the Constitution, the Senate was, as you indicated earlier, given a longer term, given staggered terms because it was supposed to exercise something of a restraining influence on the more popularly responsive branches of government.

Senator KENNEDY. This is a well-rooted responsibility, as I understand. I mean, we have seen at times when you can take—the most obvious historic would be the court-packing by President Roosevelt, when there would be an important responsibility by the Congress to stand up to a President, actions of the Executive Branch. And as someone who is a constitutional authority, such as yourself, where of that historic responsibility and role and thought about it, if there is anything you can tell—

Mr. ROBERTS. Well, I don't claim to be a constitutional authority, but certainly the Senate obviously has a critical responsibility in this area. My memory may not be correct, but I believe original drafts of the Constitution provided that the Senate would actually be appointing the judges.

[Laughter.]

Senator KENNEDY. There you go. Did you hear that, Orrin?

Chairman HATCH. That is what they think they are doing now.

[Laughter.]

Mr. ROBERTS. Cooler heads prevailed before the end.

Chairman HATCH. I am glad you added that last part.

Mr. ROBERTS. But I am happy to be scrutinized under whatever standard the Committee or the Senate wishes to apply.

Senator KENNEDY. Thank you very much.

Chairman HATCH. We will turn to Senator Durbin now.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman.

Mr. Roberts, thank you for coming back. I am glad we had a chance for this hearing, and I thank the Chairman. I think we have reached an accommodation here that may be helpful in moving this Committee forward in a better environment.

I understand my fate in life as a back-bencher in the minority in the Senate with a Republican President, that nominees that come before us are not likely to share my political philosophy. That is a fact of life.

I also understand that I have a responsibility under the Constitution to ask questions of those nominees to satisfy my judgment that they would be well-suited to serve on the Federal bench. Many of the nominees have been forthcoming, and open, and candid in their answers, others have not. As a politician, I can certainly identify with that. I have danced around questions in my life, Waltz steps, Polka steps, Samba steps, I try them all when I do not want to answer a question.

And now I am going to ask you a question, just a limited number of questions relating to some dance steps I see in your answers here.

So, in 1991, you are in the Solicitor General's Office, and in *Rust* v. *Sullivan*, you end up signing on to a brief which calls for overturning *Roe* v. *Wade*, one of the more controversial Supreme Court cases of my lifetime. When we asked repeatedly in questions of you

what your position is on *Roe* v. *Wade*, you have basically danced away and said, "No, no, my personal views mean nothing. I am just going to apply the law."

This, in my mind, is evasive. I need to hear something more definitive from you. Was the statement in that brief an expression of your personal and legal feelings about *Roe* v. *Wade*, that it should be repealed?

What is your position today, in terms of that decision?

Mr. ROBERTS. The statement in the brief was my position as an advocate for a client. We were defending a Health and Human Services program in which the allegation was that the regulations issued by the Department of Health and Human Services burdened the constitutional right to an abortion recognized in *Roe* v. *Wade*.

At that time, it was the position of the administration, articulated in four different briefs filed with the Supreme Court, briefs that I hadn't worked on, that *Roe* v. *Wade* should be overturned.

Now, if *Roe* v. *Wade* were to be overturned, the challenge to the regulations that we were tasked with defending would fail, and so it was appropriate in that case to include that argument. I think it was all of one or two sentences. The bulk of the brief was addressed to why the regulations were valid, in any event.

But since that was the administration position, and the administration was my client, I reiterated that position in the brief because it was my responsibility to defend that HHS program.

Senator DURBIN. Understood. I have been an attorney, represented a client, sometimes argued a position that I did not necessarily buy, personally. And so I am asking you today what is your position on *Roe* v. *Wade*?

Mr. ROBERTS. I don't—*Roe* v. *Wade* is the settled law of the land. It is not—it's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision. Accordingly, it's the settled law of the land. There's nothing in my personal views that would prevent me from fully and faithfully applying that precedent, as well as *Casey*.

