

they control legislators, executives, and our citizens. Otherwise, we are no longer a Nation of laws, but a Nation of politicians dressed in judges' robes.

During my tenure in the Senate, I have participated in a number of these Supreme Court nomination hearings, and I believe it is nine to date. I am hopeful that we will see a dignified confirmation process that will not degenerate into what we saw during the Bork and Thomas hearings. Rather, we need to see the same level of civility as we saw during the O'Connor, Ginsburg, and Breyer hearings.

Moreover, I am hoping that we will not see a badgering of the nominee about how he will rule on specific cases and possible issues that will or may come before the Court. That has not been the practice, as you know, in the past. And let me remind my colleagues that Justices Ginsburg and Breyer refused to answer questions on how they would rule on cases during their confirmation hearings. The fact is that no Senator has a right to insist on his or her own issue-by-issue philosophy or seek commitments from nominees on specific litmus-test questions likely to come before that Court. To do so is to give in to the liberal interest groups that only want judges who will do their political bidding from the bench, regardless of what is required by the law and the Constitution. The result is then a loss of independence for the Supreme Court and a lessening of our Government's checks and balances.

Some have suggested that since you have been nominated now to be Chief Justice, you deserve even more scrutiny than before when you were just nominated for Associate. Some are saying that we should prolong the hearings and turn over even more stones than we have already turned over thus far. Well, the Chief Justice has been described as "first among equals." The plain truth is that there really isn't anything substantively different in your role, and your vote will count just the same as other Justices of the Court. So my own questioning and analysis of your qualifications will not really be much different from your previous appointment.

But it is true that the Chief Justice has additional duties as the head of the Federal judiciary. The Chief Justice has to be someone who has a good management style, who can run the trains on time, and who can foster collegiality on the Court. So, Judge Roberts, I think that since you have appeared before the Court 39 times to argue cases on appeal, and that the current Justices know and respect you, that bodes very well in terms of your smoothly transitioning into the Court, into the new role now of Chief Justice.

I congratulate you.

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

Chairman SPECTER. Thank you very much, Senator Grassley. Senator Biden?

**STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR  
FROM THE STATE OF DELAWARE**

Senator BIDEN. Thank you, Mr. Chairman.

Judge Roberts, welcome. Mrs. Roberts, welcome to you. I might note at the outset I have never heard of or seen a Federal judge who was not independent. It is amazing what that life tenure does.

So I do not think you have any worry, Judge, about having to cash in your independence. It has never occurred in my memory or in my study.

And, Judge, I want to point out to my friends that it is true judges did not come before the Committee in the past, but in the past you needed unanimous consent of the entire Senate to get before the Senate. So, you know, there are some good things and some bad things that have changed.

Judge, as you know, there is a genuine intellectual debate going on in our country today over whether the Constitution is going to continue to expand the protections of the right to privacy, continue to empower the Federal Government to protect the powerless. And it is a big debate. All you have got to do is turn to any website—American Enterprise Institute, left, right, center. It is a gigantic debate. It has not occurred, as you and I both know, and my colleagues know, in the last 70 years. It has not been this contentious—not just the politics but the debate, the intellectual debate.

For 70 years, there has been a consensus, Judge, on our Supreme Court on these issues of privacy and protecting the powerless, and this consensus has been fully embraced, in my view, by the American people. But there are those who strongly disagree with the consensus, as is their right, and they seek to unravel the consensus. And, Judge, you are in the unenviable position, as we talked about in my office, of being right in the middle of this fundamentally important debate. And, quite frankly, Judge, we need to know on which side of that divide you stand, for whoever replaces Justice Rehnquist, as well as Justice O'Connor, will play a pivotal role in this debate. And for tens of millions of the American people, this is no academic exercise, for the position you will take in this debate will affect their lives in very real and personal ways for at least, God willing, the next three decades. And there is nothing they can do about it after this moment.

Judge, I believe in, as our Supreme Court's first great Chief, who has been mentioned here today, Justice Marshall, said in 1819, and I quote: "A Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." That is the Constitution I believe in, and that is the way I think we should look at the Constitution.

At its core, the Constitution envisions ever-increasing protections for human liberty and dignity for all its citizens, and a national Government empowered to deal with these unanticipated crises. Judge, herein lies, in my view, the crux of the intellectual debate I referred to at the outset, whether we will have an ever-increasing protection for human dignity and human liberty, or whether those protections will be diminished, as suggested by many in their reading of the Constitution that says there are no unenumerated rights. That is a very narrow reading of the Constitution.

In 1925, the Constitution preserved the rights of parents to determine how to educate their kids, striking down a law that required children to attend public school. In 1965, the Constitution told the State to get out of married couples' bedrooms, by striking down a State law prohibiting married couples from using contraception. In 1967, the Constitution defended the right of a black woman to marry a white man. In 1977, the Constitution stopped

a city from making it a crime for a grandmother to live with her grandchildren.

