

Any questions regarding his competence, his temperament, and judicial outlook have certainly been answered in his 15 years on the Court.

I believe that he is an excellent choice for the highest judicial position in our Nation.

The occasion of these hearings, as my colleagues have indicated, is an important one. The constitutional role of the Senate in the confirmation process is that of an independent assessor of judicial candidates. This is the time and the place for the important questions about the nominee to be asked and answered.

The hearings present the Senate and the American people with the best opportunity to assure ourselves of the fitness of this man for this appointment. The hearings should be thorough, and the hearings should be fair. I am personally confident that they will confirm my belief that the President chose the very best candidate to be Chief Justice.

Justice Rehnquist, I welcome you to these hearings, and I wish you well.

I thank the Chairman.

The CHAIRMAN. The able and distinguished Senator from Ohio, Senator Metzenbaum.

#### STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you, Mr. Chairman.

I want to join my colleagues in welcoming Justice Rehnquist to this hearing, and opportunity to discuss some of the issues concerning the confirmation process with the Justice directly. I'm grateful to him for taking the time to meet with me for that purpose.

In exercising our advice and consent role, the Senate has three distinct obligations. We must evaluate the nominee's competence; we must assess his or her integrity; we must determine whether the nominee will be faithful to the law and the fundamental values upon which our constitutional system is based.

I am not concerned about whether Justice Rehnquist is a political conservative. Political philosophy should not be a determinant in our evaluation. My principal concern is whether confirming this nominee as Chief Justice could affect the basic constitutional protections that Americans have enjoyed: the right to a fair trial; protection from discrimination; the right to privacy; the right to practice religion free of government interference.

That is what this hearing is about—not one man, not a President's choice, but the day-to-day rights and privileges of every person in this country.

Frankly, there is cause for concern.

Some of the positions Justice Rehnquist has taken, both before and after he went on the bench, suggest that he holds views so extreme that they are outside the mainstream of American thought and jurisprudence. In examining the record, we find that Justice Rehnquist has been the sole dissenter 54 times, more than any other sitting Justice, and to the best of my knowledge, more than any other Justice in history.

Justice Rehnquist has interpreted the first amendment doctrine of separation of church and state to mean that a State can become actively involved promoting religion. He has interpreted the Equal Protection Clause to give only the most limited protection to women, aliens who are legal residents, and indigents. He has interpreted the 14th amendment ban on discrimination to mean that prosecutors can intentionally keep citizens off juries just because they are black.

We also find a clear pattern in these decisions. If the issue involves individual civil liberties, the individual is likely to lose. If the issue involves a criminal defendant's rights, the defendant's claim is likely to be denied. But if the issue is whether big government is going to get its way, the result is likely to be that it will.

I find this last point particularly ironic, since conservatives profess to be in favor of limiting government control over our lives.

Supporters of this nomination will say that we should not consider political philosophy. I agree. But constitutional extremism is different from a conservative or liberal political philosophy. Some would argue that there is room on the Court for extremists, whether on the right, or on the left.

But it is not necessary to resolve that dispute here. The question before us is whether this nominee, if he is an extremist, should be Chief Justice.

The Chief Justice assigns the writing of opinions to individual Justices. He presides at the opinion conferences. He is the Chairman of the Judicial Conference of the United States. He has overall responsibility for the administration of the judicial branch.

We must also consider the role of the Chief Justice in achieving consensus on the most wrenching and difficult legal issues that divide our Nation. Could a Chief Justice Rehnquist have brought about a unanimous court in the *Brown v. Board of Education* case?

Could he have achieved consensus in a case similar to the one which involved access to President Nixon's tapes? The Senate must take these questions into account.

As my colleagues have already pointed out, the record of the Constitutional Convention shows clearly that the Framers intended that the Senate play an important role in advising on and consenting to Supreme Court nominations. I cannot accept the view that the Senate must passively approve a nominee merely because he or she is honest and legally competent, particularly for the position of Chief Justice if the effect will be to revise fundamentally our constitutional principles.

There is no doubt that the President should have wide discretion to pick nominees. He won that right a year ago last November. But there was no electoral mandate to repeal basic constitutional values; there was no great cry throughout the land to cut back on the Bill of Rights.

Mr. Chairman, my concern about this nomination goes beyond particular legal interpretation. We must also consider the effect of this nomination on the Court itself. The Supreme Court is perhaps the most respected institution in our country. It is perceived to be above the fray, the place where competing legal views are weighed objectively and thoughtfully.

That perception may be somewhat idealistic, but the perception is probably as important as the reality.

We must avoid a Supreme Court which lurches toward the extreme, whether that extreme be on the right or on the left. We must avoid a Court which is too quick to toss aside long-established precedent. We must avoid a Court which appears to decide the most important legal issues of the day on the basis of personal ideology, rather than a fairminded reading of the law.

And finally, serious questions have been raised about whether Justice Rehnquist was involved in challenging or harassing voters during the 1960's, and whether he was straightforward in explaining these activities to the Senate in 1971.

For this reason, Senator Simon and I asked the FBI to conduct a thorough investigation. We also requested that appropriate witnesses, 12 in number, testify before the committee. We expect that they will appear.

We must resolve these factual issues fairly and completely.

Mr. Chairman, these concerns require that we give the most careful and thorough consideration to the evidence that will be presented regarding this nomination.

Our highest obligation is neither to a single nominee, nor to the President. It is to the Court itself, and more particularly to the American people. Thank you.

The CHAIRMAN. The able and distinguished Senator from Utah, Mr. Hatch.

Senator HATCH. Mr. Chairman, thank you so much. I ask unanimous consent that my full statement be placed in the record.

The CHAIRMAN. Without objection, that will be done.

[The prepared statement follows:]