STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman.

Before discussing Judge Roberts's nomination, I would like to take a moment to express my respect and admiration for the Justice whom he will be replacing on the Supreme Court, William Rehnquist, who began his career as a lawyer in Phoenix. In 1994, until last year, he made an annual return to Arizona to teach a course of Supreme Court history at my alma mater, the University of Arizona.

Chief Justice Rehnquist provided steady leadership at the Supreme Court through several turbulent decades, showing in the process how much of a difference one person with great integrity can make. We mourn his loss.

In spite of the fact that he is not from Arizona, Judge Roberts clearly is eminently qualified to serve as Chief Justice of the United States Supreme Court. Enough has already been said about his credentials, that I will not catalog them here. Rather, the principal matter that I would like to address today is the proper scope of this Committee's questioning of the nominee. With all due respect to my colleagues, a seat on the Supreme Court is not a political, let alone a legislative office, and not every question that a Senator might think of is legitimate.

This Committee's precedents, the rules of judicial ethics, and a sound respect for the unique role of the Federal Judiciary in our society, all counsel in favor of some basic limits on the types of questions that a Senator should ask of a judicial nominee. One is not qualified for the Court by virtue of his position on issues, but rather, by his ability to judge fairly.

Most importantly, it is not appropriate for a Senator to demand a nominee's views on issues that are likely to come before the Court. This standard was reiterated 4 years ago by the late Lloyd Cutler, White House Counsel to former Democratic Presidents Carter and Clinton. In a hearing before this Committee on the subject of the Senate's role in evaluating judicial nominees, Mr. Cutler stated quite clearly what the proper limits are, and I quote: "We viewers must refrain from asking candidates for particular precommitments about unresolved cases or issues that may come before them as judges." And he continued, "The ultimate question is simply whether or not potential candidates have the qualities of integrity, good judgment and experience to become judicial officers of the United States. It would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science, it also serves to weaken public confidence in the courts."

Just imagine, Mr. Chairman, expecting litigants to appear before a court knowing in advance what the ruling will be.

Limits on the questioning of judicial nominees are reflected even in the questionnaire that this Committee submits to nominees. Question 27(b) of the Committee's questionnaire makes clear that it is unacceptable for anyone involved in the process of selecting

the nominee to seek assurances about his positions on cases, questions or issues that might come before him as a judge.

Let me quote the question. "Has anyone involved in the process of selecting you as a judicial nominee, including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff, discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question?"

Judge Roberts answered in the negative to that question, and I think it would be ironic indeed if the Committee were now to demand that the nominee take stands on questions that may come before him as a member of the Court.

As Senator Hatch noted earlier, the confirmation hearings of the two most recent nominees, Justices Ginsburg and Breyer, confirmed this same principle. Those hearings were held under the chairmanship of our colleague, Senator Biden, who presided at the time. One of the comments that he made at the time of Justice Ginsburg's hearing was, and I quote: "You not only have a right to choose what you will answer and not answer, but in my view, you should not answer a question of what your view will be on an issue that clearly is going to come before the Court."

Not only would it violate this Committee's standards and procedures for a nominee to answer questions about issues that may come before him as a judge, it would also be unethical for the nominee to answer such questions. Some have argued that nominees cannot talk about cases, but that they can still talk about issues. Well, the Code of Judicial Ethics draws no such distinctions. The American Bar Association Model Code of Judicial Conduct dictates, and I quote, "that a judge or candidate for election or appointment to judicial office, shall not, with respect to cases, controversies or issues that are likely to come before the Court, make pledges, promises of commitments that are inconsistent with the impartial performance of the judicative duties of the office."

The import of this ethical rule is unambiguous. If a nominee is asked to commit himself to a particular stance on an issue that is likely to come before him as a judge, that nominee is obligated to decline to answer the question. Any other approach would violate the Code of Judicial Conduct.

Judge Roberts, I expect you to adhere to the Code of Judicial Ethics, and I want you to know that I will defend your refusal to answer any question that you believe is improper under those circumstances.

I would also like to emphasize that the standards for questioning that apply in this Committee are not simply quaint relics of the past to be abandoned at no cost to the future. Rather, these rules are fundamental to preserving the nature and role of an independent Judiciary. A judicial nominations process that required candidates to make a series of specific commitments in order to navigate the maze of Senate confirmation, would undermine the very concept of a fair and independent Judiciary. Constitutional law would become a mere extension of politics, but in a less accountable and less democratic arena.

If the Supreme Court operated this way, if it simply enforced political commitments made during the confirmation process, why would we give the power of judicial review, the power to strike down laws made by other more accountable and democratic branches of the Government? Granting this kind of power to the Supreme Court, the power to override democratic majorities, makes sense only if what the Court is deciding is applying and upholding the rule of law and our Constitution. When the Court adheres to that neutral and unbiased role, rather than making policy like the other branches, it is enforcing principles that the people themselves have deemed so important that they should be installed in the constitutional firmament, and placed above the reach of transient majorities or the political compromises reached by elected representatives.

The Court's legitimate authority derives not from commitments made during confirmation, but from its obligations embodied in the Constitution. I raise this matter not to suggest that all questions about a nominee's understanding of the law are improper. Indeed, I think that an examination of the Court's role, and the source of legitimacy of its authority, reinforces the importance of inquiring into a nominee's judicial philosophy, of determining whether he is devoted to upholding and enforcing the laws and the Constitution as they were adopted by the people.

Our proper role this week is to determine whether Judge Roberts has the character, the legal ability and the judicial philosophy to fulfill that responsibility.

Chairman SPECTER. Thank you very much, Senator Kyl.

Now, Senator Kohl.

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman.

Judge Roberts, let me also extend my welcome to you this afternoon and to your family. Judge Roberts, if confirmed you will succeed Justice Rehnquist and serve as only the 17th Chief Justice in the history of the United States, and the youngest in 200 years. You are nominated to a position of awesome power and responsibility. The decisions you and the other Justices make will shape the lives of every person in America for generations.

Yet for only a few days this week will the people, through their Senators, be able to question and to judge you. That means that we on this Committee who will be questioning you have an awesome power and responsibility as well.

Judge Roberts, our democracy, our rights and everything we hold dear about America are built on the foundation of our Constitution. That remarkable document has endured throughout our history. In the hands of the Supreme Court, the Constitution has established a right to equal education regardless of race, has guaranteed an attorney and a fair trial to all Americans, rich and poor alike. It has allowed women to keep private medical decisions private. It has allowed Americans to speak, vote and worship without interference from their Government.

You will lead the Court in its most solemn duty to interpret the Constitution and the rights it grants to all Americans. The Court