And, fortunately, even when the Supreme Court at first took the Constitution away from the promise and hope of our Constitution's ennobling phrases, in the end it has kept the faith. In 1873, for example, the Court said States could forbid women from being lawyers. It took 100 years to undo this terrible mistake, but the Court eventually got it right. In 1896, the Supreme Court said separate but equal is lawful. It took 58 years for the Supreme Court to outlaw racial segregation, throwing the doctrine into the dust bin of history, but it got it right. In the early 1900s, the Court rendered the Federal Government powerless to outlaw child labor, to protect workers. It took until 1937 for the Supreme Court to see the error of its ways, but it finally got it right.

In every step we have had to struggle against those who saw the Constitution as frozen in time, Judge, but time and again we have overcome, and the Constitution has remained relevant and dynamic, thanks to the proper interpretation, in my view, of the ennobling phrases, purposely placed in what I refer to as our civic bible, the Constitution.

Once again, when it should be even more obvious to all Americans, we need increased protections for liberty as we look around the world and we see thousands of people persecuted because of their faith, women unable to show their faces in public, children maimed and killed for no other reason than they were born into the wrong tribe. Once again, when it should be obvious we need a more energetic national Government to deal with the challenges of the new millennium, terrorism, the spread of weapons of mass destruction, pandemic disease, and religious intolerance, and once again our journey of progress is under attack, and it is coming from, in my view, the right.

There are judges, scholars and opinion leaders who belong to this group of people who are good, honorable and patriotic Americans. They believe the Constitution provides no protection against Government intrusion into highly personal decisions like the Schiavo case, decisions about birth, about marriage, about family, about religion. There are those who would slash the power of our national Government, fragmenting it among the States in a new reading of the Tenth and Eleventh Amendments. Incredibly, some even argue, as you well know—people will not believe this—but some are arguing today, in the Constitution-in-Exile group, who argue that the national Government has no power to deal with what is going on in the Gulf at this moment.

Judge, I do not believe individuals could for very long have accomplished what we did had we read our Constitution in such a narrow way.

Like the Founders, I believe our Constitution is as big and as grand and as great as its people. Our constitutional journey did not stop with women being barred from being lawyers, with 10-year-olds working in coal mines, or with black kids forced into different schools than white kids, just because in the Constitution nowhere does it mention sex discrimination, child labor, segregation. It does not mention it. Our constitutional journey did not stop then, and it must not stop now, Judge.

We will be faced with equally consequential decisions in the 21st century. Can a microscopic tag be implanted in a person's body to track his every movement? There is actual discussion about that. You will rule on that, mark my words, before your tenure is over. Can brain scans be used to determine whether a person is inclined toward criminality or violent behavior? You will rule on that.

And, Judge, I need to know whether you will be a Justice who believes that the constitutional journey must continue to speak to these consequential decisions, or that we have gone far enough in protecting against Government intrusion into our autonomy, into the most personal decisions we make. Judge, that is why this is a critical moment.

There are elected officials in this Government, such as Mr. DeLay, a fine, honorable, patriotic man, and others, who have been unsuccessful in implementing their agenda in the elected branches, so they have now poured their energies—as the left would—they have now poured their energy and resources into trying to change the Court's view of the Constitution, and now they have a once-in-a-lifetime opportunity, the filling of two Supreme Court vacancies, one of which is the Chief, and the other is for Associate Justice, the first time that has happened in 75 years.

Judge, I believe with every fiber of my being that their view of the Constitution and where the country should be taken would be a disaster for our people. Like most Americans, I believe the Constitution recognizes a general right to privacy. I believe a woman's right to be nationally and vigorously protected exists. I believe that the Federal Government must act as a shield to protect the powerless against the economic interests of this country. And I believe the Federal Government should stamp out discrimination wherever it occurs, and I believe the Constitution inspires and empowers us to achieve these great goals.

Judge, if I look only at what you have said and written, as used to happen in the past, I would have to vote no. You dismissed the constitutional protection to privacy as "a so-called right." You derided agencies like the Securities and Exchange Commission that combat corporate misconduct, as "constitutional anomalies." And you dismissed gender discrimination as "merely a perceived problem." This is your charge, Judge, to explain what you meant by what you have said and what you have written. That is what I said when I was Chairman. That is what this is about.

The Constitution provides for one democratic moment, Judge, one democratic moment before a lifetime of judicial independence. This is that moment, when the people of the United States are entitled to know as much as they can about the person we are entrusting with safeguarding our future and the future of our children and grandchildren. Judge, as you know, and we talked about it, this is that moment, and this is what this hearing is about.

I thank you.

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

Chairman SPECTER. Thank you very much, Senator Biden.  
Senator Kyl.