

I want to speak to you today about our most recent Supreme Court appointees, Chief Justice John Roberts and Associate Justice Samuel Alito. I had the privilege to take part in their confirmation hearings, and I did my best to perform my solemn constitutional duty to assess their fitness to take their seats on the high court.

I did my best to ascertain their legal philosophies and judicial ideologies with careful questioning, as did my colleagues. Neither of them was particularly forthright in answering my questions, and I therefore could not in good conscience vote to confirm either of them.

This afternoon, I want to address three questions that arise from the experience of the Roberts and Alito confirmations:

Question One: Were we duped?

Question Two: What lessons should we draw from the process that led to the confirmation of Roberts and Alito?

Question Three: How should we apply those lessons to the next nomination to the High Court?

Question One: Were we duped?

Let me go to the first question: Were we hoodwinked?

Although I did not in the end support Judge Roberts, he garnered an impressive 22 Democratic votes, and I anguished for days before ultimately voting nay.

Although Judge Alito managed to win far fewer votes than Roberts, there was no serious effort to block him and he, too, was easily elevated to the High Court.

So the question comes: Were we too easily impressed with the charm of nominee Roberts and the erudition of nominee Alito?

Did we mistakenly vote our hopes when our fears were more than justified from the ultra-conservative records of these two men?

Were Senators too quick to credit these nominees' solemn salutes to modesty and stability and incrementalism?

Were we sold a bill of goods by two hyper-smart and well-coached nominees who artfully exploited a confirmation process ill-suited to lay bare their genuine judicial philosophy?

Based on the record of the last Supreme Court term, sadly, the answer to each of these questions is yes.

Recall the confirmation hearings and the assurances given.

First, we were promised an era of gentility and consensus if the affable John Roberts were confirmed as Chief Justice.

Roberts portrayed himself—to use a term we’ve heard before—as a “uniter rather than a divider.” He would be the consummate Chief, we were told, because he understood the importance of respecting the other Justices’ points of view. He would be a consensus builder.

Unfortunately, that portrait bears no resemblance to the bitterly divided Supreme Court we saw last term:

We saw fully a third of the Court’s docket decided on a 5-4 basis;

We saw normally placid Justices taking the unusual symbolic step of reading their dissents aloud from the bench;

And we heard astonishingly harsh rhetoric – by Court standards – from the increasingly marginalized liberal wing of that Court.

One assessment, from Justice Breyer, overnight became the most pithy and poignant indictment of the new Court’s direction:

“It is not often in the law that so few have so quickly changed so much.”

Justice Breyer’s comment leads me to my second point about the false advertising at the confirmation hearings – “so few have so quickly changed so much.”

Justice Breyer was, of course, referring to the new “dynamic duo” on the Court.

While politicians sometimes campaign on a platform of change, aspirants to the Court wisely do the opposite, selling themselves not as agents of change but as guardians of stability.

In this regard, Justices Alito and particularly Roberts were masterful in their public statements.

Both Roberts and Alito repeatedly claimed their loyalty to the principles of stare decisis and the strong gravitational pull of precedent.

Even before his confirmation hearing, Judge Roberts was compulsive in his studied invocation of “judicial modesty”: He unfailingly advertised himself as a judge who appreciates that his role is limited and who has the humility to respect the precedent that forms the rule of law.

Roberts insisted that his analysis of cases “begins with a basic recognition of the value of precedent.”

He went on to explain, and I quote:

“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.”

Roberts then famously likened his role as a judge to that of an umpire. He said, and I quote:

“Umpires don't make the rules; they apply them. [. . .] 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.”

But the umpire has to play by the rules too. He has to call balls and strikes based on the strike zone developed by those who came before him.

Unfortunately, if there is one thing this term has showed us, notwithstanding protests to the contrary, it is that Chief Justice Roberts seems intent on changing the strike zone. When the team he favors is at bat—those who seek to restrict access to the courts, those who seek to roll back civil rights and liberties—he calls all balls. When the team he doesn't like is at bat, he calls all strikes.

If the past Supreme Court term were a movie, it might be called: “The Umpire Strikes Back.”

Not to be outdone, Justice Alito also professed his deeply held respect for precedent. During his hearing, he testified:

I think the doctrine of stare decisis is a very important doctrine. [...] It's the principle that courts in general should follow their past precedents. [...] It's important because it limits the power of the judiciary. [...] And it's important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.

This easy rhetoric simply has not been supported by their decisions.

In case after case, it becomes more apparent that there was little truth in advertising.

