

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Durbin.

I recognize now Senator Brownback, and also recognize today is his birthday.

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR
FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you very much. This is certainly a long way to spend it. It is seeming like a long birthday. Judge Roberts, as one of my colleagues was just saying, I hope we are done before my birthday ends.

I welcome you to the Court, delighted to have you and your family here. I want to congratulate you on your lifetime of service thus far, and I look forward to future service that you will have for this great land.

I recall the enjoyable meeting that you and I had in my office, as many of the members here have had as well. You said two things in our meeting that I particularly took away and hung on to as an indicator of how you would look at the courts and also what America needs from our courts. One of the statements was that we need a more modest Court. And I looked at that and I thought, that is exactly the way the American people would look at the situation today. We need a more modest Court—a Court that is a court, and not a super-legislature. That looks at the Constitution as it is, not as we wish it might be, but as it is, so that we can be a rule-of-law Nation.

You had a second point that was very apt, I thought, when you talked about the courts and baseball. The analogy you draw, I found very appealing. You said it is a bad thing when the umpire is the most watched person on the field. In today's American governance, the legislature can pass a bill, and the Executive can sign it, but then everybody holds their breath, waiting to see how the Court is going to look at this and how it is going to interpret it. It seems as if the Court is the real mover of what the actual law is. And that is a bad thing. The umpire should call the ball fair or foul, it is in or it is out, but not become actively involved as a player on the field. Unfortunately, we have reached a point where, in many respects, the judiciary is the most active policy player on the field.

I was struck by your statement when you originally were nominated, that you had “a profound appreciation for the role of the Court in our constitutional democracy.” That is something I think we all respect and we look for in what we need to do.

Democracy, I believe, loses its luster when Justices on the High Court—who are unelected and not directly accountable—invent constitutional rights and alter the balance of governmental powers in ways that find no support in the text, the structure, or the history of the Constitution. Unfortunately, the Court in recent years, I believe, has gone into that terrain.

In our system of government, the Constitution contemplates that Federal courts will exercise limited jurisdiction. They should neither write nor execute the laws, but simply “say what the law is,” as Chief Justice Marshall said in *Marbury v. Madison*. The narrow

scope of judicial power was the reason the people accepted the idea that the Federal courts could have the power of judicial review; that is, the ability to decide whether a challenged law comports with the Constitution. The people believed that the courts would maintain their independence and, at the same time, would recognize their role by deferring to the political branches on policy choices.

Legitimacy based on judicial restraint was a concept perhaps best expressed by Justice Felix Frankfurter, appointed by President Franklin Delano Roosevelt. He said this: Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures. Primary responsibility for adjusting the interests which compete of necessity belongs to the Congress.

Yet courts today have strayed far beyond this limited role. Constitutionalists from Hamilton to Frankfurter surely would be shocked at the broad sweep of judicial activity today. Federal courts are redefining the meaning of marriage, deciding when a human life is worthy of protection, running prisons and schools by decree, removing expressions of faith from the public square, permitting the Government, under the Takings Clause, to confiscate property from one person and give it to another in the name of private economic development, and then interpreting our American Constitution on the basis of foreign and international law.

Perhaps the Supreme Court's most notorious exercise of raw political power came in *Roe v. Wade* and *Doe v. Bolton*, two 1973 cases based on false statements which invented a constitutional right to abortion. The issue had been handled by the people through their elected representatives prior to that time. Since that decision, nearly 40 million children have been aborted in America. Forty million lives that could be amongst us, but are not. Beautiful innocent faces that could bless our existence, our families, and our Nation, creating and expanding a culture of life.

If you are confirmed, your Court will decide if there is a constitutional right to partially deliver a late-term child and then destroy it. Partial-birth abortion is making its way to the Supreme Court. The Federal courts have thus far found laws limiting partial-birth abortion unconstitutional.

Now, it should be noted again, if *Roe* is overturned, it does not ban abortion in America. It merely returns the issue to the States, so States like Kansas or California can set the standards they see right and just. Although the principle of *stare decisis* will be involved, I would note that the Supreme Court frequently has overruled prior precedents. A case founded in my State, *Brown v. Board of Education*, which overruled *Plessy v. Ferguson*, fits within a broad pattern of revising previous decisions since the founding. I would note for you that, by some measures, the Supreme Court has overruled itself in 174 cases, with a substantial majority of those cases involving constitutional, not statutory, issues.

One final thought. In a just and healthy society, both righteousness and justice travel together. Righteousness is the knowledge of right from wrong, good from evil, and that is something that is written on our hearts. Justice is the application of that knowledge.

Everybody in our representative form of Government tries to do both of these, righteousness and justice, within the boundaries set for each of us. No one branch has unlimited control. The Supreme Court has boundaries, too. There are checks and balances on what it can deal with and what it can do. For instance, the Court cannot appropriate money. That power is specifically left to the Congress in the Constitution, no matter how right or just the Court may view the cause.

We all are constitutional officers, sworn to uphold the Constitution. Yet each branch has separate functions, which the other branch can check and balance. The total system functions best when each branch does its job but not the other's.

We have arrived at an important moment with your nomination to serve as Chief Justice of the United States, that is quite a title. Will you serve, as Hamilton assured the people, by exercising judgment rather than will? My review of your many legal writings over the past quarter-century leads me to believe that this is the case. I hope that this instinct will be proven correct during the days to come, that you, Judge Roberts, will be confirmed to serve as the first Justice among equals and that the noble legacy of the Justice that you once served will be honored.

God bless you and your family.

Chairman SPECTER. Thank you, Senator Brownback.
Senator Coburn?

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator COBURN. Thank you, Senator. First of all, I would like to thank you and your staff, as well as all the staff of this Committee. While we were traveling in August, they were laboring diligently to help prepare us for these hearings.

I also think everybody should know that Senator Brownback is entering his fifth decade, so he can catch up with the rest of us.

And finally, I am somewhat amused at the propensity for us to project your life expectancy. I met with you twice, and as the only physician on this panel and one of the few non-lawyers on this panel, I find it somewhat amusing that we can predict that without a history, a physical exam, or a family history. But we will let that pass.

I am a physician, and up until the end of this month and, hopefully, after that, I will continue to practice. This weekend I had the great fortune of delivering two little girls. And I have had the opportunity to talk with people from all walks of life as a physician—those that have nothing and those that have everything. And I believe the people in our country, and in my State in particular, are interested and concerned with two main issues. One is this word of judicial activism that means such a different thing to so many different people. And the second is the polarization that has resulted from it, and the division that occurred in our country that separates us and divides us at a time when we need to be together.