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The bill clerk read as follows:

A concurrent resolution (S. Con. Res. 147) supporting the actions taken by the President with respect to Iraqi aggression against Kuwait.

The PRESIDING OFFICER. The question is on agreeing to the concurrent resolution. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. WILSON], is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 96, nays 3, as follows:

[Rollcall Vote No. 258 Leg.]

YEAS—96

Adams	Exon	McClure
Akaka	Ford	McConnell
Armstrong	Fowler	Metzenbaum
Baucus	Garn	Mikulski
Bentsen	Glenn	Mitchell
Biden	Gore	Moynihan
Bingaman	Gorton	Murkowski
Bond	Graham	Nickles
Boren	Gramm	Nunn
Boschwitz	Grassley	Packwood
Bradley	Harkin	Pell
Breaux	Hatch	Pressler
Bryan	Heflin	Pryor
Bumpers	Heinz	Reid
Burdick	Helms	Riegle
Burns	Hollings	Robb
Byrd	Humphrey	Rockefeller
Chafee	Inouye	Roth
Coats	Jeffords	Rudman
Cochran	Johnston	Sanford
Cohen	Kassebaum	Sarbanes
Conrad	Kasten	Sasser
Cranston	Kerry	Shelby
D'Amato	Kohl	Simon
Danforth	Lautenberg	Simpson
Daschle	Leahy	Specter
DeConcini	Levin	Stevens
Dixon	Lieberman	Symms
Dodd	Lott	Thurmond
Dole	Lugar	Wallop
Domenici	Mack	Warner
Durenberger	McCain	Wirth

NAYS—3

Hatfield	Kennedy	Kerrey

NOT VOTING—1

Wilson

So the concurrent resolution (S. Con. Res. 147) was agreed to.

The preamble was agreed to.

The concurrent resolution, with its preamble, reads as follows:

S. CON. RES. 147

Whereas on August 2, 1990, the armed forces of Iraq invaded and occupied the State of Kuwait, too large numbers of innocent hostages, and disregarded the rights of diplomats, all in clear violation of the United Nations Charter and fundamental principles of international law;

Whereas the President condemned Iraq's aggression, imposed comprehensive United States economic sanctions upon Iraq, and froze Iraqi assets in the United States;

Whereas the United Nations Security Council, in a series of five unanimously approved resolutions, condemned Iraq's actions as unlawful, imposed mandatory economic sanctions designed to compel Iraq to withdraw from Kuwait, called on all states to take appropriate measures to ensure the enforcement of sanctions, called for the immediate release of all hostages, and reaffirmed the right of individual and collective self-defense; and

Whereas, in response to requests from governments in the region exercising the right of collective self-defense as provided in Article 51 of the United Nations Charter, the President deployed United States Armed Forces in the Persian Gulf region as part of a multilateral effort: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That (a) the Congress strongly approves the leadership of the President in successfully pursuing the passage of United Nations Security Council Resoltuions 660, 661, 662, 664, 665, 666, 667, and 670, which call for—

(1) the immediate, complete, and unconditional withdrawal of all Iraqi forces from Kuwait;

(2) the restoration of Kuwait's sovereignty, independence, and territorial integrity;

(3) the release and safe passage of foreign nationals held hostage by Iraq;

(4) the imposition of economic sanctions, including the cessation of airline transport, against Iraq; and

(5) the maintenance of international peace and security in the Persian Gulf region.

(b) The Congress approves the actions taken by the President in support of these goals, including the involvement of the United Nations and of the friendly governments. The Congress supports continued action by the President in accordance with the decisions of the United Nations Security Council and in accordance with United States constitutional and statutory processes, including the authorization and appropriation of funds by the Congress, to deter Iraqi aggression and to protect American lives and vital interests in the region.

(c) The Congress calls on all nations to strengthen the enforcement of the United Nations imposed sanctions against Iraq, to provide assistance for those adversely affected by enforcement of the sanctions, and to provide assistance to refugees fleeing Kuwait and Iraq.

SEC. 2. The Secretary of the Senate shall transmit a copy of this concurrent resolution to the President.

EXECUTIVE SESSION

NOMINATION OF DAVID H. SOUTER, OF NEW HAMPSHIRE, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session, and proceed to the consideration of the nomination of David H. Souter, to be an Associate Justice of the Supreme Court of the United States.

The nomination will be stated.

SUPREME COURT OF THE UNITED STATES

The assistant legislative clerk read the nomination of David H. Souter, of New Hampshire, to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, let me begin by suggesting that the committee has worked diligently over the weekend to provide all Members of the Senate with a copy of the committee report laying out in some significant detail the rationale for the committee's position, along with the dissenting view that was put forward.

Mr. President, let me say before we begin this process, that neither Judge Souter nor his chief supporter, my distinguished colleague from the State of New Hampshire, has urged me as chairman of the committee to rush this process. But the President has urged us to rush the process.

The Supreme Court sat for the first time this year, yesterday. Today is the second day of their sitting. And although, God willing, if Judge Souter becomes Justice Souter, he will sit for as long as his predecessor Justice Brennan did, which would mean for another 34 years. A couple days will not make a difference. But apparently it makes a great deal of difference to the President of the United States.

So I would say to my colleagues I do not want to in any way curtail anyone speaking as long as they would like and feel the need to speak on such an important nomination. But there is a rumor drifting around here that, if we do not finish by 6 o'clock, somehow we are not going to get to vote on Judge Souter.

I hope either we finish before 6, or, if we do not, we stay tonight until we finish voting on such an important matter, particularly in light of the fact that the President has publicly gone on television and exhorted me as chairman of the committee to move the process along.

We have waived the 48-hour rule that is ordinarily observed from the time a report on a nominee is submitted to the Senate until the time we take up the nomination. Even those who have opposed Judge Souter, and stated so publicly, have participated and are willing to allow the process to go beyond its ordinary timeframe; that is, move faster than the rules call for.

So with that brief introduction, let me suggest that I hope that my colleagues are prepared to come to the floor to speak on behalf or, if they are opposed, in opposition to Judge Souter so we can move as rapidly as possible.

I have a relatively long, about a 20-minute statement, on behalf of Judge Souter's nomination. But I see that some of my colleagues who wish to speak are here. I will have time to make the statement because I am here for the duration.

So rather than take the time at the outset, I yield to my distinguished colleague from South Carolina, if he wishes to speak first. If not, I would move to recognize one of our colleagues. But I will withhold my state-

ment which I will make at some point today on behalf of Judge Souter.

Mr. THURMOND. Thank you very much.

The PRESIDING OFFICER. The Senator South Carolina.

Mr. THURMOND. Mr. President, today, the U.S. Senate is considering the nomination of Judge David H. Souter to be an Associate Justice of the Supreme Court of the United States. The Judiciary Committee had earlier undertaken its task of holding extensive hearings and reviewing the qualifications of Judge Souter, a most important responsibility.

Last Thursday, the Judiciary Committee considered this nominee. The committee favorably reported this nomination to the full Senate by a vote of 13 to 1. I repeat, a vote of 13 to 1. This vote is certainly a strong recommendation to the full Senate in favor of Judge Souter, an individual who has outstanding qualities to serve on this Nation's highest court.

Briefly, I would like to comment on Judge Souter's confirmation hearings which spanned 5 days. The committee conducted a hearing which was equitable, thorough, and diligent. Judge Souter's 3 days of exhaustive testimony provided the opportunity to carefully examine and review his intellectual capacity, moral character, and personal and professional background. Additional witnesses who testified made a contribution to the committee's consideration of Judge Souter's nomination to this esteemed position. Finally, I would like to commend the distinguished chairman of the Judiciary Committee, Senator BIDEN, for his handling of the hearing on this nominee which was conducted in a fair and equitable manner.

My review of Judge Souter's background convinces me that he possesses the necessary qualities to be an outstanding member of the Supreme Court. His intellectual credentials are impeccable: Phi Beta Kappa, Rhodes scholar, magna cum laude graduate of Harvard, law degree from Harvard, and graduate study at Oxford University. His experience is extraordinary: Currently serving as a judge of the U.S. Court of Appeals for the First Judicial Circuit; formerly an associate justice of the New Hampshire Supreme Court for 7 years; previously served as a judge on the New Hampshire Superior Court for 5 years; served as the attorney general for the State of New Hampshire; held positions as deputy attorney general, assistant attorney general, and practical law in the private sector.

Mr. President, the American Bar Association carefully scrutinized the professional competence, integrity, and judicial temperament of Judge Souter. The ABA determined that Judge Souter deserved its highest rating based on its extensive investigation which included such comments as:

> Judge Souter is highly competent and possesses the scholarly, analytical, and writing skills necessary to serve on the Supreme Court.

As well, Judge Souter had previously received the highest rating from the ABA for his current position on the First Circuit Court of Appeals.

Regarding the hearings on this nominee, Judge Souter's impressive testimony before the committee demonstrates he is a man of keen intellect who is devoted to the law. His thorough understanding of the law and answers to the vast number of probing questions on a wide range of legal topics assures me that he possesses the substantial knowledge and understanding to make an outstanding Supreme Court Justice. Judge Souter showed that he clearly comprehends the majesity of our constitutional system of government and spoke eloquently about the lessons he has learned during his years of service on the bench. The first lesson, he said, is

> Whatever court we are in * * * where we are on a trial court or an appellate court, at the end of our task some human being is going to be affected.

The second lesson, he stated, is

> If * * * we are going to be judges, whose rulings will affect the lives of other people * * * we had better use every power of our minds and hearts and * * * beings to get those rulings right.

I strongly believe that Judge Souter will temper scholarly, knowledgeable decisions with sensitivity for those individuals who will be affected by them.

Many distinguished witnesses testified in favor of Judge Souter. Several of these witnesses have known Judge Souter for years—they are well aware of the outstanding qualities that this individual possesses.

Governor Baliles, who was formerly attorney general and a former Governor of Virginia, stated:

> Judge Souter is an individual who [will] bring objective intellect, integrity, and centered view of judicial procedure to the Nation's highest Court * * * not a populist but a rationalist, one who is moderate in tone and expression.

Ms. Deborah Cooper, a lawyer in private practice in Lebanon, NH, testified:

> I have unshakable confidence that Judge Souter * * * will approach the issues before the Supreme Court * * * not with a pre-established political agenda or ideology, but with superior legal skills, intellect and unparalleled integrity.

A former Attorney General of the United States also testified in his favor.

Members of the law enforcement community strongly endorsed Judge Souter, testifying, he is "extremely well-qualified to serve on the highest court in the United States."

There were certainly many other distinguished witnesses who spoke out strongly in favor of Judge Souter for a position on the Supreme Court. Time does not allow me to reiterate all of that testimony.

Mr. President, the framers of our Constitution created the judicial branch as an impartial, independent branch of government. A member of the Supreme Court must consider hundreds, even thousands of issues during his or her tenure. While any one issue may now be more prominent than others, as times change, so will the issues before the Court. A member of the Supreme Court makes decisions in a vast array of areas and is not put in place to make short-term decisions to satisfy any political constituency, any one individual, or any particular group. This nominee should be judged on his integrity and intellectual and professional qualifications—not on his willingness to endorse the views or position of any one particular person or political constituency.

In summary, this nominee, as does any nominee, comes to the Senate with a presumption in his favor. As the President is called upon under our Constitution to make judicial appointments, I strongly believe it is up to the opponents of a nominee to overcome the presumption in his favor. The burden of proof is not placed on the nominee to prove that he is fit to serve. Clearly, those few who oppose Judge Souter have not overcome the presumption in his favor.

In closing, Judge Souter has been thoroughly scrutinized by the Judiciary Committee. He has received the bipartisan endorsement by 13 of the 14 members of the committee. Without question, he has a keen sense of justice, a clear view of the concept of fairness, and a deep understanding of the impact his decisions will have on the individuals affected by them. Judge Souter will make an outstanding addition to the Supreme Court.

I urge the Members of the Senate to vote in favor of this nominee.

I yield the floor, Mr. President.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, I am going to make my statement now, but before I begin, let me acknowledge something I think is probably unique in the annals of American history, although I cannot swear to that at this moment.

The reason that I yielded—in the ordinary processes the chairperson of the committee speaks first on an important matter like this—the ranking member of this committee, Senator THURMOND, has sat on and deliberated over and voted on, I suspect, although I am not certain, more Supreme Court nominations than any other person in the history of the United States of

America. I just want to say that it is an extraordinary pleasure working with him and it is an extraordinary undertaking working with him because you never quite know exactly what he is going to do or say no matter how many of these nominees he has deliberated over. But one thing always is certain, whatever he says always ends up on point.

I think it is 23 appointees, nominees, to the Supreme Court of the United States, that Senator THURMOND of South Carolina has voted on.

And he pointed out to me——

Mr. THURMOND. There were 105 nominees.

Mr. BIDEN. See what I mean? You never know exactly what is going to happen. He just pointed out to me there were 105 nominees in our entire history. So about 20 percent, between 20 and 25 percent of all the nominees, about 20 percent of all the nominees that have ever been nominated for the Court, my friend from South Carolina has voted on them.

We have not always voted the same. I suspect I will be observing him voting on nominees long after I have left this Chamber, and I suspect we will not agree on all the nominees. But we do agree on this one, and we have agreed on more than we have disagreed.

Ten weeks ago, Mr. President, President Bush began the solemn task of filling Justice Brennan's seat on the U.S. Supreme Court by nominating Judge David Hackett Souter to assume that high post. Today, the Senate exercises its constitutionally assigned role in the process by deciding whether we will give our consent to the President's nomination.

Over these past 10 weeks, the members of the Judiciary Committee have devoted literally hundreds of hours to studying Judge Souter's record, his credentials, and his judicial opinions. We held extensive hearings on this nomination—the third longest set of hearings on any Supreme Court nominee in our history.

And most importantly, we used these hearings to question Judge Souter in depth on matters of judicial philosophy and constitutional law. Judge Souter was questioned for the second longest time of any Supreme Court nominee; for almost 20 hours, we had an opportunity to examine this man and his views.

We had the need—the duty—to learn as much about Judge Souter as possible. No nominee in a quarter century had come to this committee with less known about his or her constitutional philosophy than David Hackett Souter. And no nomination—at any time since the 1930's—had come before the Senate at a moment of such importance, in terms of setting the future direction of the Supreme Court, and, I might add, in turn, the United States of America.

At this critical moment—what I called a constitutional crossroads, 3 weeks ago today—I referred to it as that and I contend it is that, a constitutional crossroad—I mentioned to this Chamber that our committee had an obligation to learn all that it could about David Hackett Souter's constitutional philosophy.

And at this critical moment—and where I disagree with my friend from South Carolina—the burden of proof rests, as it always has and always should, on the nominee to demonstrate that he is the person whom we should confirm to sit on the Nation's highest court.

As I see it, Judge Souter has met this burden of proof with respect to some matters; he has failed it with respect to others. His philosophy was neither proven to be wholly inappropriate or wholly acceptable for confirmation.

In my "additional views" in the Judiciary Committee report, I have detailed my personal assessment of what we have learned about Judge Souter's philosophy in nine key areas. Today, I would like to briefly summarize these views, starting with the most positive aspect of Judge Souter's record, at least as far as this Senator is concerned.

First, in the area of freedom of speech, Judge Souter indicated his support for Justice Brennan's landmark precedent of New York Times versus Sullivan; for the Supreme Court's ban on prior restraint of the press; and for the Brandenburg decision that permits speech that urges civil disobedience.

Thus, Judge Souter showed a very strong dedication to the key principles at issue in this area.

In the field of free exercise of religion, Judge Souter indicated that he had "no reason to raise questions about the appropriateness of the strict scrutiny test" for laws that impair religious practice. Thus, Judge Souter suggested that he disagreed with the Supreme Court's recent and restricted decision in Employment Division versus Smith, a decision that in my view undermines religious freedom in our country. And again I found his disagreement with that decision very encouraging.

In the area of stare decisis, Judge Souter detailed a philosophy that shows what I beleive to be a proper respect for precedent. He particularly emphasized that before the Supreme Court reverses, a prior ruling, it should take into account "whether private citizens * * * have relied upon [the precedent] in their own planning to such a degree that * * * it would be a great hardship in overruling it now."

This, in my view, favorably distinguishes Judge Souter from other nominees who said that they would look only at whether the Government structures and social institutions have been built up around a particular decision before deciding to reverse the case, and not whether or not individuals as well had come to rely upon that decision, a distinction with a significant difference, as I read what Judge Souter is saying.

Finally, for this side of the ledger—the ledger where he has, in my view, unquestionably met what I believe to be the burden of proof he must meet—and most importantly, Judge Souter categorically rejected the arch-conservative judicial philosophy of original intent, a philosophy, I might add, were it to be adhered to by the Supreme Court, would require the Court to overturn, as Judge Bork accurately stated, a couple dozen landmark decisions.

And that view of original intent, the view that the meaning to the constitutional provisions should be limited to the specific intentions of the Framers of the Constitution at the time they wrote the Constitution, that is what I mean and most people mean by original intent.

This doctrine—was Judge Souter himself acknowledged—would undermine many of the most important decisions the Supreme Court has given us through the years. To name a few, Brown versus the Board of Education, a decision outlawing, making it illegal, and recognizing as unconstitutional the doctrine of separate but equal; separate facilities for black children in America were no longer deemed to be constitutional.

Another decision where I beleive it would overrule that view of the Constitution is the one person, one vote ruling, those decisions which said that they can no longer allow one part of a State with a very small population to have a disproportionate say in the affairs of that State, giving, in effect, the people in the metropolitan areas less than an equal vote with people in rural areas.

And there are the Court's precedents that outlawed discrimination against women, a whole number of cases that over the past years have recognized that the 14th amendment embraces the notion that when they say equality, we are talking about equality for men and women, equality among the sexes. All of those areas of the Court's decisions would be, in fact, in jeopardy if the doctrine of original intent were adhered to by the Court or this nominee.

And Judge Souter said that this "original intent" doctrine, and I am now quoting him, is "not * * * the appropriate criterion for constitutional meaning."

In a response to my question, and the question I asked was this: "Does

the correct interpretation of a constitutional provision * * * change over time?" Judge Souter responded: "Principles don't change, but our perceptions of the world around us and the need for those principles do."

As a matter of fact, the very thing that gave me heart and gave my friend from Iowa, who is on the floor, cause and pause, the very thing that made me look at Judge Souter and say, "Well, we have a Judge here that will interpret the Constitution, use a methodology that is consistent with the way the Court has ruled in the recent past, and is necessary for the well-being of America," is the very thing that my friend from Iowa very skillfully questioned the Judge about, because it gave him great concern.

In all of these critical respects that I have mentioned, Judge Souter clearly proved that his judicial philosophy was sound and, I would argue, commendable. In all of these critical respects Judge Souter met his burden of proof and then some.

In other areas, though Judge Souter compiled a more mixed record in this Senator's view. And these are the four areas I would like to address for a moment. The first is that there is the first amendment prohibition on the establishment of religion. In that area his record is mixed, in my view. Here Judge Souter criticized the prevailing Supreme Court rule in Lemon versus Kurtzman—which, by the way I might add is not an exceptional view; many people have criticized it—but he did so without indicating what guarantees of religious liberty he would impose in its place. As a result, we are left with a very unclear picture of how Judge Souter approaches this important question. We have very little idea of how high he thinks the wall of separation between church and state ought to be.

The second area that gives me concern is the area of race discrimination. Here, too, some things Judge Souter said were quite hopeful. He called the struggle for racial equality the most tragic problem confronting the Nation, and he suggested that at least some types of affirmative action, some types of affirmative action programs, are permissible, in his view; again giving me reason for hope, giving some of my colleagues pause for concern. Yet aspects of Judge Souter's record as Attorney General and his testimony before our committee were troubling. Again, the record is a mixed one.

Third, there is the area of gender discrimination. Judge Souter criticized the Supreme Court's current middle tier scrutiny for laws that discriminate on the basis of gender and even implied that the basis for his criticism was that the Court's existing standard fails to provide adequate protection for women's rights. As the Chair knows; there are three general tiers of scrutiny. Strict scrutiny—the Court says the State has to have some overwhelming right to be able to justify the existing practice saying women cannot do something men can do. The middle tier level says, we will listen to it, but it better be a pretty strong reason why you are allowing a discrimination between men and women based upon something a woman may want to do. And then there is the rational basis test which basically says, if the State comes up with any reason that is rational. There used to be cases where a woman could not be a bartender, and the rationale was "unless they happened to be married to or the child of the owner of the bar." A rational basis test basically was, it is rational to want women to be home, not in the bar. That is kind of a preposterous notion under our thinking today, if we would say women cannot be a bartender based on that reason. But under a rational basis test, were one in existence, the State would be able to pass such laws.

So, which tier of scrutiny—very high, middle, or low—that the judge would apply in dealing with gender discrimination cases is of great consequence to the people of this country, obviously to the women of this country. Yet I found, notwithstanding the fact he criticized the middle tier and implied that his criticism was based on the fact that one could not be certain enough, that it was not strong enough, he never did tell us what standard he would apply. I found that disappointing, his failure to clearly indicate whether his standards in this area would be in fact more or less rigorous than the current law. The judge's tone suggests that he was headed in the right direction, from my perspective—that is, it should be a very much stronger test the State should have to prove in order to be able to discriminate against women for anything—but we do not know for sure whether he wants a test that is stronger or weaker. I would have felt much more comfortable had he been willing to tell us. And had he told us, he would not in any way be telling us how he would rule in a future case. He would just be telling us what methodology he would apply in order to interpret the facts in any given case.

Finally, there is the area of privacy and reproductive choice, probably the single most significant area that Judge Souter failed to speak to. Choice; here Judge Souter did say some encouraging things. He agreed there is a marital right to privacy and the right of married couples to make choices about procreation, to use his phrase, "at the core of" the fundamental right to privacy. That is, the right to determine whether or not to become pregnant is "at the core of" the right to privacy recognized in the marital right to privacy.

He agreed that the Constitution protects unenumerated rights, unlike some who have come before us in the recent past, and, more specifically, that there is a substantive content in the due process clause of the 5th and 14th amendments, important guarantees of liberty for all Americans.

He even said he would give meaning to the words of the ninth amendment, which was the most refreshing of all that I heard. One recent brilliant nominee said the ninth amendment was little more—and I think I am quoting precisely when I say "little more than a water blot on the Constitution." It was nice to see a justice come along and say there was a ninth amendment and it meant something and it was another potential protection for individual freedoms.

Perhaps most importantly to me, Judge Souter flatly rejected the position being advanced by Chief Justice Rehnquist and Justice Scalia for determining when in the future privacy rights will be recognized by the Court. Judge Souter said that he "could not accept their view." I find that incredibly encouraging.

When we brought that out—I will not take the time of the floor at this moment, but in footnote 6 of the Michael H. case, the very erudite and articulate Justice Scalia set out a rational for the conditions under which the Court should go back in history to examine the social mores of a society to determine whether or not it was ever intended to be protected. But it was a formula for disaster. By taking his rational and applying it, it would be very, very difficult—very difficult—for anyone in the future to find that there were rights of privacy that existed that individuals have. It would have made it very difficult, using Justice Scalia's rationale set out in footnote 6, to have come to the conclusion on a number of cases that are already law. Loving versus Virginia, that outlawed the antimiscegenation laws—applying the rationale as most understand it, set forward by Justice Scalia in footnote 6, it would be very difficult to figure out how anyone, that Court, could have come to the proper conclusion of saying antimiscegenation laws were unconstitutional. So, when Judge Souter, rejected that rationale, it was a significant step, in my view, toward his meeting the burden of proof that I believe he need meet in order to be on the Court.

But at the opposite end of the spectrum, Mr. President, on the privacy area, I found some troubling things. I found most troubling Judge Souter's initial refusal to discuss whether unmarried persons have any fundamental right of privacy and, worse still, his ultimate declaration that whether such rights exist, that is such rights of privacy for unmarried individuals—I

asked whether they existed or not. "Do unmarried individuals have rights to privacy?" His ultimate declaration was that whether such rights exist is an open question.

Mr. President, in my view this is not an open question. Individuals do have a constitutionally protected right of privacy and it is a fundamental right of privacy, and the Supreme Court, in 26 cases written by 10 different Justices over the past 17 years, has recognized this fundamental right. In calling the existence of a right to privacy an open question, Judge Souter, I believe, was plainly wrong.

Mr. GRAHAM assumed the chair.

Mr. BIDEN. Mr. President, yet, between the privacy issues on which Judge Souter met his burden of proof and the issues on which Judge Souter failed is one vital privacy issue which Judge Souter declined to speak to altogether. And that is whether a woman's fundamental right not to be pregnant continues after her birth control fails.

As I explained in detail during the hearings, I felt that Judge Souter could have told us far more about his views in this area without compromising his judicial independence or indicating how he would vote on a request to overrule Roe versus Wade. Judge Souter's refusal to talk at all about his philosophy in this area frustrated Senators and frustrated our ability to exercise one of our constitutional responsibilities and, needlessly so. For example, Judge Souter was not at all reluctant to tell us, at least in what general categories he would apply, what methodology he would apply on gender discrimination cases. Yet, he would not discuss that at all in these other cases.

The real issue here is, in the most fundamental form without speaking to Roe is, if we recognize that a woman has a fundamental right to determine in the first instance whether or not she should become pregnant, and that is basically what the Connecticut case, Griswold, was all about. A married couple said as a married couple, we have a right to use birth control. Connecticut State law, to oversimplify it, said you do not. It went to court. The court said there is a fundamental right to determine questions of procreation. So if a husband and wife decide they do not want to have a child at that moment and use a birth control device and that is recognized as a fundamental right of privacy to use that, what happens when it fails? Does that right vanish the moment a woman becomes pregnant? What constitutes the legal definition of pregnancy? When does that right expire? And does it continue to be fundamental or is it a mere liberty interest, as every justice has acknowledged it could be?

What about contraceptive devices that, in medical terms, impact upon ending a pregnancy after the sperm and the egg meet? What is that? How do you make those distinctions? Someone constitutionally has to do that. We were not asking Judge Souter how he ruled on any particular case, but when does that fundamental right, he acknowledges, exist. How does it expire, if it does?

In sum, he did not speak to that question, and I have not said this before, but I say it now. I believe the reason many of us have given him a bye, if you will, on insisting that he answer every one of those questions, is not because we did not have a right to ask those questions, and we did ask them, but it became clear to me that Judge Souter had concluded that he would not speak to anything, anything at all, that got him remotely close to that issue.

And so, if you look at the sum of his testimony relative to privacy, relative to what he did not speak to, it is a tough decision, and I can see how someone could conclude that on the basis of that, they would not vote for him. I, on the other hand, concluded that on the basis of the whole record, I would vote for him.

So, in sum, today the Senate has before it a nominee who has satisfied his burden of proof with respect to some issues, straddled the line on others, failed in some, and left us with a question mark on still other matters. This mixed picture makes this nomination a very, very hard case; hard for me, as one Senator and as chairman of the Judiciary Committee, to determine what my proper role and responsibilities command me to do. But after weighing the evidence very closely and, believe me, I have read and reread and listened and prepared as well as I possibly could, I believe, and weighed as closely and as fairly as I could, and studied the record as intensely as I could, I on balance have decided to support the confirmation of Judge Souter as an Associate Justice to the Supreme Court.

Taking Judge Souter at his word and rereading those words quite carefully several times, I have come to the belief that Judge Souter is not an ideological rightwing conservative. And I do not mean only that he has proved himself not to be an extremist.

Judge Souter went much further still. He clearly distinguished himself from an even broader school of legal conservatism, including some conservative positions now being taken by members of the current court. He rejected Justice Scalia's cramped formula for determining when fundamental rights and unenumerated rights could be acknowledged. He rejected two key principles of rigid interpretism, saying that the due process clause does protect substantive liberties and that the meaning of the constitutional provisions cannot be limited to the original intent of the framers.

He rejected the Court's recent majority opinion in the Smith case on religious freedom, and he rejected the conservative view that courts must stay out of the realm of addressing profound social problems. Indeed, Judge Souter insisted that the Court must intervene in these areas when a vacuum of responsibility exists.

