

Before calling upon the panel of distinguished Senators and before the introductory remarks of Justice Rehnquist, each member of the committee will be recognized for brief opening remarks.

The Chair now recognizes the distinguished ranking minority member, Senator Joseph Biden of Delaware.

Senator Biden.

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

Senator BIDEN. Thank you, Mr. Chairman.

Welcome, Justice Rehnquist and your family.

To state the obvious, this is truly a historic occasion not only for the nominee but for the committee and the Senate as a whole, for we must decide on behalf of the American people who will lead the third and I am emphasize coequal branch of our National Government, not simply for some legislative period or a presidential term but as an appointee for life, almost certainly and hopefully well into the next century. Our decision on this great question may be as important or more important than the selection of the President of the United States of America.

The Chief Justice not only serves longer than any President but also with his colleagues on the Court exercises the power limited only by conscience and principle.

And that power goes to the very heart and character of our Nation as a republic, and in the end, it's that power that determines whether or not we are a government of laws or a government of men.

This is, therefore, perhaps the most awesome responsibility we will face on this committee, and I suspect as Members of the U.S. Senate.

It requires all of us to have the most searching inquiry and the utmost candor, not only because it is a responsibility that the Constitution imposes upon us but also because of the consequences our decision will have inevitably, if not altogether predictably, upon our future as a Nation.

In our two centuries as a republic, 40 men have served as President of the United States of America, and scores as leaders of the legislative branches, but only 15 have donned the robes of Chief Justice of the U.S. Supreme Court. Only 15 people.

The men who have been entrusted with this highest office are among the greatest in our history—John Jay, John Marshall, Roger Taney, William Howard Taft, Charles Evans Hughes, Harlan Fiske Stone, Earl Warren are among those who preceded Warren Burger to the chair of Chief Justice.

And we've long been in the habit of recognizing the impact of Chief Justices not only upon our law but upon our whole society. This is evident by the way in which we refer to eras in the Court's history by the names of the Chief Justice. For example, the Marshall Court is often referred to or the Warren Court.

An effective Chief Justice is the fulcrum upon which the decisions of the Court largely turn, and there is no doubt that the Supreme Court has been at the crux of the major changes that have

swept our society over the past 200 years precisely because we have attempted to conduct a government of laws.

And that reflects not only on the nature of our Government but also the nature of the American people.

As Alexis De Tocqueville, the keenest of observers of American politics and the American character pointed out 150 years ago, and I quote: "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."

Our history both before and after De Tocqueville's time has amply confirmed his judgment just as it emphasizes the central role of the Chief Justice of the Supreme Court, the third coequal branch of the Government.

The greatest among these Chief Justices, in my opinion, John Marshall, crafted the most powerful defense of a constitutional system of government ever written and firmly establish the key role of the Supreme Court in defending the Constitution in his famous *Marbury v. Madison* opinion.

Marshall's successor, Roger Taney, led a divided Court to the *Dred Scott* decision, the first link in a chain of events which eventually led to the Civil War.

Lincoln's choice for Chief Justice, Salmon Chase, struck down as unconstitutional the very legal tender acts he himself had written as the Secretary of the Treasury, acts that were to have been the centerpiece of the Republican Party's post-Civil War economic program.

In our century, Charles Evans Hughes led the Court through a constitutional crisis over Franklin Roosevelt's New Deal culminating in Congress' rejection of the Court-packing plan Roosevelt conceived to save his economic program.

Earl Warren's leadership in composing a unanimous Court behind the *Brown* decision was undoubtedly crucial in winning public acceptance for the desegregation of the public schools in the 1950's.

And most recently, Chief Justice Warren Burger wrote the opinion telling the President of the United States who had appointed him that no American, not even the President of the United States, could stand above the law that governs us all.

These decisions were not only landmarks in our law; they marked off major watersheds in American history, and it is impossible to deny the lasting impact these men have had and will continue to have upon our society.

And just as surely, no one can deny that the standards appropriate to the exercise of the Senate's constitutional responsibility in advising and consenting to the nomination of a Chief Justice not only differ from those we would apply to the nomination of judges of the lower Federal courts but differ significantly even from the standards that would be adequate for the nomination of an Associate Justice of the Court itself.

That duty is imposed upon us by article II, section 2, and it was not without constitutional afterthought.

Until the last days of the 1787 Constitutional Convention, the power of appointing Federal judges was to be lodged with the U.S. Senate alone. The President was to play no part in the process, and

it was finally shared by the President only as part of a complex political compromise in the last 2 days of that convention.

Speeches at the convention and commentaries written shortly after the convention make it clear that the Senate's role was always intended to be an active and highly visible one.

In fact, just 6 years after the Constitution was ratified, the U.S. Senate rejected George Washington's nomination of John Rutledge, a former Associate Justice to be Chief Justice.

Since then, the Senate has rejected more nominees to the Supreme Court than Presidential nominees to any other Federal office.

And out of the 18 nominations for Chief Justice considered by the Senate, 4 nominees—Rutledge, George Williams, Caleb Cushing, and Abe Fortas—have failed to win confirmation.

Historically, the Senate's inquiry into each of these nominations has been factually rigorous examination of the nominee's life and work.

One such investigation linked Ulysses S. Grant's nominee for Chief Justice, Cabel Cushing, to Confederate President Jefferson Davis, and the Senate, therefore, refused to confirm Cushing.

Doubts about capability or character have, in the past, resulted in Senate rejection of Supreme Court nominees.

Although it is probably somewhat painful and a painful episode in the memory of some sitting members of this committee, Clement Haynsworth and Harold Carswell were rejected just for those reasons.

