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**“My Obligation is to the Constitution — that’s the Oath”**

## **Judge Roberts — In His Own Words**

From September 12-15, 2005, Judge John G. Roberts, Jr., testified before the Senate Judiciary Committee in regards to his nomination to be the Chief Justice of the United States. After 20 hours of testimony, during which time he was asked more than 500 questions, the nation learned a great deal about how Judge Roberts views the judicial role and what kind of service he will provide the nation as Chief Justice. Below are excerpts from Judge Roberts’s testimony.<sup>1</sup>

### **Excerpts from Judge Roberts’s Opening Statement . . .**

“[A] certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.

... I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it’s my job to call balls and strikes, and not to pitch or bat.” (*September 12*)

### **On the Appropriate Role of a Judge . . .**

“I prefer to be known as a modest judge.... [That] means an appreciation that the role of the judge is limited, that judges are to decide the cases before them, they’re not to legislate, they’re not to execute the laws. Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of stare decisis. Part of that modesty has to do with being open to the considered views of your colleagues on the bench.” (*September 13*)

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<sup>1</sup> All quotations are taken from unofficial transcripts; exact page numbers are not available as of press time.

“If the people who framed our Constitution were jealous of their freedom and liberty, they would not have sat around and said, ‘Let’s take all the hard issues and give them over to the judges.’ That would have been the farthest thing from their mind. Now, judges have to decide hard questions when they come up in the context of a particular case. That’s their obligation. But they have to decide those questions according to the rule of law, not their own social preferences, not their policy views, not their personal preferences, [but] according to the rule of law.”

*(September 13)*

“We don’t turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It’s because we want him or her to apply the law. They are constrained when they do that. They are constrained by the words that you choose to enact into law in interpreting the law. They are constrained by the words of the Constitution. They are constrained by the precedents of other judges that become part of the rule of law that they must apply.”

*(September 13)*

“[T]he ideal in the American justice system is epitomized by the fact that judges, Justices, do wear the black robes, and that is meant to symbolize the fact that they’re not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law — not their own preferences, not their own personal beliefs. That’s the ideal.” *(September 13)*

“I don’t think you want judges who will decide cases before them under the law on what they think is good, simply good policy for America.” *(September 14)*

### **On Answering Senators’ Questions While Abiding by Judicial Ethics . . .**

“[T]he independence and integrity of the Supreme Court requires that nominees before this Committee for a position on that Court not forecast, give predictions, give hints about how they might rule in cases that might come before the Court.” *(September 13)*

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*Senator Feingold:* “What would be the harm, Judge, if we got your views at this point, and then that process caused you to come to a different conclusion, as it appropriately should? What would be the harm?”

*Judge Roberts:* “Well, the harm would be affecting the appearance of impartiality in the administration of justice. The people who would be arguing in that future case should not look at me and say, ‘Well, there’s somebody who under oath testified that I should lose this case because this is his view that he testified to.’ They’re entitled to have someone consider their case through the whole process I’ve just described, not testifying under oath in response to a question at a confirmation hearing. I think that is the difference between the views expressed in the prior precedent by other Justices in the judicial process and why — as has been the view of all of those Justices — every one of those Justices who participated in that case took the same view with respect to questions concerning cases that might come before them, as I am taking here.”

*(September 14)*

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“[Y]ou raised the question how is this different than Justices who dissent and criticize and how is this different than professors. And I think there are significant differences. The Justice who files a dissent is issuing an opinion based upon his participation in the judicial process. He confronted

the case with an open mind, he heard the arguments, he fully and fairly considered the briefs, he consulted with his colleagues, he went through the process of issuing an opinion. . . . Now, the professor, how is that different? That professor is not sitting here as a nominee before the Committee. And the great danger . . . is turning this into a bargaining process. It is not a process under which Senators get to say, ‘I want you to rule this way, this way, and this way, and if you tell me you’ll rule this way, this way, and this way, I’ll vote for you.’ That is not a bargaining process. Judges are not politicians. They cannot promise to do certain things in exchange for votes.” (September 14)

### **On His Respect for Precedent . . .**

“It is not enough that you may think the prior decision was wrongly decided. That really doesn’t answer the question. It just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the Court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of stare decisis.” (September 13)

“[S]tare decisis is not an inexorable command. . . . At the same time, you always have to take into account the settled expectations that have grown up around the prior precedent. It is a jolt to the legal system to overrule a precedent, and that has to be taken into account, as well as the different expectations that have grown up around it.” (September 13)

### **On the Right to Privacy . . .**

“The right to privacy is protected under the Constitution in various ways. It’s protected by the Fourth Amendment, which provides that the right of people to be secure in their persons, houses, effects and papers is protected. It’s protected under the First Amendment, dealing with prohibition on establishment of a religion and guarantee of free exercise. [It] protects privacy in matters of conscience. It was protected by the Framers in areas that were of particular concern to them that may not seem so significant today — the Third Amendment, protecting their homes against the quartering of troops.