This repeated rejection of the precepts of modern archconservative leadership of legal interpretism, proved to be what Judge Souter was not; namely, he is not the sort of man who, if confirmed, would run roughshod over the important precedents handed down by the Supreme Court over the past three decades.

But that alone is not enough. Beyond proving what he was not, Judge Souter also proved to me affirmatively that much about his philosophy, about his approach to dealing with the issues of the future merit our consent to his confirmation.

Weighing most heavily on me in this respect were Judge Souter's following statements: That he believed that judges must vindicate rights not explicitly stated in the Constitution; that the due process clause protects unenumerated liberties; that a fundamental right to privacy exists; that he would use a broad and not narrow methodology in deciding when the court should recognize such rights; and, lastly, but importantly, that judges must use the Bill of Rights to protect the rights of minorities.

These statements, of course, give us no clear sense of how Judge Souter is going to rule on any particular case, and I want to emphasize that point. I have no notion how he is going to rule on any particular case. None of us here today, none of us, know how Judge David Souter will rule on any specific case if he becomes Justice Souter. But this is how it should be.

As we emphasized over and over again during our hearings, our committee was not looking for case specific commitments from the nominee. What Judge Souter's statements to the committee do indicate is that he has an approach on most issues far more conservative than I would hope for the court, nonetheless an acceptable one.

I said that this was true of most issues. Unfortunately, Judge Souter's flat refusal to discuss reproductive choice leaves us with no indication at all where he will come out on this issue and, indeed, it leaves us with no indication at all of even how he thinks about this constitutional question.

What Judge Souter did tell us, however, was this: "I have not made up my mind and I do not go on the Court saying that I must go one way or the other."

This statement goes a step beyond refusing to tell us his view on repro-

ductive freedoms and tells us, if Judge Souter is to be believed, and I do believe him—he was under oath—that his mind is open.

I am not undecided on the underlying question to which he would not speak. I strongly believe that a woman's right to choose is a fundamental right, a fundamental right protected by our Constitution.

I believe that any attempts to read that right out of the Constitution are misdirected and, if they were read out of the Constitution, would reflect a mistaken understanding of the true majesty of the liberty clause of the 14th amendment to our Constitution.

But I also known that the President of the United States has a diametrically opposed view to mine. President Bush has pledged to see Roe overruled because he believes it to be wrong. He obviously has no intention of submitting, and will never submit, a nominee who adheres to my very different view on this matter. I know that and we all know that.

It is one thing to reject a nominee who would come to the court opposed to reproductive freedom. If the President attempted to send such a nominee, one who shared his view, he or she would get a serious fight up here. Although it is always dangerous to predict the outcome of this body, I submit that that nominee would have at best an even chance of surviving the advise and consent process of the Senate. That is just one person's view.

But if the Senate goes a step further and also rejects a nominee who genuinely seems to be open minded on this question, neither committed to the President's view nor the opposing view—if we make that a litmus test for confirmation, particularly in light of the fact that the nominee has gone so much further on so many other issues that I have mentioned earlier leading us to the inescapable conclusion that he is not of the school of thought that views the Constitution in such cramped and narrow terms—we will have an eight-member Court for as long as the President is President.

Under the circumstances of sharp division between the White House and the Senate, I believe the best we can hope for is a judge who has an expansive methodology for interpreting privacy rights generally and genuinely—and I emphasize genuinely—has an open-minded view of a woman's privacy right after conception occurs.

Judge Souter is not the sort of judge I would nominate had the President asked me who to nominate, but I think he is about the best that we can expect, from my perspective, from this administration.

With this realistic lens as my perspective, I will vote for Judge Souter's confirmation. I do not so enthusiastically, although I have come to have an incredibly high regard for David Souter as an individual. I do not do so without reservation, for I have stated those reservations as clearly as I know how. But nonetheless, I will support him.

In closing, I express the hope that the administration will not learn the wrong lesson from what will probably be a lopsided vote in Judge Souter's favor today.

Our overwhelming approval, in my view, is not a sign that the Senate intends to be lax about exercising its advise and consent power or intends to use that power only to screen out extremist nominees. Rather, it is a sign that we take this power seriously and that we intend to exercise it responsibly—and in doing so Judge Souter falls within the sphere of candidates acceptable to the Senate.

Based on the statements made, I might add, in the committee when we voted, this vote could have very easily been an 8-to-6 vote instead of a 13-to-1 vote, for there were five other Senators who said this was an incredibly close call for them.

I believe the burden of proof—I will end where I began, and this is where my friend from South Carolina and I differ—I believe the burden of proof is on the nominee. Just as the burden is on the President to convince the American people to vote for him to be President, is on every Senator and Congressperson to convince the people in their State to vote for them to have this power, it is also a burden that is on the nominee to be given such awesome power for a lifetime. Any future nominee who fails to meet that burden—and I emphasize again how close I believe this nominee came to that line—will be vigorously opposed, at least by this Senator. Other nominees possessing a more cramped view of the Constitution and an unwillingness to acknowledge broad, unenumerated rights already recognized, and in the future probably needing to be recognized, could well fall outside the sphere of acceptability. For example, a nominee who criticizes the notion of unenumerated rights or the right to privacy would be unacceptable in my view and I do not believe would pass muster here. A nominee whose view of the 14th amendment's equal protection clause has led him or her to have a cramped vision of the Court's role in creating a more just society for women would be unacceptable in my view. A nominee whose vision of the first amendment's guarantees of freedom of speech and religion would constrain those provisions in their historic scope would I believe be unacceptable to many here.

But Judge Souter is not such a nominee. His vision of the Constitution is not mine, but it is clearly not that of hardliners who believe that the Constitution is meant to be read very narrowly. Neither is he a man whom I would nominate, but he is a man whose nomination I will support.

Today we make a determination that will alter the course of this Nation for decades to come, for if we consent to Judge Souter's nomination we put him in a position of awesome power and responsibility, a position he is almost certain to hold for a long time after most of us are gone from the Senate floor. No one knows, no one can imagine what questions will be before the Supreme Court in the year 2024, the year until which Judge Souter will serve if he is confirmed today and matches Justice Brennan's tenure on the Court.

But if history is any guide, tomorrow's issues, whatever form they will take, will pit government against personal liberty. That has always been the case. It has always been the conflict—government versus personal liberty. It will pit majority tyranny against individual rights. That has always been at issue in our constitutional battles. It will pit the danger of discrimination against the dream of equality for all Americans.

For 200 years, Mr. President, the Supreme Court has served as the court of last resort in the struggles that I have mentioned. For 200 years the Supreme Court has been the final guardian of our fundamental rights. So it was for our parents and our gradparents and so it should be for our children and our grandchildren for decades to come. If we confirm him today, Judge David Souter will decide what our Constitution means for the next generation. It is an awesome power, an awesome power that we are giving one man. While he would not be my choice to exercise that power, I believe he is the best we could hope for from this administration.

Thus, it is with a hopeful heart and with open eyes that I will vote for the confirmation of Judge David Hackett Souter.

I now yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I rise in support of the nomination of Judge David Souter. I do so because I believe he understands the proper role of the courts—especially the Supreme Court—in our constitutional system.

To me, this has always been the touchstone of a great justice.

Early in the 19th century, when our great experiment in democratic self-government was still new and fragile, the Supreme Court confronted an important question concerning the power of the central government. The case moved Chief Justice John Marshall to write that the "judicial power, as opposed to the power of the laws, has no existence. Courts are the mere instru-

ments of the law, and can will nothing."

That was the constitutional deal as that great Chief Justice saw it, and as it was universally understood when our system was created. In return for life tenure on the bench, and in the absence of direct intervention by the other branches, the courts were to play a limited and objective role, without any policymaking function.

That is the way it has to be in our constitutional democracy, because nothing in the theory or history of separation of powers would make sense if the courts can simply hijack the power of Congress to legislate, or the power of the Congress, the States, and the people to amend the Constitution. While the executive and the legislative check the excesses of each other, and the judiciary checks them both, there is no direct check on the unconstitutional decisions of the Supreme Court. The only check on these nine men and women is their own sense of self-restraint.

But rather than the restraint of a John Marshall, we have labored under the limitless authority of others, such as a later Chief Justice, who used to ask, of a position advanced before the Court, not if it was constitutional, but merely if it was good. The result: The personal preferences, overriding the people's government, and nullifying the rule of law.

These judges—including some who have served on the Supreme Court—seem to have forgotten that they are appointed, not anointed. Some are so intoxicated with power and good intentions that they forget any sense of restraint. Their actions call to mind the warning of Daniel Webster that—

> Good intentions will always be pleaded for every assumption of power. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

The other branches—especially Congress—have been all too willing conspirators in this new order, largely out of self-interest. After all, if we consciously let the courts make all the controversial policy decisions, and allow the courts to enact an agenda that could never pass the legislature, we can tell our constituents to blame the courts, rather than us. But we have paid a heavy price for this conspiracy. For if we are to expect the people to respect and obey court decisions, the people must believe that the courts—and in particular the Supreme Court—are governed by the rule of law, not a rule of man. Unfortunately, many people have lost faith in the judiciary as an impartial, nonpolitical branch. They see the courts not as an umpire, but a partisan player—one that, to cite but one example, intentionally favors a criminal defendant over a victim and the law enforcement.

Over the past 3 weeks, we heard much about rights; rights granted by Government and rights unenumerated. But if our Constitution means anything it means that we have the right to govern ourselves pursuant to the rule of law. That law applies not just to people in Des Moines, or Cedar Rapids, or Council Bluffs in my home State; it has to apply to the Supreme Court as well. The Supreme Court must be every bit as governed by the Constitution as the rest of us are.

Judge Souter has earned my vote to be Justice Souter because I conclude that he understands the limited role of a judge in a constitutional democracy. I believe he understands what Justice Frankfurter meant when the Justice said that nothing new can be added to the Constitution except by the amendment process and nothing old can be removed except through that same process.

Let me underscore this: Irrespective of David Souter's impressive résumé and his great intellect, he would be disqualified to be a Supreme Court Justice unless he is both willing and able to subject himself to the self-restraint which enables him to accept the Constitution as his rule for decision, and makes him refrain from attempting to revise or update that instrument according to his personal views. If David Souter lacked either the ability or willingness to exercise self-restraint, he would not truly support the Constitution, no matter his respect for that document or his oath of office that he will soon take.

Fortunately, in his 12 years as a trial and appellate judge, Judge Souter has many times demonstrated his commitment to judicial restraint and is fidelity to a written Constitution.

Mr. President, I questioned Judge Souter closely on the issue of judicial restraint. I was comforted to hear him state that judges stray from their role when they decide cases according to their own views of public policy rather than according to the dictates of law. When I asked him about the potential of judges to roam over the social landscape to address problems and issues at will, Judge Souter explained that the very legitimacy of judges in a democracy rests on their appeal to a law that is outside themselves, as he testified:

> What we are trying to do to avoid that roving quality, that knight errancy, is to try to find an objective source of meaning which constrains us, as well as the rest of the Republic, which was intended by the people who drafted and the people who adopted the constitutions and the statutes that we are dealing with, because it is only if we try to search for a source of meaning outside ourselves and our preferences or the preferences that may be fleeting at the moment do we really deserve, as members of a judicial system, the respect and the acceptance which ultimately is the foundation for the rule of law in the Republic or in any republic.

Mr. President, I followed up Judge Souter's answer by seeking his reaction to the legal philosophy of Judge Robert Bork, that—to quote Bork:

> In a constitutional democracy, the moral content of law must be that of a framer or legislator, never that of the morality of the judge.

Judge Souter agreed entirely. As he elaborated, quote:

> We have not been placed upon courts, in effect, to impose our will. We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all.

In the nominee's view, therefore, a judge must follow the law, and not his personal views of morality or policy. In recognizing this fundamental limitation on a judge, Judge Souter has demonstrated that he possesses the single most important qualification for service in the judiciary in our system of divided powers.

Mr. President, a fair amount has been made of Judge Souter's seeming endorsement during the hearings of an activist judiciary when the political branches of Government are slow to act. A close reading of the transcript however, belies this hope on the part of fans of judicial activism.

Judge Souter emphasized that the courts are not super-legislatures, responsible for addressing every social ill or injustice, but rather play the more limited role of protecting those liberties and rights conferred by the Constitution or otherwise retained by the people.

To be sure, I was troubled by his introduction of the concept of legislative vacuums that could be filled by courts when others were slow to act. But upon my further questioning, Judge Souter made an important distinction—that the jurisdiction of the Federal courts can never be derived from perceptions of the moment about what ought to be done. As Chief Justice Hughes wrote:

> Extraordinary conditions do not create or enlarge constitutional power.

Judge Souter agrees. As he put it:

> The Supreme Court should only act and can only act when it has the judicial responsibility under the 14th amendment or any other section of the Constitution.

Judge Souter thus believes that courts may act only when they are empowered to do so, and not simply when they perceive that a social problem has gone unaddressed or unremedied.

This principle of restraint is not, as some argue, a controversial or extreme tenet of "modern arch-conservative legal thought." Rather, it is the cornerstone or our constitutional system. It is the defining characteristic of the

judiciary in our Government of divided powers.

I am therefore encouraged by Judge Souter's view of the properly limited role of the Federal courts.

Mr. President, Judge Souter's 12 years on the bench shows a faithfulness to the text and original meaning of the Constitution and statutes.

This is a most sound and appropriate method of judging. Judge Souter believes that judges must decide cases according to principles of law not their own personal predilections or preferences. For example, in response to another of my questions, Judge Souter said:

> It is essential for us to have some idea of the criterion that we are going to employ to find values which are not simply reflections of our own feelings at the moment and our own feelings about the desirability of the claims that may be pressed before us.

Judge Souter also properly recognizes that a judge must always be on his guard lest he substitute his own views for those of the framers of the Constitution or the Congress. Judge Souter's colloquy with me on this point is revealing, and even reassuring. He said:

> We have not been placed upon courts * * * to impose our will. We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all.

Mr. President, this original meaning approach is in the best traditions of constitutional adjudication. Its origins come right from the beginning of our Nation. As the great Justice Joseph Story wrote in 1833:

> The first and fundamental rule in the interpretation of all [written] instruments is, to construe them according to the sense of the terms and the intentions of the parties.

To this day, apparently, some insist on mischaracterizing this as an arch-conservative, or discredited philosophy. They are in error when they allege that acceptance of original meaning would freeze the Constitution as it was two centuries ago. No one of the interpretivist school believes this, and the critics know it.

The genius of the Constitution, which was contributed to its longevity, is that it was not meant to be a code of laws covering all situations. The practitioners of original meaning understand this. Rather, they see the document as setting up a structure and a set of principles for governing. And it is these principles that judges like David Souter are faithful to.

Thus, it is wrong to suggest that there is some inconsistency between Judge Souter's approach to Brown versus Board of Education and his dissent in Estate of Dionne. In Dionne, Judge Souter relied on historical evidence—in that instance reaching back to Magna Carta—in order to understand the meaning of a constitutional provision that descended from the Magna Carta.

As Judge Souter explained to our committee, the principle contained in the New Hampshire constitution was in his view a fairly narrow one. He therefore believed that the New Hampshire Supreme Court had no power to broaden it, replacing the Constitution's principle with its own feelings. Whatever the historical merits of Judge Souter's explanation of the text in that case, I agree with him that the court's responsibility was to apply the original principle.

To be perfectly candid, I was not comfortable with every answer from Judge Souter. But I understand and appreciate that our committee hearings have increasingly become matters of political theatre—where nominees are now forced to show allegiance to certain pet theories of Senators. I place more weight on 12 years as a judge, over 3 days as a candidate before the committee. Having said that, I also assume that there will be decisions by Judge Souter with which I will disagree. But no Senator has a right to insist on his own issue-by-issue philosophy, at least not if judicial independence is to mean anything.

You see, to be a "conservative" when it comes to the Court has nothing to do with particular outcomes, or even counteracting the past liberal activism. Conservative activism is no better than liberal activism.

Rather, a true conservative philosophy gives the constitution a full and conscientious interpretation, but where the constitution is silent, leaves the policy struggles to the Congress, the President and the people of the 50 States.

Many, however, who oppose this nominee are frankly not interested in a justice who will respect the people's choices, or even one who will be fair, open-minded, and without a private agenda. Indeed, some are openly hostile to the idea of a Justice who will decide cases as they come, without prejudgment. Rather, they want a judge who will rule their way, every time. No one—Senator or interest group—is entitled to this.

It is gratifying that the Senate is so overwhelmingly rejecting the extremist view, a view that unfortunately predominated during the debate in the fall of 1987.

Finally, Mr. President, I must object in the strongest possible terms to a new idea floated during these hearings, either implicit or explicit, that a nominee must meet a burden of proof to be confirmed.

A nomination is not in any way a trial, nor should it be confused with one through the introduction of such legal terms. To speak in terms of burden of proof begs other questions: Is it the burden of production or the burden of persuasion? Is the burden met only by a preponderance of the evidence or must the nominee prove himself fit beyond a reasonable doubt?

As deployed in the committee report, and that is in the additional views of that report, however, this whole subject becomes clear that a nominee meets his burden only by agreeing with a Senator's views on past precedents or legal philosophy. The burden of proof is thus simply a litmus test by another name. I reject this test and am confident that most Senators do, as well.

Mr. President, I support the nomination, and I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, first of all, I join those who pay tribute to the chairman of the Judiciary Committee for the manner in which he conducted the hearings, the forum of the hearings themselves, the balance that he developed in the presentations of a wide variety of witnesses. Both in regard to this nominee and I must say also with regard to the controversial nomination of Judge Bork, I think all of the members of that committee and all of us in the Senate owe a great debt of gratitude to our chairman, Senator BIDEN, and I think the American people who had the good chance to watch these hearings must also share in that opinion, and I acknowledge the work of Senator THURMOND, as well. This has been a result of a bipartisan effort of both the chairman and the ranking minority member, and I pay tribute to his contribution in developing these hearings.

From the beginning of our Nation, the Senate of the United States and the President of the United States have had a shared responsibility in the appointment of Justices to the Supreme Court.

That responsibility is assigned to the President and the Senate by the specific terms of the Constitution itself.

For 200 years, it has been among the highest responsibilities that any Senator has. Today, it is more important than ever, because of the central place of the Supreme Court in the life and the liberty of our Nation.

In fact, in the original drafts of the Constitution in 1787, the Founders of our country gave the Senate the sole responsibility for appointing Federal judges. But in the final draft, after the great debates that determined the future course of our Nation, the concept of dual or shared responsibility was adopted, as one of the major checks and balances of our system of Government. For two centuries, it has ensured that neither Congress nor the President has excessive influence over the Supreme Court.

Today, as always, our responsibility as Senators is to make our own independent assessment of the qualifica-

tions of Supreme Court nominees. In exercising that responsibility, our chief obligation is to determine whether the President's nominee possesses a sufficient commitment to the core constitutional values at the heart of our democracy. If we have serious doubts about the sufficiency of that commitment, our own responsibility as Senators is clear.

We are not only entitled to reject the President's nominee—we are obliged to do so. No President has a blank check in appointing members of the Supreme Court.

As I stated at the outset of the hearings, Judge Souter has a distinguished background. But aspects of his record on the bench and in the New Hampshire attorney general's office raised troubling questions about the depth of his commitment to the role of the Supreme Court and Congress in protecting individual rights and liberties under the Constitution.

Far from dispelling these concerns, Judge Souter's testimony before the Senate Judiciary Committee reinforced them. In particular, my concerns center on the fundamental constitutional issues of civil rights, the right of privacy, and the power of Congress and the courts to protect these basic rights.

Judge Souter's record and testimony on issues related to civil rights is particularly troubling. As attorney general of New Hampshire, Judge Souter defended Gov. Meldrim Thomson's decision to refuse to provide data on the racial composition of the State government work force required by regulations of the Equal Employment Opportunity Commission pursuant to title VII of the Civil Rights Act of 1964.

Attorney General Souter took the position that it was unconstitutional for Congress to require employers to compile and report such statistics. No other State advanced such a specious argument. His petition to the Supreme Court even took the extraordinary position that the EEOC was violating a worker's constitutional right to privacy by requiring employers to report the overall racial composition of their work force.

Judge Souter repeatedly defended the appropriateness of his actions as attorney general in challenging the EEOC regulation. It was only after repeated questioning that Judge Souter finally admitted that the courts had been correct in rejecting his arguments.

His unenthusiastic after-the-fact endorsement of the Court's decision does not dispel the doubts raised by Judge Souter's reactionary arguments in the case.

Discrimination is a national problem, and Congress is entitled under the Constitution to seek national solutions.

Attorney General Souter's participation and persistence in this case is troubling, because it suggests an extremely narrow view of the power of Congress to end race discrimination or other evils in our society.

As attorney general, Judge Souter was not merely acting as a lawyer for his client, the Governor. True, he had that obligation. But he also had a higher obligation. As part of his oath of office, he also made a commitment to support the Constitution of the United States. Yet in this case, he showed himself willing to make an argument that no other State in the Nation was prepared to make, an argument that the Court flatly refused to accept.

Similarly, in the area of voting rights, Judge Souter was quick to challenge congressional legislation when New Hampshire's opposing practice was at stake. In landmark legislation, the Voting Rights Act of 1965, Congress banned the use of literacy tests in States where the tests had been used for discrimination.

Extending the act in 1970, Congress determined that literacy tests were inherently discriminatory, and banned the use of literacy tests in voting nationwide.

New Hampshire had a literacy test, and in 1970, it refused to comply with the Federal law. So the United States brought suit to prohibit New Hampshire from enforcing its State test for the 1970 elections.

In opposing the suit, Judge Souter represented the State and argued all the way to the Supreme Court that Congress did not have the constitutional authority to ban literacy tests, in the absence of evidence that the specific tests had been used in a discriminatory fashion.

A three-judge Federal court rejected that argument, and struck down New Hampshire's literacy test. In Oregon versus Mitchell, the Supreme Court ruled unanimously—9 to 0—that the ban on literacy tests was a constitutional use of congressional power.

As an assistant attorney general, Judge Souter participated extensively in the litigation over the New Hampshire test. What I find most disturbing about his position on this issue was the conclusion, advanced in his briefs, that citizens who cannot read cannot cast meaningful ballots.

Judge Souter either chose to ignore, or was unaware, of ways in which voters who cannot read can be assisted in casting ballots. In fact, at the time he filed his brief, people who could not read had been voting for years in other States, and blind voters were guaranteed assistance at the polls in New Hampshire.

His insistence that literacy tests could be used to exclude such voters demonstrates a willingness to discriminate against those who have been less formally educated, but who can still make intelligent, well-informed decisions about candidates and issues in elections.

As Father Theodore Hesburgh, Chairman of the Civil Rights Commission, noted in a letter to President Nixon when Congress was considering the Voting Rights Act of 1970:

> The lives and fortunes of illiterates are no less affected by the actions of local, state, and federal governments than those of their more fortuante brethren. Today, with television so widely available, it is possible for one with little formal education to be a well-informed and intelligent member of the electorate.

In fact, when the Federal district court rejected Judge Souter's arguments and issued an order to suspend the literacy test, New Hampshire did establish procedures so that citizens who could not read were still able to vote.

In this case, as in the case involving the EEOC, Judge Souter took the position that Congress did not have the power to deal with a serious national problem. Also, as in the EEOC case, the Federal courts unanimously rejected his view.

Obviously, these are gray areas where plausible arguments can be made that Congress has exceeded its constitutional powers. But in these two cases, Judge Souter's positions were categorically rejected by the Supreme Court.

In effect, in challenging congressional power in these two cases, he was willing to defend the indefensible.

I asked Judge Souter about the literacy case during his confirmation hearings. Defending his view that the votes of people who cannot read would dilute the votes of people who can read, he called it simply "a mathematical statement * * * essentially a kind of statement of math."

The manner with which he dismissed the right of the poor and uneducated in his State to vote is all the more troubling because his response was one of the rare spontaneous moments of the hearing.

Prior to the committee hearing, news reports of a 1976 commencement address at Daniel Webster College by Judge Souter when he was Attorney General had received widespread media attention. According to contemporaneous reports of the address in several newspapers, Attorney General Souter had described affirmative action programs as affirmative discrimination.

When questioned about the remark at his confirmation hearing, Judge Souter replied, "I hope that was not the exact quote because I don't believe that." Judge Souter went on to acknowledge that he had seen the news reports on his speech at the time he gave it, but did not indicate that he denied the statement attributed to

him or sought a correction. During his testimony, Judge Souter never denied making the statement.

Instead, he attempted to defend his remark by arguing that he had been referring to affirmative action programs which were not linked to remedial purposes, but were merely distributing benefits for the sake of reflecting some formula of racial distribution.

Judge Souter's record on sex discrimination also raises troubling questions. Until the 1970's, the Supreme Court applied a weak standard to cases involving claims of such discrimination under the equal protection clause.

The courts accepted any rational basis for laws that treated men and women differently. Under this approach, women were routinely excluded from many occupations and subjected to forms of discrimination that almost all of us would regard as intolerable today. I believe the chairman of our committee reviewed the problems caused by this approach in his statement, for example, women were denied the opportunity to work in bars, and women were prohibited from being on juries in this country.

In the 1970's, however, the Supreme Court began to apply a higher standard of review to classifications based on sex, and struck down laws that discriminated against women. Judge Souter challenged this new standard as Attorney General Souter, and in a 1978 case, he urged the Supreme Court to "define, shape, limit or even eliminate" the standard.

The case involved the New Hampshire statutory rape law. A man convicted under the statute claimed the law was unconstitutional, because it did not apply to women. The Supreme Court refused to review the case, but a few years later, in another case, the Court made clear that under its higher standard of review, statutory rape laws are valid, even if they do not apply to women.

It is disturbing that Judge Souter's brief suggested that the Supreme Court eliminate the higher standard of review in sex discrimination cases. If he were genuinely concerned about the rights of women, the obvious argument to have made was that even under a higher standard of review, statutory rape laws are valid. But he did not take that course. Instead, he suggested that the Court go back to the old law, which had permitted sex discrimination to flourish.

When asked during his testimony before the committee whether legislative classifications based on sex should be accorded heightened or intermediate scrutiny under the three-tier equal protection analysis applied by the Supreme Court, Judge Souter endorsed some type of scrutiny between the weakest level, or rational basis test and the highest level, or strict scrutiny test. But he did not commit himself to a standard for sex discrimination that is at least as exacting as the standard currently used by the Court to invalidate many gender-based laws. Thus, there is significant doubt that Judge Souter will apply a sufficiently rigorous constitutional standard to make protection against sex discrimination a meaningful constitutional right for the women of America.

On the issue of whether the Constitution protects a right to privacy, Judge Souter said he believes that "the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy." However, Judge Souter refused to reveal whether he believed there is any fundamental privacy right outside the marital relationship. Specifically, in discussing the constitutional status of abortion, Judge Souter would go no farther than to say that abortion "would rank as an interest to be asserted under liberty."

In his opening prepared statement to the committee, Judge Souter spoke disarmingly about his constant awareness that his decisions as a judge would affect real people.

But when asked at the hearing about the consequences facing women if Roe versus Wade is overruled, he first described the situation as a problem of federalism. Asked a second time about the impact on women, he described it as a law enforcement problem. Finally he observed that "whatever the Court does, someone's lives, and indeed thousands of lives, will be affected, and that fact must be appreciated." Judge Souter said that he had not made up his mind about Roe versus Wade, but these answers are more alarming than disarming.

In fact, Judge Souter's reluctant comments, while ambiguous, suggest that, in fact, he takes an excessively restrictive view of the right to privacy, and that he is likely to side with the Justices on the Court who are prepared to overrule Roe versus Wade, or leave it as a hollow shell.

Judge Souter's reluctance to discuss specific constitutional issues relating to abortion and the right to privacy, contrasted sharply with his willingness to discuss, in great detail, his views on other constitutional issues likely to come before the Supreme Court, including church-state issues and capital punishment.

I am troubled that if Judge Souter joins the current closed divided Supreme Court, he will solidify a 5-to-4 anticivil rights, antiprivacy majority inclined to turn back the clock on the historic progress of recent decades.

