

## **In Support of John Roberts and Judicial Independence**

**Senator Jon Kyl**  
**September 27, 2005**

Mr. President, I rise in support of the nomination of Judge John Roberts to be the Chief Justice of the United States. Much has already been said about Judge Roberts's intellect, character, qualifications, experience, and eloquently-expressed commitment to the rule of law. I certainly agree with those who have been impressed with these qualities.

Moreover, I believe that these are the qualities that should govern this body's Advise-and-Consent role — intelligence, character, experience, and commitment to the rule of law. It is when we go beyond that role — when we begin to judge judicial nominees based on personal political ideology, how they will vote on particular cases or questions, or the nominees' willingness to engage in political bargaining with Senators in the confirmation process — that we, as Senators, undermine the impartiality and independence of our courts.

Speaking in Arizona recently, Justice Sandra Day O'Connor noted that judicial independence is "hard to create and easier than most people imagine to destroy."<sup>1</sup> She is right. As Judge Roberts said during his opening statement:

President Ronald Reagan used to speak of the Soviet constitution, and he noted that it purported to grant wonderful rights of all sorts to people. But those rights were empty promises, because that system did not have an independent judiciary to uphold the rule of law and enforce those rights. We do, because of the wisdom of our Founders and the sacrifices of our heroes over the generations to make their vision a reality.<sup>2</sup>

In other words, that rule of law is what lies at the foundation of the American system of ordered liberty. Judges owe their loyalty to the law, not to political parties or interest groups, and they must have the courage to make tough decisions, however unpopular. Consider, for example, how Judge Roberts answered a question of whether he would stand up for the "little guy":

If the Constitution says that the little guy should win, the little guy is going to win.... But if the Constitution says that the big guy should win, well, then the big guy is going to win, because my obligation is to the Constitution.<sup>3</sup>

That, Mr. President, is the essence of the rule of law as enforced by independent judges — doing what the Constitution and the law demand, regardless of the political or economic power of the parties. Indeed, that's the best way to ensure that the voice of all the "little guys" will be heard.

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<sup>1</sup> Speech to Arizona State College of Law, as reported in Editorial, *Arizona Republic*, Sept. 22, 2005.

<sup>2</sup> Opening Statement (Sept. 12, 2005).

<sup>3</sup> Testimony (Sept. 15, 2005).

Judge Roberts often spoke of the rule of law during his hearing. Consider this additional excerpt. He explained that he used to represent the United States government before the Supreme Court when he was Deputy Solicitor General, and then stated:

But it was after I left the Department and began arguing cases against the United States that I fully appreciated the importance of the Supreme Court and our constitutional system.

Here was the United States, the most powerful entity in the world, aligned against my client. And yet, all I had to do was convince the Court that I was right on the law and the government was wrong and all that power and might would recede in deference to the rule of law. That is a remarkable thing.

It is what we mean when we say that we are a government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world — because without the rule of law, rights are meaningless.<sup>4</sup>

I was struck by this comment when I heard Judge Roberts make it, because it reminded me of my earlier career as a private attorney practicing before the state and federal courts, including the Supreme Court. Parties — be they corporations or civil plaintiffs or governments or criminals — put their faith in judges to adhere to legal principles and make decisions based on the rule of law, not based on what they personally believe to be right. Parties have disputes that require a neutral arbiter who is beholden to nobody, and who will not be dissuaded from doing his duty, no matter the cost. As Judge Roberts later emphasized, “This is the oath.”<sup>5</sup> This is what the Constitution and an independent judiciary demand.

Of course, it is equally important to understand what judicial independence is not. Judicial independence does not mean that the judge has the right to disregard the Constitution or the statutes passed by legislatures. Judicial independence does not mean that, because of a lifetime appointment, the judicial role is unconstrained by precedents and principle. Judicial independence is not an invitation to remake the Constitution or the laws if it does not lead to the result the judge prefers. Nor is judicial independence an invitation to the judge to legislate and resolve questions that properly belong in the democratic branches, no matter how wise a particular judge might be. Judicial independence gives judges tremendous freedom — but it is a freedom to do their duty to the law, not a freedom from or independence from the constraints of the law. When judges confuse the freedom to follow the law with a freedom to depart from it, we see the unhinged judicial activism that has infuriated so many Americans throughout my lifetime. Consider what Justice Antonin Scalia wrote while dissenting from one of the Ten Commandments cases the Supreme Court decided this past spring, McCreary v. ACLU:

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.

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<sup>4</sup> Opening Statement (Sept. 12, 2005).

<sup>5</sup> Testimony (Sept. 15, 2005).