And in addition, the Court, with a series of decisions going back 80 years, has recognized that personal privacy is a component of the liberty protected by the Due Process Clause. The Court has explained that the liberty protected is not limited to freedom from physical restraint, and that it’s protected not simply procedurally but as a substantive matter as well. And those decisions have sketched out over a period of 80 years certain aspects of privacy that are protected as part of the liberty in the Due Process Clause under the Constitution.” (September 13)

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*Senator Biden:* “Do you agree that there is a right of privacy to be found in the Liberty Clause of the 14th Amendment?”

*Judge Roberts:* “I do, Senator. I think that the Court’s expressions, and I think if my reading of the precedent is correct, I think every Justice on the Court believes that to some extent or another. Liberty is not limited to freedom from physical restraint. It does cover areas, as you said, such as privacy, and it’s not protected only in procedural terms but it is protected substantively as well.” (September 13)

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*Senator Kohl:* “Judge, as we all know, the Griswold v. Connecticut case guarantees that there is a fundamental right to privacy in the Constitution as it applies to contraception. Do you agree with that decision and that there is a fundamental right to privacy as it relates to contraception? In your opinion, is that settled law?”

*Judge Roberts:* “I agree with the Griswold Court’s conclusion that marital privacy extends to contraception and availability of that. The Court since Griswold has grounded the privacy right discussed in that case in the liberty interest protected under the Due Process Clause that’s the approach that the Court has taken in subsequent cases rather than in the penumbras and emanations that were discussed in Justice Douglas’s opinion. And that view of the result is, I think, consistent with the subsequent development of the law, which is focused on the Due Process Clause and liberty rather than Justice Douglas’s approach.” (*September 13*)

### **On Relevance of His Personal Views . . .**

“[M]y faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or any other religious source.” (*September 13*)

### **On Abortion and Personal Views . . .**

“I think people’s personal views on this issue [abortion] derive from a number of sources, and there’s nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of stare decisis.” (*September 13*)

### **On the Right to Abortion . . .**

*Senator Kohl:* “Judge, do you believe that reasonable people can disagree on Roe v. Wade?”

*Judge Roberts:* “I certainly agree that reasonable people can disagree about that decision, yes.” (*September 13*)

### **On the “Right to Die” and the Role of Personal Views . . .**

“[T]here are cases involving disputes between people asserting their rights to terminate life, to remove feeding tubes either on their own behalf or on behalf of others. There is legislation that States have passed in this area that governs that, and there are claims that are raised that the legislation is unconstitutional. Those are issues that come before the Court, and as a result, I will confront those issues in light of the Court’s precedents, with an open mind. I will not take to the Court whatever personal views I have on the issues, and I appreciate the sensitivity involved. They won’t be based on my personal views. They’ll be based on my understanding of the law.” (*September 14*)

### **On Threats to Rule of Law . . .**

*Senator Graham:* “What is your biggest concern, if any, about the rule of law as it exists in America, and what are the biggest threats to the rule of law as we know it today?”

*Judge Roberts:* “The one threat, I think, to the rule of law is a tendency on behalf of some judges to take that legitimacy and that authority and extend it into areas where they’re going beyond the

interpretation of the Constitution, where they're making the law. And because it's the Supreme Court, people are going to follow it even though they're making the law. The judges have to recognize that their role is a limited one. That is the basis of their legitimacy.... Judges have to have the courage to make the unpopular decisions when they have to. That sometimes involves striking down Acts of Congress. That sometimes involves ruling that acts of the Executive are unconstitutional. That is a requirement of the judicial oath. You have to have that courage. But you also have to have the self-restraint to recognize that your role is limited to interpreting the law and doesn't include making the law." (*September 13*)