In case after case, our most recently confirmed Justices have appeared to jettison decisions recently authored by their immediate predecessors. Although Roberts and Alito both expressed their profound respect for stare decisis at their confirmation hearings, many of their decisions have flouted precedent. For example:

- In *Gonzales v. Carhart*, they upheld a federal law prohibiting so-called partial-birth abortion — even though just seven years ago, the Supreme Court struck down an almost identical state law as a violation of *Roe v. Wade*.
- In the *Seattle School District* case, they ruled that public schools cannot consider race to achieve desegregation except under certain limited conditions — even though only three years ago, the Court held that colleges and universities have a compelling interest in achieving diversity and may use race as a factor in their admissions decisions.
- In *Wisconsin Right to Life*, they adopted a new legal standard that will allow for virtually unlimited advertising by corporations and unions before elections—even though only four years ago, the Court upheld a provision of the McCain-Feingold Act that prohibited advertisements funded by corporations and unions that mention specific candidates immediately before elections.

Third, at their confirmation hearings, both Roberts and Alito presented themselves as fair and compassionate, as jurists who would treat the powerful and the powerless equally before the law.

Yet the decisions this term were especially cruel, advancing the traditional conservative preferences for the government over criminal defendants and the interests of business over consumers and employees.

For example:

- In *Ledbetter*, they made it extremely difficult for victims of pay discrimination to sue. The court held that a claim must be brought within 180 days of the time a person's pay is set, even though it is rare that a person would know of another employee's pay in this time period and have the information needed to be able to bring a discrimination claim.
- In *Bowles v. Russell*, a particularly outrageous decision, the court ruled that a criminal defendant was barred from appealing when a federal district court mistakenly gave him 17 days, rather than 14, to file his appeal. Even though the defendant followed the instructions of the District Court, the Court held that he was barred because the trial judge made a mistake.

The Court's decisions reflect a seemingly inexorable instinct to unravel any precedent or torture the language of a statute or ignore the legal equities that do not conform to a traditional ultra-conservative ideology.

To be sure, as one commentator put it, often rather than expressly overrule precedents with which he disagrees, Justice Roberts gives the appearance of “tweaking” the law—all the while performing “radical surgery.”

Rather than explicitly overruling precedent, Justice Roberts has happened on a strategy of gutting prior opinions of all force and substance, leaving only a hollow and brittle shell to be easily overruled in the future.

That's not judicial restraint; it's a shell game.

This is, perhaps, an extension of the confirmation show: pledge allegiance to precedent in word and in theory, but cast inconvenient precedents aside in deed and in practice.

No one should be fooled. Of all people, Justice Scalia noted in his concurring opinion in Wisconsin that Roberts' parsing of language did not mask his intention to overrule precedents. Scalia was correct when he wrote that "this faux judicial restraint is judicial obfuscation."

I don't agree with Justice Scalia on much, but on this point I do. There's nothing principled or restrained about overruling cases while pretending you are not.

Although we have only experienced one full term with both Roberts and Alito on the Supreme Court, it appears that we were not given the most accurate picture of the nominees we confirmed.

After hearing Roberts wax philosophic about judicial modesty at his confirmation hearings, and then reading his calculated decisions furtively defying stare decisis, I can only conclude that we were presented a misleading portrait.

And so, every day, I feel more comfortable with my vote against Chief Justice Roberts.

And every day, I am pained that I didn't do more to try to block Justice Alito. Every two years, I look back and take stock of my greatest failings and regrets in the past Congress. Without question, my greatest regret in the 109th Congress was not doing more to block Alito. Alito shouldn't have been confirmed. I should have done a better job; my colleagues said we didn't have the votes, but I think we should have twisted more arms and done more.

Question Two: What Lessons Were Learned?

Let me turn to the second question: what lessons should we learn from the Roberts and Alito experience?

Lesson One is that confirmation commitments made at Senate hearings, and the Senate hearings themselves, are often meaningless.

That is true for a number of reasons, many of them obvious. First, hearings produce a lot of sound and fury, often signifying nothing.

It is too easy to evade a question; it is too easy to refuse to answer; it is too easy to be coached; and it is too easy to offer an easy platitude rather than a concrete opinion.

Reporters will focus, as is their wont, on the gotcha game. They will report on who yelled, who cried, who was funny, who was charming.

When Alito's wife began to cry during her husband's hearing, that seemed to have more effect on the media analysis than anything else on that day. Moreover, when recounting the actual content of the hearings, the media reports, unvarnished and uncritically, the most banal platitudes.

I recall that headlines in major newspapers, like the Washington Post, helpfully proclaimed after day one of the Alito hearing:

“Alito Says He Will Keep Open Mind.”

While platitudes are the order of the day, truths about a nominee's legal proclivities are underreported – by both the press and the nominee, because the process is rigged that way.

Lesson Two can be summed up in four words: it's the record, stupid.

What do I mean by that? I mean that, given the dearth of information discoverable at the hearing, the single most important measure of a nominee's judicial philosophy and likely approach on the bench is his or her concrete, paper record.

