

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM
THE STATE OF UTAH

Senator HATCH. I would like to make just a few comments before I finish.

I might say that I think Justice Rehnquist has a remarkable record, and a remarkable reputation, a tremendous wit, brain and ability to bring about consensus, and of course, so many other things that even his more liberal colleagues have agreed to.

He has proven a match for the awesome task placed on him by the President, and, I believe, the Senate and the people of the United States of America. In 1985, a New York Times article said that Rehnquist stands out among his colleagues on the Court.

Esteemed University of Virginia Law Prof. A.E. Dick Howard, one of the true constitutional experts in this country, commented well over 1 year ago that Justice Rehnquist has a claim to the leadership role on the Court. Professor Howard also noted in a recent ABA Journal that perhaps no Justice of the Court generates more genuine warmth and regard among his colleagues and others who work at the Court.

This assertion is confirmed by Justice William Brennan, who in response to a press inquiry stated that Justice Rehnquist would make a, quote, splendid Chief Justice, unquote.

I would say a particularly fine remark coming from someone with whom Justice Rehnquist has differed so much in the past.

If I may, Mr. Chairman, I'd like to comment just briefly on these confirmation proceedings. As we all know, the Constitution contains no explicit standard for nomination proceedings. Article III, defining the role of the Judiciary, and article IV, requiring judges to take an oath to uphold the Constitution, suggests a standard applicable to the proper role of the Court and the ability of candidates to fulfill the obligations of serving on our Nation's highest tribunal.

These provisions note that a judge's duty is to decide cases and controversies in accordance with the Constitution and laws of the United States. Since judges are obligated to find and not make law, their personal views on the political or sociological merits of an issue have little relevance to the inquiries about judicial qualifications.

In that regard, I have been interested in some of the comments by some of my colleagues regarding Mr. Justice Rehnquist's dissenting role. I might add that in his 14-year tenure he has dissented 54 times. Now, his voting record over the years has been matched in its consistency only by Justices Thurgood Marshall and William J. Brennan, Jr. I might add that Justice Rehnquist is not the greatest sole dissenter on the current Court. During the period in which they have overlapped, Justice Stevens has had 51 sole merit dissents for the last 10 years, and he has dissented alone far more times than Mr. Justice Rehnquist, who had 40 such dissents over the same period.

Justices Marshall and Brennan have been in dissent by themselves hundreds of times during their tenure. I think that stands them good; if they believe that strongly, they ought to stand up for

I hope you pardon me for lowering the tenor of this esteemed proceeding for a moment, but I would, however, like to conclude on a higher note.

The importance of this proceeding is illustrated by the observation of Alexis De Tocqueville that, quote, "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."

I would only add that in this era when many Supreme Court announcements and pronouncements are debated in Congress that scarcely any legal question arises that is not soon a political question sometimes for us to resolve.

The legal history of this Nation, the daily lives of its citizens, the future agenda of both Congress and the Court may well be shaped by today's events.

The Supreme Court will inevitably be ensnarled in the great questions of our generation, and indeed, Justice Holmes, one of the all-time great justices, noted, and by the way a lone dissenter many, many times, noted that the only peace found at the Court is the uneasy stillness found at the eye of a hurricane.

I am grateful that President Reagan has chosen this individual, an individual of the quality of Mr. Justice Rehnquist, to guide the Court through the coming storms, and I think, Mr. Justice Rehnquist, you have the respect of most all of us, whether we agree or disagree with you. You have stood up and you have done what you believe is correct under the Constitution, and I believe that Senator Metzenbaum outlined those three points.

When it comes to competence, when it comes to integrity, when it comes to faithfulness to the law, I believe you have a plus in all three of those areas, and I believe the majority of the American people believe it, too.

I think it is time that we quit attacking everybody who comes before this committee and stop the character assassination that has been going on. It is fair to ask legitimate questions. It is fair to disagree on particular cases of law, but I think it's time to stop the politics and do what is right for the Supreme Court and this country. It is undignified to do otherwise.

Welcome to the committee. I hope it will be a better experience than it portends to be.

The CHAIRMAN. The able and distinguished Senator from Arizona, Mr. DeConcini.

Senator DeConcini. Mr. Chairman, I will just add my welcome to Justice Rehnquist here today and yield to the Senator from Vermont. I have already made a statement on behalf of the Justice.

The CHAIRMAN. The distinguished Senator from Vermont, Mr. Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, I think it would probably be safe to say that were it not for these hearings, Justice Rehnquist and I would probably both be where in this time of the year we both would rather be and that is Vermont.

their points of view, and what they believe the Constitution to be and the laws to be.

Historically, Justice Harlan's 56 sole dissents in the 7-year period between 1961 and 1967 can be compared with Mr. Justice Rehnquist's fewer dissents over a period twice as long.

I might add that Mr. Justice Rehnquist has been in the Court majority far more than several other Justices on the Court. So I find it a little bit surprising that these issues would even be raised in the way that they've been raised. Since 1980, for example, Justice Brennan has voted for the losing side almost twice as often as Mr. Justice Rehnquist. The moderate, Justice Stevens, has been the most frequent dissenter on the current court, as I have mentioned.

There are many other points that I think you could make on here, but let me just say that Mr. Justice Rehnquist has voted with the Court majority in the overwhelming bulk of the Court's cases, and especially in recent terms where he has been in dissent far fewer times than other Justices on the Court, and in particular, Justices Brennan and Marshall, who I have mentioned, and Stevens.

Now, I might add that indeed he has, over the last four terms, written more opinions on behalf of the full Court, that is, more opinions for the majority, than has any other Justice. And that's something that can't be ignored. And some of these assertions here today are somewhat ridiculous.

Just back to some of the reasons for these particular confirmation proceedings. Since judicial candidates, and particularly sitting justices or judges owe the Nation a duty to avoid prejudging issues, it is inappropriate for them to presume to guess in the abstract how they might decide a specific issue and its factual context.

In short, Mr. Chairman, the office he now holds, and the office to which he may ascend require Justice Rehnquist to refrain from some specific answers to some questions. I mention that to assure my colleagues and other witnesses that judicial duty, not any desire to evade, may prompt the Justice to avoid responding to some inappropriate inquiries.

Frankly, if this committee or any citizen wants to know how Justice Rehnquist decides questions, then his legal opinions are available to all of us to see in the 70-odd volumes of the U.S. Reports.

One further point, Mr. Chairman. We are all aware that questions have been raised about this nomination which date back several decades. Not only do many of these concerns predate Mr. Justice Rehnquist's 1971 confirmation, many relate to his clerkship in 1952.

Now, just to put these events in their proper perspective, I think it is important to note that at that time the hoola hoop was still a decade away from its heyday, Bonanza and the Mouscateer Club would not appear for many years. In fact, TV was still a luxury for most American homes. Car makers were not designing minivans but convertibles with enormous tailfins, and finally and most shocking of all, Senator Thurmond was still a misguided Democrat. [Laughter.]

And he had not yet embarked on his Senate career. Now, imagine the Senate without Strom Thurmond and you can imagine the relevance of these accounts.