

Circuit July 15, 1982, confirmed August 5, 1982, took oath and assumed duties August 17, 1982.

Senator D'AMATO. Mr. Chairman, it is a great honor and, indeed, a privilege for me to be here with my colleagues to present to you and to the committee Judge Antonin Scalia as President Reagan's nominee to be a Justice of the U.S. Supreme Court. It is a source of great pride to all Americans, and particularly to all Americans of Italian descent, that this brilliant son of an immigrant is being nominated to our Nation's highest court.

Judge Antonin Scalia is the first Italian-American ever nominated to the Supreme Court, and it is a source of great, great pride to the Italian-American community. And Mama D'Amato, Judge, sends her best.

Judge SCALIA. Thank you, Senator.

Senator D'AMATO. Judge Scalia's father, Mr. Chairman, came to this country through Ellis Island, as did so many millions of our ancestors. His grandfather brought his family to America seeking only the opportunity to work hard and to make a better life for his family.

When Judge Scalia's father became a professor of romance languages at Brooklyn College, he moved his family to Elmhurst in Queens, NY. Antonin Scalia attended high school at St. Francis Xavier Academy in New York City. He attended Georgetown University and graduated first in his class. At Harvard Law School, he was note editor of the Law Review and graduated magna cum laude from Harvard in 1960.

Antonin Scalia has excelled at every area of the law to which he has turned his attention. After practicing with a well-known Cleveland law firm, he taught at the University of Virginia for 3 years and, thereafter, had an exemplary career in the law as a professor, as a practitioner of the law and as a noted jurist.

Mr. Chairman and members of the committee, I submit to you that Justice-designee Scalia has earned the great honor that the President has conferred upon him, and I am confident that Judge Scalia will be outstanding not only as the first Italian-American Justice to serve on the Supreme Court, but as also one of the greatest Justices of any background to serve on that Court.

Indeed, it is a great honor for me to be able to present to this distinguished committee this very distinguished nominee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We appreciate you gentlemen being here and speaking and introducing Judge Scalia. You are now excused. Of course, you may remain if you care to.

Senator Moynihan cannot wait. We will proceed with the distinguished ranking member, Senator Biden of Delaware.

#### STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator BIDEN. Thank you, Mr. Chairman.

Judge Scalia, congratulations.

Judge SCALIA. Thank you, Senator.

Senator BIDEN. On being nominated by the President, you and your family must be proud. They are a good-looking family, all of them.

I have a brief statement. I ask unanimous consent that my entire statement be placed in the record.

The CHAIRMAN. Without objection, so ordered.

Senator BIDEN. Let me say to you, Judge Scalia, and to my colleagues on the committee, that this hearing, although equally as important, is different than the hearing we had last week, in my view. We last week looked at the Chief Justice and the role of the Chief Justice. As one Senator, I believe that there is a distinction between the role of the Chief and the role of an Associate.

And second, we do not have 15 years of Supreme Court decisions to look at and to pore over, to make judgments about what your jurisprudential philosophy is, Judge. You do have 4 years on the circuit court. Most of the decisions I have read, the vast majority, relate to administrative questions—very important, but nonetheless, they do not give us quite the full range of review that we have with regard to Justice Rehnquist.

Therefore, I believe it very important that we spend some time today discussing, and you discussing with us as freely and as openly as you have a reputation for doing, your judicial philosophy.

Therefore, I am going to pursue about six areas, judge, with you, based upon my review of your writings and your opinions. At the heart of my inquiry will be an effort to obtain a better understanding of how you view the Constitution as limiting the role of the Federal Government, or government at all levels, for that matter, in solving societal problems.

First, I will seek to better understand how you view the Constitution as limiting the use of independent regulatory agencies and protecting the health and welfare of Americans. For example, are there constitutional limitations on what Congress can and should delegate to these regulatory agencies?

Second, what is the proper role of statutes in solving the problems that face this Nation? How specific must Congress be in crafting these solutions? Would you place a straitjacket on my colleagues in terms of requiring such specificity that normal political processes could become in fact a logjam? Or where Congress, by design, leaves ambiguity, what role does the executive branch, the courts, and in particular, the legislative history have in determining how that ambiguity should be fleshed out.

