

record as an appellate court judge does indeed display a separation of your personal and legal views when issuing opinions.

I am interested in learning how you intend to approach the different responsibilities of the Supreme Court, vis-a-vis the court of appeals.

I will be particularly interested, Judge Kennedy, in discussing with you your views on discrimination, equal protection, privacy, criminal procedures, and access to the court.

I want to hear your opinions on the roles that precedent and stare decisis play on the Supreme Court. And I am hopeful, Judge Kennedy, that you will answer these questions as forthrightly as you can, without intimidation, without feeling put on the spot, or that there is somebody out to get you, because there is no one here that I know of who is approaching this hearing in that way.

We are out to do our responsible duty, and I am very pleased that you have been chosen for the position. I am also very pleased that your attitude is one of a willingness to work with us, so we may come to a conclusion that will fill the vacant seat on the Supreme Court, and enable the country to move ahead.

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

The CHAIRMAN. Thank you, Senator.

Our colleague from Iowa, Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, let me add my welcome to you and your family. I particularly want to congratulate you on being chosen by President Reagan to serve on the Supreme Court.

Three months ago this committee convened for the purpose of assisting the Senate's advice and consent responsibility. Badly, in my judgment, the committee and the Senate managed to transform a narrow constitutional function into a full blown fear and smear campaign.

The advice and consent function, located as it is in the Executive Branch Article of the Constitution, simply cannot mean that the Senate's last word is to be the only word.

I begin these hearings full of hope that this nomination will return the Senate to its more traditional and appropriate role.

In the past, I have set out what I believe is a principled, three-part standard for evaluating a nominee. First, does a nominee possess knowledge of and respect for the Constitution as the precious inheritance that it is for all Americans, and as the sole rule of decision in constitutional cases?

Second, does the nominee have full appreciation of the separate functions between the unelected judiciary and the political branches?

Thirdly, will the nominee exercise self restraint? Self restraint, which makes a judge resist the temptation to revise or amend the Constitution according to that individual's view of what is good policy.

Mr. Chairman, I believe that this is a good occasion to repeat some often cited history about the third branch.

First, according to the framers, the judiciary was to be the "least dangerous" branch to the political rights guaranteed in the Constitution.

Second, courts are to make decisions based on the law rather than personal preference.

Courts derive their legitimacy and authority from this restriction. They lose both when they go beyond it.

As Justice Frankfurter once expressed it, and I quote: The ultimate touchstone of constitutionality is the Constitution itself; not what we have said about it, unquote.

Much of the furor of the past few months only underscores the fact that some prefer a judiciary that obliterates the delicate balance struck by the framers in the Constitution's first three articles; a judiciary whose acts have no roots in the text or history of the Constitution and laws; a judiciary with little regard for the consent of the governed or separated powers.

Of course, good intentions will be pleased by the defenders of an untethered judiciary. But good intentions ought not to prevail over the Constitution itself, if we are to be truly a nation of laws, not men.

Following the Bork hearings, a constituent of mine reminded me of the words of a former Iowa Congressman, John W. Gwynne. His words explain it quite plainly, and I quote: A constitution is a document written by people in their better moments \* \* \* to protect themselves in their worst moments.

A constitution is not only to protect man from his enemies \* \* \* but also from his friends, unquote.

Mr. Chairman, I thank you for scheduling these hearings as early as you did, and I look forward to them as I evaluate this nominee on the vital questions concerning the judicial branch. Thank you.

[The statement of Senator Grassley follows:]