

Statement of

# **The Honorable Russ Feingold**

United States Senator  
Wisconsin  
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Statement of U.S. Senator Russ Feingold At the Nomination Hearing of John G. Roberts, Jr., to  
be Chief Justice  
As Prepared

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Mr. Chairman, thank you, and Judge Roberts, welcome. First, I want to say Mr. Chairman how much I appreciate the evenhanded way that you and Senator Leahy have approached preparations for this hearing.

To our nominee, I want to thank you in advance for the long hours you will put in with us this week. I wish you well, and I admire your record and your impressive career. This is a confirmation proceeding, however, not a coronation. It is the Senate Judiciary Committee's job to ask tough questions. We are tasked by the Senate with getting a complete picture of your qualifications, your temperament, and how you will carry out your duties. Obviously, nominees to the Supreme Court must be subject to the highest level of scrutiny. As the nominee to be Chief Justice of the United States, you will be subject to the ultimate level of scrutiny. Our colleagues in the Senate, and the citizens of this country, are entitled to a hearing that will actually help them decide whether you should be confirmed. I'm sure you understand that. This is a lifetime appointment to preside over the Supreme Court, and to lead the entire federal judiciary. So I'm sure you appreciate the importance of this hearing for the future of our country.

Some have called for a "dignified process." So have I. But at times it sounds like what some really want for the nominee is an easy process. That is not what the Constitution or the traditions of the Senate call for. If by "dignified" they mean that tough and probing questions are out of bounds, I must strongly disagree. It is not undignified to ask questions that press the nominee for his views on the important areas of the law that the Supreme Court confronts. It is not undignified to review and explore the nominee's writings, his past statements, the briefs he has filed, the memos he has written. It is not undignified to ask the nominee questions he would rather not answer should he prefer to remain inscrutable, or, worse yet, all things to all people.

This process is not a game. It is not a political contest. It is one of the most important things that the Senate does -- confirm or reject nominees to the highest court in the land. And we as Senators must take that responsibility very seriously.

The most recent nine Justices of the Supreme Court served together almost as long as any other Court in history -- more than 11 years. Because the Court has been so stable for so long, and

Chief Justice Rehnquist presided over it for 19 years, Members of Congress, lawyers, and the public have come to know the views of the Justices pretty well. Many Court-watchers have become pretty good at predicting the outcome of cases. That predictability is about to be tested because we will now have a new Chief Justice, and because a member of the Court who was the deciding vote in many cases has also announced her retirement.

I don't think, however, that the public is required to wait until a new Chief Justice is seated on the Court to get some idea of how that new Chief Justice thinks, how that new Chief Justice will approach controversial issues that might come before the Court, and how that new Chief Justice might run the Court. This hearing is our only opportunity to hear from this nominee how he would approach the important issues facing the Court.

I was struck as I was preparing for this hearing by remarks written years ago by Senator Grassley, my colleague from Iowa and a senior member of the Committee, in the Committee Report on the nomination of Justice O'Connor. The current nomination to the position of Chief Justice makes his remarks even more apt. Senator Grassley said the following:

I do not agree ... that commenting on past Supreme Court decisions is a commitment to hold a certain way on future cases and I feel that in order that we, as Senators, fulfill our duty it is incumbent upon us to discover a nominee's judicial philosophy.

In that we had a very limited number of judicial opinions rendered by Judge O'Connor on constitutional questions it was my hope, by asking specific questions regarding past Supreme Court decisions, that the committee might obtain a clearer understanding of her philosophy. ... My purpose was to satisfy my questions regarding Judge O'Connor's record in that I felt it was less complete than many other Supreme Court nominees who have had extensive experience either on the Federal bench or in leadership positions in the profession of law.

In some ways, the record of our current nominee to the Court raises similar concerns. He has a long record as a lawyer, but he has been on the federal bench for only two years, and we have little in the way of his own writings on the issues before the Court to evaluate. So like Senator Grassley, I am interested in this nominee's views on a number of cases. I don't think that getting his reaction to those decisions will commit him to vote a certain way in a future case. After all, it is not that past case he will be deciding, but a different one. Even the current Justices, whose views on specific cases are well known since they either wrote or joined one opinion or another, do not have to recuse themselves from a future case just because we know what they think of a crucial precedent in that case.

So I am looking for Judge Roberts to be forthcoming with this Committee about his views. To show the Senate's role in this process the respect it deserves, he should make every effort to be responsive.

Chief Justice Rehnquist himself acknowledged the importance of the Senate's role when he wrote the following in his last annual report on the federal judiciary: "Our Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the federal judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials."

That suggests to me that it is not only permissible, but critical, that the Senate seek to learn as much as it can about the views of nominees and that nominees be as forthcoming as they possibly can without compromising their independence.

We do have a mountain of material from the nominee's early years as a lawyer in the Justice Department and White House counsel's office of the Reagan Administration. In memo after memo, his writing was highly ideological and sometimes dismissive of the views of others. I do, however, recognize that this is a different time, and he has been nominated to play a different kind of role than he played in those early Reagan years. So, I will be looking for a somewhat different John Roberts than the John Roberts of 1985. As I have a chance to ask questions about topics such as executive power, civil liberties, voting rights, the death penalty and other important issues, I hope to see how his views have developed and changed over the years.

Of course, the best evidence of this would be some more recent writings of the nominee. But the Administration has steadfastly refused a reasonable request for documents pertaining to a small fraction of the cases in which he participated as Deputy Solicitor General during the Administration of President George H.W. Bush. I find this refusal very troubling in light of the ample precedent for releasing such documents in this kind of proceeding, and the weakness of any claim that the release would damage the litigating position of the United States, over 12 years later. And I also must say, candidly, the refusal gives rise to a reasonable inference that the Administration has something to hide here. The Administration has done this nominee no service by maintaining its intransigent position.

Mr. Chairman, it goes without saying that the Supreme Court is one of the most important institutions in our constitutional system and that the position of Chief Justice of the United States is one of the most important positions in our government. The impact of this nominee on our country, should he be confirmed, will be enormous. That means our scrutiny of this nominee must be intense and thorough. In my view, we must evaluate not only his qualifications, but also his ability to keep an open mind, his sensitivity to the concerns of all Americans and their right to equal protection under the laws; not only his intellectual capacity, but his judgment and wisdom; not only his achievements, but his fairness, and his courage to stand up to the other branches of government when they infringe on the rights and liberties of our citizens.

I look forward to the opportunity to question the nominee about his views later in the hearing, and I thank you, Mr. Chairman, again, for the opportunity to speak today.