

hearing into a referendum on *Roe v. Wade*. Those who view these procedures as just a question of how a nominee will vote on one case, in my judgment make a mockery of this process.

If confirmed, Judge Souter, you will serve on the Court long into the future, as it has been pointed out. Like any other Justice, you will face countless opportunities to cast a deciding vote on issues that can shape our society for decades. It is a nominee's ability to interpret the Constitution for these as yet unforeseen issues that we must evaluate in this process starting today. Thus, Judge Souter, your opinion on a particular case is not as important as your approach to judging and your understanding of the Constitution.

Will you be able to separate your personal beliefs from your judicial duties and your constitutional oath? Will you respect the traditions of precedents of the Court? Will you wield your judicial power with restraint and respect for the two other branches of government? Will you acknowledge that the Constitution should not only protect the haves, but also the have-nots?

I hope to be satisfied with the answers to these questions as we conclude these hearings. I am most favorably impressed with what I know about you and have read about you. I hope and, quite frankly, expect, Judge Souter, that you will be forthcoming and candid in answering my questions and those of my colleagues. I also hope that after a thorough examination, the committee and the Senate and this Senator will be able to vote for you. It certainly appears today that that is where we are headed, and I am pleased that that is how the process is moving.

In closing, I join my colleagues once again in extending a warm welcome to you. From what I know of you, it appears that you are qualified, that you have the education, that there is no question of your intellectual capacity. And the American people now will have an opportunity through this democratic process, second to none, equaled no place that I know of, to get a glimpse at perhaps the new Justice of the Supreme Court. I hope, Judge Souter, whatever the questions are, as uncomfortable as they might be, that they are taken in the spirit of this committee and certainly this Senator as trying to understand you and fulfill our constitutional responsibility.

Thank you, Mr. Chairman. Thank you, Judge.

The CHAIRMAN. Thank you, Senator.

The Senator from Iowa, Senator Grassley.

#### OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

More than 200 years ago, Alexander Hamilton, the architect of much of what became the judiciary article of the U.S. Constitution, wrote, and I quote, "the complete independence of the Courts of justice is \* \* \* essential" in a Republic governed by a "limited Constitution."

Hamilton reasoned that the courts, the weakest of the three branches, must declare the "sense" of the law made by the other two branches, but if they should be disposed to exercise "will" instead of "judgment," the consequence would be the substitution of

their pleasure for that of the democratic bodies and, hence, the people.

Unfortunately, over the past 30 years or so, the Federal courts have exercised more power over a broader range of social and economic issues than the framers of the Constitution ever imagined. Therein, I believe, lies the reason why the confirmation process in recent years has come dangerously close to looking like the electoral process. Unelected and unaccountable judges have come to play the preeminent role in virtually every aspect of American life—in many cases supplanting the politically accountable branches of government. This erosion of the principle of the consent of the governed has, at the same time, undermined public confidence in the judiciary.

I have served in the politically accountable branches of government—Federal and State—for 32 years. I am looking for a judge who understands his or her role in a democratic society, to interpret the laws made by others, rather than to second-guess them based on personalized notions of enlightened social policy. To be sure, judges have an obligation to enforce the rights guaranteed by the Constitution. When a law clearly conflicts with that Constitution, a judge is right to nullify the will of the people. But let us never forget that perhaps the most fundamental of those rights in the Constitution is the right of our people to democratic self-government.

As the second Justice Harlan explained, “the vitality of our political system is weakened by reliance on the judiciary for political reform.” The fact is that not every major social ill can find its cure in a Supreme Court promoting reform when democratic government is slow to act—that is, not unless we are to abandon the more than 200-year-old axiom that the Constitution is an instrument of government founded on the idea that only in a diffusion of governmental authority lies the greatest promise of the most liberty.

Therefore, I do not prefer politicians disguised in robes on the Federal bench, nor ones who are compelled to make campaign promises to be confirmed. Judges ought not to be “pro-this” and “anti-that.” They should, rather, be judges of cases, not causes.

As expected, we have heard a great deal about the nature of the Senate’s “advice and consent” role. It is often said—in fact, we have already heard it this morning—that our role in scrutinizing and voting on Supreme Court nominees is the most important function that we have as Senators. This has become some sort of confirmation catechism.

But why is this? Is this process more important than, for example, voting to declare war? Is it more important than voting to solve the budget deficit so that future generations won’t be condemned to a lower standard of living? Only those who desire the courts to be more powerful than the coequal branches, or the States, could answer “yes” to that question.

Now, true, the framers of the Constitution granted judges lifetime tenure; we are told that this makes all the difference. But that was to insulate judges from the passing political pressures of the day, not to make them more susceptible to that pressure.

It is also asserted that the Senate and this committee in particular have an equal role in this process, and thus we must scrutinize

the nominee as if we were the President of the United States. In fact, this nominee has for the past few weeks been studied in great detail. No stone in his life has been left unturned.

Until very recently, of course, the historical practice was quite to the contrary. With only a couple of exceptions, it was not until the 1950's that nominees regularly appeared before this committee. As recently as 1922, the President nominated and the Senate confirmed a Supreme Court nominee on the very same day, a mere 1 day after the vacancy occurred. Of course, only five nominees have been denied confirmation during the entire 20th century. Now, I point this out not to advocate a return to the past, but rather to provide some historical context to our proceedings.

Similarly, our clear practice has been to refrain from seeking commitments on specific questions likely to come before the Court. I think that we would find it quite a paradox on the one hand to shield judges from political pressures through lifetime tenure, while on the other hand subject them to the same pressure through litmus-test questions as a condition for confirmation.

President Abraham Lincoln put it another way, at the time of his nomination of Chief Justice Chase: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it." To be candid, I did not always share this view of the Senate's role. But as with Supreme Court Justices who are faced with an old precedent, I do not believe that Senators ought to be forever bound by past practice, particularly when the force of better reasoning suggests a better way.

So, Judge Souter, the ultimate question for me is whether—  
[Audience disturbance.]

The CHAIRMAN. Will the police officers please clear the folks—the committee will suspend. The committee will stand in recess until the police can restore order.

[Recess.]

The CHAIRMAN. The committee will come back to order and out of recess. Welcome to Washington, Judge. [Laughter.]

You think this is bad, you ought to run for President or run for the Senate.

I thank my colleague.

Senator GRASSLEY. Mr. Chairman, I apologize to everybody for what I said. [Laughter.]

The CHAIRMAN. There is no need to, Senator. I, on that score, completely concur with you.

Senator GRASSLEY. I am just about done, Mr. Chairman.

The CHAIRMAN. Keep going, Senator.

Senator GRASSLEY. So, Judge Souter, the ultimate question for me is whether you are the kind of judge who will be truly faithful to our written Constitution and the system of government that it supports. This quality, together with an open mind—or what Justice Frankfurter called "the capacity for disinterested judgment"—is what I hope to find by the time we have completed our questioning of you.

I congratulate you on your nomination, Judge Souter, and I look forward to hearing from you.

The CHAIRMAN. I thank the Senator. The best part, the most interesting part is, Judge, I don't know why they were for or against.