

could severely disrupt the delicate process of constitutional adjudication. But by the same token the mere fact that the nominee disagrees with me on the outcome of one or another matter within the legitimate parameters of debate is not enough, by itself, for this Senator to oppose the nomination.

In the end, I agree with Justice Rehnquist, and the chairman of this committee as expressed on numerous occasions over the past few decades, to not explore a nominee's jurisprudence would be a dereliction of our duty under the "advice and consent" clause of the Constitution.

Therefore, I will pursue at least six areas of jurisprudence with the nominee based upon my review of his writings and opinions. At the heart of my inquiry will be an effort to obtain a better understanding of how this nominee views the Constitution as limiting the role of the Federal Government or Government at all levels, in solving the problems of society.

So first, I will seek to better understand how he views the Constitution as limiting the use of independent regulatory agencies in protecting the health and welfare of Americans. For example, is there a constitutional limitation on what Congress can and should delegate to regulatory agencies?

Second, what is the proper role for statutes in solving the problems we face as a nation. How specific must Congress be in crafting solutions? Would the nominee place a straitjacket on my colleagues in terms of requiring such specificity that the normal political process would become a log jam? And where Congress by design leaves ambiguity, what role does the executive branch, the courts and in particular legislative history play in fleshing out the details?

Third, what standards should guide the Supreme Court in determining the "original intent" or "original meaning" as he prefers to say of the Bill of Rights or the Civil War constitutional amendments? What does he mean by the notion that courts should not create new rights under the Constitution unless a societal consensus exists for that new right? What would this have meant to the Court that wrote *Brown v. The Board* or *Baker v. Carr*? And what should it mean to a court which faces a reconsideration of *Roe v. Wade*?

Four, what is the nominee's personal view of the proper scope of the concept of executive privilege especially when Congress seeks documents on a nominee pursuant to its constitutional responsibility to exercise "advice and consent"?

Five, what is the nominee's view of the first amendment especially as it relates to freedom of press and the expression of speech through symbolic acts?

Six, what is the nominee's view of that most elusive but cherished constitutional principle of the right to privacy?

In every case I will view the nominee's answers through the lens of their relationship to settled judicial notions and the overall balance on the Court. But I will do so with the full recognition that in each area there is plenty of room for hearty and principled disagreement.

Thank you.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman—

The CHAIRMAN. Just a minute. Let me make this statement: We have a right to make an opening statement, and I am not going to try to curb any of them. At the same time, there is no use to tell what you are going to go into. Just wait and go into it later. You will save a lot of time.

The Senator from Maryland.

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. Mr. Chairman, I am glad to join with you and other members of the committee in welcoming Judge Scalia here this morning. Judge Scalia comes before us with an impressive record of achievement and persuasive endorsements, not to mention the recommendation of the President of the United States.

There is, from the outset, no doubt that he has the intellectual attainments and the legal and judicial experience to serve effectively on the Supreme Court. Judge Scalia's strong credentials make it all the more important that we pause at the beginning of this proc-

ess to reflect on the importance of the task that the Senate is about to undertake.

No responsibility entrusted to the Senate is more important than the duty to participate in the process of selecting the judges of the U.S. courts. Our role in this process is different from any other business that comes before the Senate. Most of the other decisions we make are subject to revision, either by the Congress itself or by the executive branch. Statutes can be amended, budgets rewritten and appropriations deferred or rescinded. Of most of the legislative sins we commit in haste, we can repent at leisure. But a judicial appointment is different because it is for life.

The decisions of a judge of an inferior court are subject to correction in the appellate process. If the system works as it should, no lower court judge can stray too far from the law of the land.

But a Supreme Court Justice is different. In Justice Jackson's famous dictum, that tribunal is not final because it is infallible; but it is, in the constitutional sense, infallible because it is final. Precedent controls a lower court's disposition of a constitutional controversy. But for the Supreme Court of the United States, precedent is a path that the Court may usually—but need not always—choose to follow.