If so, literally millions of our fellow citizens will be denied their rights as Americans to equal opportunity and equal justice under law.

I hope I am wrong. But I fear I am right. To a large extent, in spite of the hearings we have held, the Senate is still in the dark about this nomination. And all of us are voting in the dark. The lesson of the past decade of the Senate's experience in confirming justices to the Supreme Court, is that we must vote our fears, not our hopes. If nominees do not meet the test of demonstrating a convincing good-faith, in-depth, abiding commitment to the core constitutional values of the kind so obviously at stake at this turning point in our history. They can—and should—be rejected by the Senate. To apply a lesser standard is to fail our own constitutional responsibility in the confirmation process.

In my view, Judge Souter does not meet that test. In good conscience, I cannot support this nomination.

The PRESIDING OFFICER (Ms. MIKULSKI). The majority leader is recognized.

THE BUDGET RESOLUTION CONFERENCE REPORT

Mr. MITCHELL. Madam President, as in legislative session, I note the presence on the floor of the distinguished Republican leader with whom I had a number of discussions today regarding the procedure with respect to the budget resolution conference report.

I apologize to our colleagues for interrupting this debate. This will just take a few moments.

Because there has been a great deal of interest by the press and, through the press, the public in the procedure that we would use, I thought it would be useful to bring the membership of the Senate up to date on how we are progressing in that regard.

As the Members of the Senate know, we are dealing with a conference report on the budget resolution. The original schedule called for the House to take the matter up first, which would be the case in the ordinary course of events and, following action by the House, to have the matter taken up in the Senate.

It is my understanding that the House is now considering taking the matter up during the day on Thursday, which means that if the conference report were approved in the House, we in the Senate would be taking it up sometime Thursday afternoon. I would like, if I might, to yield to my distinguished colleague for further discussion in that regard.

Mr. DOLE. We had discussed the possibility, maybe, of initiating the action on the Senate side based on the hope that we have the votes on the Senate side, on each side of the aisle, to pass the conference report, and then send it to the House where that may be more in doubt. But there are some procedural difficulties that could be encountered there, as we have dis-

cussed privately, and I would guess for the present are still under review, as I understand it, because there could be a motion to recommit offered; that could be amended. That could present problems.

But the important thing, I think, is that we get to it as quickly as we can and act in a positive way because if not we are going to be faced again on Friday with another continuing resolution and extending the debt ceiling and delaying sequester or letting the Government come to a halt. I hope my colleagues in the Senate and my colleagues in the House fully appreciate the consequences if we do not act in a positive way.

Mr. MITCHELL. Madam President, I have discussed this with the distinguished Republican leader and with the Speaker today, both in person and by telephone. Just for the information of Senators, under the rules of the Senate, conference reports are subject to motions to recommit if the House has not yet acted on the conference report. And of course such motions to recommit could include instructions. The instuctions themselves would be subject to amendment.

By contrast, if the House has already acted, the conference is dissolved and the matter is before the Senate not subject to either motions to recommit or amendment and therefore there would simply be one vote on it.

I want to make very clear we are talking here about the budget resolution which legally binds only as to the aggregate budget figures. The specific law changes which create, in effect, the subparts that lead up to those totals would not be effectively changed as a result of the budget resolution, but rather would be in the reconciliation bill which will follow. And under the agreement that we reached on Sunday, would follow not later than October 19.

At that time, in the Senate the reconciliation bill will be fully open to amendment and debate. So I wanted to make clear we are not attempting in any way to foreclose Senators from offering amendments to the reconciliation bill to change that. That is the relevant and appropriate stage in the process at which amendments can be offered and both the distinguished Republican leader and I fully expect such amendments to be offered. What we are trying to do not is to start the process in motion that will produce a reconciliation bill and that requires as a first step enactment of the conference report on the budget resolution.

So we are going to continue to consider the measure and determine the manner most likely to produce the desired result, which is the adoption of the conference report of the budget resolution, enabling us to proceed to send the matter to the committees who will report back. And then we will have a reconciliation bill on the floor that will include all of the specific law changes and be open to amendment by Members.

Mr. DOLE. If the Senator will yield for 1 additional moment, he put his finger on it in the last sentence or two. The ultimate, the bottom line, is to get the conference report adopted and the reconciliation. The leadership along with the President has committed itself to this course. We want it to be successful. There is a lot riding on it. Not the leadership or not the President, but there are lot of people in the country who I think are looking for leadership on this particular issue, as painful as it may be to some. We have to devise a strategy that will try to make certain that will happen.

We are continuing to review it. The normal procedure would be it would go to the House and come to the Senate. I just urge my House colleagues to think very seriously about the consequences—some of my House colleagues.

Mr. MITCHELL. Madam President, if I might add, in conclusion, I share the concern of the distinguished Republican leader and hope very much that the conference report will be approved in the House and in the Senate.

Again, so Members of the Senate understand that they are not agreeing to a procedure that would prohibit all amendments. When we come back with a reconciliation bill, as we have in the past, that bill would of course be subject to the provisions of the Budget Act, that is the time for debate would be limited and there are certain tests which apply to amendments to that bill under the Budget Act. But within those constraints of the Budget Act which traditionally have applied to the reconciliation bill, Senators would be free to offer their amendments and have them debated and voted on here in the Senate. That is, of course, the appropriate stage in the process to accomplish that.

I am going to continue our discussions with the Republican leader and the Speaker. I merely wanted through this exchange to inform Senators of the current state of the process and summarize it. It now appears that the House will act on the conference report Thursday during the day and then it will come to the Senate and hopefully we will have it on the Senate floor for action during the day on Thursday. That is our present plan. That is of course subject to change. But I will keep Members fully advised as soon as any final decision is made.

I thank the distinguished Republican leader and I thank particularly my friend and colleague from Utah for yielding to permit us to have this exchange.

NOMINATION OF DAVID H. SOUTER, OF NEW HAMPSHIRE, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The Senate resumed consideration of the nomination.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Madam President, I have listened to the remarks made thus far. I do not think any person wants to see anybody go on the bench who is a radical activist judge either on the left or on the right. I think what we want is we want judges who basically are going to be people who I think, frankly, look, act, talk, and think like Judge David Hackett Souter.

He calls himself an interpretist. I would use the term interpretivist. In other words, he indicates he is going to determine the constitutional decisions that come before him, and the legislative decisions and other decisions, based upon the original meaning of those documents.

That does not mean necessarily that he is going to go back into the mind of James Madison and the other Founders. But he will follow the broad meaning, which the Founders anticipated within their language that they used in these various documents.

We are founders today as we pass legislation. Maybe not as significant or as important, but nevertheless our original meaning should be given great weight with regard to constitutional principles.

He knows that by going into the original meaning, that those original Founding Fathers knew that our country was going to grow, it was going to become more modern, it was going to have great inventions, it was going to become more sophisticated. So that comprises a broad set of considerations for anybody who really wants to adhere to the original meaning of the Constitution.

He also understands that the Constitution provides for a means to overcome that which the Constitution does not cover. It provides a number of means, but one in particular is in article V to the Constitution, which provides for a means of amending the Constitution. He understands that if the Constitution is silent on some issue that is of overwhelming importance to the public, that we can amend the Constitution and that is the way you do it. You do not do it by ad hoc activist judicial decisionmaking from one's own viscera. And unfortunately that is what has been going on for too many years.

The right to amend the Constitution is a safety valve that basically allows us to make changes if we want to, or if we have to, if there is an overwhelming support for it. And as we all know

there have been 26 times that that right has been exercised.

Judge Souter understands the need to protect the minority, as well as the majority, within the terms in the original meaning of the Constitution and that which would be naturally extrapolated from that original meaning.

David Hackett Souter, I am convinced—and I think most people who watched the proceedings on television are convinced—is a person of integrity, competency, intelligence, compassion. He is a person who appears to be—and I think anybody watching would have to conclude is—a kind person, considerate of other people. He is a person of considerable eloquence, especially when he is talking about the law of the land.

I think he showed that he is a person of fairness—5 years on the trial bench, 7 years on the Supreme Court of New Hampshire, and 1 year on the First Circuit Court of Appeals—and he is a decent man. He is a person who has the health to do this job. He clearly stood up to all the pressures of those hearings. I think he is a person of humility. He is teachable. He is someone who acknowledges that others might understand things even better than he does form time to time, and he is willing to listen. He is a person of independence.

With humility, he proved himself to be a listener, somebody who was considerate of other people's views. To me, that is pretty important.

He has shown through his lifetime that he is a person of public spirit—serving on hospital boards, serving in his own church and doing other things that were in public spirit and he has given a lifetime to public service—just exactly the type of person with a broad background that we need on the Supreme Court.

I have heard some of the criticisms that have come up. Some of them have come from my good friend from Massachusetts. I hesitate to point out that he stands alone on the Judiciary Committee, as the only one against this nomination made by the President who had the support of 40 States in the last election.

No one who listened to Judge Souter's testimony could believe that he takes a limited view of the ability of Congress to remedy civil rights; no one believes that unless you were not listening or unless you just do not want to listen.

As a matter of fact, he took just the opposite viewpoint, which was very interesting to a lot of people who were there.

There was no objection raised here today that Judge Souter had argued that enlarging the franchise dilutes the votes of those who previously were entitled to vote. That objection is frivolous. Voter dilution cases are standard forms of voting rights challenges recognized by the Supreme Court.

I hasten to point out when he made that statement in his brief, Judge Souter was an advocate, arguing an advocate's position based upon the then current law as established by Justice Byron White and even Justice Hugo Black who made exactly the same statements in opinions of the Supreme Court; yet Judge Souter is now being criticized for, as an advocate, making exactly the same point on appeal.

So I point out that he was an advocate at the time. Literacy tests at the time were legal. No matter how much we dislike them today, they were legal at that particular time. He was sworn to uphold the law, not to remake it. He was advocating for his State at that particular time. He was an assistant attorney general of the State of New Hampshire, advocating a position that had already been advocated by his predecessors and, I might hasten to add, under the then existing law.

So it is not right to go back in hindsight and say he should not have done that; that that shows something wrong with him. Come on, that is what advocates do.

If we are going to start using a nominee's briefs against him in the confirmation process, we are going to be setting a shocking precedent. Every client is entitled to zealous advocacy. It is an advocate's job to make arguments to sway a court, including plausible arguments based on extension of principles established by then current case law. It would be a very, very dangerous message to send to lawyers: If you have any ambition to be a judge, you lawyers, do not represent controversial clients and be careful what you say on behalf of a client because you might be held responsible for the fact that the law was as it was at the time you made the statement.

In my view, positions taken by Judge Souter in any legal brief representing a client are not fair game for inquiry, other than as a reflection of his writing ability and his ability as an advocate. They are pieces of advocacy in fulfillment of his duty as a lawyer to his client. What is, in fact, important is not what he said as an advocate but what he believes the role of the U.S. Supreme Court is or should be in our Federal system.

Suppose the President nominates a criminal defense lawyer to be a Supreme Court Justice? This person may have defended murderers, rapists, drug kingpins—you name it. It would have been his job zealously to advocate their interests, extend the reach of procriminal defense legal theories on the inadmissibility of physical evidence and the inadmissibility of the defendant's own words. He may have harshly cross-examined rape victims; he may have questioned them about their own behavior in ways we might find offensive in retrospect. Should that lawyer be disqualified because of his or her advocacy on behalf of their clients?

Virginia Attorney General Mary Sue Terry has defended the male-only admissions policy at the Virginia Military Institute, a State institution against a legal challenge by the Federal Government. Should this count against her in the nomination process, were she to be nominated to the Federal court or Supreme Court?

One consequence of this trend is that academic writings, even of a speculative nature, even ones where the nominee has since changed his or her mind, can be misused to discredit a nominee.

This can be a double-edged sword. Of course, if the traditional roles of the nomination process are permanently changed, are we now going to witness the misuse of a lawyer's role as an advocate in the nomination process? Will the message be not only do not write anything potentially controversial, but also do not represent anyone or any institution who is controversial or unpopular? Do we wish to discourage lawyers from taking the tough cases, from taking on such clients if they have any, and especially if they have any aspirations to be a judge? I hope not. That, too, in my opinion, is a double-edged sword and something we have to consider.

Mr. President, it seems to me that several of my good friends on the other side of the aisle, particularly on the Judiciary Committee, are rent by self-doubt, angst, and some guilt in voting for Judge Souter. I believe, however, it is fair to say, based on his opinions, and testimony that Judge Souter is clearly well within the reasonable and respectable range of an appropriate nominee. It also seems to me, Mr. President, that today's debate is largely about Judge Souter's nomination and our colleagues, a few of them, are concerned. They are concerned about some of his opinions and his testimony, because it has not fit every niche that they want it to fit.

His nomination has really been conceded for some time, and it should be. He should be overwhelmingly confirmed today. I think everybody knows that.

I want to respect my colleagues who have stood up on both sides of the Judiciary Committee and have stood up for Judge Souter, as they should. I appreciate it. But what we are hearing from some of my thoughtful friends on the other side of the aisle is really an opening salvo in the next round if President Bush has an opportunity to nominate another person. It is pretty much a foregone conclusion that Judge Souter is going to be Justice Souter after today.

Accordingly, we have heard in the last few weeks an exposition of views on various legal and constitutional issues in an effort to characterize and limit the spectrum of constitutional thought. Thus, at length, we have been treated to various legal thoughts: How certain cases should be decided under each school, which school is doctrinaire, which is entirely OK. In my opinion, these are interesting but relatively more edifying as an insight into the views of those who expound them for anything else.

Even more disturbing, some of what we are hearing from the other side appears to be in large part a thinly veiled extraordinary, unfortunate, and, in my view, unconvincing effort to set the parameters on President's Bush's next Supreme Court nomination, if he has the privilege of having one.

It may be that some pundits or interest groups will suggest that if such a future nominee is thought to be clearly "more conservative than Judge Souter," as measured according to many of the notions we are hearing from Judge Souter's reluctant supporters in this body, no matter how reasonable and responsible the nominee's views may be, such nominee is "automatically out of the mainstream."

The committee would be well advised in such a case to determine whether such suggestions themselves emanate from the brackish backwaters, before assuming they constitute the mainstream.

Madam President, it is not easy in this day and age to get a person on the Supreme Court who fills the needs of everybody in this body. In fact, I venture to say that nobody can meet that test. If we are going to adopt litmus tests as the way to determine whether or not a person comes on the Court, and especially a single litmus test, no matter how important it may be, then I think that is a tremendous mistake.

Nobody knows what will happen to these people once they go on the Court, with experience, with time, with facts, with cases, with other problems that come up. Nobody really knows how they are going to rule in the future, and many Presidents have been upset at how some of their nominees have ruled as they have watched both in the remaining years of their Presidency, and after they are retired from the Presidency.

The fact is it is ridiculous to impose any single litmus test on any candidate for this high office, this high position. If we follow the lead of the litmus testers, to preprogram the responses in the judicial process, then the job could be done by computers, and judges would not really be necessary.

Yet what has made the Supreme Court great for over 200 years—what has allowed it to occupy such a distinguished, unique, and important place in American society—a role shared by no court in any other nation in history—is the quality of judgment that has been shown by the persons who have served with distinction on the Court.

Madam President, I did not mean to take this much time. I do not see how anybody who watched the hearings, watched the difficult questions, watched the problems that were raised, and watched Judge Souter in response to those problems and those questions, could conclude that he is not a worthy person to go on the Supreme Court of the United States of the America. I really have difficulty seeing why anybody would feel that way.

On the other hand, I respect the feelings of some of our colleagues who are going to vote against Judge Souter for whatever reason. I do not see a logical reason for it. I do not see a legal reason for it. I do not see a confirmation reason for it. Frankly, I hope that the litmus test mentality is not used in the future, because if it is I can think of at least 150 litmus tests that people feel strongly about around here that would make it almost impossible for any great nominee to make it on the Court.

Judge Souter is a great nominee. He is not just a nominee. I first became acquainted with him when Senator RUDMAN brought him to my attention after the Bork nomination failed. I am fully aware of his career from that point. I have a tremendous and inestimable respect for this man. I expect him to go on to become a Supreme Court Justice who will please the vast majority of people in this society, because as I have said he is honest, he is decent, he is a person of integrity, he is a person of competence, of ability, and all of those other wonderful attributes that I hope we can find in other Judges on any court in this country, let alone the Supreme Court of the United States of America.

Madam President, I hope our colleagues will see fit to vote for Judge David Hackett Souter to be a Justice on the Supreme Court of the United States of America. It is the right thing to do. It is the important thing to do. This is an important office, and it is important that we dignify it with important arguments. I have not seen good arguments used against him yet, either in committee, since the committee has held its hearings, or on the floor today.

Madam President, I hope our colleagues will vote for Judge Souter.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. HEINZ. Madam President, will the Senator from Wisconsin yield for a brief unanimous consent request?

Mr. KOHL. Yes.

VISIT TO THE SENATE BY CHILEAN DELEGATION

Mr. HEINZ. Madam President, as in legislative session, earlier today I notified the leadership that there is present in the Capitol today a delegation of senators from the Republic of Chile.

RECESS

Mr. HEINZ. Madam President, I ask unanimous consent that we might stand in recess for not to exceed 2 minutes. The Senator from New Hampshire has indicated he would yield me 2 minutes, if such was necessary to accommodate the Senate. I ask that no time be taken from the Senator from Wisconsin.

There being no objection, at 4:36 p.m., the Senate recessed until 4:38 p.m., whereupon, the Senate reassembled when called to order by the Presiding Officer [Mrs. MIKULSKI].

NOMINATION OF DAVID H. SOUTER, OF NEW HAMPSHIRE, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. KOHL. I thank the Chair.

Madam President, First, I congratulate Chairman BIDEN for his work on the Souter nomination. The chairman and his staff made a difficult process run smoothly. The hearing was well-focused and illuminating on a host of issues. His impartial and fair handling of the hearing allowed us—on behalf of the American people—to conduct a thorough examination of the nominee.

Madam President, I intend to vote for Judge Souter, but this was not an easy decision. In the course of reviewing the nominee's record and listening to him at the hearing, two different pictures of David Souter emerged: one revealed a conservative New Hampshire attorney general and jurist; the other, a reasurring pragmatist without an ideological agenda. I am voting to confirm the second Judge Souter despite my reservations about the first.

As attorney general—where he was required to be an advocate—Judge Souter took several stands that he acknowledged he would not take today. He defended lowering the American flag on Good Friday; he supported the continued use of literacy tests for prospective voters; and he argued against supplying civil rights data to the Federal Government as required by law. More than that, while on the New Hampshire Supreme Court, he issued a number of troubling rulings and dissents.

In his testimony before our committee, however, we heard a different Judge Souter. He demonstrated admirable personal qualities and expounded moderate judicial views.

Without question, Judge Souter revealed a remarkable intellect, one that equals or even exceeds the traditionally high standards required of a Supreme Court Justice. And he showed a warmth and humor that belied his image as a man out of touch with modern life. In my opinion, Judge Souter clearly has the competence, character, and integrity necessary to sit on our Nation's Highest Court.

At the hearing, Judge Souter's judicial philosophy was reassuring. He displayed an understanding of and respect for the values which form the core of our constitutional system of government.

Judge Souter firmly rejected the doctrine of original intent, which would undermine many of the Court's most important achievements. Brown versus Board of Education, which desegregated public schools, would never have been decided if the Supreme Court had interpreted the 14th amendment using original intent. And our fundamental right to privacy would have been severely cramped had the Court applied this doctrine to the Bill of Rights.

Fortunately, the Judge Souter who testified before our committee does not seem locked to the past. I was heartened by his strong words of praise for former Justice William Brennan, the Court's leading opponent of original intent. David Souter told us:

> Justice Brennan is going to be remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have.

And Judge Souter spoke of the need "to make the Constitution a reality for our time." Clearly, these are not the words of a conservative ideologue.

Still, the hearing did not paint an entirely complete picture of Judge Souter's judicial views. I would like to have heard a clearer statement in support of civil rights and the struggle for racial equality.

Similarly, I am concerned that Judge Souter did not explicitly recognize—or even address—a woman's constitutional right to reproductive choice. This fundamental right should not hang by the thread of a shrinking Supreme Court majority. And so I have joined as a cosponsor of the Freedom of Choice Act, which would write into Federal statutory law the abortion provisions on Roe versus Wade.

Let me conclude on this note: It is not just a Supreme Court seat that is at stake here; in my judgment it is also the entire confirmation process. I believe the nominee was candid in his testimony, and I was persuaded by watching and listening to him at the hearing. But if Justice Souter turns out to be a rigid ideologue—and not the moderate that he appeared to be—then both the Senate and the American people will have been deceived. That would call into question the value of having nominees appear before our committee. We might be justified—or even required—to ignore personal presentations entirely, and rely exclusively on the written record.

Madam President, in reaching my decision, I had to determine whether the conservative public servant from New Hampshire matured into the moderate nominee who appeared before the Judiciary Committee. I believe that he has. And while I was troubled by parts of Judge Souter's record, I was impressed by the man himself. And so, despite my reservations, I will support Judge Souter as someone who is capable of personal growth, shows an open mind and rejects ideological extremism. I will vote my aspirations rather than my fears.

Thank you, Madam President.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. MITCHELL. Madam President, I will shortly propound a unanimous-consent request setting the vote for 6 p.m. I understand that has been cleared on both sides. We are now checking to make absolutely certain that it is agreeable so that no Senator feels he or she has not had the opportunity to speak. I will do that momentarily. In the meantime, I am pleased to yield to other Senators.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Madam President, I have already spoken at some length on the Senate floor on my view in support of Judge Souter. So I will refer anyone who might conceivably be interested in those views to the CONGRESSIONAL RECORD on September 19, 1990, a week ago Wednesday.

But there are a few other comments which I think appropriate to make at this time, that relate to the very important principle, that was established in our hearings, that a nominee should not be required to answer the ultimate question on how the nominee would rule on a case which may come before the Supreme Court even where that question is as important as the nominee's views on what will happen to Roe versus Wade. The issue of choice, the issue of abortion is, I think, the most divisive issue which has confronted the United States since the country's inception perhaps with the exception of slavery, Madam President. There were many who came forward and strongly urged that Judge Souter should be required to say how he would rule on Roe versus Wade.

It is my expectation that there will be a very strong vote in support of Judge Souter today. Certainly the vote on the Judiciary Committee of 13 to 1, where many who voted in favor of Judge Souter were those individuals who were very strongly in favor of upholding Roe versus Wade, established a very important principle that people in our society were willing to abide by the system as to what would happen in the regular context where a case was decided in the context of specific facts, briefing, argument, consultation among the Justices, and that a nominee would not be required to answer a question as to how the nominee would rule on a case yet to come before the Court.

Madam President, I have expressed my view, both on this floor and otherwise, about my support of the choice position. Although I am very much opposed to abortion as a personal matter, I do not think it is something that the Government can regulate. But, notwithstanding my own views on the subject, I took the strong position that Judge Souter should not be compelled to say how he would rule when the issue of Roe versus Wade came before the Court again.

At the same time, Madam President, I think it is important to emphasize, that if the Supreme Court moves further on the road to deciding ultimate positions of public policy as a superlegislature, that the Supreme Court runs the risk of losing its standing, and the nominees run the risk of losing their standing to decline to answer the ultimate questions.

This Senator is very much concerned about a series of Supreme Court decisions illustrated by the Griggs case, the Wards Cove case, the National League of Cities versus Usury, and Garcia versus San Antonio Transit Authority, where the Court has moved in the direction of being a superlegislature.

The Civil Rights Act was passed in 1964, and, in 1971, a unanimous Supreme Court in the opinion written by Chief Justice Burger, not known for any expansive interpretations, defined discrimination in the disparate impact situation. I will not speak at length about what that means, because it is not necessary to illustrate the point.

Eighteen years later, last year, 1989, the Supreme Court of the United States reversed Griggs in Wards Cove and did so with five Justices changing the law in the context where the Congress of the United States had let the Griggs opinion stand for 18 years, giving full force and vitality to what is realistically a conclusive presumption of congressional assent to the Griggs opinion as interpreting congressional intent.

Four of those Justices who reversed Griggs had appeared in the Judiciary Committee during the course of the past decade and put their hands on

the Bible and had sworn not to be judicial activists but to interpret rather than to make the law.

I would suggest, Madam President, that if the Court, if the Justices are to become superlegislators, they will not be immune from stating their positions on such issues, just as candidates for the Senate are not immune from stating our position on matters of public policy.

There is a similar issue involved in the case of National League of Cities versus Usury, where the Supreme Court of the United States in 1975, defined the relations between Federal and State governments, local units of government. That position was reversed in Garcia versus San Antonio Transit Authority, 9 years later, in 1984. In writing in dissent, Chief Justice Rehnquist and Justice O'Connor, in separate opinions, said that the Garcia opinion was really like a railroad ticket. As Justice Roberts said years ago, "this day and this train only." Chief Justice Rehnquist and Justice O'Connor said, when the issue came before the Court, with a change in membership and constituency, the opinion would be reversed.

I was on the point that if the decisions of the Supreme Court on important constitutional doctrines, like Federal and State relations, depend upon the constituency of the court, then I think nominees are going to be asked how they are going to decide these issues on public policy.

On the man himself, Madam President, I think Judge Souter presents a record of qualification. His record, academically, in law school, Rhodes scholar, record as a practitioner, attorney general, trial judge, State supreme court justice, his judicial opinions, his testimony before the committee, was exemplary.

I do not agree with some of my colleagues who have supported Judge Souter, based upon a change in position before the committee. I believe that Judge Souter took expansive views when he testified before the Judiciary Committee, but that is understandable. The opinions of Judge Souter were the basis for my reliance on evaluating Judge Souter, and he was much more restrained and restrictive in those opinions than the testimony he gave before the Judiciary Committee.

Madam President, even in those opinions, in the Richardson case, Judge Souter found a liberty interest. In the criminal law cases, he had a good balance recognizing defendants' rights as well as the interest of law enforcement.

So whether you take the more expansive views of Judge Souter testifying before the Judiciary Committee, or the more restrictive views that he exhibited in his opinions, I believe he is well within the continuum of constitutional jurisprudence and ought to be confirmed.

In view of the limitations of time, although there is much more that could be said, that summarizes my views. I thank the Chair and yield the floor.

Mr. SIMON. Madam President, I rise briefly to explain my views to my colleagues. I think there are three basic points.

One is, does Judge Souter meet the basic standards that we are looking for? In terms of ability, in terms of scholarship, in terms of someone who is willing to listen, it is very clear that he does.

On two points I would like to have seen a stronger nominee. One is, I want someone who is a champion of civil liberties. The second thing I would like is someone who will lead for those less fortunate. Unfortunately, in the Souter record there is no evidence that Judge Souter will be a leader in either of these areas.

The second question then is, if he does not meet these latter two standards, should he be considered? If I were to go solely by the record, candidly, I would vote against him. But his testimony showed an appreciable growth, if you want to make that assumption, or it showed political dexterity, if you want to make that assumption. But his testimony clearly was better than his record. If I had gone just by his record, as I have indicated, I would have voted against Judge Souter in committee, and I would be voting against him now.

In the area of civil rights, at least one statement he made while he was attorney general was a statement that concerned me. But in response to my specific questions, he was more forthcoming and encouraging, though he made one statement that still concerns me; and that is that there is no discrimination in New Hampshire. I wish that were the case in any one of our 50 States. It is more of an indication that his continued growth is still in need.

On the much publicized Roe versus Wade case, my own belief, my own impression, is that he will vote to sustain Roe versus Wade. It is made up of several reasons. One was his counseling of a young woman who was about to have an illegal abortion under Massachusetts law. The second was his vote as a member of the hospital board, where they authorized that hospital to have abortions performed at that hospital. A third came in response to a question by Senator SPECTER, in which Judge Souter said, so far as he knew, the court had never taken away a right that had been given. Finally then, it was the impression that I have from him of great reverence for precedent.

On the basis of those things, I will personally be surprised if he votes to overturn Roe versus Wade, though no one can know the answer for sure.

