The CHAIRMAN. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Kennedy, I join my colleagues in welcoming you here. These hearings have already been described as harmonious, perhaps routine, and maybe less important than previous hearings. I frankly disagree with that for a number of reasons:

I believe that these hearings are very important to explore key issues on your record and your views; secondly, to proceed to develop the Senate's judgment on the proper scope of inquiry into a nominee's judicial philosophy; and, third, somewhat differently, to discharge the Senate's constitutional duty to scrutinize a Supreme Court nominee and make an independent judgment on the nominee's qualifications.

I disagree with those who have described your judicial approach as bland or vanilla. I yet do not know what flavor it is, but I am convinced that it is not vanilla. And we will have to wait until the final outcome of the hearings to see precisely where you fit into the tradition of constitutional jurisprudence.

In reading many of your opinions, in reading many of your speeches, I note very profound philosophical strains running through your approach to constitutional law. Those subjects that I think are appropriate and really very important for inquiry. I have noted your comment on executive power, for example, that Presidents have significant degrees of discretion in defining their constitutional powers. Today, there are many important issues on executive power which confront the nation, and specifically confront the Congress.

You have written landmark opinions on the good-faith exception to the exclusionary rule, a dissent which started the Supreme Court in that track. You have written a major opinion on the *Chadha* decision. You have written about legal realism and original intent. And during the course of the questioning, I think it is important to see just where you are in the tradition of constitutional jurisprudence.

When you and I talked privately, I commented on *Chadha* with respect to whether that might reflect your underlying view about the inadequacies of Congress's own action, and called your attention at that time to a very interesting statement, hardly bland, where you said in one of your speeches that:

> The ultimate question, then, is whether the *Chadha* decision will be the catalyst for some basic congressional changes. My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of principal course of action besides the ethic of ensuring its re-election.

I do not necessarily disagree with that conclusion, but the importance in an analysis of judicial philosophy is to what extent that underlying approach had an effect on your decision in *Chadha*. You have made a very interesting statement about original intent, a subject of really great importance in terms of where the court is going to go and how free Justices are to decide important constitutional issues, free perhaps, to some extent, at least from original intent. And you and I discussed this, again, at some length. I intend to pursue it, but your comment on a symposium was,

"There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers." I think that is a subject which really requires some analysis.

You have moved from that position in a very erudite and philosophical speech on constitutional law on the right of privacy and the right to travel and the right to vote, and in that speech dealing with the right to privacy, recognize that right perhaps in fairly emphatic terms. I do not want to draw any conclusions. The speech speaks for itself. That will obviously be a subject of inquiry.

But one of the very profound statements that you made in that speech was your comparison of "essential rights in a just system or essential rights in our constitutional system." Then you say that the two are not coextensive, and I believe that that is a subject which requires some examination as to whether there really is a difference between a just system and our Constitution which speaks to a just system.

In that same speech, you made a reference to other constitutional provisions beyond the due process clause in a very interesting way, and inquired into the subject as to whether equal protection may have a broader application to homosexual rights than due process, which was the basis of the Supreme Court's decision in the *Bowers* case.

Then in conclusion, you had made a fascinating reference to arguable rights—you did not adopt them—as to education, nutrition, and housing; and you really looked away from them as rights embodied in the Constitution. But I do believe that your writings and your decisions—decisions on school desegregation, on comparable worth, on a large representation—pose really breadth of understanding and, as I read them, a balance and essential elements of judicial restraint, but not judicial restraint to the extent of being musclebound, in your interpretation of the Constitution. But there is a great deal in your record which I think warrants inquiry in our proceedings.

On the subject of judicial philosophy, our introductory statements today have already negated to some extent the conclusion of harmony in these hearings. You have already heard a fair difference of views. And the first question I asked of you when you and I sat down to talk—and I thank you for the almost 3 hours we spent together in two extensive sessions. The first question I asked you was whether you thought that judicial philosophy was an appropriate subject for inquiry. You said you thought that it was, and we proceeded to talk. And I did not ask you about your views on any specific cases, and I would not in private or in public. But I do believe that there are broad parameters which are appropriate for discussion. The only advice that I am going to give you on this subject is not to take any advice on this subject.

That was the first question I asked of Judge Bork as well, whether he thought judicial—we were talking about judicial ideology at that time, and Judge Bork said in response that he did not like the term "ideology" because it had some political connotations, but he thought judicial philosophy was an appropriate subject for inquiry.

And it is true that some nominees have answered to a lesser extent than have others. There was a very important article on

this subject written by a lawyer named William H. Rehnquist back in 1959, our current Chief Justice, when he took the Senate to task in Judge Whittaker's confirmation proceeding for not asking Judge Whittaker questions about due process of law and equal protection of the law, because Lawyer Rehnquist thought that that was indispensible in the Senate's discharge of its constitutional duties.