Senator DURBIN. Then, let me ask you this question. You make a painful analogy, from my point of view, when you suggest that calling for the overturn of *Roe* v. *Wade* was not any different than the Government calling for overturning *Plessy* v. *Ferguson* and *Brown* v. *Board of Education*. *Plessy* v. *Ferguson*, separate, but equal, was really the basis for racial discrimination and segregation in America for decades.

I hope that that is just a strict legal analogy and does not reflect your opinion of *Roe* v. *Wade* policy compared to *Plessy* v. *Ferguson* policy.

Mr. ROBERTS. Senator, the question I was asked, were there other occasions in which the Department—if I am remembering correctly—if there were other occasions in which the Solicitor General had urged that a Supreme Court precedent be overturned, and that is just—*Brown* v. *Board of Education* is the most prominent one. The answer wasn't meant to draw a particular substantive analogy.

Senator DURBIN. And I will not push any further because I was hoping that is what your response would be.

So in the panel that you were on the last time before us, Justice Deborah Cook of the Ohio Supreme Court was one of the members of the panel, and I sent a written question to her, which I sent to you. And the basic question goes into the cliches we use in this Committee about strict construction, and where are you, and how do you compare yourself to Justice Scalia and Justice Thomas, and then try to draw some conclusions.

Now, as oblique as those questions may be, that is as good as it gets in this Committee. That is as close as we can get to trying to find out what is really ticking in your heart when it comes to your judicial philosophy.

And her answers were, as I have said, painful, but painfully honest. She said she was not a strict constructionist, but she conceded in answers to question that if the Supreme Court had a majority of strict constructionists, it is not likely they would have reached the same conclusion in *Brown* v. *Board of Education*, the *Miranda* decision or *Roe* v. *Wade*. I thought that was the most honest answer we have been given by a Bush nominee, and I have used it as kind of a standard ever since to just see how far other nominees would go in their candor and honesty.

I found your answer evasive. When I look at what you had to say about your philosophy, you said, "In short, I do not think beginning with an all-encompassing approach to constitutional interpretation is the best way to faithfully construe the document," and then you went on to say I am not going to draw any conclusions on the Supreme Court decisions.

I need more. I need to hear more from you about where you are coming from and, at least hypothetically, if you agree that those who call themselves strict constructionists would not likely be in the vanguard of the socially important Supreme Court decisions that we have seen in Brown v. Board, *Miranda* or *Roe* v. *Wade*.

Mr. ROBERTS. Well, Senator, I don't know if that's a flaw for a judicial nominee or not, not to have a comprehensive philosophy about constitutional interpretation, to be able to say, "I'm an originalist, I'm a textualist, I'm a literalist or this or that." I just don't feel comfortable with any of those particular labels. One reason is that as the Constitution uses the term "inferior court judge," I'll be bound to follow the Supreme Court precedent regardless of what type of constructionist I, personally, might be.

The other thing is, in my review over the years and looking at Supreme Court constitutional decisions, I don't necessarily think that it's the best approach to have an all-encompassing philosophy. The Supreme Court certainly doesn't. There are some areas where they apply what you might think of as a strict construction; there are other areas where they don't. And I don't accept the proposition that a strict constructionist is necessarily hostile to civil rights.

For example, Justice Black thought he was a strict constructionist of the First Amendment. No law means no law. Well, that's a very sympathetic view to people who have First Amendment claims. I can see the argument that someone who is going to be a strict constructionist on the Eleventh Amendment might result, come forward with decisions that are more acceptable to some of the questions Senator Leahy was raising earlier. The Eleventh Amendment says the citizen of another State, so how does it apply

with citizen of the same State if you are going to be a strict constructionist?

The Supreme Court doesn't apply a uniform and consistent approach. I certainly don't feel comfortable with any uniform or consistent approach because the constitutional provisions are very different. You have a very different approach in saying how are you going to give content to the Fourth Amendment prohibition on unreasonable searches and seizures. That's one thing. It doesn't mean that you apply the same approach to a far more specific provision like the Seventh Amendment.