Finally, we face a very difficult question. That is, is it likely that President Bush will send a nominess with more moderate views than Judge Souter? As you look at the list of those who are considered, I have come to the reluctant conclusion that that is very unlikely. If I were to vote against the nominee, it would be a signal to the President that it does not matter who you send up, you are automatically going to get votes against that nominee from those who want to see the Court as a champion of civil rights and civil liberties.

Finally, I add, Madam President, the departure of Justice Brennan means, unquestionably, no matter what the votes of Judge Souter, the Court is going to be shifting to the right. That means that the basic defense of civil rights and civil liberties, I think inevitably, is going to shift from the Supreme Court to the Senate and the House. It makes our responsibilities more awesome, and I hope we will live up to those responsibilities. I will vote to confirm Judge Souter.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. Madam President, this Senator is pleased to report that his impressions have been confirmed. Those are impressions of a man I met over a decade ago, David Hackett Souter, a man who now awaits the advice and consent of the Senate of the United States to confirm him as the 105th Associate Justice of the Supreme Court of the United States.

While I was attorney general of the State of Washington and president of the National Association of Attorneys General, I first met David Souter, who was then attorney general of New Hampshire. I was not happy to meet David Souter under those circumstances, because my friend WARREN RUDMAN had just left that position. He turned it over to an individual whom I did not know, and about whom I knew nothing. But I learned quickly that David Hackett Souter was a thoughtful, courageous, and intelligent man, a man of integrity and steadfast purpose.

The Nation watched as Judge Souter's fitness for a seat on the bench was questioned by the Senate Judiciary Committee for the second longest period of time of any Supreme Court nominee in history.

(Mr. SIMON assumed the chair.)

Mr. GORTON. I believe we observed the courage and independence of a man confronted on each side by those who wanted to hear clear and preconceived notions. I can say that had he told the committee what many of its members wished to hear, he would not gain this Senator's vote today to become Justice David Souter. Presi-

dent Lincoln once observed under similar circumstances, "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."

Why? Because the Constitution requires of our jurists the impartial balancing on the scales of justice the facts which are presented to them. Our Federal Code states:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (28 U.S.C. 455(a)).

To be impartial, a judge must divorce his personal feelings from the philosophical analysis which he is charged to employ for the benefit of every citizen. Impartiality is and must be a prerequisite to the grant of the awesome power of this position. Judicial independence fostered by that impartiality is the touchstone by which our law lives.

The report of the Judiciary Committee on this nominee concluded:

We believe that Judge Souter struck an appropriate balance in this testimony; that his testimony and the record before the committee enabled us fully to discharge our constitutional responsibility of advice and consent; and that a requirement of greater specificity would gravely compromise the independence of the judiciary and the separation of powers. Such independence is explicitly mandated by the Constitution, by Federal statute, and by the canons of judicial ethics.

I am proud to have witnessed Judge Souter withstand the test. And I can think of no qualities which are more important for a position on the Supreme Court of the United States than those which David Souter demonstrated in those 20 hours, a constant willingness and ability to listen, to learn, to grow from experience. Judge David Souter has the integrity and the dedication to ideals which made this country great.

Mr. President, I think none of us, even Members of the Senate of the United States, can fully appreciate the awesome and lonesome responsibility of being a member of the Supreme Court of the United States and having the Constitution of this great country in his or her hands. My conviction is that David Souter can take on that responsibility thoughtfully, responsibly, with an open mind, and with the ability to contribute greatly to the development of legal institutions in this country. Judge Souter has earned my vote for his confirmation, and I hope my colleagues will find that he has also earned their vote as well.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. WIRTH. Thank you very much, Mr. President

I want to spend a few minutes sharing my own thoughts and experiences with my colleagues about my own decision related to Judge Souter and the decision facing the Senate this week.

As you know, I am not a lawyer and I therefore come at this with perhaps a bit of a different window than those who are looking at the record, reading cases, and so on.

I would like to do two things today. One, to talk a little bit about the issue of Roe versus Wade in front of us and, second, sketch what I think is a very interesting and informative profile of David Hackett Souter as I gathered it over the last 10 weeks.

First, the issue of Roe versus Wade is clearly the issue many of us, commentators and observers, have come back to. This is one of the dominant issues of this time, if not the dominant issue on the Court right now. I would hope that David Hackett Souter will be voting to uphold Roe versus Wade. I am sorry——

(Disturbance in the Visitors' Galleries.)

Mr. WIRTH. Mr. President, the issue, as we all know, elicits all kinds of responses and emotions, and it would be my hope that the concern for precedents, the concern for privacy, would lead Justice Souter in this direction. I would also think it is absolutely appropriate for everybody to be asking questions on this front and I am sorry we did not get more specific answers on it but you know that is the judgment that was made by David Souter.

Beyond question, the Supreme Court is now at a crossroads. Judge Souter's role on the bench may well be pivotal. Because I take the advice and consent role of a Senator very seriously, I met with Judge Souter, have reviewed the hearing record and some of his decisions and have spoken with many people associated with him professionally. Given my division with the President on many of the issues the Supreme Court may hear, the best I could hope for would be a skilled judge who comes to the bench with an open mind—I believe Judge Souter does just that.

I do have some reservations, similar to many of my colleagues. Upfront I must admit that I hope he holds fast to the approach he cited when discussing fundamental rights during his hearing. He stated that he would use the approach identified with Justice John Marshall Harlan—that the question of weighing the value of asserted rights cannot be approached without an inquiry into the history and the traditions of the American people, in order to try to find, on a historically demonstrable basis, their commitment to a set of values which either do or do not support the claim that a particular right in question is fundamental.

During his testimony, Judge Souter stated that he has not made up his mind as to whether or not he would vote to uphold Roe versus Wade. Judge Souter did not address the fundamental right to privacy with as much clarity as I would have liked. But he did indicate his commitment to certain matters of privacy, and I hope that during what is expected to be a long term on the bench, he continues to support the fundamental individual rights.

When Judge Souter was asked about the equal protection clause in the 14th amendment, he stated that his approach in interpreting the Constitution would be to determine the meaning or principle that the framers intended—not the specific application they had in mind at the time. Should this be the case, when a question of protecting individual rights of privacy were to come before the Supreme Court, I expect that Judge Souter will set fit to see to decide the case with the breadth of our time, not be limited to the scope our framers had when writing the Constitution.

To go on, Mr. President, let me talk a little bit about what I understand and have learned about David Souter over the last 10 weeks. David Souter and I were in the same class in college. We lived in the same living unit, a very large dormitory kind of unit that had its own dining room, and so on. There were probably 350 undergraduates in this unit. We were in the same class. We did not know each other. We knew who the other person was but did not know each other.

As an aside, I might say a friend of mine came up and said, how could you vote for someone when you did not even know him when you were there? I said he did not know me either. I think that is appropriate commentary on the fact it is a large institution. In any case, I was surprised it came up in the same class.

So soon after his nomination was sent up, became public, I got on the telephone and I made a variety of calls in August and let me flesh out, if I might, the profile that emerged. This was in early August. That profile, and these are my notes that I picked up off my desk the other day in summary of all these conversations. I must have talked to 10 or 15 classmates who knew David Souter.

Smart, courteous, little fastidious, devotion to precedents, extraordinary intelligence, great integrity, a man who puts principle before expediency, a man of old New England values, intensely private. Asked a liberal Democrat, does Bush know any more than we do? How could he? He is an intensely private man, describing David Souter. Devoutly Episcopalian. Another said, no reservations, an individual of great principle and underlying humanity.

Another, without qualification. And then he said, I also am a liberal Democrat. He said my view of George Bush

just jumped up. Sense of many as a person, concerned sense of a person who does not exist any more.

Said one, an individual who is joyous within his own house and his own library. I believe he is truly interested in judicial restraint, not an individual who has commented to me and through the years on politics.

That was a profile in August as I talked to people. All of these individuals were close to David Souter and very positive.

I picked this up again at the beginning of last week and made another round of calls and let me just share these last reactions and I will stop.

From one individual in our class who is a reporter for a major national newspaper: He said, having called around himself—this is a secondary research—my general sense of those who are—this is a man who chooses to live his own life although he is not a hermit by any means, he maintains friendships of individuals who themselves are from moderate and a progressive stripe. The people who are close to him are not ideologs. His friends describe him as being bright, thoughtful and idealistic. This is a profile from our classmate reporter who had talked to other classmates. While he may be cautious, from a conservative State, he is not a Reagan Justice, or someone you would think George Bush would appoint.

None of the people had a conversation with him about Roe versus Wade. I checked and cross-checked them for over an hour. None believed with his own belief in precedents that he will overturn Roe versus Wade, and his own instincts will lead him in the direction of supporting precedent.

Men and women say the same thing. Among the people who know him well I get the same reading. If I were a conservative I would be petrified by this guy. There is no guarantee he will do what they want, not a Scalia clone.

That is the secondary research of this last week from a reporter friend of mine, a classmate who talked to a variety of other individuals. I have done a lot of my own primary research and again let me close with reactions of this week.

None of these people obviously do I want to identify. I asked one gentleman who is again a liberal Democrat, a clergyman and a very, very thoughtful and bright individual whom I knew also 30 years ago. I asked him, would you vote for David Souter? He said, I think I am sure I would vote yes. I was a little surprised by this statement on Brennan; I did not know he would say that. He is very honorable. He simply would not fake it. I was asking what he thought about the Souter testimony on the girl at college, and so on. He said he simply would not fake it. What you see is who he is. When we were undergraduates this classmate said he lived and breathed the Supreme Court and judicial process, so much that we used to call him then Justice Souter. He has great respect for precedent, he is a student of Holmes, did his senior thesis on Holmes and Holmes' judicial philosophy, has a deep abiding interest and respect for the Court and American history; certainly not likely to be an extremist in any way. Nothing would suggest that that is the case. With time, in fact, I believe he will be a coherent force on the Court.

He is a wonderful and amusing friend. "Something I have always wanted to do," said David to me. After I called him when I heard about the appointment, he said, "This is something I have always wanted to do. But if it doesn't work out, I can be blissfully happy on this court in New Hampshire."

It is sort of an accident of fate that someone who is so nonpolitical would be washed up on these shores. As part of the research this last week, let me conclude with this morning's telephone calls, if I might, Mr. President.

"David Souter, simply stated, is one of the greatest individuals I have ever known. He is extraordinarily brilliant, intellectually gifted in an openminded way, not a bully like some who are that smart. He can then carefully and calmly come to a conclusion having put his force of mind to work on it."

And "I am a liberal Democrat. This will be one of George Bush's great appointments."

"On predictability, on the issue that everyone is talking and asking about, and given the caveats of Supreme Court decisions—and having spent so much time with him, as has my wife and daughter; I am a lawyer—I do not think he will kick over the traces. He will get people talking together like Justice Powell."

And, "I imagine he will be a jealous guardian of individual liberties, sort of a New England-like approach to guarding the individual against the State."

And, "Watching the hearings confirmed what I know about him personally. What you see is what you get. He is not partisan. He is not an ideolog. He is not a zealot. I did not vote for Ronald Reagan or for George Bush. My guys have not done very well. But even given the presumption that they can appoint anybody who they want, he is really a fine appointment."

I was very impressed, Mr. President, with this catalog of individuals, the perspective was very broad. Most of them are people who are more progressive rather than conservative. But these are people who have known David Souter for 30 years. What emerges is that profile that I have described. I am going to vote for David Souter. I believe that this profile is one that I can trust. I did the best that I could in the research available to me, read the record, looked at the hearings, watched David Souter testify, and I have talked to the lawyers. But maybe more importantly I have put together this human dimension which I wanted to share with my colleagues and with the country today.

Thank you very much, Mr. President.

I yield the floor.

Mr. ADAMS addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. ADAMS. Mr. President, I have previously stated my position with regard to the nomination of David Souter in the CONGRESSIONAL RECORD of September 27 at the beginning of that day on S14035.

But I felt that it was necessary during the course of this debate, during this executive session, that I once again make a few very brief remarks to not reiterate what I stated on that day, which I still believe and feel is an important part of this record, but to simply state again the concern and the real lack of substantial position that many of us feel with regard to nominee David Souter concerning his feelings on the right to privacy and in particular the right to privacy contained within the U.S. Constitution as it affects the right of women to make a choice on their reproductive rights.

I was very impressed with the comments of my very good friend, Senator WIRTH, as to the personal integrity and the intelligence of David Souter. I have not doubted this. But it was refreshing to hear his analysis of the people he had talked to and the hope that he has that we will have—from a President who has deliberately stated he wishes Roe versus Wade overturned and has nominated this man—a man that may indeed be another Lewis Powell or a Blackmun and may be his own person on the Supreme Court.

I am opposing the nomination of David Souter because in this position as a Senator of the United States, I am 1 of 100 who give their advice and their consent to the creation, along with the President, of the third branch of Government under this Constitution. In the creation of that branch, we had, during the course of our history, created some good, some bad, some mediocre Supreme Courts.

We have the present situation in the United States where we have a President committed to one position. We have probably a majority of the U.S. Senate committed to another position on this right to privacy as it affects the right to choose of over half of our people. And we have a Supreme Court that has been appointed over a series of years that is either evenly balanced or is balanced in favor of overturning a basic right of privacy.

As a lawyer and as a person who has tried many lawsuits and been involved in both the Congress—the House, the Senate—and in the administration as a Cabinet officer, I take very seriously the duty that we are to give both advice and consent on a person who, in this particular case, gave a very good presentation on nearly all matters.

I think he will make an excellent judge on the first circuit, and after a number of years might well be considered, as he has made decisions on Federal cases involving the Constitution, for a Supreme Court position by this President. And it may well be, as my friend, Senator WIRTH said, that we have gotten lucky and that this is a person that would be far better than any other we might ever get.

But I am struck by the fact that we had testimony—and I followed it carefully—with regard to David Souter's position on the death Penalty. I happen to agree with his position on the constitutional effect of the death penalty. But 2,000 people on death row know where he stands on that and his general philosophy—not a particular case but his general philosophy—and yet over 100 million law-abiding women in the United States of America do not know what his position is on what had been a settled fact of law for over 17 years in Roe versus Wade and a basic right that we very often—98 men in this body, and 8 on the Supreme Court—pass on the rights that we know not all about.

So this is a very important question for a lot of people, and a lot of people view this not as some deep political question but as a deep constitutional question—the fundamental right of privacy. I am always struck by those who would deregulate everything in this country but would regulate a women's most private rights.

I am concerned and, therefore, I shall vote against the nomination of David Souter. I hope that I am proven wrong and that the statement that was just made on the floor that this might be a great surprise to all of us and this might be a person who would vote to uphold, by stare decisis or otherwise, a constitutional interpretation that has existed for 17 years.

The Constitution, Mr. President, of the United States is a shield not a sword. It is a shield for individuals against the power of the State. It is a shield, in this case, for over half of our population, who happen to be female, from having their right of privacy deeply invaded and regulated, whether it be by the State or by the Federal Government. And it is something that very often is debated without their presence being a major factor.

I, therefore, feel in the case of David Souter, this body should wait awhile. Let him show his mettle on the First Circuit. Because an appointment to the Supreme Court is very different than an appointment to any other court in the land. A person appointed need not be a lawyer. A person appointed need not have any particular set of qualifications. A person appointed becomes one of nine, rather than 535, or rather than an individual, as one of the three parts of the U.S. Government.

The decisions that will be made by this appointee will probably last in this country for the next 30 years. The Senate has to give its advice and its consent. My advice is that we appoint someone who will uphold the traditions of the Court and use the Constitution as a shield, particularly as it involves the rights of the women in this country. My consent is withheld because I have not been convinced that this would occur. I hope it will.

As I said in my earlier comments in the CONGRESSIONAL RECORD several days ago, if I am proven wrong and he protects these fundamental rights of the women of our country, I will appear on this floor and I will offer him a personal apology that I misjudged him. But all I have at this point is the judgment that I can render based upon the testimony that he gave, the testimony that others gave, and the record that he has. I must admit that record is very limited so far as the Court is concerned.

So let us all hope David Souter is what he appears to be; according to Senator WIRTH, a person of independence, a person who will follow the traditions of the Constitution, who will treat it as a shield, who believes in the right of privacy and will enforce it and, therefore, will not go to the Court and join a group to overturn a 17-year-old decision.

I realize many if not most of my colleagues may disagree with me on this, but I have felt it very important that the President of the United States understands and that my colleagues understand that many of us, as a matter of conscience, cannot support this nomination.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. SIMPSON. Mr. President, obviously I am supporting the nomination of Judge David Souter. I think the remarks of Senator WIRTH of Colorado were so appropriate and very moving to talking with regard with the people who know him best. That is the test of any human being. I think that is one of the most impressive relations of support that I have heard on any nomination. And to speak as a classmate of the man, men who knew him, and the other classmates as they remember him, and many happening to be of liberal Democratic philosophy, that I think says it all.

I have a strange view of politics. I always like to see how a person does in his home precinct as he runs for political office. How does he do right there among the people who supposedly know him best? I think that is a pretty good test, and one we should use.

I must also respond to the comments of some who suggest that Judge Souter came to the confirmation process bearing some burden of proof. This is a particularly inappropriate use of that phrase, in my opinion. The Senate Judiciary Committee was not sitting as some omniscient body sitting in judgment of executive nominations. Our proper role, under the advice and consent clause of article II, section 2, of the Constitution, in my view, is to provide an additional, more personal, information gathering mechanism through which our colleagues, the full Senate, may make an informed decision whether or not to confirm a nominee. Our job was to look not only to the nominees paper trail, academic credentials but to also try to see into the nominee's heart. I commented on those perceptions last Thursday and will not restate those here. I am troubled, however, about this perception that a nominee must prove something to the committee and the Senate before he or she is fit to assume a position on the Supreme Court.

I just want to comment briefly on the burden of proof issue that came up, and continues to pop up. It is my personal view there is no burden of proof on a nominee to assure the Senate that he or she will vote in the manner dictated by the particular politics of the moment, either according to some specified political philosophy or to a specific outcome on any particular issue, abortion being a classic example.

I happen to feel that a woman should have the choice, indeed, in that ghastly situation known only to them. But if there is indeed any form of burden of proof, that burden is, in my mind, upon any Senator who comes into the confirmation process with a personal agenda. That is where the burden of proof falls, heavily and clearly.

The burden is on those who would vote against the nominee only because they disagree with the choice made by the American people when they elected the President of the United States. The burden is on those Members who approach the process with a closed mind, or who have made up their mind. It is their burden to prove to the American people that they are discharging their constitutional duties, rather than acting most energetically out of personal bias or purely political motives.

I think it is unfortunate the confirmation process has indeed become overly permeated with politics in the partisan sense. It will always necessarily be present, but not as an overweening component.

We expect our judges and Justices to approach cases with pure objectivity. We demand they shed their personal feelings while sitting in judgment of others and while passing on the important constitutional issues of the day. I am concerned we in the Senate, while considering the equally crucial question of confirmation of a Presidential nominee to our highest Court, appear reluctant to impose upon ourselves an equally stringent standard of objectivity in performing our duties under the advise and consent clause.

So any burdens, I think, are upon those who seek for any reason to destroy the presumption in favor of the President's appointment.

That is not to say we should not be critical. It is not to say we should not question. We do not blindly accept, but we should never demand to know how a future case will be decided as a condition to a favorable confirmation vote, because such conditioning, in my opinion, undermines the basic requirement that our judges approach each case objectively and that their decisions in those cases be based purely on the law.

I hope we will have a successful vote. I know we will, in a few moments. I am convinced that the record leads—and any thoughtful person who reads it will be led—to only one conclusion, the conclusion reached by an overwhelming vote of the committee, by a 13-to-1 vote of my colleagues: That David H. Souter will be one splendid and fine addition to the Supreme Court; and, as Justice Souter, he will not be swayed in his decisions by sheer numbers. He is not afraid to depart from the majority of his colleagues if his interpretation of the law leads to a result different from others. He will listen.

We hear that again and again. That is a key aspect of this man. He will set aside his own personal and political beliefs when deciding cases brought before him. He will not legislate, nor will he be afraid to make the politically unpopular decisions if the law requires a politically unpopular result.

David Souter will be a Justice—a Justice in the purest and finest sense of that word—and our country will be well served by his presence on the Court. He is a most impressive man, a sincere and authentic and kind human being. He will be a tremendous Justice. He is going to make us all very, very proud. I say God bless him in his deliberations on that bench, and in his stewardship of our enduring Constitution.

Go back and look at his opening statement before the committee. That said it more beautifully than I can.

I thank the Chair.

Mr. DECONCINI. Mr. President, there are several major issues of the utmost importance presently facing this body and the American public. The controversy in the Persian Gulf has yet to be resolved and requires our constant attention. The budget summit agreement is on the mind of every Member in this body. Both of those issues involve two of Congress's most important powers: The power to declare war and the power of the purse. Today, Mr. President, we execute a power entrusted to the Senate that can weigh just as heavily as those two other powers. For through our role of advice and consent on Supreme Court nominees, we determine, with the President, which individuals will be interpreting the Constitution for future generations.

President Bush has nominated Judge David Hackett Souter to a position of extraordinary importance in our country. I spent a great deal of time prior to his confirmation hearings studying the record of Judge Souter. I was indeed impressed with his background. As a member of the Judiciary Committee, I with my colleagues questioned him on the great constitutional issues of our day. In the end, I felt secure that Judge Souter would protect the rights embodied in our Constitution that we all so cherish. For that reason I decided to vote to confirm his nomination.

In Judge Souter, President Bush nominated an individual who appeared to possess the intellect, integrity, experience and judicial temperament to serve on the Supreme Court. The committee hearings gave him the opportunity to confirm those impressions.

I was very impressed with Judge Souter's testimony before the committee. I was especially pleased by his openness in answering committee members' questions, He heeded the advice of several of my colleagues and myself to be forthcoming. Yet he drew a reasonable line in his response. Judge Souter adequately and properly protected his need to withhold answers in certain areas that will still come before the Court. At the same time, he discussed at length his approach to constitutional interpretation and his legal opinion on settled law.

The hearings made clear that Judge Souter did not have a hidden agenda he would attempt to impose upon the Court. Instead, Judge Souter is a proponent of judicial restraint. He respects and defers to precedent. He understands the respective powers of the three branches of Government. Most importantly, he understands the role of the Court in our system and its duty to protect individual liberties. He will not attempt to protect the "haves" at the expense of the "have nots."

Mr. President, no one in this body will ever be satisfied with every response of a nominee. I would have liked to have heard Judge Souter's own standard for gender discrimination under the equal protection clause of the 14th amendment. But I feel confident that he will not attempt to dismantle the protections the Court has provided in this area.

We have no absolute assurances how any nominee or sitting Supreme Court Justice would vote. The Constitution does not entitle the Senate to such a guarantee. Our ability to predict a Justice's future decisions is limited. Justices have changed their positions from time to time. Throughout their careers they face constitutional issues never contemplated at the time of their nomination. Thus, the ultimate question we as Senators must ask ourselves is whether we feel secure entrusting him with the tremendous responsibility of protecting the rights embodied in our Constitution. I am confident that Judge Souter will guard these rights judiciously.

Changes in the Court's composition are disruptive but inevitable. Justice Brennan's retirement is indeed a turning point in the history of the Supreme Court. Although I disagreed with some of Justice Brennan's decisions, no one can deny his mark on the Court or his place in history. In that respect, Judge Souter, as he so candidly admitted, has some pretty big shoes to fill. He will, I believe, serve the Court and out country well.

Mr. President, I hope that the Souter nomination will serve as an example for President Bush and future Presidents on the nomination process. President Bush fulfilled his appointment duty by presenting us with a nominee who possesses competence, integrity, judicial temperament, and experience. Through the committee, the Senate fulfilled its role of examining and questioning the nominee on the great constitutional issues of our day. We conclude that duty today by exercising our advice and consent authority. Chairman BIDEN and the ranking member, Senator THURMOND, of the Judiciary Committee should be commended for conducting very thorough hearings. I believe the committee asked extensive but fair questions and I further believe that Judge Souter responded with fair and thoughtful answers.

I have concluded that President Bush chose Judge Souter because he will be an openminded jurist. And, most importantly, as he so often stated during the hearing, he will listen. He was not chosen to turn back the clock on the great constitutional principles of our day. Through the hearings the Senate and the American public heard an individual with a great understanding of the Constitution and the role of the Court in protecting our individual liberties.

Mr. President, today this body will be entrusting Judge Souter with a position of immense power. Soon, he will begin making decisions affecting the lives of each of us far into the future.

His decisions will also impact on our children and their children. We cannot reverse the course that Judge Souter will pursue. Thus, we can only be secure in believing that we made the right decision based on what we know today. I am secure in voting to confirm Judge Souter to the Supreme Court. And I am confident he will fulfill our expectations.

Mr. BIDEN. Mr. President, to bring the Chair and my colleagues up to date here, I think we only have three more people who wish to speak on this nomination. One is on his way, as I speak—Senator CRANSTON—who indicates he would like to speak on the nomination for about 10 minutes. And then I believe the only two people left who indicated a desire to speak on the nomination—I say this for the convenience of my colleagues in determining when the vote is likely to take place—is the distinguished Senator from New Hampshire, the real justice. I should not be so facetious. We have all been kidding him so much because he has an intense interest in and is a close friend of the nominee.

The Senator from New Hampshire is on the floor and, after Senator CRANSTON speaks, he will be the last speaker on the Republican side, and then Senator MITCHELL would like to close. He indicates he has about 7 minutes worth of comments. So if all goes well in the next few minutes, we should be able to be voting on this nomination by 6 o'clock, hopefully maybe as early as 10 minutes of 6. In the meantime, I suggest the absence of a quorum awaiting the arrival of the Senator from California.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BIDEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President, as the Senate deliberates on the nomination of Judge David H. Souter to serve as an Associate Justice of the U.S. Supreme Court, I am reminded of a statement uttered by one of our greatest Presidents, Abraham Lincoln, nearly 136 years ago. Referring to the great strife that was dividing our Nation at that time. Lincoln stated, "No man is good enough to govern another man without that other's consent."

Although circumstances differ, President Lincoln's statement still rings true today. In considering the nomination of Judge Souter to serve on our Nation's Highest Court, we are offering the Senate's consent—the people's consent—to selecting Judge Souter to decide some of the most important and controversial issues that will be coming before the Supreme Court.

This is a very sobering responsibility, and one that I do not take lightly. The cases that will be considered by the Supreme Court this coming year, and the next several years, are sure to be among the most contentious for many decades. During this term alone, the Supreme Court will be deciding cases involving such controversial issues as abortion, sex discrimination, punitive damages, and challenges to the death penalty. Therefore, I am concerned that the individual who receives my consent—indeed, the Senate's consent—brings an open mind and a tempered judicial willingness to thoroughly review the facts and circumstances of these cases.

Mr. President, I have reviewed Judge Souter's background. I am much impressed by his academic and professional credentials. Judge Souter's testimony before the Senate Judiciary Committee indicates that he possesses an agile legal mind and a keen intellect, reflective of a well-reasoned and experienced judicial philosophy. Judge Souter has the background and the legal knowledge that should serve him well in deciding vital constitutional issues of our time. He received the highest judicial rating possible from the American Bar Association's judicial screening panel. Judge Souter's academic record is flawless, boasting two undergraduate degrees—one from Harvard and one from Oxford where he studied as a Rhodes Scholar. Subsequently, Judge Souter earned his law degree at Harvard University, where he was named Phi Beta Kappa.

Judge Souter's professional background demonstrates a commitment to public service that is lacking in many lawyers with his distinguished academic credentials. He served as an associate with the New Hampshire law firm of Orr and Reno for 2 years after graduating from Harvard. He then turned to public service, as both assistant attorney general and associate attorney general for the State of New Hampshire before being named attorney general of that State in 1976. In 1978, Judge Souter was appointed to the New Hampshire Superior Court, and 5 years later, he was appointed to the New Hampshire State Supreme Court. Most recently, Judge Souter was appointed to the First Circuit U.S. Court of Appeals, where he has been serving since this past April.

