people. That recommendation gets made only once, only once in your lifetime.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, I join my colleagues in welcoming you here today. We are giving you a lot of advice. You really have to run between the raindrops in a veritable hurricane here. But we are very much concerned about the successor to Justice Brennan because so many major issues are decided by 5-to-4 votes, and a single Justice can decide questions of enormous importance to this country. If you are fortunate enough to be confirmed and to serve as long as Justice Holmes did, you will serve until the year 2031.

There has been overriding concern about the abortion question, and while it is of great moment, there are many other matters of tremendous importance to this country. We talked about some of them: Civil rights and freedom of religion and freedom of the press and freedom of speech and right to die and death penalty as a deterrent to violent crime. In looking over next year's docket on the Supreme Court, there is a major desegregation case. There are major matters on employment discrimination, taxation, antitrust, citizenship, death penalty. And even beyond the range of importance for the United States, the Supreme Court may be called upon to make a decision which will have international implications as to what is happening in the Persian Gulf today.

There is much concern at the moment about the authority of the President to dispatch U.S. troops under concerns of the War Powers Resolution with the very vital constitutional provisions on the President's authority as Commander in Chief contrasted with the congressional authority, sole prerogative to declare war. Those are the kinds of issues on which you may be the decisive vote, and your influence may be greater than many Presidents', certainly many, many Members of the Senate. So we have very strong reasons to be extremely careful in this very important confirmation process.

My reading of several dozen of your opinions tells me that you have a very extensive record—not a complete record, but a very extensive record to consider. Some of your opinions are restrictive on criminal defendants' rights and some are expansive. You have an opinion on the *Dionne* case which is candidly very narrow on interpretism and original intent, something that if others don't cover first I will, about how much emphasis is appropriately placed. That opinion you cite goes back to matters in 1663 and 1781 and 1768, and it is narrow. And we will be concerned, I will be concerned, about how you apply the equal protection clause as to women and indigents.

At the same time, your opinion in *Richardson* has a broad interpretation of the liberty interest in a very difficult case involving a charge against a man allegedly French-kissing a 14-year-old girl under his charge. In an employment rights case, you found an ex-

pansive liberty interest. And the issue of stare decisis, the fancy legal word for whether you follow precedent, is very instructive. One of your opinions says that "The consequences of what I believe was an unsound conclusion in that case are not serious enough to outweigh the value of stare decisis," which is an important counterbalance in the law. So I think you have quite a record and we have very important matters to discuss with you.

The standards of confirmation are not clear. There has been a lot of debate on it for a long time, and perhaps it originated with an early draft of the Constitution which gave to the Senate the authority to appoint. Can you imagine the Senate agreeing on—we can't agree on a budget, let alone on an appointment.

We had very interesting hearings on the American Bar Association's role, and we all agreed that the ABA should limit itself to qualifications as opposed to the political question. But there was considerable opinion that the Senate had equal standing with the President. I am not prepared to go that far. I think we owe deference to the President's selection. But, candidly, it is becoming a complicated matter as the Supreme Court moves farther into public policy issues and functions as a superlegislature.

I make no bones about my concern about the Court's expansive role there, regardless of whose agenda it is. We have a very difficult matter now pending before the Congress on the Civil Rights Act interpretation. We had a decision in *Griggs,* a unanimous Court. The Chief Justice wrote an opinion in 1971, and it was overruled in 1989 on what is a clear-cut change in law where four Justices appeared before this committee, put their hands on the Bible, and made commitments for judicial restraint, to let the Congress change the law. Now, of course, I speak for myself, my interpretation here, but I think it was clearly an overruling, burden of proof on employees and business necessity.

There is a conclusive presumption of congressional intent when a case stands for 18 years. If that trend continues, I believe there will be greater pressure on nominees to answer ultimate questions on issues of public policy. And you have the important issue on Federal-State rights, and you have *Garcia* v. *National League of Cities,* and I won't go into them now but will later. You have the Chief Justice and Justice O'Connor saying as soon as we get one more person we are going to change the law of *Garcia.* So if the law becomes personalized, depending on who is on the Court, then I don't think it will be possible to restrain Senators from demanding ultimate answers.

I hope we don't get there because judicial independence requires that you not make commitments, that the nominee not be asked to make commitments, and that the decisions be rendered in the tradition of the judicial process, where cases in controversy—that is what the Constitution says—are decided with specific facts, briefs, argument, judicial conference, and then a decision. And I do not believe that any interest group is entitled to a Justice predisposed to their views any more than a litigant is. They are entitled to someone who is qualified and has an open mind and will apply the Constitution.

The process here today, Judge Souter, I think is the—well, you might call it the quintessential interaction of the three branches,

where the President nominates, the Senate is called upon to confirm or not, and then a Justice takes the Court. When the Constitution was written, article I was meant for the Congress, article II for the executive branch, and article III for the Court. And I believe if the Constitution were to be rewritten today, article I would be for the Court.

The Court has taken the dominant authority under our system in deciding the tough questions, questions of competing authority between the President and the Congress, questions that may involve the Persian Gulf, the big issues of the day. So that when we look forward for the next several decades, perhaps four decades, and we know that the future will hold many 5-to-4 decisions, and Justice Brennan's successor may pass the key votes on matters of overwhelming national and international importance, we are very concerned. And it is an important task we have.

I think you come to this nomination with fine credentials, and part of the picture is filled out by your opinions. But there is a great deal more which we have to find out to make our determination as best we can whether you should be in the position to cast that critical vote for so many years on so many issues of tremendous importance.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

The distinguished Senator from Alabama, Senator Heflin.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. Mr. Chairman, once again, our Nation stands at a crossroads, a constitutional crossroads, as the President nominates and the Senate, through its elected membership, must under our Constitution "advise and consent" on the nomination of Judge David Souter to the U.S. Supreme Court. Our task is important, for the future course of the constitutional jurisprudence of this Nation could rest upon the collective judgment of this Senate.

In the Supreme Court term ending this year, 1990, 38 out of a total of 129 written opinions were decided by a 5-to-4 vote. It is my belief that the American public deserves a Justice who evidences a clear commitment to basic constitutional values.

I ascribe wide latitude in our President's right to nominate who he chooses, especially with regard to a nominee's qualifications, integrity, and judicial temperament. These are all hallmarks of a good judge. I believe that all Presidents have endeavored to select nominees that meet these qualifications.

I further believe that Presidents have the right to nominate individuals that belong to the President's political party and that possess his political and philosophical views, even if they differ from the views of most of a Senate controlled by another party. However, our Founding Fathers felt that such a Presidential right to appoint judges should not be unlimited, and provided a check and balance by requiring a role for an element in the legislative branch. That check and balance is the Senate confirmation process.

Historically, the rejection of Presidential nominees has rarely been exercised. Usually, when it has been exercised, arguments for good cause have been made. Nevertheless, the confirmation process