### **On Courts' Need to Protect Their Legitimacy . . .**

"[T]he Court has to appreciate that the reason they have that authority is because they're interpreting the law, they're not making policy, and to the extent they go beyond their confined limits and make policy or execute the law, they lose their legitimacy, and I think that calls into question the authority they will need when it's necessary to act in the face of unconstitutional action." (*September 13*)

"Judges need to appreciate that the legitimacy of their action is confined to interpreting the law and not making it. And if they exceed that function and start making the law, I do think that raises legitimate concerns about legitimacy of their authority to do that." (*September 14*)

### **On the Use of Foreign Law in Supreme Court Decisions . . .**

*Senator Kyl*: "[W]hat, if anything, is the proper role of foreign law in U.S. Supreme Court decisions?"

*Judge Roberts*: "I would say as a general matter that a couple of things that cause concern on my part about the use of foreign law as precedent . . . . The first has to do with democratic theory. . . . judges of course are not accountable to the people, but we are appointed through a process that allows for participation of the electorate. The President who nominates judges is obviously accountable to the people. The Senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. . . . The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does." (*September 13*)

### **On His Respect for Statutory and Constitutional Text . . .**

"I think when you folks legislate, you do have something in mind in particular, and you put it into words, and you expect judges not to put in their own preference, not to substitute their judgment for you, but to implement your view of what you are accomplishing in that statute.

I think when the Framers framed the Constitution it was the same thing, and the judges are not to put in their own personal views about what the Constitution should say, but they are supposed to interpret it and apply the meaning that is in the Constitution, and I think there is meaning there, and I think there is meaning in your legislation, and the job of a good judge is to do as good a job as possible to get the right answer.

Again, I know there are those theorists who think that is futile, or because it is hard in particular cases, we should just throw up our hands and not try in any case, and I do not subscribe to that. I believe that there are right answers, and judges, if they work hard enough, are likely to come up with them.” (September 13)

### **On the Supreme Court’s Deference to Congress . . .**

*Senator DeWine:* “In your opinion, what role should a judge play when reviewing congressional fact findings?”

*Judge Roberts:* “Judges know when they look at those [findings], that they’re the result of an exhaustive process of a sort that the Court cannot duplicate. We simply don’t have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the fact finding that is made. It’s institutional competence. The courts don’t have it. Congress does. It’s constitutional authority. It’s not our job. It is your job. So the deference to congressional findings in this area has a solid basis.” (September 13)

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“I don’t think the Court should be the task master of Congress. I think the Constitution is the Court’s task master, and it’s Congress’s task master as well. And we each have responsibilities under the Constitution. And I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It’s not just disagreement over a record. It’s a question of whose job it is to make a determination based on the record.” (September 14)

### **On Judicial Activism . . .**

*Senator Hatch:* “[S]ome seem to argue that overturning a statute that we pass here in the national legislature is almost presumptively an example of judicial activism.”

*Judge Roberts:* “Well, the obligation to say what the law is, including determining that particular legislation is unconstitutional, is, as Chief Justice Marshall said, emphatically the duty and province of the Judicial Branch. You and I can agree or disagree on whether the Court is right in a particular case, but if the Court strikes down an Act of Congress and it’s wrong — the Court shouldn’t have done that — that’s not an act of judicial activism, it’s just being wrong.” (September 13)

### **On Original Intent Versus Textualism . . .**

“I depart from some views of original intent in the sense that those folks, some people view it as meaning just the conditions at that time, just the particular problem. I think you need to look at the words they used, and if the words adopt a broader principle, it applies more broadly.” (September 14)

### **On the Right to Vote . . .**

*Senator Grassley:* “Judge Roberts, do you believe that every citizen who meets the qualifications set forth in the Constitution and our laws should have the opportunity to cast a free and unfettered vote? And as a follow-up, will you on the Court fairly apply the Voting Rights Act?”

*Judge Roberts:* “Well, I certainly agree that every citizen who meets the qualifications not only has the right to vote but should vote. I think it’s a problem that we don’t have more people voting. And any issues that come before me under the Voting Rights Act, I will confront those with an open mind and decide them after full and fair consideration of the arguments, in light of the precedents of the Court, and in light of a recognition of the critical role that the right to vote plays as preservative of all other rights.” (September 14)

### **On the Bill of Rights During Times of War . . .**

“The Bill of Rights doesn’t change during times of war. The Bill of Rights doesn’t change in times of crisis. There may be situations where demands are different and they have to be analyzed appropriately so that things that might have been acceptable in times of war are not acceptable in times of peace. I think everyone appreciates that. But the Bill of Rights is not suspended and the obligation of the courts to uphold the rule of law is not suspended.” (September 13)

### **On His Commitment to Rule of Law in Times of War . . .**

*Senator Durbin:* “What is it in your background or experience that can convince the members of this committee and the American people following this that you are willing to stand up to this President if he oversteps his authority in this time of war, even if it is an unpopular thing to do?”

