

1980s. As a result, you will have stability on the court, which I think all of us in the United States desire today.

Let me make one further observation. In the next few days, you will hear testimony from a gentleman for whom I have a great deal of admiration. The gentleman is from Sacramento. His name is Nathaniel Colley. Nathaniel Colley is a black lawyer. He was former general counsel of the NAACP. He was born in Alabama, came to Sacramento, opened up his law practice, and became truly one of the prominent lawyers in the United States and one of the great trial lawyers in the State of California. I would like you to read or listen to his testimony when he gives it because that testimony will demonstrate the regard that lawyers, law students and ordinary individuals have for Judge Kennedy.

I heartily endorse his nomination to the U.S. Supreme Court. You could not make a better selection.

Thank you.

#### OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The CHAIRMAN. Thank you very much, Representative. As I indicated to my three colleagues, you are welcome to stay. We will now move to opening statements from me and my colleagues, but any time you have to absent yourself, we understand. We want to thank the three of you for coming over and being so eloquent in your support of Judge Kennedy.

This committee last assembled to consider the Supreme Court nomination on the eve of the 200th anniversary of the Constitution's drafting, and our discussion with the previous nominee and other witnesses was vigorous, educational and, I believe, ultimately enlightening. In sum, it was a discussion that I and most of my colleagues believe was worthy of the momentous anniversary that we were at that very moment celebrating.

Today, there is a calmer atmosphere. The confrontational spirit that characterized the last two nominations has passed as well. But make no mistake about it: at this moment in history, the Senate's decision on this nomination is every bit as important as our decision on the nomination of Judge Bork or anyone else. For if we are to do our job, and if you are to be confirmed, Judge Kennedy, you will occupy the same position of responsibility and power to which Judge Bork and Judge Ginsburg were nominated.

Our tradition of evolving liberty is just as much at stake today as it was when Justice Powell resigned in July. So once again, we meet to discuss the meaning of the majestic phrases of our greatest document, the Constitution; phrases that Justice Harlan knew cannot "be reduced to any formula"; a document that Chief Justice Marshall foresaw was "intended to endure for ages to come and consequently to be adapted to the various crises of human affairs."

Through that document, the Supreme Court holds far-reaching power over the constitutional rights and the daily lives of every American citizen. Accordingly, our role of advice and consent demands from every Senator a thorough and careful review, even with nominees of sterling character and qualifications, as you obviously have, Judge Kennedy. This careful review is not an expres-

sion of doubt about you, or any nominee, but a recognition of our obligation under the Constitution.

As someone said this morning, as I turned on the television: "I hope we have ended, once and for all, the debate as to whether or not this committee has the right to delve into the judicial philosophy and constitutional grounding of any nominee."

In the past, I, and many other Senators of both parties, had been frustrated with the confirmation process for some Supreme Court nominees. The Senate was being asked, in effect, to waive through nominees to the highest tribunal in America, largely on faith, sometimes on the assertion that the President wanted the person, and surely, in my opinion at least, the framers did not intend this institution in the United States Senate to bestow such monumental powers after such cursory examination.

In contrast, when we considered the last nomination, every one of us, literally every one of us on this committee, carefully reviewed the nominee's full record of constitutional and judicial thinking. And the heart of that review took place during the committee's hearings. Each Senator on the committee reached his own conclusion about what those views are, and are not; what they were and were not; whether they are or whether they are not acceptable for a Supreme Court Justice to hold.

And that review process begins again with your nomination, Judge. We have spent the past month reviewing all 438 of your opinions that you wrote, and close to a thousand opinions that you were a part of, if not the author, and the twenty speeches delivered by you.

These hearings will extend that review, and should provide a rich body of information that will answer the question: Who is Anthony Kennedy and what does he stand for, and how does he, how does he view the Constitution and its role in our society?

The Bork hearings set high standards for this committee, the Senate, and the President, in the appointment of a Supreme Court Justice.

From those hearings have emerged lasting principles for the nomination and confirmation of members of the Supreme Court. First, the President exercises better judgment when he considers the prevailing views of the Senate, and the American people before making a nomination. This has always been the case for 200 years.

Second, if the President does consider the views of the Senate and the people in making the nomination, the Senate may not need to act as such a forceful constitutional counterweight.

