Statement of

The Honorable Orrin Hatch

United States Senator
Utah
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Statement of Senator Orrin G. Hatch
before the United States Senate Committee on the Judiciary
on the Nomination of John G. Roberts, Jr.
to be Chief Justice of the Supreme Court of United States
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Thank you Mr. Chairman.

I want to begin by saying that my thoughts and prayers are with the family of Chief Justice William Rehnquist. He concluded his life on earth the same way he lived it, independently and with dignity.

I am glad that his children were with him when he passed away. He was a good man and a good judge.

Judge Roberts, I know that you and Chief Justice Rehnquist remained close friends. He would have been proud to have a former clerk join him as a colleague, and now you have been nominated to succeed him as Chief Justice.

When President Bush nominated you two years ago to your current post on the U.S. Court of Appeals, you had two hearings before this committee and answered approximately 100 written questions from various Senators.

The American Bar Association twice unanimously gave you its highest well qualified rating.

That process covered a lot of ground, including many of the same issues which are sure to be raised here. You acquitted yourself so well that the Senate confirmed you without dissent.

Do not be surprised now, however, if it seems like none of that scrutiny and evaluation ever happened.

Let me mention one example relating to my home state of Utah to show how the confirmation process has changed.

President Warren G. Harding nominated former Utah Senator George Sutherland to the Supreme Court on September 5, 1922. That same day, the Judiciary Committee Chairman went straight to the Senate floor and, after a few remarks, made a motion to confirm the nomination.

The Senate promptly and unanimously agreed.

There was no inquisition, no fishing expedition, no scurrilous and false attack ads.

The judicial selection process has changed because what some political forces want judges to do has changed from what America's founders established.

America's founders believed that separating the branches of government, with the legislature making the law and the judiciary interpreting and applying that law, is the lynchpin of limited government and liberty.

James Madison said that no political truth has greater intrinsic value.

Quoting the philosopher Montesquieu, Alexander Hamilton wrote in The Federalist no.78 that

"there is no liberty if the power of judging be not separated from the legislative and executive powers."
Times have changed.
Today, some see the separation of powers not as a condition for liberty but an obstacle to their political agenda.
When they lose in the legislature, they want the judiciary to give them another bite at the political apple.
Politicizing the judiciary leads to politicizing judicial selection.
Former New York Governor Mario Cuomo recently said that someone's personal opinions on issues are as relevant when they are a judicial nominee as when they are a political candidate.
The confirmation process has sometimes been unbecoming of the Senate and disrespectful of nominees.
I applaud President Bush for resisting this trend, and for nominating qualified men and women who, as judges, will not legislate from the bench.
The conviction that judges interpret and apply but do not make the law helps us sort out the information we need, the questions we ask, the standards we apply, and the decisions we make.
With that in mind, I believe three facts should guide us in this hearing.
First, what judges do limits what judicial nominees may discuss.
Judges must be impartial and independent.
Their very oath of office requires impartiality and the Canons of Judicial Ethics prohibit judges and judicial nominees from making commitments regarding issues that may come before them.
I will be the first to admit that Senators want answers to a great many questions.
But I also have to admit that a Senator's desire to know something is not the only consideration on the table.
Some have said that nominees who do not spill their guts about whatever a Senator wants to know are hiding something from the American people.
Some compare a nominee's refusal to violate his judicial oath or abandon judicial ethics to taking the Fifth Amendment.
These might be catchy sound bites, but they are patently false.
That notion misleads the American people about what judges do and slanders good and honorable nominees who want to be both responsive to Senators and protect their impartiality and independence.
Nominees may not be able to answer questions that seek hints, forecasts, or previews about how they would rule on particular issues.
Senators consult with law professors to ask these questions a dozen different ways, but we all know that is what they seek.
In 1993, President Clinton's Supreme Court nominee, Judge Ruth Bader Ginsburg, explained better than I can why nominees cannot answer such questions, no matter how they are framed.
She said: "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."
Nominees may not be able to answer questions asking them to opine or speculate about hypotheticals, outside of an actual case with concrete issues and real facts.
Since 1792, as long as the judiciary itself has existed, the Supreme Court has held that judges do not have the authority to render such advisory opinions.
We should not be surprised when nominees decline to provide what judges themselves may not

provide.
So the first fact that should guide us here is that, no matter how badly Senators want to know things, judicial nominees are limited in what they may discuss.
That limitation is real, and it comes from the very nature of what judges do.
The second fact is that nominees themselves must determine where to draw the line.
Judges, not Senators, take the oath of judicial office.
Judges, not Senators, are bound by the Canons of Judicial Ethics.
Judge Roberts will be a federal judge for many years to come; this process will only determine which courtroom he will occupy.
He must determine how best to honor his judicial obligations.
Different nominees may draw this line a little differently, but they draw the same kind of line protecting their judicial impartiality and independence.
Justice Stephen Breyer drew that line in 1994. As he put it, clients and lawyers must understand that judges are really open-minded.
Justice Anthony Kennedy drew that line in 1987. He said that the public expects that a judge will be confirmed because of his temperament and character, not his positions on the issues.
Recently one of our colleagues on this committee dismissed as a myth the idea that Justice Ginsburg refused to discuss things related to how she would rule.
Anyone watching C-SPAN's recent replays of Justice Ginsburg's hearing knows that this is not a myth, it is reality.
I was on this committee in 1993. Justice Ginsburg was not telling mythological tales when she refused nearly 60 times to answer questions, including mine, that she believed would violate what she said was her rule of "no hints, no forecasts, no previews."
Those were her words, not mine.
Justice Ginsburg did what every Supreme Court nominee has done. She drew the line she believed was necessary to protect her impartiality and independence.
Finally, the third fact that should guide us is that the Senate traditionally has respected nominees' judgment about where to draw the line.
In response to some of my questions, Justice Ginsburg said: "I must draw the line at that point and hope you will respect what I have tried to tell you."
Did I wish she had drawn the line differently?
Of course, but I respected her decision.
This is the historical standard.
In 1967, our colleague Senator Kennedy made the same point at a press conference supporting the Supreme Court nomination of Thurgood Marshall.
He said: "We have to respect that any nominee to the Supreme Court would have to defer any comments on any matters which are either before the Court or very likely to appear before the Court. This has been a procedure which has been followed in the past and is one which I think is based upon sound legal precedent."
Justice Marshall drew his line, yet we confirmed him by a vote of 69-11.
Justice Sandra Day O'Connor drew her line, yet we confirmed her by a vote of 99-0.
Justice Kennedy drew his line, yet we confirmed him by a vote of 97-0.
Justice Ginsburg drew her line, yet we confirmed her by a vote of 96-3.
Justice Breyer drew his line, yet we confirmed him by a vote of 87-9.
Let me finish up so we can hear from other members of the committee.
We must use a judicial, rather than a political, standard to evaluate Judge Roberts' fitness for the

Supreme Court. That standard must be based on the fundamental principle that judges interpret and apply but do not make law.

Judge Roberts, as every Supreme Court nominee has done in the past, you must decide how best to honor your commitment to judicial impartiality and independence.

You must decide when that obligation is more important than what Senators, including this one, might want to know.

As the Senate has done in the past, I believe we should honor your decision, and then make our own.

Thank you, Mr. Chairman.