Mr. President, I do not casually offer my support to any nominee. After much study and review, I am satisfied that this nominee is eminently qualified and will provide a well-reasoned and an aptly tempered approach to the cases that will be coming before him. I approve of Judge Souter because he offers a unique combination of qualities that will serve him well on the U.S. Supreme Court. I recall a statement that he made during his confirmation hearings that a few of us here in the legislative branch would do well to remember. He said, "* * * at the end of our task some human being is going to be affected * * *," and judges, therefore, "had better use every power of our minds and our hearts and our bodies to get those rulings right."

I am certain that Judge Souter will wrestle to the utmost to get those rulings right. His brilliant legal mind, combined with his human approach to the law, will serve our country well. I hope my colleagues will join with me in offering their consent for approval of this nominee.

Mr. DURENBERGER. Mr. President, I rise to support the nomination of David Souter to the U.S. Supreme Court.

Judge Souter will replace a legend, Associate Justice William Brennan, who after 34 great years on our Nation's Highest Court has stepped down. Justice Brennan's powerful intellect, winning personality, and willingness to take on the tough issues have served the Nation well and will be hard to replace. He has left a legacy of wisdom and service that will grow in history. His shoes cannot be filled by anyone, nor should they be.

On July 23, 1990, President Bush nominated David H. Souter to fill Justice Brennan's vacated Supreme Court seat. I believe the President's choice is a wise one and am very glad that he has acted so swiftly to fill the seat. The Court will be asked to address many complicated and important issues this fall and it is very important that all nine chairs be filled.

I take my constitutional role of advising and consenting on judicial nominees very seriously. It is one of the most important responsibilities assigned to each Senator and one that I have devoted a great deal of time to in the last couple months. Accordingly, I have evaluated Mr. Souter's nomination very carefully. I listened to his hearing testimony, and that of other witnesses, read many pertinent documents, and spoken with many Minnesotans about Souter's nomination.

Mr. President, shortly after I was elected to the U.S. Senate in 1978 I was faced with my first appointment. President Jimmy Carter had nominated Congressman Abner Mikva to the U.S. Court of Appeals for the District of Columbia. I grappled with the choice of standards for evaluating judicial nominees. Article II, section 2 of the Constitution provides that the President's power to appoint important public officials is to be exercised "by and with the advice and consent of the Senate." Alexander Hamilton, in No. 76 of the Federalist Papers stated that the purpose of advice and consent was "to prevent the appoint-

ment of unfit characters." Senators have interpreted this power in different ways.

Under one standard, the one I have come to use, it is the Senate's role to evaluate the nominee on the basis of his competence and integrity. This standard is premised on the view that the President, elected by all the people, was empowered by the Constitution to appoint officeholders who would further his philosophy and goals. The other standard, a distinctly minority and different view, was that a Senator would vote his perference on the political views of the nominee. The second standard was, and is, very tempting. Abner Mikva's views were much more liberal than mine. But, after careful analysis I decided that politics did not belong. As I stated at the time:

The power to "advise and consent" on judicial nominations has never been viewed as authority for the Senate to substitute its judgement for the President's on the qualifications of a nominee. For two centuries that power has been regarded as authorizing rejection of nominees for only two reasons—lack of integrity or lack of competence. No judicial nominee has even been rejected simply because the Senate disagrees with his political views.

So, I swallowed hard and voted to confirm Abner Mikva. I have employed that standard for every judicial nomination since. I did for Judge Bork, and I will apply it to the Judge Souter's nomination today.

In sum, my constitutional advise and consent role is to evaluate a nominee's fitness to serve as a judge. My goal is to insure that members of the Supreme Court are able jurists, honest, and will fairly interpret the Constitution and laws of the land. I do not have a litmus test; such tests are not appropriate. I do not look for a political agenda or philosophical bias. Competence and integrity are what matter.

Mr. President, Judge Souter is competent and has an unblemished history of legal and public service. His career is one of high intellectual achievement and personal integrity. While watching his confirmation hearing before the Senate Judiciary Committee, Judge Souter showed me that he is a man of deep intellectual character; a man who will approach every case presented to the High Court with a willingness to listen carefully to both sides, and then cast his vote based upon the principles embodied in our Constitution. He does not bring a personal or political agenda to the court. The only agenda Judge Souter has is to interpret the Constitution and law consistent with the principles of fairness and justice.

I was most struck by a comment Judge Souter made about the awesome power that any judge must have, especially a member of the Supreme Court. Let me quote Judge Souter when he described his judicial role: "Whatever court we are in * * * at the end of our task some human is going to be affected. Some human life is going to be changed by what we do * * * (therefore) * * * We'd better use every power in our minds and our hearts and our beings to get those rulings right."

Mr. President, I conclude David Souter is fit to serve on the Supreme Court of the United States. This very intelligent, scholarly, and refreshingly private man well understands the imposing authority, power, and responsibility that he will have on the highest court in our land. He will not abuse that awesome power, but will interpret the Constitution of this land fairly and with compassion. These are the essential characteristics of a judge and make him fit to serve, and serve well on the Supreme Court.

Mr. HEINZ. Mr. President, on July 23, 1990, President Bush nominated David Hackett Souter, presently a sitting justice on the U.S. Appeals Court for the First Circuit, to fill the Supreme Court seat left vacant with the retirement of Associate Supreme Court Justice William Brennan.

As is the case with every recent Supreme Court vacancy, Judge Souter's nomination has engendered public debate and public scrutiny. The public has a compelling interest in the character and capabilities of individual justices who would serve on the Supreme Court, the highest court in the land. A nomination to the U.S. Supreme Court is a lifetime appointment, and the nine justices of the Court are, therefore, a select group. Together, they represent the final arbiters of the Constitution, the framework of our democracy and the guarantor of our individual liberties.

Because of the importance of the position, the Senate is required, under the Constitution, to give the President our advice and consent to the nomination. I approach this decision with an especially keen sense of responsibility. The process is demanding and challenging. In the discharge of my duties, I owe to my constituents, and Judge Souter, an impartial and fair decision in casting my vote.

In the 2½ months since the President nominated him, the Nation has learned a lot about David Souter, the person and the jurist. His entire life has been put under a microscope, leaving not a single aspect of his career uninvestigated. The Senate Judiciary Committee and numerous interest groups examined hundreds of his decisions as a member of the Supreme Court of the State of New Hampshire. They probed the actions he took and the briefs he wrote as attorney general and assistant attorney general of New Hampshire. They looked into his finances, his education, and his pastimes. The committee itself questioned Judge Souter for 20 hours in open session—more time spent before the committe by any other Supreme Court nominee in history save one.

Mr. President, the record demonstrates that Judge Souter is eminently qualified to sit on the Supreme Court. As an alumnus of Harvard College and Law School, a Rhodes scholar, private practitioner, New Hampshire attorney general and State supreme court justice, Judge Souter has shown the scholarship, legal acumen, professional achievement, integrity, fidelity to the law and committment to the constitution to serve on our highest court.

A standard I have applied in all nomination considerations is to determine whether the nominee is an extremist or activist. If so, the nominee should be rejected. I believe this test is fair and impartial, preventing extremism of both the right and left, either a conservative activist or liberal activist from joining our highest court. In responding to direct inquiries from committee members, Judge Souter articulated a judicial philosophy that is within the mainstream of constitutional thought. His answers on the issues of original intent, stare decisis, statutory construction and judicial restraint revealed a judge committed to rendering an honest interpretation of constitutional rights and liberties. He strongly and convincingly indicated his commitment to precedent regarding previous interpretations of the Bill of Rights, due process and the equal protection clause of the Constitution.

One of the highly controversial aspects of this nomination revolved around how Judge Souter would rule on cases coming before the Court which challenged the premise of the Supreme Court's decision in Roe versus Wade. Several Senators directly, and some others indirectly, asked Judge Souter his position on this controversial case. Judge Souter declined to answer this line of questioning, as is his perogative, since cases concerning abortion rights are scheduled to be heard by the Supreme Court in the near future. Judge Souter did comment on the constitutional underpinnings to that decision—the right to privacy. He stated that he believed that there is a fundamental if unenumerated right to privacy in the Constitution, and that the right of married couples to make choices about procreation is at the core of that fundamental right. His response may not have satisfied either side of the abortion debate, but it did reveal a person with a scholarly appreciation of the competing constitutional interests and with the integrity to render judgment in accordance with those interests.

Finally, Mr. President, I found this nominee to be both learned and eloquent. In his opening statement, and I recommend it to all my constituents interested in gaining a measure of this

man, Judge Souter acknowledged that the actions of a jurist cannot be rendered without thought to its effect. He recognized that his actions will affect human beings, that some human life is going to be affected in some way. His comments suggest to me a man who is capable of bringing depth and compassion to the Supreme Court.

Therefore, Mr. President, I will vote in favor of the nomination of David H. Souter to the Supreme Court of the United States.

Mr. DOLE. Mr. President, after 3 days of testimony and 18 hours of often grueling congressional questioning, Judge David Souter has demonstrated to America that he deserves a seat on our Nation's highest court.

Throughout his legal career—as New Hampshire attorney general, as an associate justice on the New Hampshire Supreme Court, and as the author of more than 200 judicial opinions—Judge Souter has consistently distinguished himself with his keen intellect, with his evenhandedness, and with his commitment to the rule of law.

Most importantly, Judge Souter understands that in a three-branch democracy such as ours, the role of a Federal judge is to interpret the Constitution strictly, and not to legislate one's own personal or political agenda from the bench.

So, Mr. President, it is no wonder that the American Bar Association has given Judge Souter its highest rating—well qualified.

And it is no wonder that—last week—the Judiciary Committee gave Judge Souter its stamp of approval—for the second time in less than a year.

JUDGES, NOT POLITICIANS

Throughout the confirmation process, Judge Souter has consistently refused to answer specific questions about specific cases now pending on the Supreme Court's docket.

This reticence may disappoint some of the beltway special-interest groups, but it does not disappoint the American people.

The American people have always cherished, and jealously guarded, the independence of their Federal judiciary. And they understand that this independence is endangered—gravely endangered—by the brazen intrusion of special-interest politics into the confirmation process.

To his credit, Judge Souter has gamely resisted these political pressures. And, for this, he has earned the Senate's—and the Nation's—respect and gratitude.

Mr. President, it is my hope that the experience of this nomination will help set the standard for Senate review of future Supreme Court nominees.

Without a doubt, Senators have a constitutional obligation to probe a nominee's judicial and legal philosophy. They have the right to ask tough questions. And they may properly examine personal qualities that are of critical importance to a nominee's fitness to serve—qualities like openmindedness, integrity, a commitment to equal treatment under the law for all Americans, and an ability to understand real life people and their real-life problems.

These topics are all fair game. And no Senator should feel reluctant to press a nominee hard in these areas, and to reject that nominee if he or she falls short of the mark.

But, Mr. President, no nominee to the Supreme Court—or to any court, for that matter—has the obligation to explain how he or she will vote once confirmed.

Simply put, Federal judges should judge only from the Federal bench. They should not, and must not, prejudge cases from the bench of a Senate confirmation hearing.

In a recent article, former Chief Justice Warren Burger gave us all ample warning about the dangers of transforming Federal judges into politicians.

And I quote:

> No nominee worthy of confirmation will allow his or her position to become fixed before the issues are fully defined in detail before the Supreme Court with all the nuances that accompany a constitutional case. Presidents and legislators have always had platforms and agendas, but for judges the only agenda should be the Constitution and the laws agreeable with the Constitution.

THE SUPREME COURT'S FALL TERM

Mr. President, yesterday, the Supreme Court began its fall term. There are many important cases now pending on the Court's docket—cases involving the death penalty, the right to legal counsel, school desegregation, and the constitutionality of punitive damage awards.

With these important issues now under consideration, the Supreme Court deserves a ninth Justice who has the intellectual capacity to hit the ground running, to make a contribution to the intellectual life of the Court right from the start.

By any standard, Judge Souter has demonstrated an intellectual ability, skills as a lawyer and jurist, and a quiet, but firm, personal and judicial temperament that leave little doubt that he will make a significant contribution to the Court from day one.

Very simply, Judge Souter deserves to be confirmed by the Senate, and he deserves to be confirmed today.

Finally, Mr. President, I want to thank the distinguished chairman of the Judiciary Committee, Senator BIDEN, and the committee's ranking member, Senator THURMOND. They have conducted fair and comprehensive hearings. And they have greatly assisted the Senate in discharging its constitutional responsibilities.

I also want to congratulate my good friend and colleague, Senator WARREN RUDMAN. As most of us know, Senator RUDMAN's interest in this nomination extends beyond "advice and consent" to the bonds that flow from of a long and enduring friendship.

The success of Judge Souter before the Judiciary Committee, and almost certainly before the Senate later today, is as much a testament to the qualities of the Senator from New Hampshire as it is to the considerable qualifications of this fine nominee.

Mr. PACKWOOD. Mr. President, I rise today to discuss the nomination of Judge David Souter to be an Associate Justice of the U.S. Supreme Court.

No duty of a U.S. Senator is more important or deserving of careful consideration than that of a nomination to the Supreme Court. If confirmed, a nominee may well serve for decades, and his or her written opinions and ability to persuade fellow Justices will profoundly affect our lives, and the lives of future generations.

In the days since the Senate Judiciary Committee completed its hearings on Judge Souter, I have given this nomination a great deal of thought.

First, I have examined transcripts of Judge Souter's testimony before the committee.

Second, constituent organizations have shared their concerns with me about this nominee. This input was welcome and helpful in directing my attention to aspects of Judge Souter's record as well as the hearing proceedings.

Third, I have listened with interest to the reasoning of my Senate colleagues as they announced their respective positions on this nomineee.

Ultimately, of course, each Senator must keep his or her own counsel in a matter of this magnitude. I welcome this opportunity to share my decision on this nomination and the thinking which led me to it.

First, and I will not belabor this point because so many other Senators have covered it quite eloquently, Judge Souter has a superb educational background and impressive legal experience. The number of years he served as a State court judge, and State attorney general, leave no doubt of his legal competence.

In addition, those who know Judge Souter personally, gave him positive references almost without exception. This is true of: hearing witnesses; the judge's friends and associates who have been quoted in the media; and individuals of long acquaintance with Judge Souter who personally shared with me their high regard for him.

Judge Souter's associates find him personable, compassionate, and possessed of great integrity.

As important as outstanding professional competence and excellent char-

acter are, those qualities alone do not a Supreme Court Justice make. The Senate's constitutional duty to provide advice and consent in the matter of Supreme Court nominations demands that we look beyond these qualities to the most critical issue: what kind of steward of the Constitution would this nominee be?

There is absolutely no doubt that the next Justice to the confirmed will be the deciding vote on a number of issues of critical importance to Americans.

Keeping this in mind, as well as the duty of Congress to safeguard constitutional rights, I reviewed with particular interest Judge Souter's testimony on privacy, gender discrimination, civil rights, and freedom of religion.

Judge Souter was questioned on freedom of religion by committee members concerned about two of his actions as State attorney general:

First, his defense of an executive order calling for the lowering of flags on Good Friday, and

Second, his statement that the beliefs of Jehovah's Witnesses who refused to display the words "Live free or die" on their license plates were "mere whimsy."

Mr. President, I, too, felt concern about these positions which the judge had taken. Freedom of religion, one of the basic tenets on which our Nation was founded, means nothing if a State can establish one sect as more legitimate by its actions, or prevent the free exercise of religion. I was therefore gratified to note that the hearing record reflects that Judge Souter would apply strict scrutiny to laws that impair the free exercise of religion. His answer about the reasoning he would apply in cases where a State is alleged to violate the establishment clause was somewhat less clear. However, on balance, I am satisfied that the positions he took as Attorney General would not be reflected in his philosophy as a Justice.

Civil Rights is another area I red flagged for careful review, due in part to Judge Souter's now-famous alleged quote that "affirmative action is affirmative discrimination." I was also interested in the novel position he took as State attorney general that employee privacy rights prohibited the State from revealing its minority hiring practices to the Federal Equal Employment Opportunity Commission. However, Judge Souter's testimony again did much to allay my concerns. He did not reject the concept of affirmative action, and indicated that he would find it appropriate in certain circumstances. He also showed, in my view, a sensitivity to the degree that race discrimination affects our Nation, recognizing it as a tragedy. Finally, he left no doubt that Brown versus Board of Education is to him a matter of well-settled law.

On the issue of gender discrimination, Judge Souter indicated dissatisfaction in his testimony, as he has in his writings as an attorney and a judge, with the so-called middle tier of constitutional protection generally used. He is not the first to find fault with this standard. More important to me than his criticism of midlevel scrutiny, is what standard of protection he would apply in gender discrimination cases: Strict scrutiny? The rational basis test? Or a newly fashioned, more acceptable middle tier standard? This issue is of more than academic concern to American women, and I wish the record were more illuminating in this regard.

Finally, let me address the issue of the constitutional right to privacy. In this area of the law, more than any other, Judge Souter was reluctant to discuss his views, and he has been widely criticized for this. Judge Souter agrees that there is a fundamental marital right of privacy as found in Griswold versus Connecticut, which includes the right to use contraceptives. However, he stopped short of expressing his opinion of the reasoning in Eisenstadt versus Baird, in which the court found that the right to use contraceptives extends to unmarried persons.

He did this, I believe, out of an overabundance of caution rather than any desire to frustrate the factfinding efforts of the committee. It is obvious from the record that Judge Souter believed that any discussion of a case coming anywhere near Roe versus Wade in the line of privacy cases might cause him to comment on the merits of Roe. I disagree with his position that answering the committee's questions on Eisenstadt would have been improper. However, each nominee must decide for him or herself what the bounds of propriety are for discussing issues they feel may come before the court.

I also disagree with Judge Souter as to whether the right to choose recognized in Roe is a matter of settled law. However, in the face of my dissatisfaction and disagreement with some of his responses in this area, I keep coming back to one statement he made. In response to Senator KOHL's question: "Do you have an opinion on Roe versus Wade?" Judge Souter replied, "I have not got any agenda on what should be done with Roe versus Wade, if that case were brought before me. I will listen to both sides of that case. I have not made up my mind, and I do not go on the court saying, I must go one way or I must go another way."

My distinguished colleagues, based on what we know of Judge Souter's character, and the totality of his testimony, I take him at his word. And knowing that he is of an open mind on the question of abortion, I find encouragement in his statements about how he would evaluate a claim that a particular right is fundamental. Judge Souter voiced approval for Justice Harlan's approach, taking into consideration the history and traditions of the American people. If he applies that analysis, the right to choose must, I believe, be found to be fundamental because the legal structures against abortion in this country are of comparatively recent origin. Indeed, at the time our Constitution was written, abortion was permitted under the common law.

Further, I am convinced that Judge Souter is cognizant of the legal chaos that would ensue if the right to choose is struck down. He testified that the practical consequence of overturning Roe would be "a range of protection afforded which would raise complicated federalism issues." When asked by Senator METZENBAUM whether he would consider consequences, such as the death of women from botched illegal abortions, in determining whether the right to choose is fundamental, Judge Souter indicated strongly in the affirmative.

Although I take these as encouraging signs that this nominee would recognize that the right to choose is fundamental, I am not so naive as to assume what his decisions in individual cases would be on this or any other issue. To paraphrase an apt statement, which one Senator made in committee, I cannot be accused of making my decision on Judge Souter based on the single issue of abortion, because I do not know where he will come down on that issue. I do not believe we will be sent a nominee in the foreseeable future whose position on Roe and abortion will be easily discerned. Given those circumstances, and based on the totality of the record, I will vote to confirm Judge David Souter to the U.S. Supreme Court.

This does not mean that I believe it is inappropriate to ask nominees where they stand on the right to choose. Nor does it mean that if a nominee clearly indicated that he or she would overturn Roe that I would not mount a vigorous campaign against that nominee's confirmation. However, this nomination is not the occasion to wage that battle. The record simply does not indicate to me that Judge Souter would go to the Court with the intent to overturn Roe, or that he has an agenda to weaken constitutional protection against discrimination or freedom of religion.

Mr. President, I will vote to confirm Judge Souter, believing that the scholarly mind and compassionate heart which he evidenced during the confirmation hearings, will serve him and the American people well in his years on the Court.

39-059 O-91-10 (Pt. 19)

Mr. McCONNELL. Mr. President, I rise today in support of the confirmation of U.S. Court of Appeals Judge David H. Souter as an Associate Justice to the Supreme Court of the United States.

Before addressing the nominee's qualifications, I would first like to speak to the standard by which I examine nominees to the highest court in the land.

Over 20 years ago, as a legislative assistant in the Senate, I began to review and study the intent of our Founding Fathers in this important constitutional process. As a result, I devised a standard that I believe to be the Senate's role in this process. It was during this time that I wrote a law review article on this topic. Mr. President, I request that my article, "Haynsworth and Carswell: A New Standard of Excellence," Kentucky Law Journal (Volume 59, 1970-71), be included in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

[Article not reproducible in the RECORD.]

Mr. McCONNELL. Mr. President, an examination of the Senate's historic role in this confirmation process should begin with the political writings contemporaneous with the drafting and approval of the Constitution. In the Federalist, No. 76, in discussing the nomination process, Alexander Hamilton clearly defines the limits of the Senate's "advice and consent" power:

> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would . . . be an excellent check upon a spirit of favoritism in the President, and . . . prevent the appointment of unfit characters from State prejudice, from family connection, personal attachment, or a view to popularity.

Clearly, a test of ideology and politics was not contemplated. Also, the very structure of the proposed government, and the relationship of each branch to the other, supports this view. The framers intended for three separate and independent branches of government. The judiciary was to be free from political influences, insulated from the whims of a changing majority and answerable only to the law and a public that expected the judicial branch to despense justice free from the taint of popular politics. Any attempt to deny confirmation on the basis of a philosophy, that is within the mainstream of American political and judicial thought, is an assault on this tripartite structure of government. It is clear under our form of government that the advice and consent role of the Senate in judicial nominations should not be politicized.

Therefore, from Hamilton's description of the Senate's role in the nomination process, I have identified five basic criteria for reviewing nominations to the Supreme Court: Competence, temperament, judicial propriety, judicial achievement, and personal integrity.

Obviously, there are other theories to apply regarding the correct confirmation test, at various times during the history of Senate confirmation proceedings of Supreme Court nominations, the personal or political philosophy of the nominee has become the principle, and sometimes the only, criteria for fitness to the Court. Most recently, we went through the shameful debacle of the Bork confirmation process. The Bork proceeding was, thus far, the nadir of the 20th-century version of the bitter battles of the 18th and 19th century where judicial nominees were rejected because of partisan and ideological differences. The political judgment of a nominee's fitness for judicial office has found modern day validation in the writings of Yale Law School Professor Charles Black.

In my opinion, Senator KENNEDY stated the correct view during the confirmation of Justice Thurgood Marshall. Justice Marshall's nomination was strenuously opposed by Senate conservatives. The senior Senator from Massachusetts said:

> I believe it is recognized by most Senators that we are not charged with the responsibility of approving a [Supreme Court Justice] only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance.
>
> We are interested really in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle this most sensitive, important, responsible job.

There is no doubt that fundamental differences continue to exist as to what standards of fitness to apply. However, unlike the competency, integrity criteria, the successful application of the political fitness test requires an environment of intense political activity. As the Bork nomination proved, an extensive record of written achievement can create such a fertile environment.

However, the ideological litmus test may be applied differently when the nominee has neither written nor stated sufficient views on particular issues. Thus, the mechanism for determining whether the candidate will pass the political litmus test, may itself become the test. For example, during the Souter hearings, ideological opposition evolved to opposition based upon the nominee's failure to answer specific questions relating to issues that are most certainly to come before the Court.

With this new approach, those opposed to Judge Souter have tried to apply their political litmus test in a different fashion. Unhappy that the nominee has not provided any so-called controversial material—disagreement with the questioner's position—upon which to oppose the nominee, some would reject him for not commenting on issues of a future case before the Court. It started with general concerns about the open-mindedness of the candidate:

> David Souter must assure the Senate and the public that he has an open mind, is forward-looking and has a vision of the Constitution which respects individual rights. If he fails to meet this burden, the Senate should withhold its consent. (Nan Aron, Director, Alliance For Justice)

Later, the demand for David Souter's personal views on specific constitutional issues arose.

While I agree that a nominee should have an open mind, any questioning beyond a genuine effort to determine this openness is clearly inappropriate. Likewise, any attempt to elicit a specific response regarding an issue which is reasonably expected to come before the Court in the future is fundamentally unfair to any future parties and a violation of the judicial canons of ethics.

Moveover, such tactics begin to impinge upon an even greater principle, the constitutional doctrine of separation of powers. Warren E. Burger, in commenting on what he characterizes as a new assault on the independence of the judiciary, refers to this line of questioning as an inquisition. He states that the practice of calling upon Supreme Court nominees to answer questions in advance of how they would vote on specific constitutional issues is demeaning to, and a corrosive action upon, the Court and its necessary independence:

> Does such an inquisition not demean and undermine our historic separation of powers? If Senators can commit a future justice as to how he or she will decide a particular case, who then is construing the Constitution? Where does this place the high duty of constitutional interpretation?
>
> Now the question is whether the American people are witnessing a confirmation process in which special interest groups have flooded Senators with questions demanding advance commitment from the nominee as to what his or her vote will be on some pet subject.

Justice Burger was further quoted as saying:

> Of course, no nominee worthy of confirmation will allow his or her position to become fixed before the issues are fully defined in detail before the Supreme Court with all the nuances that accompany a constitutional case.
>
> To expect a nominee to make commitments, or even to engage in substantive discussion of a case yet unseen, borders on the preposterous. Judges, like Senators and Presidents, while entertaining general impressions on a subject, have been known to change their minds when they have all the facts and circumstances as distinguished from some hypothetical proposition.

Lloyd N. Cutler, counsel to former President Jimmy Carter, in a written article disapproving of this type of questioning of Judge Souter, wrote:

As Prof. Charles Black has noted, the Court is the great legitimator of our government, the final arbiter of whether or not the executive and legislative branches have exceeded or abused their limited powers. To perform this vital function, the Court must be, and must appear to be, as independent of the President and of the Congress as humanly possible. While the President must appoint and the Senate must confirm or reject the nominee, it is vital to the integrity of the process that neither they nor the rest of us insist on knowing in advance how a new Justice is going to vote in a particular case.

The key to the Court's critical constitutional role lies in the mystery of its future actions. If the Justices appear to have committed their votes to the President, who appoints them, or to the Senate which confirms them, we will no longer trust them as our ultimate authority on the Constitution's meaning.

In August, speaking before the American Bar Association, Supreme Court Justice John Paul Stevens warned against either the executive or legislative branches trying to determine in advance the views of the nominee:

You really wouldn't want a judge who would say in advance how he or she would vote on particular issues. That's not part of the independent judiciary that's such an important part of our tradition and our history.

I continue to believe that the Senate should reject the political litmus test. I also believe the Senate should reject any test requiring a nominee to state in any substantial way how he or she will vote on a particular issue that may come before the Court.

Mr. President, regarding Judge Souter's qualifications, it is quite obvious that after 5 days of hearings and 40 witnesses, Judge Souter's competency is certainly not in doubt. The American Bar Association's standing committee on the Federal judiciary has given him its highest rating, "well qualified." As both a lawyer and judge, his peers have spoken of his brillance and his outstanding intellectual capacity.

As to the second criterion, judicial achievement, Judge Souter is also very qualified. He has served with distinction in the following New Hampshire offices—assistant attorney general, attorney general, State superior judge, and State supreme court judge. Most importantly he has a depth of judicial experience including the hands on experience of a trial judge, a significant skill and perspective to take to the Higher Court. With his current position on the U.S. Court of Appeals, Judge Souter has 12 years on the bench. In fact, he has more judicial experience than all but one of the current Justices had at the time of their confirmation. John Broderick, a former New Hampshire Bar Association president, said of his judicial ability, "he's a judge's judge, extraordinarily talented and impeccably fair."

Judge Souter clearly meets the exacting standard of excellence. Academically, Judge Souter, a Phi Beta Kappa, graduated magna cum laude from Harvard College. Afterward he studied at Oxford University for 2 years as a Rhodes scholar. He completed his academic and professional studies at Harvard Law School. A "first rate scholar," says a former president of the New Hampshire Bar Association.

