidelines, and I think the debate about whether the guidelines are good or bad is carried forward in the debate about how you should review departures and enhancements. I did handle one case challenging a departure under the sentencing guidelines, and we went up to the Supreme Court several times. And each time it would go back, the district judge would find another way to impose the same sentence. It would go back, it would get thrown out again.

So I know it's a system on which judges have strong views. From my own point of view, the only thing that I feel comfortable opining on is that it is in an area that is quintessentially, as I said, for the Congress to decide what the sentence should be and how it should be administered.

Senator FEINGOLD. I am somewhat struck by that answer because the Chief Justice of the United States felt comfortable commenting, in fact, in a critical manner, on these new provisions, obviously believing that it is appropriate for him to indicate that going too far in limiting judges' discretion is not a good idea.

I would be interested, given the life term that you will shortly I think probably receive, what are your views on that fundamental question, which is—

Mr. ROBERTS. Well, I—

Senator FEINGOLD. And if your view is that Congress gets to decide the whole thing, so be it, but it is a big deal in terms of what our judges do, I think.

Mr. ROBERTS. Well, again, subject to constitutional limitations, you obviously can't have different sentencing schemes based on different racial impacts and things like that, but it is a Congressional legislative decision to determine the sentence.

Now, I'm sure that the Chief Justice is appropriately commenting on what he thinks about it as head of the Federal judiciary because it will have an impact on the Federal courts.

The debate goes back, of course. I mean, I understand the value of discretion, and before the imposition of the guidelines you had a situation that troubled Congress sufficiently to put the guidelines in. Where you do the same crime in one place and you do the same crime in another, and somebody's getting 30 years, and the other person is getting 2 years, and you can't see any distinction, that type of inequity I think does call for a legislative response, and that's what the guidelines were all about.

I know a lot of district judges didn't like it. They're used to sitting there and making more of a Solomonian decision about what this particular defendant deserves or whatnot, but there is a value in ensuring some uniformity across the country. That's why the guidelines were imposed.

I know the rules for departure and enhancement were intended to accommodate the discretion. But, again, beyond the judgment that that's for the legislature to make, I don't feel comfortable commenting.

Chairman HATCH. I suspect when you become a judge, you won't like it either.

[Laughter.]

Senator FEINGOLD. Well, and that's why, Mr. Chairman, I want to just follow for a second, not ask another question, but just comment. I certainly agree with you that the notion of uniformity, to the extent that a legislature can help make that happen, has tremendous value, but it is also the case that justice often can only be served with judicial discretion.

And I again repeat the words of the Chief Justice, Chief Justice Rehnquist, that this series of provisions, at least in the form they were in the House, would, in his words "seriously impair the ability of courts to impose just and responsible sentences." That, to me, is a countervailing value that has to be balanced, and I appreciate your attempt to answer the question.

Chairman HATCH. Would the Senator yield on that point just for a second?

As you know, I brought about a compromise where we changed that greatly, but I have agreed to hold hearings on the whole sentencing.

Senator FEINGOLD. Pardon me, Mr. Chairman?

Chairman HATCH. I have agreed to hold hearings on the whole sentencing matter. I have my own qualms about some of these things, as I know you do. As an intelligent member of this Committee, you are certainly not going to be ignored with regard to those issues.

Senator FEINGOLD. I appreciate that. I have heard from sitting judges, many of whom are very conservative judges, about how pained they are at the lack of discretion in a number of these cases, but let me go to the last subject because I know Senator Shumer would like to ask some questions.

In response to a written question from Senator Durbin, you stated that you have assisted your colleagues at Hogan & Hartson in the firm's representation of an inmate on Florida's death row. Could you tell me more about that case, and your involvement and what was the outcome?

Mr. ROBERTS. Well, he is still alive. That is sort of the goal in representing inmates facing the death penalty. I'm certainly not—don't have lead responsibility in the case.

What happened, and this was some years ago, a motion was being made in connection with one of his many sentences, and I was asked to assist in reviewing the motion. It had moved up to an appellate stage, and that was my specialty, and I looked at that and worked on that motion. I think it actually was not successful, but the long-term representation, as I said, he's still with us.

Senator FEINGOLD. Well, I congratulate you on your involvement in this. You and your firm represented the Florida death row inmate pro bono. Hogan & Hartson, of course, has enormous resources and is one of the best law firms in the Nation. Of course, not all death row inmates are lucky enough to secure such talented, well-resourced representation, especially at the trial stages of a capital prosecution. And I understand that law firms like yours typically don't get involved in capital cases until the appellate stage.

Given your experience with that case, do you believe that all capital defendants receive adequate legal representation in the current death penalty system, and are you concerned that poor defendants

may not receive adequate legal representation, especially at the trial level of a capital case?

