

People have described those fundamental rights in many different ways. There are a variety of approaches to figuring out what they are. Almost every Supreme Court Justice since then has accepted the existence of some, and what they are and how you find them is a big question.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. In the meantime, there was the incorporation doctrine.

Judge BREYER. Yes.

The CHAIRMAN. Senator Grassley.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I would like to have my opening statement inserted into the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR GRASSLEY

Congratulations on your nomination to the Supreme Court, Judge Breyer. It is readily apparent that your nomination developed from the reputation you have established over many years as a law professor and judge.

Your writings and legal opinions appear to reflect an understanding of the proper place of the Supreme Court, and courts generally, in our society. I find your approach to deciding cases to remind me of Justice Frankfurter. Time and again, when asked to find statutes unconstitutional, you have examined the language and legislative intent, and resolved all legitimate questions in favor of constitutionality. This deference to the legislature is a hallmark of judicial restraint.

In recent decades, too many judges have permitted political considerations of desired policy results to affect their legal conclusions. These decisions are based on the view that the Constitution, rather than guaranteeing specific rights, broadly protects judicially-defined liberty and dignity. More recently, the Court has focused more on legal principles, rather than personal preference. There are those who may hope that their policy goals, unattainable through the political process, can be obtained through your vote on the Supreme Court. Your record as a judge thus far gives little support to such hopes. Nonetheless, as a Supreme Court Justice, you will not be constrained to follow precedent to the same extent as a Federal judge.

The legitimacy of judicial review derives from the power to enforce the Constitution as supreme law. When judges impose their own personal views, they necessarily do not apply the law. The basis for judicial review evaporates in these circumstances, and our limited government of laws becomes a government of people.

I hope to explore with you during your testimony issues relating to the role of judges and important principles of constitutional and statutory decisionmaking. I am not looking for campaign promises, but I do hope to determine your judicial philosophy.

Judge Breyer, your objectivity, adherence to the Constitution, and your awareness of the limited power of judges and the appropriate role of the branches elected to decide policy questions are important. I look forward to addressing these issues with you during these hearings.

Senator GRASSLEY. Judge Breyer, I am glad to hear you say in your previous discussion with Senator Leahy that child pornography is not protected speech. You dealt with child pornography when you served on the Sentencing Commission, and you were making guidelines for violation of the child pornography statutes. There was a January 1987 meeting when one of the Commissioners, Judge MacKinnon, suggested adding an aggravating factor to the crime of transporting, receiving, or trafficking in child pornography. He proposed increasing the sentence when the large sums of money often correlated with organized crime involvement in child pornography were present. And he made a motion to raise