That is what prevents judges from ruling now this way, now that, thumbs up or thumbs down, as their personal preferences dictate.<sup>6</sup>

Mr. President, I focus on the need for judicial independence and respect for the rule of law because I am very concerned about threats to judicial independence that have infected the confirmation process. During Judge Roberts's hearings, we saw efforts to demand political promises in exchange for confirmation support. Specifically, some Senators demanded to know how Judge Roberts will vote on issues that will come before the Supreme Court. In doing this, Senators risk turning the confirmation process into little more than a political bargaining session in which Senators refuse to consent to a fully qualified nominee unless the nominee promises, under oath, to vote a certain way on a future case. Yet during this confirmation process, some Senators said that they would not support Judge Roberts unless they knew "where he stood" on important "issues of the day." And when the Judiciary Committee voted last week, more than one Senator explained that, while John Roberts was a brilliant man who would be a thoughtful Chief Justice, they would not support him because he they could not learn enough about his views on issues that they thought would come before the Supreme Court.

Mr. President, the Senate must reject this improper politicization of our judiciary. A judicial nominations process that required nominees to make a series of specific commitments in order to navigate the maze of Senate confirmation would bring into disrepute the entire enterprise of an independent judiciary. In July, I asked the Senate Republican Policy Committee, which I chair, to examine the canons of judicial ethics and the views of the sitting Supreme Court Justices. I ask unanimous consent that the resulting report, titled, "The Proper Scope of Questioning for Judicial Nominees," be included at the end of my remarks.

Judge Roberts confronted this challenge repeatedly during his hearing. Senators would ask him — sometimes directly, sometimes obliquely — how he felt about different issues. And to his credit, he resisted answering those questions that could have jeopardized his judicial independence. As Judge Roberts explained:

The independence and integrity of the Supreme Court requires that nominees before this Committee for a position on that Court not forecast, give predictions, [nor] give hints about how they might rule in cases that might come before the Court."<sup>7</sup>

Judge Roberts's formulation is exactly right. If judges were forced to make promises to Senators in order to be confirmed, constitutional law would become a mere extension of politics. If we allow this radical notion to take hold, and if Senators can demand such promises, then what would become of litigants' expectations of impartiality and fairness in the courtroom? The genius of our system of justice is that people are willing to put their rights, their property, and even their lives before a judge to be dealt with as he or she sees fit. People do this because of the expectation that they will be treated fairly by a judge with no preconceived notion of how their case should be decided.

Mr. President, let me be clear: I share my colleagues' curiosity about how Judge Roberts and the next nominee will rule on the hot-button legal questions of the day. For example, I hope

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<sup>6</sup> *McCreary County v. ACLU*, 545 U.S. \_\_\_\_ (2005) (Scalia, J., dissenting)

<sup>7</sup> Testimony (Sept. 13, 2005).

that he will join most Americans in recognizing that partial-birth abortion does not deserve constitutional protection. Similarly, it is my personal wish that the Supreme Court will allow states to pass laws requiring minor girls to gain the consent of — or at least notify — their parents before getting an abortion. We remain a nation at war, and I believe it is crucial to our national security that the Supreme Court support common-sense rules governing the War on Terror without requiring that foreign terrorists be treated the same as American criminals, with the same constitutional rights as citizens. I would like him to resist the siren songs of those judges who would craft a constitutional right to same-sex marriage. I would strongly prefer that he uphold legislative efforts to guarantee that crime victims have a substantial role in the prosecution and sentencing of perpetrators. And I hope that he will help clean up the Supreme Court's habeas corpus jurisprudence so that we do not have to wait 20 years for justice to be done.

On these and many other matters, I have deep interest and strong opinions about what the Supreme Court ought to do, but Mr. President, I did not ask John Roberts for commitments on these matters. Of course I am curious, but I did not ask him how he would rule because, had I done so, I would have been encouraging him to violate his judicial ethics as a sitting judge as well as jeopardize the independence of the Supreme Court itself. Should a nominee answer questions? Absolutely. But should a nominee engage in political bargaining by prejudging an issue or case? Absolutely not.

Nobody disputes that John Roberts will be confirmed later this week. I am encouraged by the strong bipartisan support for John Roberts, and I am cautiously optimistic that the size of this vote represents a repudiation of the politicization of the judiciary. But I am concerned that others will see the number of votes against Judge Roberts as justification for the proposition that one should not support a nominee who refuses to indicate how he will rule in future cases.

This vote should represent a fresh start. The President sent us a brilliant and distinguished nominee who had the character and commitment to the rule of law to deserve the Senate's support. The nominee is a Republican who clerked for one of the great conservative judges of the 20<sup>th</sup> Century. He served in the executive branch for Republican Presidents. He advocated conservative policies on those Presidents' behalf. Yet that political background will not be a bar to Judge Roberts's confirmation. Equally importantly, Judge Roberts's refusal, throughout his hearings, to make promises to Senators in exchange for their support is being affirmed as an appropriate adherence to judicial ethics. The courage that John Roberts has shown in upholding his ethical standards should not be punished.

Justice O'Connor stated earlier this month, "We must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies."<sup>8</sup> Once again, my fellow Arizonan was right. The Senate will exercise that vigilance later this week by confirming John Roberts and rejecting the politicization of the confirmation process. In the coming weeks, the Senate will consider the nominee to replace Justice O'Connor, and it is my hope that Senators will exercise that same vigilance. The rule of law demands it.

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<sup>8</sup> Speech to University of Florida Law School, reported in *The Independent Alligator* [school paper], September 12, 2005.