*Judge Roberts:* Well, Senator, I would just say that my demonstrated commitment to the rule of law. . . . The idea that the rule of law — that’s the only client I have as a judge. The Constitution is the only interest I have as a judge. The notion that I would compromise my commitment to that principle that has been the lodestar of my professional life since I became a lawyer because of views toward a particular administration is one that I reject entirely. That would be inconsistent with the judicial oath. . . .” (September 13)

### **On the Religion Clauses of the First Amendment . . .**

“There is a tension of sorts between the Establishment Clause, on the one hand, and the Free Exercise Clause on the other, and the Court’s cases in recent years have tried to consider when is an accommodation for religious belief — when does that go too far and become an establishment of religion? The Court has a case on its docket coming up. I think the animating principle of the Framers that’s reflected in both of the religion clauses is that no one should be denied rights of full citizenship because of their religious belief or their lack of religious belief. That is the underlying principle. That is, I think, what the Framers were trying to accomplish.” (September 13)

### **On Private Property and the *Kelo* Decision . . .**

*Senator Brownback:* “Judge Roberts, what is your understanding of the state of the Takings Clause jurisprudence now after *Kelo*? Isn’t it now the case that it is much easier for one man’s home to become another man’s castle?”

*Judge Roberts:* “[T]he Court was not saying you *have* to have this power, you *have* to exercise this power. What the Court was saying is there *is* this power, and then it’s up to the legislature to determine whether it wants that to be available — whether it wants it to be available in limited circumstances, or whether it wants to go back to an understanding as reflected in the dissent, that

this is not an appropriate public use. That leaves the ball in the court of the legislature, and I think it's reflective of what is often the case and people sometimes lose sight of — that this body and legislative bodies in the States are protectors of the people's rights as well. It's not simply a question of legislating to address particular needs, but you obviously have to also be cognizant of the people's rights and you can protect them in situations where the Court has determined, as it did 5-4 in Kelo, that they are not going to draw that line." (*September 14 (emphasis added)*)

### **On Civil Rights Laws and Congressional Intent . . .**

*Senator Feingold*: "More generally, do you believe that the ADA [Americans with Disabilities Act] or any other civil rights statute should be interpreted narrowly or broadly when it comes to the issue of who it protects?"

*Judge Roberts*: "Well, I have to say I think it should be interpreted consistent with Congress's intent, and you look at a lot of different factors in trying to flesh that out. If you folks here in Congress had a particular — in any statute, a narrow focus — then to give that focus a broader impact, I think would be wrong. If you had a broad focus, as, of course, you often do when you're dealing with statutes designed to address discrimination, giving that interpretation a narrow focus would be wrong. The effort in every case is to try to give it the *right* focus, and that's the focus that you intended when you passed the law." (*September 15 (emphasis added)*)

### **On the Primacy of the Constitution . . .**

*Senator Kyl*: "What is your take on your role if you were to become the Chief Justice of the United States in considering this notion of advancing freedom and progress through your decision making?"

*Judge Roberts*: "Well, Senator, judges and Justices do have a side in these disputes. They need to be on the side of the Constitution, and in most of these areas, what the Constitution provides is that these sorts of policy debates, which approach is better suited to promote freedom or to promote progress are vested in the Legislative Branch. . . . I think people on both sides need to know that if they go to the Supreme Court that they're going to be on a level playing field, that the judge is going to interpret the law, that the judge is going to apply the Constitution and not take sides in their dispute." (*September 13*)

### **On the Direction of the Supreme Court . . .**

*Senator Graham*: "The idea of a dramatic departure under your watch from the Rehnquist era is probably not going to happen, is that true?"