Judge Scalia, if he is confirmed, will be charting new routes, and correcting old courses. So the Senate has an obligation to find out, as best we can, where the nominee would take us before we decide whether to empower him to take us there.

The Supreme Court has an unparalleled power under our constitutional system to advance the cause of liberty, or to impede it; to strengthen the foundations of republican government or to undermine them. That may help to explain why the Framers of the Constitution thought that the power to appoint justices was too important to be reposed within the hands of one branch of Government alone.

Of this sharing of power—the President's to nominate, the Senates to confirm—Hamilton wrote that, "It is not easy to conceive a plan better calculated than this to produce a judicious choice of men for filling the offices of the Union." In the process that begins today, the Nation once again puts Hamilton's assertion to the test.

Judge Scalia merits our congratulations. He is the President's choice for an office of unsurpassed importance. He also deserves our wishes for good luck, for the scrutiny that this nomination will receive will be and should be thorough and exacting. The Constitution, and our oaths to support and defend it, demand no less.

For when we carry out our duty to give the President advice and to consent to his nomination, as our predecessors first did nearly 200 years ago, our first loyalty, like theirs, is neither to the party nor to the President, but to the people and to the Constitution that they have established.

If we cannot act and recognize that higher loyalty when we confirm judges, then we cannot demand it of the judges that we confirm.

Thank you, Mr. Chairman.

The CHAIRMAN. Our next opening statement is by Senator Kennedy. Senator Kennedy, I notice that Senator Domenici has come

in. Senator Moynihan is here, too. Would you mind giving them 3 minutes each?

Senator KENNEDY. I welcome my colleagues. I would like to hear from them.

The CHAIRMAN. Senator Domenici and Senator Moynihan, you all come around.

We took the Senators before we started opening rounds, but you were not here. We saved you time, and we will take you now for 3 minutes each.

We will put your full statements in the record, if you want to, and you can take 3 minutes to give the thrust of it.

Senator DOMENICI. Thank you very much, Mr Chairman.

Senator KENNEDY. If I could at the outset, we welcome Senator Domenici. We have had Senator D'Amato, and we have Judge Scalia who all come from a certain ethnic background. If this establishes a precedent, I want the Chair to understand we have 32 Irishmen in the Senate. When there is an Irish nominee, the agenda will be very filled. But we are delighted to have Senator Domenici here this morning.

**STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM
THE STATE OF NEW MEXICO**

Senator DOMENICI. Senator Kennedy, if that happens and I am up there, I would welcome all 32.

First of all, Mr. Chairman and members of the committee, I am not here to discuss Judge Scalia's legal abilities. Actually, he is lucky that I am not going to do that because I heard that he wrote the opinion striking down Gramm-Rudman-Hollings.

But in any event, this is a great day for me and I would not miss this unless you would not let me talk.

You are all aware of the litany of Antonin Scalia's successes all the way from graduated summa cum laude from Georgetown, magna cum laude from Harvard, graduate fellow at Harvard, associate with a prestigious law firm, law professor at four universities Assistant Attorney General, Judge of the U.S. Court of Appeals, and on and on and on. That is many lifetimes worth of achievement for most of us.

As a scholar and a judge, he has made many major contributions to our jurisprudence on administrative law, separation of powers, libel and slander law, and many other areas. And as I see it, he is now poised to proceed to the pinnacle of his profession.

It is a distinct pleasure for me to speak on his behalf because he is a personal friend. I have no doubt that you have read the wonderful tributes to him, which use terms such as articulate, energetic, gregarious, brilliant, intelligent, and quickwitted. They are there all the time whenever you read about him. But actually, Judge Scalia's nomination is meaningful to me for another reason. Judge Scalia is the first American of Italian extraction to be nominated to serve on the Supreme Court in the history of the republic.

I believe this is a magnificent tribute to the Italian-Americans of this Nation. Our President has repeatedly said that he will pick the very best men and women he can find to serve on this Court.