Mr. ROBERTS. I don't know sufficiently what the situation is with respect to appointed counsel. I have certainly seen the cases where the counsel, whether attained or appointed, has been inadequate. I mean, some of them, you know, where the counsel was asleep or not present or the type of conduct, even apart from whether particular motions were made or not.

So the answer to your question is, no, it certainly can't be the case that in all cases they receive adequate representation. I have—

Senator FEINGOLD. Does it rise to a level where you have concerns?

Mr. ROBERTS. Well, certainly. If you're in a capital case and the lawyer is asleep, of course.

I have long been of the view that whether you're in favor of the death penalty or opposed to it, the system would work a lot better, to the extent that defendants have adequate representation from the beginning. The reason a lot of these cases drag out so long is because you spend decades scrutinizing the conduct of the lawyer in the initial case. If you make sure that there is adequate representation in the beginning, that should obviate the necessity for that, in most cases.

Senator FEINGOLD. Finally, on this issue, and my last question, as you may know our Nation last year reached a troubling milestone. Over 100 death row inmates have now been exonerated in the modern death penalty era—people who were actually on death row, having been sentenced to death.

What is your sense of the fairness of the administration of the death penalty in our Nation today? Do you think that the current system is fair or do you agree with an ever-increasing number of Americans that it risks executing the innocent?

Mr. ROBERTS. I think one thing that is unfair about the system is that it is not, and I believe this is one of the Supreme Court cases saying that it would be applied this way, it's not certain, it's not definite, and there doesn't seem to be any reasonable time limitation. The effectiveness, if you believe in capital punishment, the effectiveness of capital punishment diminishes if the crime was committed 30 years ago. And if it takes that long to get through the system, it's not working, whether you're in favor of the death penalty or opposed to it.

Senator FEINGOLD. But what about the fact that 100 people have been exonerated, who were already sentenced to death, how do you feel about that?

Mr. ROBERTS. Well, obviously, the first reaction is that the system worked in exonerating them. I don't know the details of the particular cases, but if they've been exonerated, that's how it's supposed to work.

Senator FEINGOLD. Is it your guess that we've gotten all the ones that are innocent on death row?

Mr. ROBERTS. Of course, it causes concern whenever somebody gets to that stage. It would be important to know at what stage it is. If it's on direct review, you feel a little more comfortable about it. If it is something coming out years later that should have come

out before, that does cause some degree of discomfort. Because, of course, when you're talking about capital punishment, it is the ultimate sanction, and sort of getting it right in most cases isn't good enough. I agree with that.

Senator FEINGOLD. Thank you, Mr. Chairman. Thank you, Mr. Roberts.

Chairman HATCH. Thank you.

Senator Schumer, you will be our last questioner.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding this hearing. I want to thank Mr. Roberts for returning to the hearing today. I know it wasn't your choice to be scheduled the same day we had hearings for two other controversial nominees, and I for one am sorry you didn't get your own hearing earlier, but I am glad you are here today.

Now, after your hearing, I sent you several written questions. For all intents and purposes, you refused to answer three of them. I know you had your reasons for refusing to answer, but to be frank, I don't find the reasons compelling, I don't find them fair, and I don't find them really in accord with your responsibility to let this Committee know as part of the advise and consent process your views.

The Senate has a duty, as you know, to thoroughly vet individuals nominated to the Federal courts, but that duty is especially sacred when it comes to the most important courts, and there is no question that the D.C. Circuit, the court to which you have been nominated, qualifies on that score. I have called it in the past "the second most important court in the land." I was at the naming of our courthouse for Thurgood Marshall in New York City, and my friends from New York on the Second Circuit took a little umbrage, but it is true. The D.C. Circuit I think is the second most important court in the land.

But when I say we have a sacred duty in this process, I mean it. That is not just verbiage for me. The Founding Fathers worked long and hard to achieve balance in our system of Government. They struggled to ensure that no one branch would dominate the others. And an essential part of that balance is the advise and consent clause. It is true at any time in our history, but it is especially the case in an era when the President seems to have an ideological prism with whom he nominates. Clearly, the nominees that have come from the White House, if you sprinkled them throughout the political spectrum, wouldn't land evenly throughout.

And that is a President's prerogative. I have nothing against the President doing it. But I truly do object to the idea that we shouldn't ask and you shouldn't answer questions, particularly at a time when the President is seeing things through an ideological prism, when he has stated, to his credit, he wants to appoint Justices in the mold of Scalia and Thomas, who are not moderate mainstream judges, but whatever your views of their views, they tend to be way over to the right side, and every one—not every one, but most of their decisions show that.