*Judge Roberts*: "Given my view of the role of a judge, which focuses on the appropriate modesty and humility, the notion of dramatic departures is not one that I would hold out much hope for." (*September 13*)

### **On the Politicization of the Courts . . .**

"I think it is a very serious threat to the independence and integrity of the courts to politicize them. I think that is not a good development, to regard the courts as simply an extension of the political process. That's not what they are." (*September 13*)

### **On the Politicization of the Confirmation Process . . .**

“Judges don't stand for election. I'm not standing for election, and it is contrary to the role of judges in our society to say that this judge should go on the bench because these are his or her positions and those are the positions they're going to apply.” Judges go on the bench and they apply and decide cases according to the judicial process, not on the basis of promises made earlier to get elected or promises made earlier to get confirmed. That's inconsistent with the independence and integrity of the Supreme Court.” (September 14)

“It's not supposed to be a bargaining process, and if you start stating views with respect to particular issues of concern to one Senator, then obviously everyone is going to have their list. And when that individual nominee, if confirmed, if the bargain is successful from his or her point of view and he gets confirmed, he will have to begin each case not with the parties' briefs and arguments but with the transcript of the confirmation hearing to see what he or she swore to under oath was their view in a particular area of the law or a particular case. And I think that would undermine the independence of the Supreme Court. It would undermine the integrity of the judicial process. Every one of the Justices on the Court today, every one of them refused to engage in that type of process . . . . [T]he nominee I think has to be comfortable with the proposition that they're not doing anything that's going to undermine the integrity of the Court.” (September 14)

### **On the President's Questions During the Interview Process . . .**

*Senator Feinstein:* “Has anyone, when you were being interviewed for this position, ever asked your opinion on Roe?”

*Judge Roberts:* “No.”  
(September 14)

### **On the Importance of Individual Cases in the Judicial Process . . .**

“Well, judges, when they sit down to decide a case, when the cases come into the chambers, judges don't sit and decide, well, what do I think about issues under the Fourth Amendment or the Fifth Amendment or the Seventh Amendment. They want to know what the case is about, and that begins with knowing what the factual dispute is about and what the record is. Then they want to know what law applies in resolving that question. And they want to know what the arguments are. That's why we have briefs on one side, then briefs on the other. (September 14)

### **On Equal Opportunity for All Americans. . .**

*Senator Kennedy:* “Do you think having a diverse society where everyone has an equal chance to participate is an American value and is fundamental to the strength of our society?”

*Judge Roberts:* “I do, I agree with that statement Senator, yes.”  
(September 15)

### **On Why John Roberts Became a Lawyer . . .**

“People become lawyers for different reasons, all perfectly good and noble, and legitimate. People who are interested, for example, in protecting the environment often will go into the law and practice environmental law because they think that is an effective way to advance a cause in

which they passionately believe. People who are committed to the cause of civil rights may become lawyers and become civil rights lawyers and present and press those causes because they are causes in which they passionately believe.

I became a lawyer or at least developed as a lawyer because I believe in the rule of law. . . . [Y]ou believe in civil rights, you believe in environmental protection, whatever the area might be, believe in rights for the disabled — you're not going to be able or effectively to vindicate those rights if you don't have a place that you can go where you know you're going to get a decision based on the rule of law." (*September 15*)

### **On Fair-Mindedness due to Extensive Litigation Experience . . .**

"If it's somebody who's representing welfare recipients who have had their benefits cut off, I've done that.

If it's somebody who's representing a criminal defendant who's facing a long sentence in prison, I've done that.

If it's a prosecutor who's doing his job to defend society's interest against criminals, I have been on the side of the prosecution.

If it's somebody who's representing environmental interests, environmentalists in the Supreme Court, I've done that.

If it's somebody who's representing the plaintiffs in an antitrust case, I've been in that person's shoes; I've done that.

If it's somebody representing a defendant in an antitrust case, I've done that as well. . . .

I have not just represented one side or the other. I've represented all of those interests. And I think those people will know that have had their perspective. I've been on the other side of the podium with a case just like theirs, and that should, I hope — and I hope it does now — encourage them that I will be fair and that I will decide the case according to the law, but I will have seen it from their perspective." (*September 14*)

### **On the Constitution's Demands . . .**

"I had someone ask me in this process — I don't remember who it was, but somebody asked me, you know, 'Are you going to be on the side of the little guy?' And you obviously want to give an immediate answer, but as you reflect on it, if the Constitution says that the little guy should win, the little guy is going to win in court before me. 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. That's the oath.*" (*September 15*) *emphasis added*)