Senator KENNEDY [presiding]. Thank you very much.
Mr. Barr?

STATEMENT OF ROBERT L. BARR

Mr. BARR. Thank you, Mr. Chairman and members of the committee. It is an honor to be here 5 minutes to speak before the Judiciary Committee of the United States of America with regard to a nominee to the highest court in the land, I daresay in the world. It is worth more than many years of struggle in other countries. It is an opportunity that we in Southeastern Legal Foundation realize the importance of and deeply appreciate being able to be here today to speak—not so much on behalf of or against Judge David Souter, but on something that we believe is even more important than any single nominee, than any single President, and than any single Senator or Senate body, and that is on behalf of the process of confirming nominees that is embodied in our Constitution; namely, the advise and consent role of the U.S. Senate.

Of the many of the provisions in our Constitution, the most important ones are frequently the shortest. That is, I think, by design of our Founding Fathers, and I think that we ought to keep that in mind as we go through the confirmation process and focusing on the advise and consent role. There is a great deal more written about other provisions in our Constitution than this one, but we believe that the importance of the advise and consent role is really second to none in its importance to the people and to the sanctity of the judicial process in our country, which, of course, is the bulwark on which all other aspects of our Government and our lives in this country rest.

We believe that in focusing on that advise and consent role, the issues are very clear. They were clear to our Founding Fathers as set forth, for example, in Federalist Paper No. 76 by Alexander Hamilton and other writers after him, most recently by publications from this very city, that the advise and consent role of the Senate, as important and as profound as it is, is very limited in scope. We believe that to stray from that very limited focus, to focus on the constitutional understanding of nominees, to focus on their judicial temperament, their ability to reason, their background as judges or whatever background they bring to their nomination, is and should be the sole focus of this committee. We believe also that for other groups to come forward, other individuals and groups to come forward, as important as the issues are that are on their minds and in their hearts, to bring a political agenda to the committee demeans the process of advise and consent; and, indeed, to focus on those aspects of a nominee's opinions or how he or she might rule on a particular case, as opposed to the process that they bring to ruling on a particular case, is inappropriate and raises very serious questions about separating the political from the judicial processes and ideology of our country.

We believe that for groups to come forward and place before this committee a political agenda on which to base a vote on this nominee, or any nominee, is to attempt to perhaps come in through the back door of the political process what they have been unable to accomplish through the front door, namely the ballot box. We be-

lieve that that is inappropriate. It is inappropriate for any group, whichever side of the political spectrum they are from or whichever side of the spectrum on a particular issue, again, no matter how important those issues are, such as civil rights, abortion, property rights, the ability to tax. There is a whole panoply of issues.

Those issues really have no role in being placed before this committee on behalf of a nominee or against a nominee in his or her opinions and how they might rule. This is something that I know has been gone into in a number of contexts and through a number of witnesses but what we believe is a thread that should run throughout the entire process. We believe to stray from that and to place before this committee a nominee and question him or her on how they might rule on a particular case, even if it is done obtusely, if that is the point of the questioning, then we are placing that future Justice in a very untenable situation.

If, then, an issue comes before that person while they sit on the highest Court of this land, for example, and they have already rendered an opinion on how they might rule on case "X" or issue "X," and they, in fact, rule that way, then they and the Court are subject to have its credibility attacked for prejudging issues, for judging issues before they come before that Court, and for making up their mind beforehand. We believe that attacks and that demeans the credibility of the Court.

On the other hand, if that nominee has rendered an opinion or has been forced to render an opinion at a hearing on issue "X" and then rules differently, then that Justice and that Court in the future—not just on that case—is then subject to criticism for changing its mind or for waffling. In either instance, that Justice and that Court is caught in a Hobson's choice, a dilemma. And we believe it is unfair and really an improper use of the advise and consent process to place nominees in that posture.

Again, we appreciate the opportunity to be here. I would appreciate, Mr. Chairman, if the written comments that I have prepared, which go into this in a little more detail, could be made a part of the record. I will not belabor that point, but certainly we believe that is an extremely important function of this committee. We appreciate the opportunity to make these matters known on the record and also to answer any questions that the members might have.

[The prepared statement of Mr. Barr follows:]