

OPENING STATEMENT
SENATOR JOSEPH R. BIDEN, JR.
SENATE JUDICIARY COMMITTEE HEARING
ON THE NOMINATION OF ANTHONY KENNEDY
TO BE AN ASSOCIATE JUSTICE
OF THE SUPREME COURT

MONDAY, DECEMBER 14, 1987

This committee last assembled to consider a Supreme Court nomination on the eve of the 200th anniversary of the Constitution's drafting. Our debate with Judge Bork and the other witnesses was vigorous, educational, and ultimately enlightening. In sum, it was a debate that I and most other Senators believe was worthy of that momentous anniversary.

Today, there's a calmer atmosphere. The confrontational spirit that characterized the last two nominations has passed as well.

But make no mistake about it. At this moment in history, the Senate's decision on this nomination is every bit as important as our decision on the nomination of Judge Bork. For if you are confirmed, Judge Kennedy, you will occupy the same position of power and responsibility to which Judge Bork and Judge Ginsburg were nominated. Our tradition of evolving liberty is just as much at stake today as it was when Justice Powell resigned in July.

So, once again, we meet to discuss the meaning of the majestic phrases of our greatest document, the Constitution -- phrases that Justice Harlan knew cannot be "reduced to any formula;" a document that as Chief Justice Marshall foresaw, was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

Through that document, the Supreme Court holds far-reaching power over the constitutional rights and the daily lives of every American citizen. Accordingly, our role of advice and consent demands from every Senator a thorough and careful review, even with nominees of sterling character and qualifications.

This careful review is not an expression of doubt about a nominee, but a recognition of our obligation under the Constitution.

In the past, I and many other Senators of both parties have been frustrated with the confirmation process for some other Supreme Court nominees. The Senate was being asked, in effect, to

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waive through nominees to the highest tribunal in America -- largely on faith. Surely, the Framers did not intend this institution to bestow such monumental powers after such a cursory examination.

In contrast, when we considered the Bork nomination, every one of us carefully reviewed the nominee's full record of constitutional and judicial thinking -- and the heart of that review took place during the committee's hearings. Each Senator on the committee reached his own conclusion about what views are or are not acceptable for a Supreme Court Justice to hold.

That review process begins again with this nomination. We have spent the past month reviewing the 438 opinions written by you and the 20 speeches delivered by you. These hearings will extend that review, and should provide a rich body of information that will answer the question -- Who is Anthony Kennedy and what does he stand for?

The Bork hearings set high standards for this committee, the Senate and the President in the appointment of a Supreme Court Justice. From those hearings have emerged lasting principles for the nomination and confirmation of members of the Supreme Court.

First, the President exercises better judgment when he considers the prevailing views of the Senate and the American people before making a Supreme Court nomination.

Second, when the President does consider the views of the Senate and the people in making the nomination, the Senate may not need to act as such a forceful constitutional counterweight. Thus, the Senate must carefully judge whether the President has nominated someone who is simply philosophically compatible with him, or someone who would bring a political agenda to the Court.

Third, we in the Senate still have a constitutional duty to make our review a thorough one. That means we must know the nominee's constitutional views, and state clearly to the nominee our own perspectives on constitutional interpretation.

To uphold these standards, we must begin by insisting that every Supreme Court nominee understand and accept a number of basic constitutional principles. Among them: the separation of powers; unenumerated rights; equal protection for minorities, for women, for all citizens; due process of law; and the precious rights protected by the First Amendment.

The Senate should properly explore these issues further.

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And it is equally reasonable to expect every nominee to state to the Senate the general criteria that he or she would use to apply those fundamental principles. For without the criteria to apply them, fundamental principles may shrink to the status of noble but empty rhetoric.

Therefore, in these hearings, Judge Kennedy, I intend to ask you questions in the following five areas:

I will ask you questions intended to determine whether you view the Constitution as a narrow code of **enumerated** rights. To me, the idea of unenumerated rights expresses a larger truth: a truth to which I believe the President alluded when he introduced you -- that Americans have certain rights not because the government gives them or because the Constitution specifically names them, but because we exist, as children of God; that our rights can expand with America's proud and evolving heritage of liberty, a heritage founded on a Constitution that is, in the words of Justice Harlan, a "living thing."

I will ask you questions about the nature of what you have called our "unwritten constitution," which restrains the exercise of power among all branches of government, and about how the doctrine of precedent restrains the exercise of power by the Supreme Court in particular.

I will ask you questions about your sensitivity to matters of civil rights and gender discrimination, and your understanding of the role of Congress and the courts in providing remedies for past discrimination.

I will ask you questions on the constitutional balance that should be struck between the procedural protections guaranteed to those accused of criminal acts and the consideration that should be given to the safety of society and the victims of crime.

In discussing these areas, I will not ask you to predict your vote or to say how you would decide any specific future case. I want instead to understand the approach you would use and the general criteria you would bring to constitutional claims on these issues -- a discussion that is critical if this committee is to perform its constitutional role properly.

Some outside this committee misunderstood this very vital distinction during our last hearings. Indeed, there are reports that the Administration and even some of my colleagues haven't

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observed that distinction either. In my view, those reports are a matter for grave concern.

So finally, I will also ask you whether the Administration or any member of this body have sought any commitments from you on matters that might come before the Supreme Court.

In September, both my conservative and liberal colleagues, as well as Judge Bork, were emphatic that no "campaign promises" were sought or secured in the Judge's testimony before this Committee. None will be sought or secured in these hearings.

I expect, however, that within reasonable limits of propriety, you will respect the Senate's constitutional role of advice and consent by being as forthcoming and responsive as possible. As I am sure you remember from our conversation, Judge, the committee fully expects a thorough discussion of your constitutional philosophy; because while your judicial record is impressive, it doesn't address many critical constitutional issues; and though your speeches are stimulating, they raise as many questions as they answer.

Consequently, Judge, the Committee would appreciate forthcoming answers that shed light on your constitutional philosophy.

Welcome Judge. I look forward to hearing from you.