Last, a thorough examination of his background has found his judicial propriety and personal integrity to be above reproach. Even his most severe critic makes no challenge regarding Judge Souterh's personal or professional honesty. The ABA's standing committee stated that "Judge Souter's integrity, character, and general reputation appear to be of the highest order and without blemish."

In conclusion, Mr. President, under these standards of fitness I will vote to confirm Judge David H. Souter as Associate Justice to the Supreme Court.

Mr. COATS. Mr. President, in the last several years the Senate's constitutional role of advise and consent has lost its way in a thicket of policy debates and partisan agendas. Recent confirmation fights have scarred the process with bitterness and distortion. Senate hearings have become political inquisitions, rehashing the shifting debates of current elections.

But with the nomination of Judge Souter, we have the opportunity to defy the recent past.

To begin with, we must relearn a basic principle, a principle concerning how the Senate should treat the President's Supreme Court appointments. A principle about what the power of nominations means.

This is not a debate we conduct in a vacuum. The doctrine of advise and consent was given considerable attention by the founders. Alexander Hamilton wrote that the Senate should approve a president's nominee unless there were *"Special and strong* [emphasis mine] reasons for refusal." And further, that when the Senate oversteps its proper bounds, the result is "the full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly."

Senatȯr George Cabot of Massachusetts wrote in 1799, "I have always rejected the idea of non-concurrence with a nomination merely because the nominee was less suitable for the office than thousands of others: He must be positively unfit for office, and the public duty not likely to be performed by him, to justify in my mind the non-concurrence. It has always appeared to me that a departure from this principle would soon wrest from the President altogether the essence of nominating power, which is the power of selecting offices."

A judicial nomination is not properly a political struggle for the direction of the court between executive and legislature. That decision was made in a national election 2 years ago. The president has earned the right to make his choice under the Constitution. The Senate, quite simply, has no political role in this process at all. The criteria for our judgment is character, experience, and intelligence—these minimum standards of fitness. These limited determinations exhaust our appropriate involvement.

But with Judge Souter, we can say more than the undisputed fact he is fit for office. We can say he will bring exceptional talents, temperament, and knowledge to the court. This nominee merits more than grudging acceptance. He deserves our strong support.

His academic record is unexcelled. His service to New Hampshire as attorney general was outstanding. His tenure on the New Hampshire supreme court was distinguished. He is a scholar of the law and an individual of personal loyalty and religious conviction.

But above all, he takes it as his purpose to ensure fidelity to the words of the Constitution and the original intent of the framers. In a 1986 case Judge Souter wrote that "the court's interpretive task is to determine the meaning of * * * [constitutional language] as it was understood when the framers proposed it."

Some have attempted to define this approach as a variety of extremism. But it was once the dominant view of constitutional law.

Justice Nathan Clifford, in 1874, summarized this attitude, "courts cannot nullify an act of the legislature on the vague ground that they think it is opposed to a general latent spirit supposed to pervade or underlie the Constitution. * * * Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism." Justice Felix Frankfurter, about 90 years later, reflected, "as a member of this court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."

I am convinced that the job of the judge is the application of the law, not the creation of new laws. The Supreme Court should be an instrument to check Federal expansion, not an instrument of Federal expansion. It is a principle, by every indication, that Judge Souter supports.

The alternative is to turn the court into a source of unpredictable interventions in policy debates. Judges become oriented toward political outcomes. Courts become political tribunals, and the consequences for democracy are profound.

Important decisions are taken out of the hands of voters and put into the hands of unelected judges. "If this is all that judges do," wrote Alexander Bickel, "then their authority over us is totally intolerable and totally irreconcilable with the theory and practice of democracy." Justice Hugo Black, who was occasionally guilty of the sin he condemns, warned that the Nation could "cease to be governed by the law of the land and instead become one governed ultimately by the rule of judges." He preferred to put his faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of the fairness of individual judges." Abraham Lincoln said that under an activist court, "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

We cannot predict what decisions the court will be forced to make in future years. Issues change from decade to decade, even from year to year. The things that seem most important today may be relegated to footnotes in the dissertations written when the century turns. The most important attribute of a judge is his judicial philosphy and temperament, not his stand on current and shifting political debates.

By this standard, the president has made an excellent choice. He has appointed a candidate of judicial distinction and judicial restraint—a judge who will leave to legislators the business of legislation. And I hope the Senate will respond with its careful consideration and overwhelming support.

Mr. COHEN. Mr. President, the Senate's role in judicial appointments, and particularly the appointment of members of the U.S. Supreme Court, is one of its most important functions. In fulfilling its constitutional duty of advice and consent, the Senate shares with the President the critical responsibility of shaping the quality of the Federal judiciary and, therefore, the quality of justice in our Nation.

Although there may appropriately be a strong presumption in favor of a Presidential nominee, each Senator has an obligation to evaluate the qualifications and competence of those individuals nominated by the President in order to meet the responsibility imposed by the Constitution. After reviewing with some care David Souter's academic and professional qualifications, and his writings and testimony before the Judiciary Committee, I believe that Judge Souter should be confirmed for a seat on the U.S. Supreme Court.

The Judiciary Committee's hearings on the Souter nomination were lengthy and comprehensive. With few exceptions, the members of the committee and those who watched the hearings were impressed with Judge Souter's intelligence, his thoughtfulness and his strong streak of independence. His background is equally impressive, from his notable educational credentials to his experience as a State attorney general, trial judge, and New Hampshire Supreme Court justice.

The Standing Committee on the Federal Judiciary of the American Bar Association unanimously found Judge Souter to be "well qualified," its highest rating. The president of the New Hampshire Bar Association testified that "those of us who have witnessed Judge Souter's judicial performance firsthand can, in good conscience, report to this committee that he possesses * * * a first-rate legal mind, a flexible and curious appetite for the law, an unbiased ear for argument, an uncommon civility and * * * a quiet compassion."

There is, of course, uncertainty on how Judge Souter will rule on issues of considerable importance, particularly the issue of abortion. Many individuals and organizations who support a woman's right to choose, including myself, have reservations about what Judge Souter will do once he is on the Court. However, I am convinced by Judge Souter's testimony that he brings no personal agenda to the Court, and that he will be an open minded, fair and compassionate jurist.

I do not believe that Judge Souter's intelligence, his integrity, his respect for the rule of law and the Constitution, or his commitment to the fundamental principles of justice and equality can be questioned. It is by these standards, together with professional competence, that Judge Souter and other nominees to the Federal judiciary should, in my opinion, be judged. I believe Judge Souter has demonstrated the kind of qualities that will make him a fine addition to the U.S. Supreme Court.

Mr. ROBB. Mr. President, I rise to declare my support for the confirmation of Judge David H. Souter to the Supreme Court of the United States.

I followed Judge Souter's testimony before the Judiciary Committee with interest. He was questioned at great length and, at times, sharply. Yet I did not hear anything which would cause me to vote against his nomination.

Judge Souter's objective academic qualifications are superb. More persuasive, though, was the subjective evidence offered on his behalf by a number of witnesses, including two former Democratic attorneys general of Virginia, one of whom was my successor as Governor.

Many people have raised concerns not about what was said in the Judiciary Committee, but about what wasn't said. While I share the concerns of many about critical issues, including the right to privacy, I was impressed by Judge Souter's apparent willingness to listen to the arguments presented to him. In casting my vote on his behalf, I add my fervent hope that Judge Souter's openness and willingness to listen remain hallmarks of his service as Associate Justice of the Supreme Court.

Mr. HATFIELD. Mr. President, I will vote to confirm the President's nomination of Judge David Souter to the Supreme Court when the Senate turns to this matter later today. Like the majority of my colleagues, I was enormously impressed by Judge Souter's personal decency, intellectual capacity and legal expertise during his recent testimony before the Senate Judiciary Committee. I will cast my vote for Judge Souter with full confidence that his will be a voice of reason and fairness on the bench in the years ahead.

The fact that this nomination comes at a time when our Nation's attention is focused on Roe versus Wade has forced all of us to think long and hard about how we view the Supreme Court and how we approach the Senate's confirmation process. I want to share briefly with my colleagues some thoughts on this nomination, on this process and on the complicated and sometimes polarizing times in which we live.

Undoubtedly, there are organizations and individuals who will accuse those of us who vote to confirm Judge Souter of being insensitive to their concerns and to their depth of commitment. That charge cuts to the heart of what I believe is a very serious misunderstanding of this confirmation process.

If part of our constitutional responsibility to give our advice and consent regarding a judicial nomination involved making sure that the nominee's views on specific issues match our own, I am afraid I would never be able to support a judicial nomination. I certainly would not be able to support this one. Why? Because I know where Judge Souter stands on an issue I care and feel deeply about: the death penalty. Unlike abortion rights activists whose opposition to this nomination stems from the fact that they do not know where Judge Souter stands on Roe, I know where he stands on the death penalty. He stands firmly on the other side of the issue. As deeply and strongly as some people feel about Roe I feel just as deeply and strongly that the death penalty is not merely wrong but fundamentally immoral.

Perhaps there are those who will argue that my opposition to the death penalty is somehow rendered meaningless by my willingness to confirm a Supreme Court nominee who disagrees with my position—just as there are those who will question the commitment of abortion rights Senators who vote for a nominee whose position on abortion they do not know. But, Mr. President, I do not exaggerate when I suggest that this single-minded vision, if it prevails, could destroy our democracy.

Our population is infinitely diverse in race, ethnic origin, economic status, religion, and personal values. Our States and regions are equally diverse in history, geography, and economic base. This pluralism and individualism argues against our survival as a nation. But we have survived—despite often bitter debate and a bloody Civil War. We have survived because our forefathers gave us a constitutional government based on pluralism and individualism, and a Supreme Court free of daily political pressures.

To apply a single-issue litmus test to a Supreme Court nominee would be to contravene the fundamental principles of American democracy. As the Oregonian stated in its September 20, 1990 editorial "* * * spokesmen for abortion-rights and women's groups are wrong in trying to make Souter's position on Roe versus Wade [sic] the sole test of whether he should be confirmed." I agree and refuse to apply such a test in the case of Judge Souter.

Unfortunately, Mr. President, I am convinced that the highly charged political atmosphere in which Judge Souter has found himself is largely a problem of our own making. On one hand, I give great credit to my colleagues who refuse to allow this nomination, and indeed this entire process, to become a series of political litmus tests. But on the other hand, I am increasingly convinced that the very fact that all judicial nominees are now greeted with more questions about politics than about principles is a direct indictment of us and of what this process has become.

We have allowed this political polarization to occur—indeed we have fostered an environment in which single-issue politics flourishes and prevails—by being more interested in ducking the tough issues than a taking responsibility for them. This legislative paralysis has resulted in people looking to the courts for political activism. That is not only wrong, it is also dangerous.

We live in enormously complicated and increasingly polarized times. But that fact simply underscores the urgent need for both the continued integrity of the Supreme Court and for Congress to take responsibility for the tough issues at hand. Voting to confirm Judge David Souter's nomination will ensure the former. But only we can ensure the latter.

Ms. MIKULSKI. Mr. President, the Constitution requires that Members of the U.S. Senate advise and consent to a Presidential nomination for a vacancy on the Supreme Court.

Once consent is given, a Supreme Court Justice may serve for the rest of his or her life, virtually unaccountable to any person or group.

This is as it should be. We don't want our Supreme Court to be swayed by momentary Presidential passions, or forced to choose between justice and votes.

In return for our consent, however, the Members of the U.S. Senate have a right to know for whom we are voting.

I have no doubt that Judge Souter is professionally competent. Nor do I question his personal integrity.

But I cannot cast my vote to confirm a man who has been silent, vague, or evasive every time he has been asked if he would uphold fundamental constitutional rights—rights of concern to every American and particularly of concern to America's women.

Judge Souter has refused to discuss how the Constitution's guarantee of equal protection under the law protects women against gender discrimination; and he has refused to discuss the fundamental right of privacy.

Through most of the Senate's confirmation hearings, Judge Souter dazzled us with his wit and intelligence. He discussed at great length many areas of the law with which he will have to deal. He spoke on issues of desegregation, the death penalty, and the separation of church and state.

But whenever questioning turned to the constitutional rights of women the eloquent Judge Souter became the intractable and laconic New Englander of legend.

And so today, we do not know if Justice Souter would vote regarding women under the protection of the Constitution.

We don't know if Justice Souter would vote to protect a woman's right to decide when and if to bear a child.

Mr. President, women were not even allowed to vote in this country until 1920. Only 16 women have ever stood on the floor of this Chamber as a U.S. Senator. Only in the last generation have many women truly started to gain control over their lives, their careers, and their families.

And we still have far to go.

We have worked too hard and come to far to accept silence and evasion from a Supreme Court nominee.

The U.S. Senate represents 250 million Americans. We cannot act on their behalf without candor and from men like Judge Souter.

I respectfully submit that it is not acceptable for a Supreme Court nominee to conceal his views of the critical constitutional issues of the right of privacy.

I cannot make a leap of faith for Judge Souter. I will vote against his confirmation.

Mr. KERRY. Mr. President, as I contemplate a vote on this nomination, I know that Judge Souter will be confirmed overwhelmingly. I doubt there will be more than 10 votes against him. So I am voting on a nomination that is not in doubt.

Judge Souter has been impressive in the confirmation process. He is obviously extraordinarily bright and articulate, and worthy of the high regard in which he has long been held by my friend Senator RUDMAN, whom I respect greatly.

There is no question of the potential for Judge Souter to make a significant contribution to the Supreme Court, in the tradition of Justice Harlan—a goal he has set for himself.

He may well be as some have said, "the best nominee we could expect from this President."

But while there is a great deal that commends this nonimee to me and urges me to vote for him, I want my vote to underscore my deep concern about two areas.

On civil rights and on women's rights there are significant questions about Judge Souter which loom large enough to justify a vote against this nominee. This seat is a critical seat on the court at a critical moment in its history.

Many of my colleagues have come to the floor and bemoaned the gaps in their knowledge and in the record about Judge Souter's philosophy in these areas. They have also expressed concerns about some of the things he did say.

For example, in his testimony, Judge Souter distinguished between "marital privacy" which he stated "can and should be regarded as fundmamental" and other privacy, "not every aspect of [which] may rise to a fundamental level."

Judge Souter suggested that in the privacy area, one had to engage in a balancing test, under which any fundamental State interest can be balanced against the fundamental interest of the individual to determine which interest shall prevail—the individual's right of privacy, or the "fundamental right" of the State, which Judge Souter did not define.

There are two problems here, and both are serious.

First, because Judge Souter is vague as to what might constitute a "fundamental interest" of the State, in theory, he might find that almost any interest of the State could be determined to be "fundamental." Judge Souter's balancing test here might be interpreted as requiring only some-

thing more than a rational relationship test. The test implies that Judge Souter might well agree to loosen current constitutional restraints on the ability of Government to intervene in people's private lives.

Second, Judge Souter explicitly, carefully, and definitively distinguished the right of privacy of people who are married from those who are not. The former have a fundamental right, according to Judge Souter, looking back to the intent of the Founding Fathers; the latter have some rights, but these may not be fundamental, Judge Souter testified.

This is an odd and disturbing distinction. Unfortunately, Judge Souter refused to answer other questions which would have more fully explained the practical meaning of the distinction, so it is difficult to understand the meaning of the distinction. Nevertheless, it is a troubling one.

These are examples only, but they suggest why so many of us find this nomination to be, as in the words of Senator BIDEN, "a hard case," requiring a difficult choice.

In the past, I have voted for Justices whose judicial philosophies were far from the approach that I would like to see taken by the Supreme Court, including Justice Scalia and Justice Kennedy.

Today, I have decided to make a different choice to carry out my responsibility of advise and consent. I choose with my vote to express my concern about the future of civil rights and women's rights, and therefore will vote against this nomination.

Mr. HUMPHREY. Mr. President, my remarks will be brief, since Judge Souter's eminent qualifications for confirmation as a Supreme Court Justice have been thoroughly demonstrated and discussed.

Needless to say, New Hampshire is extremely proud of Judge Souter. His legal and judicial accomplishments, and his lifelong commitment to public service, were already well-established before the confirmation hearings began.

But if there were any doubts about Judge Souter's fitness for the High Court, they were demolished by his impressive demonstration of legal knowledge and unflappable judicial temperament during the ordeal of confirmation hearings. Once his testimony was completed, even the skeptics understood what those from New Hampshire have known for years: Judge Souter has the "right stuff" to serve with distinction on the U.S. Supreme Court.

Of course, no nominee for the Supreme Court can be "all things to all people", and Judge Souter is no exception. To his credit, he declined to yield to the demands of those who sought a pre-confirmation commitment on crucial issues that will be coming before the Supreme Court in future cases. Ironically, Judge Souter's demonstration that he would listen with a fair and open mind to the arguments on such issues was attacked as grounds for opposing him by those who demanded a pledge to rule their way in future abortion cases.

I am pleased to see that these blatant assaults on the principle of judicial independence have failed to carry the day. Many of the same groups that conspired to defame Judge Bork 3 years ago have called for the rejection of the moderate Judge Souter because he has declined to endorse their liberal agenda before taking a seat on the Court.

Although a few Members have heeded that call, I am confident that an overwhelming majority of the Senate will reject it. Any other result would cause irreparable damage to judicial independence.

In that regard, it is also important to recognize that portions of Judge Souter's testimony were of little comfort to those who seek a more conservative judiciary. I readily admit that some of his testimony was a bit disturbing to this Senator. For example, I do not share his assessment that Justice Brennan has been a peerless defender of the Constitution—at least not the Constitution that I know. His testimony also indicated that Judge Souter needs to be more sensitive to the dangers of judicial usurpation of legislative powers. I suspect that this may be attributable to the fact that he has spent his judicial career in the relatively sane environment of the New Hampshire courts. After a few months exposure to the excesses of some of the Federal courts, I am confident that he will develop a keener appreciation of this problem.

While Senators on both sides of the aisle may have their individual reservations on various issues, it is clear that Judge Souter is a sound and solid choice for the Supreme Court at this time. The American people entrusted President Bush with primary responsibility for selecting Supreme Court Justices in the last election, and he has chosen well.

Judge Souter has demonstrated a rare combination of qualities which will serve the American people well—a keen understanding of the Constitution coupled with a strong sense of fundamental fairness. I strongly support his confirmation and urge my colleagues to do the same.

Mr. LIEBERMAN. Mr. President, after careful consideration, I have decided to support the nomination of Judge David Souter to the U.S. Supreme Court. This is based upon my own conversations with Judge Souter, the material we have received from both supporters and opponents of his nominations, Judge Souter's testimony before the Judiciary Committee and the committee's report and additional and dissenting views.

I have concluded that Judge Souter is extremely well-qualified for the position of Associate Justice of the U.S. Supreme Court. He has received the highest rating of the American Bar Association's Standing Committee on the Federal Judiciary. His long experience as an attorney general, a trial judge, and a State supreme court justice gives him a great deal of perspective on, and sensitivity to, the effect of his decisions on litigants and the judicial system. He clearly is very intelligent, and capable of rendering well-reasoned decisions solidly grounded in both the facts of the case and the law as he interprets it.

I, of course, have no greater insight than any of my colleagues into what result Judge Souter would reach in specific future cases. I nevertheless will vote to give advice and consent to his nomination because I believe that he will approach the issues before him with an openmind in an attempt to reach a fair and reasoned conclusion. A judge must decide each case in the light of the facts and arguments presented, and the law as it stands at the time judgment is rendered. I believe Judge Souter will do this, that he will not decide these cases in the abstract, and that he will not join the Supreme Court with an agenda to fulfill.

I am comfortable that, in voting to confirm Judge Souter, we will place on the Supreme Court a man who will approach the new legal issues of the next century in a careful, methodical, and analytical manner. I believe Judge Souter will serve with honor and distinction. I will, therefore, vote to confirm Judge Souter as an Associate Justice of the U.S. Supreme Court.

Mr. HEFLIN. Mr. President, I come to the floor today to reaffirm my announced position on the confirmation of Judge David Souter to be Justice on the U.S. Supreme Court. I strongly believe that Judge Souter has the necessary qualities to be a Justice on the Court, and I will vote in favor of his confirmation.

I believe that Judge Souter will bring to the Supreme Court strong credentials will serve him well over the course of his tenure on the Court. His academic background is clearly outstanding, and his legal experience more than adequately qualifies him to sit on this Nation's Highest Court. Further, I believe that Judge Souter will bring the reflected values of a small town that is tightly knitted, that cares about its neighbors, and that reflects traditional American concepts of respect for the rights of others and respect for a fair and just society.

I accept Judge Souter's responses to the committee's questions on a wide range of legal issues. I believe that he will respect precedent and be a faith-

ful guardian of the Constitution. Further, I know that Judge Souter will bring a historical perspective and a clear-headed approach to the analysis of issues which will come before him.

In conclusion, I wish to add my voice to the chorus of support which has followed this nominee, and I urge my colleagues to vote in favor of his confirmation.

Mr. CONRAD. Mr. President, I rise to speak in support of the nomination of David H. Souter to be an Associate Justice of the U.S. Supreme Court.

Judge Souter was nominated by President Bush to replace one of this century's most vigorous defenders of individual liberties, Justice William Brennan. In his 34 years on the Supreme Court, Justice Brennan authored more than 1,200 opinions. He leaves a legacy that extends from Baker versus Carr—a decision that enunciated the one-man, one-vote principle and opened the courts to litigation over voting rights—to the case New York Times versus Sullivan—a case which is the basis for the expansion of first amendment speech and press guarantees that we have seen in this century. Justice Brennan's principled application of constitutional protections has made this country a better place to live for many Americans.

Justice Brennan's departure also means that his replacement will step onto a court fiercely divided over issues like the separation of church and state, the question of exclusion of illegally seized evidence from State and Federal trial proceedings, and the issue of privacy, to name just a few. It is indeed a pivotal time for the U.S. Supreme Court.

Mr. President, in the fall of 1987, the Senate and this Nation experienced one of the most divisive confirmation battles in our history. It was during that year—my first in the Senate—that I realized that there were few Senate responsibilities more solemn than the constitutional duty of advise and consent. Nominees to the High Court face the prospect of deciding cases when every Member of this body is long gone. They may cast deciding votes on issues which we cannot even imagine today. Our decision to approve a nominee cannot be amended. There is no omnibus bill to revisit approval of a nominee. It is a decision we can only make once, and it must be wisely made.

I hold deeply to the view that the Senate has a coequal role in the nomination of Supreme Court Justices. It surprises advocates who argue for Presidential deference to know that in one early draft of the Constitution, the U.S. Senate was the body which chose nominees to the High Court. The current partnership between the Senate and the White House was settled on to provide an appropriate balance between the branches.

While the Constitution confers on the Senate the duty to share the responsibility of nominating a Justice, it does not give guidance on the criteria for evaluation of such nominees. Each Senator must develop his own standards. The nominee must be intelligent, honest, and competent. The nominee must also possess a deep understanding of the constitutional issues that have been crucial in this nation since its inception: State and Federal powers and the rights and liberties of all individuals.

Our duty in this body, then, is to elicit the views and thoughts of Supreme Court nominees. Accordingly, I closely followed the nomination of Judge Souter. I watched or reviewed the tesimony from his confirmation hearings. I solicited the views of members of the bar of my own State of North Dakota. I conferred with Members of this body on the nomination of Judge Souter. And, finally, I was fortunate to have the opportunity to meet and spend some time with Judge Souter.

From this examination, a very clear picture of Judge Souter has emerged: A highly intelligent, dedicated jurist who has an impressive command of the issues that may come before the U.S. Supreme Court.

Judge Souter is clearly qualified to serve on the Supreme Court. His legal career is very impressive, and his experience spans almost all aspects of the legal profession. His decision to dedicate much of his career to public service is laudable. Colleagues who have opposed him in Court, or who have lost cases before his court, have universally applauded his intellect, his dedication to fairness, and his judicial temperament.

His appearance before the Senate Judiciary Committee demonstrated that he possesses an impressive command of modern constitutional issues. He spoke knowledgeably about issues that have occupied the Court in the 20th century, including the separation between church and state; civil rights; Federal affirmative action programs; the guarantees of free speech and the free exercise of religion; the constitutionality of the death penalty; the relationship among the various branches and levels of Government; the powers and limits on powers of the State; and the rights and liberties of individuals.

I will vote to confirm Judge Souter, but I had one concern. While I understand the Judge's personal view that he could not comment on issues which might prejudge cases that could come before the Court, I was dismayed with what I thought was selective application of this principle.

For instance, when asked by Senator SPECTER about his view of the free exercise clause as expressed in the case involving the use of peyote by drug counselors, Judge Souter said:

> On the free exercise question, I have to be circumspect to a point because I believe that the Smith case is subject to a motion for rehearing presently before the Court. But I think there are some things that with a reasonable degree of specificity I can say.
>
> The first is that I do not come here and prior to the decision of that case or after it I have not had personal reason to want to reexamine the strict scrutiny test which has been applied in a lot of cases since Shurbert. I recognize the reasoning of the majority opinion. I mean I can follow it; I understand what the Court was saying in the Smith case. But I also recognize I think the fact that case could also have been examined under the Shurbert standard. As you mentioned or indicated a moment ago, that, of course, is exactly what Justice O'Connor did in her concurring opinion in that case. (Transcript, September 14, pp. 47-48)

This amplification of views on the free exercise clause is utterly appropriate, in my view. And, yet, in response to questions in any way related to Roe versus Wade or the War Powers Resolution, for example, Judge Souter invoked his prohibition on responding. In response to the very next question posed by Senator SPECTER, Judge Souter stated:

> The first is, of course—and I know you recognize this—that because of the reasonable likelihood that the constitutionality of the War Powers Resolution could come before the Court in some guise, I cannot give an opinion on the constitutionality of that.

Judge Souter, in fact, refused to reflect in any way on some key constitutional questions. I agree that he should not have to indicate how he would vote in particular cases, but he could discuss his views on many issues without revealing the way he might vote.

This pattern greatly concerns me because I fear it may betray a lack of candor on issues which might provoke opposition from this body. I oppose the single-issue politics which may have fostered this strategy, yet I believe Judge Souter could have forthrightly replied to many of the questions that he declined to answer without jeopardizing his independence or integrity on the bench. His refusal to answer these questions has left the Senate to consider his nomination without knowing his views on the pivotal issues of civil rights and race and gender discrimination, the right to privacy, Federal powers, biomedical ethics, and many others. He has tried to calm the fears of concerned Senators by assurances that he will listen. I believe that he will listen, but I fear that he has not fully revealed views that should appropriately be discussed.

I hope, Mr. President, that I am wrong and this was not a concerted strategy, but I must agree with my colleagues on the Judiciary Committee

and express my dismay at Judge Souter's unwillingness to answer crucial questions on some major constitutional issues of our day.

Mr. President, despite this concern, I shall support the nomination of Judge Souter to the U.S. Supreme Court. I found him in our meeting together to be an open, learned individual. I believe his statement that he shall listen to those who come before the Court. I believe that he truly understands that millions of Americans' lives may be affected by decisions he renders. This is an awesome responsibility, and he has convinced me that he is worthy of the trust and confidence of the American people.

Mr. NUNN. Mr. President, I rise today to announce my support for the nomination of Judge David H. Souter to the U.S. Supreme Court. I believe that he is a well-qualified individual who will serve with distinction on our Nation's highest court.

Judge Souter has an impressive academic record and a career of distinguished public service. Following his graduation from Harvard College in 1961, he was selected as a Rhodes scholar and attended Magdalen College, Oxford, between 1961 and 1963. He then enrolled in Harvard Law School and was graduated in 1966.

In his first job out of law school, Judge Souter practiced law in a private firm in Concord, NH, and 2 years later began 10 years of service with the State attorney general's office. In 1976, he was appointed attorney general for the State of New Hampshire, a position he held for 2 years until he was appointed to the superior court bench. Five years later, he was named an associate justice of the New Hampshire Supreme Court. Earlier this year, President Bush nominated Judge Souter to the First Circuit Court of Appeals.