But historically, from the fight over the Rutledge nomination in 1795 which centered on his speeches against the Jay Treaty, through more contemporary struggles over the nominations of Louis Brandeis, John Parker, and Abe Fortas, the Senate has often considered a nominee's judicial philosophy and vision of the Constitution.

And so we must because unlike other lower court judges, Supreme Court Justices have a significant hand in fashioning the ultimate shape of the law, and they just exercise greater flexibility of judgment in reaching the broader decisions demanded of the Nation's highest court.

The Senate's constitutional responsibility in advising and consenting to the nomination of a Chief Justice must be taken as an exercise of a rare and special duty.

The leading opponent of the 1930 nomination of Judge John Parker to be Associate Justice, Senator William Borah of Idaho, said of the Senate's role in the confirmation process, and I quote:

(The Supreme Court passes) upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. We declare national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court bench something of their views on these questions.

Senator Borah, a progressive who loathed the Court's conservative opinions, nevertheless, understood the importance of the Court's independence and integrity. Seven years later it was he who rallied the Senate in opposing Roosevelt's court-packing plan.

And his views also deserve our consideration here because they were quoted favorably by Justice Rehnquist in a speech that he made 11 years ago.

But we need not go back to the 1930's to see a Senate leader closely scrutinizing the views of a Supreme Court nominee. During the hearings on the last nominee for the Chief Judgeship who was not confirmed, Abe Fortas, our distinguished Judiciary Chairman, Mr. Thurmond said, and I quote:

It is my contention that the Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of prospective Justices or Chief Justices as it relates to broad issues confronting the American people and the role of the Court in dealing with these issues.

I believe we owe the country nothing less than we did at that time. These hearings should meet at least the same standard of thoroughness and hard scrutiny that Senator Thurmond expressed in those words 18 years ago.

Outside the marble halls of the Supreme Court, the Chief Justice plays an important symbolic role of leadership in this Nation. We must never forget that the Court's place in our system of constitutional government, resting neither on the purse nor the sword, depends solely upon public confidence in its dedication to the faithful application of the rule of law.

The Chief Justice must be an effective leader who can, at critical moments in our history, build a consensus among nine independent strong-willed men and women for at such moments in our Nation's history, the American people have needed to hear a clear, common voice emerging from the Court.

When the Court has succeeded in meeting that need, it has been the intellect and persuasive power of the Chief Justice that has fashioned these powerful messages from the Court to the country.

Furthermore, the Chief must be the one person more than any other who symbolizes the Supreme Court's duty under our Constitution to guarantee "equal justice under the law" for all Americans.

Under what circumstances, if any, the next Chief Justice will exercise this implicit and important power, is a question we must ask in these hearings, in my opinion. In approaching this awesome responsibility of advise and consent on the nomination of the head of the third branch of Government, the Chief Justice of the Supreme Court, we should have no preconditions about how the nominee meets these criteria.

We should listen with open minds to all of the witnesses we will hear in the days ahead, foremost among them, Chief Justice Rehnquist. And we should understand that we will conduct these hearings in a manner not only out of consideration for Justice Rehnquist; not only out of consideration to the President who nominated him; but even more, much more, out of consideration of the people of the United States and the future of this great Nation.

For, as the Framers of the Constitution intended, the burden is upon the nominee and his proponents to make the case for confirmation of Chief Justice. We will be obliged to take into account, and members of this committee will want to satisfy themselves about such issues as: the nominee's role as a Supreme Court clerk, in advising his Justice on equal education; his role in challenging minority voters at the polls in Arizona; and the state of his personal health.

Of even greater concern will be the nominee's views of the role of the Chief Justice; his explanation of how the Constitution is intended to end discrimination in our society, and if it is intended to do that; and his vision, generally, of the Constitution, and how it is to be applied to the issues that come before the Court.

But most of all, Mr. Chairman, I believe we will need to ask the nominee, and finally ask ourselves, how his views, in Senator Thurmond's words, quote: "Relate to the broad issues confronting the American people," end of quote. And what he believes to be, quote: "The role of the Court in dealing with these issues."

Mr. Justice Rehnquist, if you are confirmed as Chief Justice of the United States, of the Supreme Court, the significant impact you will have upon the lives of Americans is likely to last long after everyone on this panel is gone from public life.

This is a fact that we simply cannot step aside and pretend does not exist. In undertaking this solemn responsibility, we will look to the past for guidance, but in reaching our decision, I believe we must keep our eyes fixed firmly upon the future, which will lie so much in the hands of the person, such as you, if you are confirmed as Chief Justice; a person who will, in fact, be able to act upon and be required to act upon the major social and political issues that we cannot even envision at this moment.

It is to that future, and to the coming generations of Americans, that I am convinced, we owe our first and final allegiance. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We are not going to limit, or attempt to limit any member of this committee on what he has to say. I would say, though, that you do not have to deliver long, scholarly lectures until you feel that you are called on to do it.

Now, I observed that the able and distinguished majority leader, Senator Robert Dole of Kansas is here, and our two Senators from Virginia, Senator Warner and Senator Tribble, the State in which Chief Justice Rehnquist now resides. And if there is no objection on the part of the committee—I know they want to get back to their duties—I would like to call on Senator Dole, if he cares to make a few remarks at this time. Senator DeConcini, I imagine that since you are from his State, that you will want to make some remarks, too. If you will join them down there.

We will now hear from Senator Dole, and then we will call on the other gentlemen. Senator Dole, we would be glad to hear from you.

#### STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator DOLE. Mr. Chairman, let me just say, very briefly, that I am here really for two purposes: one, to express my own appreciation for these hearings and for the cooperation we have had from Members on each side in setting a date for the hearing. I think it has worked out very well.

Second, I want to add my endorsement to those many other endorsements recommending Justice Rehnquist be our Chief Justice.