Senator DURBIN. That is a reasonable answer. It is also a safe answer, and I am not going to question your motive in that answer. I accept it at face value as being an honest answer, but it raises the question that comes up time and again. If this job is so automatic, if the role of a judge is strictly to apply the precedent, then, frankly, I think we would have as many Democrats being proposed by the Bush White House as we do Republicans, but we do not. They understand that it is not automatic, it is not mechanical.

There are going to be discretionary and subjective elements in decisions, and that is why we have people coming from major law firms who have made a living representing rather wealthy clients. We have people who are conservative in their philosophy. We have many, many members of the vaunted Federalist Society, which my Chairman is so proud to be part of, all of these people come before us because I think, when it gets beyond the obvious, we understand that there is subjectivity here.

The last question I will ask you is a quote, and you better take care when you get quoted, but you were asked about the Rehnquist Supreme Court in 2000, for your opinion.

Now, many people had characterized it as a very conservative Court, but you said, "I don't know how you can call the Rehnquist Court conservative."

When asked specifically about the 1999–2000 Supreme Court term, a term in which the Court rendered numerous, highly controversial decisions, you said, "Taking this term as a whole, the most important thing it did was to make a compelling case that we do not have a very conservative Supreme Court."

What were you talking about?

Mr. ROBERTS. Well, that was the labels that people had been tossing about, and I thought that it didn't help public understanding of what the Court does to not look beyond that label. In that particular term, 1999 to 2000, some of the things the Supreme Court did was reaffirm the constitutional basis of the *Miranda* rule; strike down a restriction on partial-birth, late-term abortions in the case out of Nebraska; strike down, as violating the First Amendment, the giving of an invocation at school. In other words, reinforced *Miranda*, reinforced *Roe*, reinforced the ban on school prayer.

It issued the *Apprendi* decision, a great benefit to criminal defendants in sentencing. If there is going to be an enhancement of your sentence, you have all of the constitutional rights before that enhancement can be applied.

In the Nixon case out of Missouri, it even upheld constitutional limits on campaign contributions. In the Playboy Enterprises case,

it struck down an act of this body, this Congress, trying to regulate indecent speech. And I'm thinking, sitting there, well, there are six cases, every one of which—again, the labels are not helpful—but every one of which you would describe not as a conservative Court. It's a conservative Court giving criminal defendants a big break, reaffirming *Miranda*, reaffirming *Roe*, striking down regulation of indecent broadcasts, striking down school prayer.

Now, you can tell, if you're being interviewed for public consumption, you can say it's a conservative Court, it's a liberal Court. I think if you want to educate a little bit about what the Court does, they need to know that even when other people would say this is a conservative Court, there are those decisions. It's much more complicated than those labels.

Senator DURBIN. Thank you, Mr. Roberts.

Mr. ROBERTS. Thank you, Senator.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman HATCH. Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

I would like to welcome Mr. Roberts. Many of us wanted to have you back before the Committee for quite some time. So I want to thank the Chairman for scheduling this hearing. I hope this is a first step toward restoring some measure of regular order to our consideration of judicial nominations, and I do think, Mr. Chairman, if we work together in good faith it will be possible to bridge some of the differences we have on the issues.

Mr. Roberts, I enjoyed your reference to the Missouri Shrink case, which I agree is an important case.

Let me ask you something else. You were interviewed on the radio in 1999 and said, "We have gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a Federal law, whether it is the Violence Against Women Act or anything else. The fact of the matter is conditions are different in different States, and State laws can be more relevant is I think exactly the right term, more attune to the different situations in New York, as opposed to Minnesota, and that is what the Federal system is based on."

That is your quote, and I certainly do not disagree with some of the sentiments of it, but could you elaborate a little bit on the statement. Were you referring there simply to the constitutional limits on Congress's power that were being asserted in the case that challenged VAWA or were you saying that Congress was going too far in trying to address Violence Against Women, even if the Court were to hold that it could constitutionally take the action that it did?

Mr. ROBERTS. I didn't have any particular reference. I think that it was the VAWA case that had come up, if I am remembering the interview correctly, and I didn't mean to be passing either a policy or a legal judgment on the general policy question. I just wanted to make the basic point, and I'm sure it is a judgment that Senators deal with every day, that simply because you have a problem