I believe that Judge Souter's life time commitment to public service makes him a good candidate for the Supreme Court. From my review of the Judiciary Committee's hearing records and from my conversations with colleagues, I am convinced that Judge Souter will not be an ideologue with an agenda, but rather a temperate jurist. I believe that he has the intellect and integrity to fulfill his constitutional duties as an Associate Justice of the Supreme Court.

Finally, I believe that Judge Souter will not be judicially rigid. Instead, it is my hope that he will decide the cases that come before him with a healthy application of common sense. It is my view that our Founding Fathers intended to set forth general principles which would remain the foundation of our Nation and that they viewed the Constitution as a living document to be interpreted with common sense in light of changing circumstances and conditions. Mr. President, I believe that Judge David Souter will use such a standard and will serve our Nation well.

Mr. DOMENICI. Mr. President, I rise today to express my support of the confirmation of Judge David Souter to be an Associate Justice of the U.S. Supreme Court.

Under the Constitution, the Senate has the duty to offer advice and consent on judicial nominees. Our primary concerns when confirming a nominee for the Supreme Court should not focus on specific issues, but rather on the nominee's ability to serve on our Nation's Highest Court.

The Senate must determine whether the individual that the President has nominated has the competence, integrity, temperament, and respect for the basic principles of our constitutional system necessary to serve as a Justice of the Supreme Court. I am convinced that Judge Souter possesses these qualities.

First, a Justice must be a person who has exhibited exceptional competence in the law: He or she should be learned in the law and have extensive experience in the practice of the law.

Judge Souter graduated magna cum laude and Phi Beta Kappa from Harvard University in 1961. He continued his education as a Rhodes scholar at Oxford University in England and then returned to Harvard, where he earned his law degree.

After 2 years of private law practice, Judge Souter entered public service. He was an assistant attorney general of New Hampshire for 3 years, deputy attorney general for 5, and attorney general—the State's chief law enforcement official—from 1976 to 1978.

In 1978, he was appointed to the New Hampshire Superior Court on which he served for 5 years until he was appointed to the New Hampshire Supreme Court. In 1990, Judge Souter was unanimously confirmed by the Senate to be a judge on the U.S. Court of Appeals for the First Circuit, where he currently serves. With his 12 years on the bench, Judge Souter has more judicial experience than all but one of the current Justices has at the time they were appointed to the Supreme Court.

During his confirmation hearings, Judge Souter demonstrated an impressive knowledge and command of constitutional law. Clearly, by reason of his intellect, his education, and his experience, Judge Souter possesses the competence that the American people demand of their Supreme Court Justices. That is why the American Bar Association gave Judge Souter its highest rating and declared him to be "well qualified" to serve on the Supreme Court.

Second, a Justice must be a person with unquestioned integrity: He or she should be honest, ethical, and fair.

Those who know Judge Souter best—his peers in the legal profession in New Hampshire—are united in their opinion that Judge Souter is an impeccably fair man who adheres to the highest ethical standards of the legal profession. His honesty is beyond reproach.

Third, a Justice must be a person with a judicial temperament: He or she should be even-tempered, firm, compassionate, and able to listen to different points of view.

Judge Souter ably demonstrated during his confirmation hearings that he has the right temperament to serve as a judge. His answers were calm and thoughtful. He engaged in a scholarly discussion with the members of the Judiciary Committee, listening to their viewpoints and explaining his with utmost courteousness. Judge Souter also movingly demonstrated that he is a man of compassion when he related his experience of advising a woman who was confronted with an unwanted pregnancy.

Some would question whether an unassuming man who would rather live in a small town, who enjoys the solitude of nature, who prefers books to television, who goes to church every Sunday, and who is devoted to his family and friends has sufficient real-life experiences to function effectively as a judge.

Frankly, Mr. President, I'm not sure I understand this criticism. In any event, Judge Souter—as an active and involved member of his community and as a practicing lawyer and a judge—has been exposed to a broad spectrum of real-life problems. He knows that deciding a case is not an abstract intellectual exercise, but rather is a serious activity that can potentially affect millions of people. As Judge Souter testified:

> Whatever court we are in, at the end of our task some human being is going to be affected. Some human life is going to be changed and we had better use every power of our minds and our hearts and our beings to get those rulings right.

Fourth, a Justice must be a person who respects the basic principles of our constitutional system: He or she should not be burdened by an ideology that would prevent him or her from being an impartial judge.

During his confirmation hearing and throughout his 12 years as a judge, Judge Souter demonstrated a profound respect for and devotion to the philosophical underpinnings of our American democracy—federalism, separation of powers, freedom of speech and religion, individual rights, equal protection, due process, and the rule of law.

I am convinced that he will adhere to the doctrine of judicial restraint and will interpret and apply the laws, not impose his own political views. He

has an independent mind and has no ideological agenda that he seeks to fulfill, except to preserve the Constitution of the United States.

Mr. President, in the case of Judge David Souter, President Bush has nominated an individual who has demonstrated throughout his lifetime that he possesses those traits. He is extremely well-qualified to sit on the Supreme Court, and I will vote to confirm him.

Mr. BUMPERS. Mr. President, few events in my career have struck as close to home as Justice Brennan's decision to retire. The Senate's duty to advise and consent to a successor to a Justice of such unique stature is especially heavy. That successor will likely be serving out a life term at the top of our third branch of government long after most of us in this body are gone from here. When Justice Brennan announced his retirement, I hoped the President would put aside any ideological agenda and try to find the best qualified person in the country for this job. I have no way of knowing whether Judge Souter is that person or not.

Many things in his record commend him for service on the Court. First, he will be the first former trial judge in recent memory to serve on the Nation's Highest Court. As a former trial lawyer, it gives me great comfort to think that someone who has actually tried lawsuits will be sitting in judgment over important cases. One of the most well-founded criticisms of the Court, it seems to me, is that too often the Justices have little familiarity with the realities of trial practice.

Without belaboring the facts, Judge Souter has an enviable record of accomplishment as a lawyer. He was graduated from Harvard University and Harvard Law School. He has been deputy attorney general, attorney general of New Hampshire, a trial judge and State supreme court justice, and earlier this year he was confirmed by the Senate as U.S. circuit judge for the First Circuit.

My hesitation is not over any qualms about Judge Souter's character. From every report, he is a man of unquestioned integrity and certainly has an outstanding educational and professional background. He appears to be a very traditional New Englander, conservative in his appearance, manner and thinking.

I am somewhat reassured that Judge Souter is highly recommended by a respected Senator on the other side of the aisle, WARREN RUDMAN.

I have studied the record of the confirmation hearings before the Judiciary Committee. It goes without saying that when the Constitution is being discussed I pay attention to what's being said. Judge Souter said little with which I would disagree, and he was genial and accommodating. Frankly, his answers were not very reassuring for the right wing of the President's party.

Yet, still, there are those who say he is a wolf in sheep's clothing who will give a narrow berth to constitutional liberties. There are at least two kinds of conservatives—those who believe the State can do no wrong and those who believe that governmental restraints on the individual must be strongly justified. For too long, the former have dominated the debate. Judge Souter seems to have a Jeffersonion streak about him.

I cannot see into David Souter's mind and know what he will do when faced with issues surrounding Roe versus Wade and its progeny. The Court has already ensured, however, that there will be plenty such cases on the docket. We have seen draconian measures enacted in Guam and Louisiana, and more are sure to come. While I wish I knew more of Judge Souter's true feelings on a number of issues, I think he acquitted himself well enough in his hearings to receive the benefit of the doubt. I will resolve that doubt in his favor.

Mr. KERREY. Mr. President, I plan to vote to confirm Judge Souter as a Associate Justice of the Supreme Court.

This is my first vote on a Supreme Court nomination, and I wish to set out the standards that I believe should guide such decisions. I believe there are three. While I have reservations about Judge Souter's record, which I will discuss, I believe he has met these three standards.

The first standard I would invoke asks whether the nominee has a distinguished judicial record. While Judge Souter's credentials as a nominee do not rise to the level of some of the titans of the Supreme Court's history, his record is nonetheless distinguished. He has served as a State attorney general; a State superior and supreme court justice; and a judge for the Federal court of appeals. He is known in the legal community for an inquiring and exacting legal intellect. He received the highest rating from the American Bar Association's Standing Committee on the Federal Judiciary. His personal integrity and ethical standards are beyond reproach.

The second standard asks whether the nominee is within the Nation's judicial mainstream. Judge Bork was not. Judge Souter is. In the hearings, he accepted certain high standards of protection for the essential freedoms of speech and religion. He indicated his support for certain remedies for racial discrimination. He committed himself to the important concept of deference to precedent, and rejected notions that we should in all cases return to the "original intent" of the Constitution's framers. Judge Souter is, to be sure, a very conservative jurist. But that is hardly surprising or objectionable given that he was nominated by a conservative President.

The final standards asks whether the nominee has the judicial temperament necessary to sit on our highest court. As I will explain, I am concerned about Judge Souter's sensitivity to political, social, and economic minorities. I am troubled he was willing to act as an advocate, as New Hampshire attorney general, for some official initiatives that smacked of intolerance. Yet Judge Souter's judicial record, which I believe is far more important, suggests that he receives the opinions of all parties before him with an attentive, fair, and open mind. The willingness to listen respectfully to diverse arguments is essential to the credibility of our judicial process.

While I will vote for confirmation, it is with reservations. First, I have serious reservations about Judge Souter's position on abortion. My reservation is that I, like the rest of America, do not know what his position is on the right of women to make the most fundamental choices about reproduction. That is a troubling gap in the record. I am troubled that this nominee and the administration that nominated him do not recognize the right to make such a choice as fundamental. I am troubled that on the difficult choice over abortion they are willing to substitute their moral judgments for those of individual Americans.

At the same time, I find it comforting that Judge Souter recognizes an implicit constitutional right of privacy as "fundamental." And I must take Judge Souter at his word when he says he has not made up his mind concerning Roe versus Wade. We can only hope the Court's other eight Justices will approach this divided and divisive issue with equally open minds.

Second, I have reservations about the level of Judge Souter's sensibilities about society's treatment of women, racial minorities, and religious minorities. Our society today is not the society of 1789. One of the journeys of our time has been toward expanded participation in our economy and society by those who had been excluded in the past. Judge Souter's experience and views, to the extent he revealed them during his confirmation hearings, seem remote from that defining American odyssey.

Let me cite one example. At one point in the hearings, Judge Souter said, "the State of New Hampshire does not have racial problems." Perhaps Judge Souter was characterizing what others would say about his home State; there is some possibility of that from the context. Perhaps all Judge Souter meant is that New Hampshire is racially homogeneous in relative terms. I can understand that. I am also from a State that has a relatively

small proportion of residents who are racial minorities.

Yet one of the Constitution's chief missions is to protect those who are not part of the majority. Thus it speaks to the rights of political, social, and racial minorities of all sizes—not just those who are near-majorities. I am aware that even in Nebraska there are racial problems. Yet the record sadly suggests it might surprise Judge Souter to learn, as I did, that over a dozen racial discrimination complaints were brought over the past year to his State's human rights commission, and that his State has seen many serious racial incidents over the years, as the testimony of witnesses during the hearings made clear.

I hope Judge Souter will hear this message from me and others as he takes his seat on the Supreme Court: Racial discrimination, unfortunately, still exists in every town in America. Sexual discrimination and harassment, unfortunately, still exist in every industry. I hope Judge Souter's constitution, like mine, listens for the voices of victims of discrimination and has something to say to their pain.

Subject to those reservations, Mr. President, I will cast my vote in favor of confirming Judge Souter's nomination.

Mr. WARNER. Mr. President, I rise to join in this debate, for a second time, to express my respect for the work done by the Senate Judiciary Committee and to encourage Senators to give their support for this outstanding nominee for the Supreme Court of the United States.

During the consideration of this nomination, I have solicited the views of a wide range of my fellow Virginians. Clearly the majority—a very significant majority—express confidence in Judge Souter's ability to serve our Nation in this position.

Today, I ask the Senate to consider the opinions of a man whom I respect greatly— Andrew Miller, Esq. In 1978 this distinguished former attorney general of Virginia opposed me in the election for the seat in the U.S. Senate I am now privileged to hold. Our campaigns were fair, by today's standard unbelievably fair and honest. I won by a narrow margin, which reflects the confidence and respect many Virginians held, and still hold, for Andrew Miller.

In the time that has ensued, Mr. Miller has worked with me on a number of public issues. He is very successful in the private practice of law and continues to contribute of his time and wisdom for the public betterment of others.

I greatly value his friendship and have confidence in his views on this nomination.

Mr. President, I will now read to the Senate a letter from Andrew Miller to the President of the United States:

WASHINGTON, DC,
September 24, 1990.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: As a former Attorney General of the Commonwealth of Virginia, I write in support of your nomination of David H. Souter as an associate Justice of the United States Supreme Court. I became acquainted with Mr. Souter shortly after I was sworn in as Attorney General of the Commonwealth of Virginia in January 1970. At that time he was serving as an Assistant Attorney General of the State of New Hampshire. From 1970 to 1975, we worked closely together in representing the interests of the Atlantic Coastal States in the case of *United States* v. *Maine, et al.,* 420 U.S. 515 (1975).

During this period, I became very impressed with Mr. Souter's legal abilities. Not only was he willing to work hard but his intellectual brilliance, scholarly research and thoughtful analysis all contributed to the enhancement of the States' position. While the Supreme Court ultimately decided against the States, the Court had greater difficulty in doing so as a consequence of Mr. Souter's contributions in the drafting of the States' papers. Moreover, on a personal level, I found our association extremely pleasant because of his courteous and considerate demeanor.

While Mr. Souter has held a variety of public offices, in the discharge of his responsibilities he has never been political. Indeed, he has not sought opportunities to exercise legislative or executive authority. As you know, the Attorney General of New Hampshire is appointed, not elected by popular vote. During his tenure in that office, and subsequently on the bench, I know of no instance in which his integrity was questioned. He has chartered his course as a lawyer and judge dedicated to excellence in the performance of duty in the justice system.

As a judge Mr. Souter has understood the role of oral argument in ensuring that issues are fully examined. He also has recognized that not every issue brought before a Supreme Court has constitutional implications. I believe that as an Associate Justice his State background will bring a useful perspective to the Court's deliberations. I am also confident that he will not engage in public rhetoric about his fellow justices or about political leaders, which circumspection should benefit the Court institutionally.

The foregoing views are undoubtedly shared by many others who have known Mr. Souter for an extended period of time. I feel compelled to write this letter of endorsement, however, out of my own experience as Attorney General, in light of some of the concerns expressed in the confirmation process about his performance as Attorney General of New Hampshire. The gist of these concerns appears to be that Mr. Souter as Attorney General defended State policies with which those expressing the concerns did not agree.

If such expressions of concern were intended to be justifiable criticism, they were wide of the mark. All Attorneys General take an oath to uphold the Constitution of the United States and their respective States. What engenders constitutional litigation, of course, are differences of opinion as to the meaning of the Constitution to be upheld. Assuming that the State's policy is not frivolous, an Attorney General has a legal and moral obligation as its chief legal officer to advocate that position, whether established by its legislature by statute or its governor by executive order.

As is the case with any lawyer representing a client, an Attorney General may not on occasion agree with his client's, i.e., the State's, policy. His individual views are not relevant to his obligation to see that the State's position is fairly and effectively presented before the judicial tribunal where it is being challenged. Thus, in defending policies of the State of New Hampshire with which he or others disagreed, Mr. Souter far from breaching his commitment to uphold the Constitution was in fact discharging his constitutional obligation as Attorney General of that State. This is so even though in certain instances the judiciary ultimately decided that the questioned policies of New Hampshire failed to pass constitutional muster.

I respectfully submit that the fact that these State positions did not withstand judicial scrutiny has nothing to do with whether Mr. Souter withstands Senatorial scrutiny. As the confirmation record demonstrates, he has passed personal and professional muster with distinction. Those of us who have worked with him and had the pleasure of this acquaintance over the years are not surprised.

Sincerely yours,

ANDREW P. MILLER.

Mr. President, I will vote for this distinguished American and urge others to do so.

Mr. BIDEN. Mr. President, in the interest of time, but also in the interest of clarity and fairness, this is usually done after the vote takes place, but I would like to do it prior to the vote because these people very seldom get the recognition they deserve.

I would like to recognize for particular thanks staff people who played a key role in putting these hearings together. They devoted hundreds of hours and late nights to making the committee's consideration of Judge Souter's nomination orderly and fair: John Bauer, Jamie Daniel, John Dichtl, Ted Hosp, Kim Kachmann, Lisa Meyer, Ross Mansbach, Anne Rung, Henry Noyes, Phil Shipman, Pam Yonkin, Brooke Thomas, Justin Tillinghast, and Grace Lescelius.

And special thanks to two staff members who put in countless hours to make sure that the hearings went smoothly: Joel Feyerherm and Sally Shafroth, who has done so much for the committee for so long. They really went above and beyond the call of duty.

These attorneys and professionals on the Judiciary staff helped us study Judge Souter's record, assemble that record, and conduct a thoughtful analysis of it. Their intellectual skill and contribution was first rate: Scott Schell, Annette Anthony, Harriet Grant, and Andy Tartaglino.

Five professional staff people deserve particular credit for their contributions:

Paul Bland, our committee's chief nominations counsel, who supervised

our study and review of Judge Souter's record and writings. His performance on this nomination, as with the many others he has worked on, was superb.

David Strauss, a University of Chicago law professor who joined our staff to work on the Souter nomination, and did a fantastic job of working with constitutional scholars and conducting vital research into the complex constitutional questions at issue here.

Chris Schroeder, of Duke University Law School, who volunteered his time to help with briefings, and the preparation of materials for the hearings. As always, Chris' intellectual insights were of great value.

Jeff Peck, our committee's general counsel, who spearheaded my preparation for the hearings. Quite simply, there is no constitutional lawyer anywhere in this country who has thought as intelligently or deeply about the role of the Senate in confirming Supreme Court Justices.

And last, but not least, Diana Huffman, the committee's staff director, who supervised the committee's preparation for the hearings, and the conduct of those hearings. Her tireless and savvy work in putting together the hearings was essential in our success in balancing the committee's need to be thorough with its duty to be fair.

Now I see my colleague from California is here, and I yield the floor.

The PRESIDING OFFICER. The Senator from California is recognized.

Mr. CRANSTON. I thank the distinguished chairman of the Judiciary Committee for his courtesy.

Mr. President, last Monday, September 24, I addressed the Senate at some length on the reasons why I will vote "no" on the nomination of David Souter to succeed Justice William Brennan as an Associate Justice of the U.S. Supreme Court. My view of my constitutional responsibilities to exercise advice and consent to a lifetime appointment to the highest court of the land compels me to vote no. I am not voting against Judge Souter because we disagree on the issue of abortion or on the Supreme Court's decision in Roe versus Wade, since I have no idea what his position is on abortion or Roe versus Wade.

I am voting no because I have no idea what his position is on the level of scrutiny to be applied in right-to-privacy cases. I am voting no because I have no idea what his position is on the constitutional right of individuals, married or unmarried, to use contraceptives. No Member of the Senate, to my knowledge, knows the answer to any of these questions because Judge Souter has declined to answer them. He did not decline to answer questions on other important constitutional issues ranging from the constitutionality of capital punishment to his views on cases involving the religious freedom provisions of the first amendment, but on constitutional issues involving the right to privacy of millions of American men and women, we know little.

Mr. President, Judge Souter told the Judiciary Committee that he did not know how he would rule on any prospective future specific case involving reconsideration of Roe versus Wade and would listen to the arguments made on both sides. That is a position which any judicial nominee is obligated to take. Indeed, any nominee who cannot make that commitment should be rejected out of hand. A commitment not to prejudge an issue prior to hearing the arguments is an essential element of justice. No member of the Judiciary Committee of the U.S. Senate asked Judge Souter to state how he would rule on any prospective case.

I am voting against Judge Souter's confirmation because he has asked us to take him on faith in this critical area of constitutional rights. That I cannot do. Many, many Senators have expressed similar concerns about Judge Souter's refusal to answer questions in this important area of constitutional law. Many who will vote for him have expressed the hope that they are making the right choice and that he will not cast a fifth vote on the Court which will dismantle the long line of cases recognizing and securing the right of Americans to privacy in matters relating to procreation, including the right to abortion.

I intend to do more than just hope for the best. Mr. President, to the millions of American women who fear that by its action today in confirming Judge Souter, as is about to happen, the U.S. Senate is placing their lives in jeopardy, I make this pledge to them: If the unhappy day comes when David Souter casts a fifth and deciding vote to overturn Roe versus Wade, I will take action to bring before the Senate the Freedom of Choice Act. The Freedom of Choice Act is legislation I have introduced which will make freedom of choice Act would have the effect of nullifying a Souter vote to overturn Roe versus Wade. This legislation provides simply that a State may not restrict the right of a woman to choose to terminate a pregnancy before fetal viability, or at any time, if necessary, to protect her life or her health.

Mr. President, Congress has the authority under section 5 of the 14th amendment to the Constitution to enact legislation to protect the liberty interests of Americans where the Supreme Court cannot find a specific right protected under the Constitution.

Many Members of the Senate from both sides of the aisle who are committed to protecting the rights of women to make these most fundamental decisions for themselves free of Government interference have already joined as cosponsors of this important legislation. I hope that other Members who share these concerns will join as cosponsors of this legislation and help us work to ensure that this country does not return to the dark days of back alley abortions and Government interference with private, personal decisions of Americans.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island is recognized.

Mr. PELL. Mr. President, the Senate will today undertake its constitutional obligation to advise and consent on the nomination of Judge David Souter to be an Associate Justice of the Supreme Court.

Such votes are never easy to cast. Because each Justice has the ability to affect—indeed, to alter—the very fabric of our Nation, I believe that every Senator has a deep responsibility to evaluate thoroughly every nominee before deciding how to vote.

As you know, Mr. President, the Judiciary Committee held 5 days of hearings to examine Judge Souter on his qualifications and record. In addition, numerous distinguished witnesses representing themselves and/or their organizations testified for and against this nominee. In my view, each witness contributed to the mosaic that the Senate has created on the very private Judge Souter.

I must say that I share the frustration of those Senators and witnesses who wanted to learn more. While questions were asked and answers were given, many of us continue to feel uncertain about the real views of a man who could change the course of our history. In particular, I wanted to know more about his views in the areas of privacy—including a woman's right to choose an abortion, racial and gender discrimination, and religious freedom.

In the absence of certainty, Mr. President, I must rely on the two things that a Senator must always rely on: Judgment and experience. During my almost 30 years in the Senate, I have faced votes on more than a dozen different nominees to the Supreme Court. I have also seen those nominees, once on the Court, both please and disappoint the American people and the Senators who voted to confirm them. It is my fervent hope that Judge Souter, whom I believe will be confirmed by the Senate, will bring to the Court and to the Nation compassion, understanding, and wisdom.

In deciding how to vote, Mr. President, I have also looked back on my prior decisions. Over the years, I have voted both for and against various nominees to the Court. I have voted against nominees when it was clear to me that the national interest would be harmed, and I have voted for nomi-

nees—even those who do not share my views or philosophy—when I was confident that the nominee was professionally and personally qualified.

Mr. President, unlike some of my colleagues, I do not subscribe to the theory that Senators should not inquire into a nominee's personal views. Rather, I believe it is incumbent upon each Senator to ensure that the Supreme Court is composed of judges of compassion, intelligence, and integrity. If intensive questioning is the best way—or the only way—to make this determination, then it is fair and necessary that it be done.

Still, it is often difficult to tell, in advance of Senate confirmation, whether a nominee has the qualities that are necessary in a guardian of our constitutional rights and liberties. In this instance, I have concluded—from the Judiciary Committee hearings and a review of the record—that Judge Souter seems to be a person of integrity who has the professional and personal qualifications necessary to sit on the Nation's highest court.

In reaching this decision, I have been cognizant of—and troubled by—the concerns of individuals and organizations who share my views on issues of great consequence to our society. I have weighed carefully those concerns, and I appreciate the effort and commitment of many who have shared their concerns with me. In my view, however, Judge Souter—the nominee of a Republican President who was elected on the coattails of the most conservative President in recent history—is probably the best and most moderate nominee we can expect from this administration.

Mr. President, I think it is entirely possible that Judge Souter will serve this Nation well. I hope that the Judiciary Committee hearings, and the words and advice of concerned Senators and citizens, will help Judge Souter remember every day that he serves on the Court his own eloquent testimony: "if [judges] * * * are going to change * * * lives by what we do, we had better use every power of our minds and our hearts and our beings to get those rulings right."

I wish Judge Souter well, and wish for the country that the Senate is vindicated in its decision to confirm this nominee.

Mr. SYMMS. Mr. President, I rise on this second day of the Supreme Court's 1990-91 term to announce my support for the nomination of U.S. Circuit Judge David H. Souter to be an Associate Justice of the U.S. Supreme Court. President Bush announced his nomination of Judge Souter just 10 weeks ago yesterday, and I am pleased the majority leader and Senator BIDEN, the chairman of the Judiciary Committee, have brought the nomination to the full Senate in time for Justice Souter to be seated for all but a few days of the Court's new term.

I have reviewed Judge Souter's record as a jurist in both the Federal and New Hampshire State courts and, prior to that, as the attorney general of New Hampshire. In addition, I was pleased to be able to watch a good deal of the Judiciary Committee's confirmation hearings.

Clearly, there are a few issues, such as abortion, on which Judge Souter does not have a well-established record of personal opinion or judicial decisions. And that fact probably serves him well in this confirmation process. On the other hand, there are many legal and constitutional issues where Judge Souter's writings from the bench or as attorney general have left a paper trail that was explored in depth during the Judiciary Committee's hearings and by which Senators can garner a pretty clear picture of the kind of jurist this man is likely to be.

As attorney general, Judge Souter was a staunch defender of the right of law-abiding citizens to be protected against society's criminal element. He demanded respect for State law and those who threatened public order were dealt with firmly and fairly. He was a no-nonsense chief prosecutor for the State, and the citizens of New Hampshire benefited greatly by the attention Attorney General Souter paid to the serious responsibilities of his office.

As a judge, he has written numerous decisions involving important constitutional issues such as freedom of association, due process rights, and protection against unwarranted search and seizure and self-incrimination, as well as legal issues relating to important questions of family, labor, and criminal law. What this record establishes clearly is that David Souter is a careful, precise, keenly intellectual jurist who believes in the court's limited constitutional role as the interpreter, rather than the creator, of law. He accepts and applies traditional standards of statutory and constitutional interpretation by referring to "the plan meaning of the language employed," and in constitutional cases, he applies "the clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption.'"

In a response to a question on the Judiciary Committee's questionnaire regarding his general approach to judging, Judge Souter said:

> The obligation of any judge is to decide the case before the court, and the nature of the issue presented will largely determine the appropriate scope of the principle on which its decision should rest. Where that principle is not provided and controlled by black letter authority or existing precedent, the decision must honor the distinction between personal and judicially cognizable values. The foundation of judicial responsibility in statutory interpretation is respect for the enacted text and for the legislative purpose that may explain a text that is unclear. The expansively phrased provisions of the Constitution must be read in light of its divisions of power among the branches of government and the constituents of the federal system.

Mr. President, in that statement and in terms far more eloquent that I could muster, Judge Souter has aptly described the approach to judging that I look for and highly approved in any nominee to serve on the Federal bench but particularly so for nominees to the Supreme Court. On that basis, I feel confident that David H. Souter is eminently qualified and will be a very able Associate Justice of the Supreme Court. I hope he will be overwhelmingly confirmed.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. THURMOND. Mr. President, since we are about to conclude the debate on Justice Souter, I wish to take this opportunity to express my deep appreciation to several members of my staff who have done such a fine job preparing for the hearings, during the hearings, for floor consideration today. They are Terry Wooten, who is chief counsel and staff director on the Judiciary Committee; Melissa Riley, who does outstanding work in connection with the judges on the committee; Duke Short, who is now my chief of staff but formerly was in charge of nominations and continues to take a great interest in this work; and Melinda Koutsumpas, the minority chief clerk whose efforts were very beneficial. I thank them for their good work.