And third, I want to talk to you about what standards should guide the Supreme Court in determining the original intent, or to use your phrase, the original meaning of the Bill of Rights or of the Civil War constitutional amendment. And what do you mean by the notion that the Court should not create new rights under the Constitution unless a societal consensus—if I read your writings correctly—exists for that new right? What would this have meant to the Court that wrote *Brown v. the Board* or *Baker v. Carr* or any number of other decisions? And what should it mean to a Court which is going to face reconsideration of *Roe v. Wade*.

The fourth thing I would like to talk to you about is what are your personal views on the proper scope of the concept of executive privilege, something we have some interest in of late here in this committee, especially when Congress seeks documents on a nominee pursuant to its constitutional responsibility to exercise its advice and consent function.

The fifth area is what are your views on the first amendment, especially as it relates to the freedom of the press, and expression of speech through symbolic acts?

And the sixth and last area I would like to raise with you, judge, as we go on today is what is your view of the most elusive but, in my view, one of the most cherished principles; that is the right to privacy.

In every case I will view your answers through the lens of their relationship to the settled judicial notions and the overall balance of the Court. But I will do so with the full recognition that in each of these areas there is plenty of room for healthy and principled disagreement, and I look forward, I truly look forward to discussing these areas with you and hope you find today a pleasant undertaking.

Judge SCALIA. Thank you.

Senator BIDEN. And that your family concludes that, also.

[The prepared statement of Senator Biden follows:]

#### PREPARED STATEMENT OF SENATOR BIDEN

Last week we began the process of participating in what may become a watershed in the history of the Supreme Court. Today we begin the second chapter of that story.

While the selection of a Chief Justice, the head of a coordinate branch of Government is of obvious moment, the responsibility we face today is no less important. For no matter what we do in the case of Justice Rehnquist he will continue to serve on the Court.

In the case of Judge Scalia we will actually be adding a new person to that elite body of men and women which nurtures and preserves our constitutional heritage.

In a sense the challenge in the case of Mr. Scalia may be greater. At least in the case of Justice Rehnquist we have over a decade of published opinions. In Mr. Scalia's case we have only four years of written opinions. And those were written as a court of appeals judge where the variety of issues and his discretion to examine old cases or make new law is considerably more limited than that of an Associate Justice of the Supreme Court.

Furthermore, his background as an academic and an executive official presents a different body of writings than does Mr. Rehnquist's numerous Supreme Court decisions. First, because as an academic Mr. Scalia was fond of the provocative argument and as an executive official he was expressing the opinion of his client. In both cases it is difficult to ascertain if the opinions he expressed are a genuine reflection of his philosophy.

No matter how daunting, we must and will pursue a better understanding of Mr. Scalia's jurisprudence.

Here again there is a significant difference between what we are about this week from what we sought last week. Last week I sought to understand Mr. Rehnquist's views in large measure to determine whether he could perform the role of chief, as a centrist, a symbol, and a consensus builder.

That is less relevant, if not irrelevant, in the case of evaluating an Associate Justice. I firmly believe that a diversity of views from liberal to conservative should be represented on the bench. To paraphrase Justice Rehnquist in a recent interview—just as it would be wrong to have 9 Justice Rehnquists it would also be wrong to have 9 Justice Brennans on the Court.

America's faith in its Judicial Systems and the rule of law is based in large part in the belief that most of our fellow citizens share that any person can get a fair hearing before openminded jurists. At the heart of that faith, I believe, is the conviction that our whole system of justice is capped with a Supreme Court composed of a diversity of opinions and background.

Most Americans believe like I do, that when the case has been heard and the justices retire to that conference room to argue and vote that a full variety of opinions well be ventilated.

That is why the primary line of inquiry is to determine whether the nominee adheres to a judicial philosophy that would unravel the broad fabric of settled practices. Such a nominee should be rejected because his or her presence on the Court

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 of Education* 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-