When Justice Alito sat on the Third Circuit, we knew from his dissents that he was usually to the right of his Republican colleagues on the bench. That was the most important indicator of how he would judge on the High Court.

Alternately, when the Senate is stonewalled in obtaining information, we are unable to make a careful and reasoned judgment about whether to confirm.

Similarly, when a nominee has a sparse record, he is effectively a stealth candidate and – because the hearings provide more heat than light – we cannot make a good judgment about his fitness for the Court.

Even if we doubled the length of our hearings, testimony from the candidate cannot come close to filling the information gap created by a sparse record.

Lesson Three: Ideology matters. It stands to reason that a conservative lawyer who has represented the most conservative Administrations and taken the most conservative positions as a lawyer is likely to be a very conservative jurist.

Senators have an obligation to scrutinize the character and philosophies of judicial nominees, and nominees have an obligation to cooperate. This is especially when a

nominee's ideology, judicial philosophy, and constitutional views are central considerations in the President's decision to nominate.

There is an inherent illogic in preventing the Senate from considering the one factor – ideology – that is central to the President's own nomination decision. It is best for the Senate and the country when this scrutiny and debate occurs in an open and rational way.

It is no longer reasonable or sensible or smart to hypothesize that such a person will “grow” on the bench and become something that she never was because it is our hope or wish.

At every confirmation hearing, we are treated to tirades about David Souter and Earl Warren being more liberal than expected. We are told: “You never know how someone will turn out.”

Those days are over, as people have come to understand the central importance of the Court and the need to not take chances.

That leads me to *Lesson Four*.

Take the President at his word. When a President says he wants to nominate justices in the mold of Scalia and Thomas, believe him.

Don't be fooled by the occasional chink in a nominee's conservative armor: that he once worked pro bono for a gay rights group, for example. Or that he does not subscribe 100 percent to Justice Scalia's blanket refusal to consider legislative history in interpreting statutes.

The burden of proof lies with the nominee to prove that he is something other than what the President chose him for.

The burden always lies with the nominee to show that he or she is within the mainstream. And that burden cannot be met, as we've seen, by mouthing pleasant platitudes about modesty and stability at a confirmation hearing.

Ultimately, the overarching lesson of Roberts and Alito could be summed up with that familiar old phrase:

Fool me once, shame on you. Fool me twice, shame on me.

Question Three: How Do We Apply These Lessons?

So, we come to the third and final question: How do we apply the lessons we learned from Roberts and Alito to the next nominee, especially if – God forbid – there is another vacancy under this President?

We now have the most conservative Supreme Court in memory. And, as everyone knows, the Justices who are – actuarially speaking – most likely to step down next are the liberal ones.

The Court is, interestingly, at odds with the country. As the Court grows more conservative, the rest of the nation is in the midst of a pendulum swing in the progressive direction.

Unless we are vigilant in our efforts to moderate the Court, that institution will stand in the way of a much-needed and long-overdue swing back to moderation.

I am not a scholar or a practitioner, but a Senator. As such, I am vested by the Constitution with the responsibility to provide advice and consent on the President's judicial nominees.

So, based on my experiences of the last two years and my reading of the last term's cases, let me share with you how I intend to apply the lessons learned:

First, because of the limited usefulness of the hearings, when in the future we are presented with a nominee with a sparse written record, a Senator might very well be justified in voting against that nominee on this basis alone.

One should not have to engage in conjecture about a nominee's way of thinking and method of reasoning. This is not the lotto.

As we have seen, a stealth nominee with a sparse record has scarce incentive to provide meaningful answers to questions about judicial philosophy and Constitutional interpretation.

Second, for the rest of this President's term and if there is another Republican elected with the same selection criteria let me say this:

We should reverse the presumption of confirmation. The Supreme Court is dangerously out of balance. We cannot afford to see Justice Stevens replaced by another Roberts; or Justice Ginsburg by another Alito.

Given the track record of this President and the experience of obfuscation at the hearings, with respect to the Supreme Court, at least: I will recommend to my colleagues that we should not confirm a Supreme Court nominee EXCEPT in extraordinary circumstances.

They must prove by actions—not words—that they are in the mainstream, rather than the Senate proving that they are not.

In the end, these three questions provide the foundation for thinking about how we ensure that our Court reflects what America wants, rather than what a diminishing clique of conservative ideologues wish for.

There is no doubt we were hoodwinked. Let me remind you of one particularly striking passage from Justice Roberts' confirmation hearing:

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

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

Of course, after only a short while, we have a better understanding.

There is no way to say it better than Justice Breyer; it bears repeating: "It is not often in the law that so few have so quickly changed so much."

And this the somber judgment after just one full term of Roberts and Alito.

This is just a prologue.

Consider the Constitutional harm and "dramatic departures" that are in store if those few are joined by just one more ideological ally.

I will do everything in my power to prevent that from happening.

Thank you.