I also commend several members of Senator BIDEN's staff who have been cooperative and helpful during this process: Jeff Peck, Ron Klain, and Diana Huffman.

Senator BIDEN and I have a fine relationship. Our staffs have a good relationship, and it is very nice that we can all work together.

I yield the floor.

The PRESIDING OFFICER. Who seeks recognition? The Senator from Delaware is recognized.

Mr. BIDEN. I believe the Senator from New Mexico has indicated that he would like to speak to this nomination.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Mr. President, I will vote for the nomination of Judge David Souter for a position on the Supreme Court. My vote is determined by two considerations:

First of all, the information which has come out during the hearings on Mr. Souter's nomination in my view has been favorable to him. Based on his intellectual capacity, education, and his reputation for integrity, he

seems eminently qualified to serve on the Supreme Court.

Second, I firmly believe that the Senate's responsibility is to give its consent to a President's nominee unless there is a basis in the record of the nominee that renders him unfit for the position to which he is nominated.

Many are apprehensive about Judge Souter's views on the right to privacy and, more particularly, about his views on the right of a woman to choose to have an abortion. I share those concerns and I hope that he will have the wisdom to leave established law in place on that extremely sensitive issue.

I believe my duty under the circumstances is to give him the opportunity to exercise his judgment. I fervently hope, as do many of my colleagues, that judgment proves to be good.

I thank the Chair. I yield the floor.

Mr. BIDEN. Mr. President, there is an additional colleague who wishes to speak, and I am told that he is on his way to the Chamber. I believe that will be the last person to speak until we have the closing statements by the distinguished Senator from New Hampshire [Mr. RUDMAN] and the majority leader.

So while we are waiting for the Senator to arrive, I suggest the absence of a quorum.

Mr. THURMOND. Mr. President, if the distinguished Senator will withhold, I would like to take this opportunity to commend Senator RUDMAN for being so active in behalf of Justice Souter. I do not think I have known any Senator in my 36 years here who has taken more interest in a nomination than has Senator RUDMAN. They have been friends for many years. They know each other well. His opinion, I am sure, has had a great influence on many other Senators.

I just want to pay him that tribute and tell him he has done a fine job in connection with this nomination.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Thank you, Mr. President. I will not be long, because I know that my colleagues wish to get on with this matter.

Mr. President, as I said earlier in the Senate Judiciary Committee, I will consent to the nomination of David Souter to be the next Justice of the United States Supreme Court. In debating this nomination and Judge Souter's qualifications, the U.S. Senate carries out one of its most profound responsibilities.

The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Judges of the Supreme Court."

Those 20 words are in article II of the Constitution, and they lay out the guidance for the President and the Senate as we come together to select members of the Judiciary. In confirming judges, we should neither rubber-stamp the President's choice nor make the process partisan.

I think the Judiciary Committee has fulfilled its responsibility with care and deliberation. Chairman BIDEN deserves a great deal of credit for this. Senator THURMOND, too, deserves credit. Others have done a tremendous job as well. Senator RUDMAN went to every one of his colleagues, both Democrat and Republican, who had any question whatsoever about this nomination. He very frankly and honestly filled us in.

Whenever the Senate completes its work of advice and consent, I always ask myself whether we have served the Constitution and the American people in confirming or rejecting a nominee. In this case, we probed deeply into Judge Souter's professional and intellectual qualifications. But we always do.

I will put into the RECORD some of my findings of his qualifications.

I just want to take a moment to talk about "Advice and Consent" because some people lose sight of exactly what that means. There was some grumbling even in the Judiciary Committee that the Senators asked too many questions. I thought the questions were tough and probing, and fair and thorough, as they should be. Some used the time to talk about past confirmations, but most Senators asked significant, difficult, probing, and exhaustive questions.

Advice and consent in the Constitution demand thorough questions. It does not demand excuses for asking them. We demean ourselves and we demean the Constitution if any of us apologizes for asking thorough questions.

The more answers we get, the more the American people know about an individual, especially an individual who will make important decisions about our lives and our country; and the better the Constitution is served. The Court and the Constitution were well served by the Senate hearings on Judge Souter. This body, the U.S. Senate, was also well served and I believe, through it, the American people.

We understand that the framers of the Constitution and the Bill of Rights did not entrust certain fundamental liberties entirely to the good intentions of the executive and legislative branches. For that reason, we have an independent judiciary. And we Senators are the ones who have to make sure that we preserve that.

So let us never make excuses for upholding the Constitution through advice and consent. After all, we take an oath of office to do just that. It is an obligation none of us should ever forget. We want members of the Judiciary Committee to take that to heart in probing the nominee's views on constitutional law. We asked whether Judge Souter will respect the fundamental rights and liberties that Americans have fought for two centuries to preserve.

Over the last 2 months since Justice Brennan resigned, we have reviewed every aspect of Judge Souter's judicial and legal career. We have questioned him about his tenure in the Attorney General's office, his years in the New Hampshire State courts, and his current views on a wide range of legal and social issues. The committee concluded, in a strong bipartisan vote reflecting the thoroughness and quality of the hearings, that Judge Souter should be confirmed.

I will not go back through all of this. I will put that in the RECORD.

I have said before I do not believe that Judge Souter has answered all my questions, to the extent that I wish he had. But he has demonstrated a belief in the Constitution and a willingness to approach issues fairly. He is not, in my mind, an ideologue.

If we offer our consent to President Bush's nominee, as I believe we will, he will be entrusted with the awesome responsibility that Justice Brennan fulfilled so well, so nobly, and so magnificently.

As the honorable man that I believe he is, Judge Souter is not going to forget the valuable lesson he learned as a trial judge, that the decisions he will make will have an impact for the rest of the life on an individual and sometimes on many individuals.

So through us the American people express their faith in Judge Souter's ability to preserve the essence of the American tradition. My vote today represents my faith that he is a nominee worthy of that trust.

The Senate must take great care in asking questions during confirmation hearings because the individual who ascends to the Supreme Court this term will help to mold the course of American jurisprudence well into the next century. As we look ahead we will lose much of that little message on the American penny—E Pluribus Unum, bringing from the many, one; bringing from diversity, a unity of purpose and spirit—if we do not preserve the quality, dignity, and independence of the Supreme Court.

Time after time, throughout our history, when other branches of Government were either unwilling or unable to protect fundamental rights, Americans have turned to the courts and, ultimately, to the Supreme Court. It would be a foolish dereliction of our duty to give any nominee this power without understanding—as fully as we can—where the nominee thinks the Court should go. Our advice and consent structure epitomizes the framers' genius for the separation of powers,

which guarantees the protection of the freedoms in our Constitution.

To maintain this historical role for the Court, it is up to both the White House and this body, walking separate but parallel paths, to chart the future course of judicial selection. Presidents consistently should pick nominees from the very large list of able, experienced, tested, and well-known men and women whose lives make them natural choices as protectors and expositors of the Constitution. The ultimate critics or our advice and consent task are the American people, and their oversight is utterly impossible if this Senate performs nothing more than polite or perfunctory review.

What are the factors the Senate must consider during the advice and consent process?

The threshold qualifications are competence, honesty, and integrity. Judge Souter's record, combined with his performance in 2½ days of testimony, convinces me that he is intelligent, learned, forthright, and honorable. But those attributes are no more than prerequisites for the job, and mark only the beginning of our deliberations.

We must also ask whether Judge Souter will respect the fundamental rights and liberties that Americans have fought for two centuries to preserve.

Does Judge Souter accept the first amendment as protecting our right to speak and worship as we believe, to articulate our grievances and express them to our Government, and to benefit from a free press?

Does Judge Souter respect the freedom from government interference in our private lives that Americans have come to expect and enjoy?

Does Judge Souter commit himself to ensuring that the rights and opportunities that uniquely characterize our society will be equally available to all, regardless of race or gender?

After listening to Judge Souter at the confirmation hearings, examining his writings and speaking privately with him twice, I decided to support his nomination.

Mr. President, that decision was a difficult one. Judge Souter did not give the committee all of the answers—either in content or breadth—to which I believe the Senate is entitled.

I questioned Judge Souter extensively about his views on the establishment clause of the first amendment and remain troubled that he would not commit himself to Jefferson's idea of a "wall of separation" between church and state. I trust that if Judge Souter is confirmed and called upon to consider the establishment clause, he will keep in mind our discussion of the poignant experiences of his friends WARREN RUDMAN and Tom Rath or the similar experience that my friend from Vermont, Jerry Diamond, described in his appearance before the committee.

I trust Judge Souter will understand that government has no business flying flags at half-mast on Good Friday, and will recognize that the moral and religious beliefs of Americans, even small minorities, must not be disparaged by the state as "mere whimsy." The first amendment has made this Nation tolerant, united, and strong. I do not believe that Judge Souter will view this legacy lightly.

I remain troubled by Judge Souter's reticence in answering questions on the scope of fundamental privacy rights. In response to my question about whether Roe versus Wade is settled law, Judge Souter declined to respond, saying he drew "a fine line" at Griswold versus Connecticut.

That line was the wrong line. Although we do not expect a judicial nominee to comment on a specific case before the court, the public we represent should know how the nominee regards fundamental rights.

While he refused to comment on Roe versus Wade, Judge Souter assured us that he would not approach challenges to this important case with any agenda or preconceived ideas about the results. The majority of Americans expect that David Souter will share their view that decisions about reproduction are best left to the individual. This is one realm of life where the State has little interest or right to interfere.

Judge Souter spoke movingly about an incident in which he counseled a young woman who was contemplating a self-induced abortion. I hope Judge Souter learned that day that while abortion decisions are traumatic under any circumstances, abortions in the pre-Roe era were dangerous, beyond the means of most women, and often life-threatening. American women cannot be plunged into the dark ages ever again.

I wish there would never be the need for another abortion, but that is a decision for a woman, not for a legislature or a court. During the hearing, I reminded Judge Souter of my own experience with illegal, pre-Roe abortion. As a prosecutor in Vermont, I received a call from the police. It was 3 o'clock in the morning and a woman in the emergency room of the local hospital had nearly died from a botched abortion.

I prosecuted the man who arranged for this and other women to travel from Burlington, VT to Montreal for abortions performed by a nurse who learned her trade from the SS at Auschwitz. This nurse nearly killed a young woman, who ended up sterile. And this woman was not the only victim. Several other women, after having abortions performed illegally, were blackmailed for money or sex by the man who arranged the dangerous procedure. Quite a racket.

Abortion is not an easy question, but none of us wants women to endure this pain and exploitation again. Let us be realistic, if abortion is outlawed again, women will retreat to back alleys and back rooms where they will be vulnerable to the kind of piranha I prosecuted in Vermont. Judge Souter and I discussed this incident during the hearing. I hope he will not lose sight of its message.

I also believe that Judge Souter will not approach constitutional questions as a strict constructionist. Judge Souter recognizes that the equal protection clause was properly applied in the landmark case of Brown versus Board of Education, that the Constitution protects unenumerated rights, and that changing social attitudes and traditions must be considered in identifying such rights.

Another area that disturbed me was Judge Souter's role as New Hampshire attorney general when 1,414 protesters were arrested at the site of the Seabrook nuclear powerplant in 1977. I questioned Judge Souter about the State's establishment of a private fund to help finance its costs. I was alarmed that the utility donated $74,000 to the fund, while the prosecutions were pending. This arrangement evoked images of "rent-a-prosecutor."

Attorney General Souter—as the chief law enforcement officer in charge of the prosecutions—should have prevented an interested party from influence the judicial process. I welcomed Judge Souter's remarks that he now understands he should have opposed the fund.

Nonetheless, Mr. President, Judge Souter demonstrates that he approaches issues fairly and reveres the Constitution. Once confirmed, Judge Souter will take the seat of Justice William Brennan. Justice Brennan is a remarkable jurist, who will long be remembered for his fierce, unyielding support of individual rights—even in the face of popular prejudice and scorn.

At critical moments in history we have depended on the Supreme Court—and justices like William Brennan—to be our unifier, to being together a divided society, to bridge deep gulfs in understanding, to help explicate complex problems thrust on us by modern times. As Judge Souter acknowledged during his confirmation hearing, "Justice Brennan is going to be remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and will ever have."

As a Supreme Court Justice, David Souter will serve as the guardian of the liberty and cherished freedoms of all Americans.

Mr. RUDMAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. RUDMAN. I thank the Chair.

Mr. President, first let me say in all sincerity, that I have no words to express my thanks to the chairman of the Judiciary Committee, Senator BIDEN of Delaware, and the ranking member, Senator THURMOND of South Carolina, for their unfailing courtesy through a rather interesting, and I would say, difficult period for my friend, David Hacket Souter.

The conduct of the hearings was scrupulously fair and thorough. I think in many ways, they set a standard on both sides of the dias, for what hearings should be.

I also want to pay a particular note of thanks to two people who also went the extra mile to make it possible for David Souter to get to those hearings, feeling that all of the logistics of the details had been prepared. They are Diana Huffman of Senator BIDEN's staff, and Duke Short of Senator THURMOND's staff. To all others, I give my personal thanks.

To my colleagues, I would say it is a unique situation in which a nominee to the U.S. Supreme Court happens to be one of the dearest and closet friends of a Member of the U.S. Senate. That is a unique situation. To all of my colleagues who came to me to ask questions about the nominee, I tell you now as I told you then, I have tried to be frank and candid and direct, as we expect of each other.

Mr. President, I can only think back to a day 20 years ago when I met a young man as an assistant in my office, when I became attorney general of our State. I recognized how extraordinary he was soon after I met him. And the most extraordinary thing for me standing here today is that in 1973 I had a conversation with him, which I remember very distinctly. After he had done an extraordinary piece of work, I remember saying to him, "I do not know what you your future will be, I do not know what path you have charted for your life, but it seems to me that you ought to have an interest in being on the bench. Hopefully the State bench and maybe someday the Federal bench."

I remember saying very clearly: "And when you get there, as I expect you will, I hope you will aspire to the highest possible place that you can be," never thinking, Mr. President, that I would be given the privilege by the Republican leader, which I appreciate, of giving the closing remarks in behalf of my very dear friend on this very special October day.

Mr. President, David Souter is my friend. I have trusted him, I have respected him, and I like him. He has made all of us, who know him, think, and to laugh, and to reflect. When I became attorney general of New Hampshire, our office was small. He helped me build it to one of the top law firms in the State. He succeeded me and excelled what I did.

He did so by recruiting a staff of extraordinarily talented young men and women, some of them who the committee heard from, who are hired on the basis of talent, not politics or ideology. He had a staff that was the envy of the law firms of the region. Those lawyers today are judges, public servants, and partners in major law firms in New Hampshire and across the country.

David Souter served with great distinction as a judge. Everyone who practiced before him lauded his fairness and his wisdom.

Moveover, I believe that his days as a judge on the trial court impressed upon him some very interesting lessons. One of those, I think struck all members of the committee, when he said it. I will quote it from those hearings. He said:

> When those days on the trial court were over, there were two experiences that I took away with me and the lessons remain with me today. The first lesson, simple as it is, is that whatever court we are in, whatever we are doing, whether we are on a trial court or in an appellate court, at the end of our task some human being is going to be affected. Some human life is going to be changed in some way by what we do.
>
> The second lesson that I learned is that if we are going to be judges, whose rulings will affect the life of other people, we had better use every power of our minds and our hearts and our beings to get those rulings right.

During the hearings, the Senator from Wisconsin [Mr. KOHL] asked David Souter why he wanted to sit on the Supreme Court. After noting with absolute candor that he did not seek the position, David Souter said:

> I want to try the best I can to exercise that responsibility to give the Constitution a good life in the time that it's entrusted to me, to preserve that life and to preserve it for the generations that will be sitting in this room long after you and I are gone.

That struck me as one of the most eloquent statements I have ever heard in my days of public service. His devotion to the Nation and its constitutional principles were made clear when he said this, in answer to a question:

> I would not be true to my own sense of constitutional principle if I did not say that the Senate ought to be looking for someone who, in going through the very difficult process sometimes of seeking constitutional meaning, would seek for something outside that judge's personal views for that moment, who would seek to infuse into the Constitution a sense of enduring value, not of ephemeral value, and who would try to rest the process on as objective an inquiry as can be possible for these massive and magnificent generalities that are committed to us.

Mr. President, that is the kind of a Justice of the U.S. Supreme Court that this Nation sorely needs.

As those of us from New Hampshire have known for many years, and millions of Americans came to realize when he testified before the Judiciary Committee, this is the kind of Supreme Court Justice we will get in David Souter. His life has been rooted in our rocky soil and nurtured by a lifelong commitment to public service. David Souter is a good person—one who will bring honor to the Supreme Court and to our constitutional system.

So, Mr. President, it is with unbounded enthusiasm and with conviction that I consider it a special privilege today to urge my colleagues to join me in voting for this magnificent man from New Hampshire.

I thank the Chair.

Mr. BIDEN. Mr. President, while we are waiting for the majority leader, let me just say that David Souter is indeed fortunate to have such a friend.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. LIEBERMAN). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MITCHELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The majority leader is recognized.

Mr. MITCHELL. Mr. President, I begin by commending the distinguished chairman of the Judiciary Committee, Senator BIDEN of Delaware, for the fair and thorough manner with which this nomination was considered. And, also, the members of his staff, most especially Ron Klain, who did an outstanding job in organizing the hearings and organizing the prompt action by the Senate.

I also commend my thanks to the distinguished ranking member of the Judiciary Committee, Senator THURMOND, and of course to Senator RUDMAN, whose support for, sponsorship of, and diligent effort on behalf of the nominee, has in my view been a major factor in the reception received by the nominee in the Senate.

I will say in all candor that the fact that Judge Souter has a long history of association with Senator RUDMAN and is strongly endorsed by Senator RUDMAN was an important factor in my own consideration of this matter, and I know the same to be true of all of the Members of the Senate who so respect our distinguished colleague from New Hampshire.

Mr. President, I will vote to confirm the nomination of Judge David Souter to the Supreme Court of the United States.

I do so not because I feel confident that I can predict his future course on the Court. Rather, because I believe that in outlining the broader framework within which he views constitutional protections and the responsibil-

ity of the judiciary to adjudicate cases, Judge Souter reflected a reasoned approach and a sound understanding of the Constitution.

In a discussion with the committee chairman about the development of the Bill of Rights, Judge Souter made the following observation:

* * * the starting point for anyone who reads the Constitution seriously is that there is a concept of limited governmental power which is not simply to be identified with the enumeration of those specific rights or specifically defined rights that were later embodied in the bill [of Rights].

If there were any further evidence needed for this, of course, we can start with the Ninth Amendment. * * *

* * * it was * * * an acknowledgment that the enumeration [or rights in the Bill of Rights] was not intended to be in some sense exhaustive and in derogation of other rights retained.

I agree with that statement and the approach to the Constitution that it reflects. Our Constitution was not written to prescribe specific remedies for particular problems. It was, rather, intended to prevent a concentration of power by any group or individual so as to preserve the liberties of the people.

In his testimony, Judge Souter acknowledged the responsibility of the Court in fulfilling that purpose. He said, "* * * courts must accept their own responsibility for making a just society." Judge Souter repeatedly acknowledged that the rights of Americans are not exhausted by the specific rights listed in the text of the Bill of Rights, but that they also include rights implicit in the text of the Constitution.

He made it clear that what is implicit in the text of the Constitution is not limited to the particular factors present at the time of writing, but includes broader principles.

His interpretation, as he put it, is not that original intent is determinative, but original meaning.

He said, for example, "If you were to confine the equal protection clause only to those subjects which its framers and adopters intended it to apply to, it could not have been applied to school desegregation," because those who wrote and adopted the 14th amendment lived at a time when segregated schools were the standard.

He went on to say, "What we are looking for, when we look for original meaning, is the principle that was intended to be applied * * *."

The distinction Judge Souter drew between original intent and original meaning is a useful distinction. It permits the underlying principles to be applied to new needs without limiting the broad rights of our people today to the political or social circumstances of the 18th or 19th centuries.

Judge Souter's understanding, in particular, of the significance and reach of the 14th amendment in the constitutional system reflects an understanding of our Nation's history and of the central role that the tragic fact of racial prejudice has played in our history.

Judge Souter said no social problem is "* * * more tragic or demanding of the efforts of every American in the Congress and out of the Congress than the removal of societal discrimination in matters of race * * *." He also said, in response to a question about judicial activism, "The obvious and significant fact of history * * * is the adoption of the 14th amendment."

As we all know, Judge Souter declined to address specifically the question of abortion and the Court's past rulings on that matter. He acknowledged a core right of privacy but would not be drawn into discussion of how broad or how enforceable against government such a right would be.

For that reason, those who are particularly concerned that the Supreme Court may in the near future dramatically tighten or even reverse the right of a woman to choose to terminate a pregnancy have suggested that Judge Souter's nomination ought to be rejected.

I respect the view that this factor is so central that no other factor should be considered. But, on reflection, I do not share that view.

The hearings focused to a substantial degree on the subject of privacy.

That is understandable at a time when developments in medicine and technology are altering our ability to intervene medically to save and prolong life and to intrude technologically into the most private recesses of individual thought and behavior.

There is little doubt that future cases before the Supreme Court will develop the legal boundaries of privacy, individual autonomy, conscience, and related concepts.

Advances in genetics have already raised questions about the legal ownership rights an individual may have to his or her physical body. Advances in voice transmission have raised questions about the expectation of a privacy in conversations conducted over certain telephone equipment. Medical advances have raised the exceedingly difficult issue of the State's relationship to an individual's death from natural causes.

But while this new and expanding area of law will continue to play a central role in the development of constitutional doctrine and the protection of individual rights, we must remind ourselves that the Supreme Court is not the sole source of legal development in the American system.

The Congress and the executive branch also have their responsibilities in meeting the new challenges that face our society.

I said at the outset that I do not have a feeling that I can predict how Judge Souter would vote on cases that may come before him on the Supreme Court.

I have, therefore, rested my decision on his nomination on the approach that he uses to determine the source of individual liberties, the breadth with which he sees constitutional guarantees, the emphasis he places on the structure of the constitutional system and its purpose, and the criteria he would use to determine if an individual liberty is enforceable against the government.

These factors do not give me an infallible guide as to his future rulings. But they do not give such a guide to anyone else either.

Those who argue that Judge Souter should be opposed because they are certain they know how he will vote have no objective basis for that certainty.

But there is one certainty over which there can be no dispute: No matter what the pressing controversy of the moment is, Judge Souter or any other nominee will occupy a seat on the Supreme Court for many years after the hot controversies of today are settled law.

I believe that if Judge Souter brings to those future controversies the breadth of experience, understanding, and the careful judgment which his testimony before the Judiciary Committee reflected, then his decisions in those cases will continue to reflect the fundamental American constitutional tradition.

For those reasons, I shall vote to confirm his nomination.

Mr. President, I ask for the yeas and nays on the nomination.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of David H. Souter, of New Hampshire, to be an Associate Justice of the Supreme Court of the United States? On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. WILSON] is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 90, nays 9, as follows:

[Rollcall Vote No. 259 Ex.]

YEAS—90

Armstrong	Boschwitz	Coats
Baucus	Breaux	Cochran
Bentsen	Bryan	Cohen
Biden	Bumpers	Conrad
Bingaman	Burns	D'Amato
Bond	Byrd	Danforth
Boren	Chafee	Daschle

DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Jeffords
Johnston
Kassebaum
Kasten
Kerrey
Kohl
Leahy
Levin
Lieberman
Lott
Lugar
Mack
McCain
McClure
McConnell
Metzenbaum
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sanford
Sarbanes
Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wirth

NAYS—9

Adams
Akaka
Bradley
Burdick
Cranston
Kennedy
Kerry
Lautenberg
Mikulski

NOT VOTING—1

Wilson

So the nomination was confirmed.

Mr. THURMOND. Mr. President, I move to reconsider the vote.

Mr. JOHNSTON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

(Disturbance in the Visitors' Galleries.)

Mr. BYRD. Mr. President, may we have order in the Galleries?

The PRESIDING OFFICER. The Galleries will refrain from any noise. Order will be restored.

Mr. THURMOND. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FORD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. FORD. Mr. President, I ask unanimous consent that the President be immediately notified that the Senate has confirmed the nomination of Judge David Souter.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. FORD. Mr. President, I ask unanimous consent that the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. FORD. Mr. President, I ask unanimous consent that there be a period for the transaction of morning business with Senators permitted to speak therein.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

THE INTERNATIONAL FUND FOR IRELAND

Mr. KENNEDY. Mr. President, the International Fund for Ireland has now been in operation for 4 years. In that time, it has grown from a hopeful idea in the Anglo-Irish Agreement on Northern Ireland in 1985, through a troubled initial phase, to what it has become today, a worthwhile participant in the search for a peaceful settlement of the violence and divisions that have plagued the people of Northern Ireland for over 20 years.

The United States has a substantial interest in promoting this search for peace. After a difficult start, the Fund has turned out to be an effective means for us to help achieve the goal that all of us share for the future of Northern Ireland. Annual appropriations from the United States have played a major role in the Fund's success. An appropriation of $20 million for fiscal year 1991 has strong support in Congress, and I hope that it will be enacted.

From the beginning, the mandate of the Fund was clear—to encourage economic development in the areas most affected by the violence in Northern Ireland. In article 10 of the Anglo-Irish Agreement, the Governments of Ireland and Great Britain pledged to

> Cooperate to promote the economic and social development of those areas of both parts of Ireland which have suffered most severely from the consequence of the instability of recent years, and shall consider the possibility of securing international support for this work.

The International Fund for Ireland was subsequently created to carry out this purpose. In the initial phase of its operations, the Fund established seven key programs:

First, two investment companies operating according to strict commercial criteria;

Second, a business enterprise program to stimulate job creation;

Third, an urban development program to revitalize town centers, including 24 towns in Northern Ireland, and 12 in the South;

Fourth, a tourism program to develop one of the region's principal industries;

Fifth, an agriculture and fisheries program to stimulate new enterprises;

Sixth, a science and technology program to emphasize practical research likely to lead to early economic benefits;

Seventh, a wider horizons program to encourage new skills through practical work experience, training, and education overseas.

At the outset, however, the Fund had difficulty in developing and implementing its mission. Projects were funded that were difficult to justify on the basis of the priority intended to be given to areas most affected by the violence. These areas include over a third of the population of Northern Ireland, and are concentrated in West and North Belfast, Derry, and along the border with Ireland. As a result of its missteps, the Fund was legitimately and increasingly criticized, and there were growing doubts in Congress about the desirability of U.S. support.

To its credit, the Fund responded to these concerns. A new series of initiatives was developed with special emphasis on disadvantaged areas, and the Fund has received high marks in the past year for its work in implementing these initiatives.

At a meeting of the Anglo-Irish Intergovernmental Conference on September 14, the conferees noted with particular satisfaction the growing evidence of the Fund's success in promoting economic regeneration to the direct benefit of the entire community, particularly in the most disadvantaged areas.

There is tangible evidence of this success. In all, 1,300 projects have been supported by the Fund; 8,000 jobs have been created; and substantial assistance has been made available to disadvantaged areas, with special emphasis on economic development projects in North Belfast, West Belfast, and Derry.

For the vast majority of the people on both sides of the conflict in Northern Ireland, the Fund has become a symbol of hope for a better future. It is helping to reduce the violence, mistrust, and discrimination that have plagued Northern Ireland for too long. In my view, the Fund deserves credit for resolving its early difficulties. It is coming into its own today, and it deserves continued support from the United States.

Mr. President, a four-part series of articles by Niall Kiely in the Irish Times last August provides an excellent analysis of the Fund. I believe that the articles will be of interest to all of us in Congress, and I ask unanimous consent that they may be printed in the RECORD, along with a subsequent editorial in the Irish Times.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

[From the Irish Times, Aug. 20, 1990]

FUND'S U.S. BACKERS DISAPPOINTED BY DUBLIN

(By Niall Kiely)

Beset by radical critics drawn from the ranks of Sinn Fein supporters in the United States, the International Fund for Ireland could have done without this year's unpublicised differences between the Irish Government and its most important supporters, the Friends of Ireland (FoI) group in the American Congress and Senate.