When the subject came up with Justice Rehnquist on his confirmation proceedings for Chief Justice, he did answer a fair number of questions in terms of the jurisdiction of the court and first amendment rights; and, of course, Justice Scalia answered very few questions, leading a number of us on this committee to consider a sense of the Senate resolution on the appropriate scope of the inquiry. And Judge Bork's proceedings led to an extensive examination of judicial philosophy. My own sense is that within appropriate parameters on generalized subjects it is appropriate. At least speaking for myself, I intend to pursue it very much as we did in our private discussions where no objection was raised to any of the questions which I had asked at that time.

The subject about our own independent role I think is one which warrants a comment or two. There is widespread misunderstanding about the Senate's role with many people thinking that it is a party matter for an automatic approval as to what nominee the President sends to the Senate. Some analogize it to the nomination of a Cabinet officer. My own sense is that it is fundamentally different from a Cabinet officer who serves the pleasure of the President and during the term of the President.

These proceedings constitute really the apex of the separation of power under our Constitution. All three branches are involved. The President makes the nomination; it is up to the Senate to consent or not; and then the nominee who is successful goes to the court and has the final word over both the executive branch and the legislative branch. So there are really very important issues involved.

I believe that the Senate has learned significantly from the confirmation proceedings as to Judge Bork. Prior to those hearings, many on this committee had expressed conclusions. As of this moment, that has not taken place. I think the Senate also learned the error of the so-called rolling vote; that when some 51 Senators had announced positions that then there was a call for Judge Bork to withdraw. To his credit—and I said so contemporaneously with his statement that Friday afternoon that he would not withdraw—he did not. But the proceedings as to Judge Bork lacked the Senate's deliberative process because so many Senators expressed conclusions without the benefit of a Judiciary Committee report and without the benefit of the debate. I think that we have learned from that.

As Judge Bork urged, voices should be lowered, and I think they have been lowered. So I think progress has been made on all sides.

It is an inexact process, I think. We all have a great deal to learn from it, and I think that the great public attention and the great public focus on these nominations is very much in the national interest.

In conclusion, I think it worth just a brief comment about one of your concluding statements to me when we finished our brief discussion about 10 days ago, when you said did I think it was appro-

priate under the advice and consent function for the Senate to give advice to a nominee. And I responded that I thought that was up to the nominee. But in the informal sessions which you have had with all of us—and you had expressed this to me—you saw a keen sense of interest by the Judiciary Committee, and it is reflected in the entire Senate. And what we say to you both privately and publicly reflects our own views which are distilled significantly from representation, the majoritarian position we have as elected officials.

So I do think there is something that we all learn from these processes, and that an appropriate range of discussion—and I emphasize the word "appropriate." We should not go too far, but we should go far enough. That is what, speaking for myself, I will attempt to do.

Thank you very much, Mr. Chairman.

The CHAIRMAN. One thing you can be assured of, Judge, is you will find the spectrum covered in this committee on the type of advice you get. And it is all cost free.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Mr. Chairman, I commend you for moving rapidly in regards to these hearings. On November the 11th, Armistice Day, Veterans' Day, Judge Kennedy was nominated. Here, 34 days later, we are conducting his hearings. They have been set in the closing week of this session of Congress when much activity is going on in various matters and their will, of course, require the presence of members of this committee on the floor and in other places.

Nevertheless, I feel that the Supreme Court needs the ninth member, and I congratulate you on the effort to bring these hearings to a speedy focus and on the effort for us to proceed.

Two hundred years ago, the framers of the Constitution captured the spirit of a struggling new nation in 52 words. These words form the Preamble of the Constitution. I think most of us are familiar with it, but just to set the tone for it I will quote a little of it.

> We the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility.

I think we ought to look at the first three words of the Preamble, "We the people." That is what this nation is all about, and that is why the Constitution is so important, because it protects the rights of all people: conservatives and liberals, extremists and moderates, young and old, men and women, rich and poor. Some may argue that the ability of the Constitution to be all-encompassing is its greatest weakness. I would argue, therein lies its greatest strength.

The Constitution is the cornerstone of our democracy, and if we are to protect it, we must entrust it to men and women who will respect its principles and its parameters. That is our function today: to determine the fitness of this nominee for a lifetime position on the Supreme Court. As Senators, we have a constitutional mandate to provide advice and consent on this nomination.

Judge Kennedy, in your questionnaire, you listed what you consider to be the attributes of a good judge: compassion, warmth, sensitivity, and an unyielding insistence on justice. I could not agree with you more. But let me add two additional criteria: an understanding of the proper role of the judiciary as expressed in the Con-