Thus, the Senate must carefully judge whether the President has nominated someone who is simply philosophically compatible with him, or someone who would bring a political agenda to the Supreme Court. And third, we, in the Senate, still have a constitutional duty to make our review a thorough one.

That means we must know the nominee's constitutional views, and state clearly to the nominee our own perspective on constitutional interpretation. To uphold these standards, we must begin by insisting that every Supreme Court nominee understand and accept a number of basic constitutional principles, among them the separation of powers, unenumerated rights, equal protection for

minorities and for women, for all citizens, and due process of the law, and the precious rights protected by the first amendment.

It seems to me the Senate should, properly, explore further each of these issues, and it is equally reasonable to expect every nominee to state to the Senate the general—I emphasize general—criteria that he, or she, would use to apply these fundamental principles.

Without the criteria to apply them, fundamental principles may shrink to the status of noble but empty rhetoric. Therefore, in these hearings, Judge Kennedy, I intend to ask you questions in the following five areas.

I will ask you questions intended to determine whether your view of the Constitution has a narrow code of enumerated rights. To me, the idea of unenumerated rights expresses a larger truth, a truth which I believe the President alluded to when he introduced you.

The American people have certain rights, not because the government gives them those rights, or because the Constitution specifically names them, but because we exist, simply exist as children of God. That our rights can expand with America's proud and evolving heritage of liberty, a heritage founded in the Constitution, that is, in the words of Justice Harlan, quote, "A living thing."

I will ask you questions about the nature of what you have called the "unwritten Constitution," which restrains the exercise of power among all branches of government, and about how the doctrine of precedent restrains the exercise of power by the Supreme Court in particular.

I will ask you questions about your views on civil rights and gender discrimination, and your understanding of the role of Congress, and the courts, in providing remedies for past acknowledged discrimination.

I will ask you questions on the constitutional balance that should be struck between the procedural protections guaranteed to those accused of criminal acts, and the consideration that should be given to the safety of society and the victims of crime.

In discussing these areas, I—and I expect most of my colleagues—will not ask you to predict what your vote will be, or to say how you would decide a specific case in the future. I want instead, to understand the approach you will use, the general criteria you will bring to constitutional claims on these issues, a discussion that is critical, if the committee is to perform its constitutional role properly.

It is somewhat presumptuous of me, Judge, but I suggest that you might adopt the role of professor, rather than judge, in answering those questions.

Discuss with us how you arrive at your views on the Constitution. Educate us a little bit as to who Tony Kennedy is. Some outside this committee misunderstood this very vital distinction during our last hearing.

Indeed, there are reports that the administration, and even some of my colleagues, have not observed the distinction, either. In my view, these reports are a matter of grave concern.

So finally, I will also ask you whether the administration, or any member of this body, have sought any commitments from you on

matters that might come before the Supreme Court. For just as it is, in my view, inappropriate for us to seek those commitments, it would be highly inappropriate for anyone else, in determining whether or not you are appointed, or whether or not they will vote for you, to seek similar commitments.

In September, both my conservative and liberal colleagues, as well as the previous nominee, were emphatic, that no campaign promises were sought or secured in the judge's testimony before this committee. None will be sought or secured at this hearing either.

I expect, however, that within reasonable limits of propriety, you will respect the Senate's constitutional role of advice and consent, by being as forthcoming and responsive as possible. As I am sure you remember from our conversations in private, Judge, the committee fully expects a thorough discussion of your constitutional philosophy, because while your judicial record is impressive, it does not address many constitutional issues.

And though your speeches are stimulating, they raise, in many cases, as many questions as they answer, and, consequently, Judge, the committee would very much appreciate—and quite frankly we expect—forthcoming answers that will shed light on your constitutional philosophy.

I expect this to move very swiftly, and fairly, and I hope—and I mean this sincerely—I hope you enjoy the experience. This is not anything other than an attempt to have a dialogue with you as to who you are, what you stand for, why you want to be on the Court, so we have a sense of what we are about to vote on.

Most everyone on this committee look—I think everyone on this committee looks very favorably on your nomination, but most of us have an open mind. As one of my colleagues said this morning, the most important witness in this hearing will be Judge Kennedy, and Judge, we welcome you, we look forward to hearing from you, and with that, let me yield to my colleague from South Carolina for his opening statement.

[The statement of Senator Biden follows:]